

(2007) 01 OHC CK 0046
In the Orissa High Court
Case No : Writ Petition (C) No. 233 of 2002

Bajaj Auto Ltd. and Another

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-01-2007

Acts Referred:

Central Sales Tax Act, 1956 — Section 14, 15, 26, 3(1), 3(2)
Orissa Entry Tax Act, 1999 — Section 3, 3(3), 4, 4(1), 4(2)
Orissa Entry Tax Rules, 1999 — Rule 18, 18(1)
Orissa Sales Tax Act, 1947 — Section 11, 4, 4(1), 5, 5A

Citation : (2007) CLT 621 Supp

Hon'ble Judges : B.P. Das, J;A.K. Parichha, J

Bench : Division Bench

Advocate : B.P. Ray, B. Sahoo and S.J. Pradhan, in WPC No. 233/2002, D.N. Panda, N.R. Pandit, S.K. Das, M.K. Panda, A.K. Mishra and M.S. Raman, in W.P.C. No. 3870/2002, J.B. Sahoo and S.K. Burma, in W.P.C. Nos. 4617 and 4718/2002, M.K. Mohanty-2, R. Pal, A.K. Tripathy, P.K. Mohanty and Satrusally, in O.J.C. No. 4303/2002, J.B. Sahoo, N.K. Rout, A. Das and S. Burma, in W.P.C. Nos. 1145/2003 and 2584/2005, N. Paikray, B.P. Mohanty, A.N. Ray and S.K. Mohanty, in W.P.C. No. 9766/2005, for the Appellant; Standing Counsel, for the Respondent

Final Decision : Allowed

Judgement

A.K. Parichha, J.—In these writ petitions, the modality adopted by the opp.parties in working out the surcharge u/s 5-A of the Orissa Sales Tax Act, 1947 (in short, "the OST Act") is under challenge basically on the allegation that the said modality contravenes the provisions of the Orissa Entry Tax Act (in short, "the OET Act) and Orissa Entry Tax Rules (in short, "the OET Rules"). Since common question of fact and law are involved in all the writ petitions, they are taken up for analogous disposal by this common order.

2. The Petitioners" case is that they are all registered dealers in motor vehicles under the Orissa Sales Tax Act. (in short, "the OST Act") as well as the Central Sales Tax Act and are engaged in purchase and sale of Motor vehicles. They pay

entry tax on the purchase value of the Motor vehicles, which are brought into the State of Orissa from outside as required u/s 3(3) of the OET Act and in their sales tax returns filed in obedience to Section 11 of the OST Act claim set off of the entry tax amount already paid in respect of the motor vehicles against the sales tax and surcharge payable in accordance with Section 4(1) of the OET Act and Rule 18 of the OET Rules. They allege that suddenly the concerned Sales Tax Officers, who are the assessing authorities of the Petitioners, proceeded to work out the tax demand by computing the surcharge on the amount of tax payable before reduction of the entry tax amount contemplated u/s 4 of the OET Act, disregarding the provision and illustration of Rule 18 of the OET Rules which resulted in extra tax demand. The Petitioners claim that on an enquiry they learnt that the above said exercise by the assessing authorities was in consequence to a letter of the Government of Orissa addressed to the Commissioner of Commercial Tax and circulated to all the Range Officers and Sales Tax Officers wherein direction has been given that surcharge under the OST Act is to be computed on the payable amount of tax demand instead of reduced sales tax amount after deduction of the entry tax. According to the Petitioners, this letter of the Government is in total contrast to the Rule and the illustration given in Rule 18 of the OET Rules and the clarification letter dated 31.5.2001 issued by the Commissioner of Commercial Tax and is, therefore, untenable as an executive instruction cannot supersede a rule framed through legislation. The Petitioners have, therefore, prayed for quashing the aforesaid circular letter of the State Government dated 20th November, 2001 as well as the notice issued by the concerned Sales Tax Officers to the respective Petitioners making extra tax demand.

3. Opposite parties while supporting the legality of the impugned letter and notices have taken the stand that computation of the sales tax and surcharge thereon is to be undertaken according to the provisions of OST Act and Rules and the provision of the OET Act or Rules has nothing to do with such exercise. According to them, Section 4 of the OET Act and Rule 18 of the OET Rules simply provide for reduction of the tax liability of the dealer by the amount of entry tax paid and there is nothing in these provisions to indicate that they will govern or regulate the assessment of surcharge in any manner. Opposite parties claim that the tax payable under the OST Act is completely different from the amount to be arrived at after reduction of the tax liability stipulated u/s 4 of the OET Act and so assessment of the surcharge can never be after the grant of reduction contemplated u/s 4 of the OET Act. Opposite parties assert that Orissa Sales Tax Act and Rules being the charging legislation for the assessment and realization of sales tax and surcharge and Section 4 of the OET Act and Rule 18 of the O.E.T. Rules providing for reduction of the tax payable under the OST Act, the above provision of the OET Act and Rules have to be read harmoniously with principal Act and Rules which are the OST Act and Rules and any provisions which are inconsistent with the provisions of OST Act and Rules must be ignored. The plea of the opposite parties in essence is that assessment of surcharge u/s 5-A of the

OST Act is an act preceding the process of set off contemplated u/s 4(1) of the OST Act and Rule 18 of the OET Rules.

4. Learned Counsel appearing for the Petitioners offered their submission separately, but in essence they took the same stand. According to them, the provision of Section 4 of the OET Act provides for reduction of tax liability under the OST Act to the extent of entry tax paid under the OET Act and in notification in S.R.O. No. 149 of 2001 the Government have also notified that rate of tax in Sales Tax Act shall be subject to Section 4 of the OET Act, 1999 which are indicative of the fact that the reduction of the entry tax amount is to be given at the stage of computation of the gross sales tax liability. Indicating the illustration of Rule 18 of the OET Rules in this regard, they argued that when the government have framed the Rule and have explained the mode of computation of surcharge, the same government in Finance Department has no locus standi to clarify that surcharge is levyable on sales tax payable before the set off of the entry tax amount. They postulate that surcharge is to be computed on the amount of sales tax payable after the deduction contemplated u/s 4 of the OET Act is made and in this regard indicated a letter of clarification issued by the Commissioner of Commercial Tax on 31.5.2001 that surcharge is to be computed on the net sales tax payable after the set off of the entry tax paid in respect of the purchase value of the vehicles. To fortify their contention learned Counsels relied on the cases of Prabhat Solvent Extraction Industries Pvt. Ltd. Vs. The State of Gujarat, ; Commissioner of Sales Tax Vs. Burmah Shell Refineries Limited, ; Commissioner of Sales Tax v. Bharat Petroleum Corporation Ltd. 85 STC 220 (SC); Commissioner of Sales Tax Vs. Jai Hind Oil Mills Co., ; Saraswati Oil Mills Vs. The State of Gujarat, ; C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, .

5. Mr. A. Mohanty, learned Standing Counsel (Sales Tax) on the other hand argued that Section 5-A of the OST Act is the charging Section for assessment of surcharge on the sales tax payable by a dealer; whereas Section 4 of the OET Act and Rule 18 of the OET Rules provide for reduction of the sales tax amount payable by a dealer to the extent of entry tax already paid by the said dealer; and so the provision or the illustration contained in OET Act and Rules cannot in any way govern or regulate the computation and assessment of sales tax and surcharge. According to him a harmonious reading of the provision of Section 4 of the O.E.T. Act with Section 5-A of the OST Act would indicate that the sales tax and surcharge is to be first assessed as per the provision of OST Act and thereafter a reduction on the same is to be given as per Section 4 of the OET Act, i.e., computation of surcharge amount u/s 5-A of O.S.T. Act has to precede the exercise of set off of the entry tax amount as per Section 4 of the OET Act. Mr. Mohanty pointed out that the above interpretation also finds support from Section 4(3) of the OET Act, which says that reduction in tax liability as contemplated u/s 4(1) of the OET Act to a dealer will not be allowed unless the entry tax paid and the sales tax payable are shown separately on the cash-memos, bills, invoices issued by him for the sales by virtue of which such liability

accrues. Regarding Rule 18 of the OET Rules and the illustration contained therein, he argued that the said Rule has to be read harmoniously with the provisions of Section 4 of the OET Act and Section 5-A of the OST Act and in case any conflict arises between the two, then the provisions of the Act would prevail under the accepted norm that a river cannot rise above the source. In support of his contention Mr. Mohanty cited cases of *The Central Bank of India Vs. Their Workmen*, ; *Collector Central Excise, Guntur v. Andhra Sugar Ltd.* (1988) 73 STC 216 (SC); *Organo Chemical Industries and Anr. v. Union of India and Ors.* AIR 1979 SC 1803; *Mary Angel and Others Vs. State of Tamil Nadu*, and *Directorate of Enforcement Vs. Deepak Mahajan and another*, .

6. From the rival submission of the learned Counsel for the parties it can be gathered that the only controversy is whether surcharge u/s 5-A of the OST Act is to be computed before giving the reduction of the entry tax amount as contemplated u/s 4(1) of the OET Act or from the net amount of sales tax payable after grant of such reduction. To resolve this controversy, interpretation of provisions of Section 5-A of the OST Act, Section 4 of the OET Act, 1999 and Rule 18 of the OET Rules is necessary. For this purpose it will be worthwhile to note the said provisions. Section 5-A of the OST Act reads as follows:

5-A. Surcharge - (1) Every dealer shall, in addition to the tax payable by him under this Act, also pay a surcharge at the rate of ten per centum of the total amount of tax so payable by him:

Provided that the aggregate of the tax and surcharge payable under this Act shall not exceed in respect of goods declared to be of special importance in inter-State trade or commerce by Section 14 of the Central Sales Tax Act, 74 of the 1956 the rate fixed by Section 15 of the said Act.

be of special importance in inter-State trade or commerce by Section 14 of the Central Sales Tax Act, 74 of the 1956 the rate fixed by Section 15 of the said Act.

(2) All provisions relating to the payment, assessment, recovery and refund of the tax under this Act shall, as far as may be, apply to the payment, assessment, recovery and refund of the surcharge.

Section 4 of the OET Act reads thus:

Section 4. Reduction in tax liability: (i) Where an importer of motor vehicles liable to pay tax under Sub-section (3) of Section 3 being a Dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicles then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

Explanation - For the purpose of this Sub-section the chassis and the vehicle with body built on the chassis shall be treated as one and the same goods.

(2) When an importer or manufacturer of goods specified in Part-III of the Schedule except motor vehicles pays tax under Sub-section (1) of Section 3 or

Section 26 of this Act, being a Dealer under the Sales Tax Act becomes liable to pay tax under the said Act by virtue of sale of such goods then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

7. From a plain reading of Section 5-A of the OST Act along with Section 4 of the said Act it can be seen that Section 5-A creates a charge and imposes liability on every dealer under the OST Act to pay surcharge " 10% on the amount of tax payable by him under the OST Act. The wordings of Section 5-A indicate in no manner that the surcharge is payable on any tax other than the tax payable under the OST Act. Similarly, a close reading of provision of Section 4(1) of the OET Act would show that it simply prescribes for reduction of the tax amount payable by the dealer to the extent of entry tax already paid for the same articles for which Sales Tax is payable. The Section does not specifically contemplate anything, which would indicate that the provisions of OET Act or Rule have to be taken into consideration while assessing the sales tax or surcharge. Learned Counsels for the Petitioners, however, expressed that despite absence of specific stipulation, provision of Section 4(1) of the O.E.T. Act and Rule 18 of the O.E.T. Rules have to be taken into consideration at the time of fixing the sales tax liability and surcharge. In support they highlighted the illustration given in Rule 18. They also relied on the letter of clarification issued by the Commissioner of Commercial Tax dated 31st May, 2001 wherein it has been indicated that the surcharge is payable on the amount of any tax which remains payable by a dealer after set off of entry tax paid for such goods. According to them, when the State Government itself framed the Rule through legislation and issued clarification letter through their own Commissioner, there is no scope left for any other interpretation and the surcharge has to be computed as per the illustration given in Rule-18. They also argued that a Rule enacted through legislation cannot be superseded by the executive direction contained in the impugned letter.

8. The counter argument from the side of the Revenue is that the OST Act is a self-contained Act, which prescribes the mode of computation of Sales Tax and surcharge thereon and so, the provisions of the said Act cannot be superseded or influenced by any Rules or notification formulated under another Act. It was also argued that the provision and illustration contained in Rule 18 of the OET Rules simply explains about set off of the entry tax against the Sales Tax and surcharge and the said provision can never regulate the process of taxation under the OST Act. It is also submitted that whenever any Rule or notification becomes inconsistent with the provisions of the parent or principal Act, then the said Rule or notification has to be harmoniously read and such part of the Rule or notification would be accepted, which are in harmony with the provisions of the Act, Principal Act and Rules.

9. "Set off" is a protection measure and a mode of relief granted under the law to a dealer paying tax. In *Prabhat Solvent Extraction Industries Pvt. Ltd. v. State of Gujarat* (supra), it was held that set off means adjustment or reduction of tax

payable by purchasing dealer to the Government of the amount to be returned to such purchasing dealer in respect of purchase tax paid by him or as representing the amount of sales tax or general sales tax collected by his vendor. In *Commissioner of Sales Tax v. Jai Hind Oil Mills Co. (surpa) and Godrej Boyce Manufacturing Co. Ltd. v. Commissioner of Sales Tax* (1992) 87 STC 186, the term "set off" was interpreted as a measure to provide relief to the dealers to the extent of purchase tax paid when he purchased raw materials and he is again obliged to pay the sales tax when he sells goods manufactured by him out of the said raw materials. The judicial pronouncements as narrated above analysed the term "set off", i.e., it is intended to avoid double taxation by allowing deduction of tax already paid from the amount of tax liability. The provisions made in the Rules lay down the modality of set off. It is worthwhile to mention here that O.S.T. Act and O.E.T. Act are two separate and independent legislations. While the former was legislated in 1947, the latter at a much later stage in 1999. The provision of set off has been made in the O.E.T. Act and the Rules framed thereunder, i.e., O.E.T. Rules, and not in the O.S.T. Act. So, when the O.E.T. Act and Rules were framed, the law-makers and rule-framers had taken into consideration the provisions made in the O.S.T. Act, which was an earlier statute. The principle of set off and for which amount set off would be allowed, have been provided under the O.E.T. Act and Rules. The relevant provisions of Section 4 of the O.E.T. Act (since omitted by Orissa Act 2 of 2004) and Rule 18 of the O.E.T. Rules (since omitted by the Orissa Entry Tax (Amendment) Rules, 2004) were as follows:

Section 4. Reduction in tax liability:

(1) Where an importer of motor vehicle liable to pay tax under Sub-section (3) of Section 3 being a Dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicles then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

Explanation - For the purpose of this sub-section the chassis and the vehicle with body built on the chassis shall be treated as one and the same goods.

(2) When an importer or manufacturer of goods specified in Part-III of the schedule except motor vehicles pays tax under Sub-section (1) of Section 3 or Section 26 of this Act, being a Dealer under the Sales Tax Act becomes liable to pay tax under the said Act by virtue of sale of such goods then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

Rule 18. Set off of Entry Tax against Sales Tax -

(1) When the importer of a motor vehicle liable to pay tax under Sub-section (2) of Section 3 of this Act being a dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicle, his tax liability under the Sales Tax Act shall be reduced to the extent of the tax paid under these rules.

Illustration - Assuming Entry Tax Rate and Sales Tax Rate to be 10%.

(1) Purchase value of Motor vehicle Rs. 2,00,000/ -

(2) Entry tax payable " 10% Rs. 20,000/ -

Total Rs. 2,20,000/ -

(3) Sales Price of the Motor vehicle Rs. 2,20,000/ -

(4)(a) Sales Tax due " 10% Rs. 22,000/ -

Deducted Entry Tax paid Rs. 20,000/ -

Sales Tax payable Rs. 2,000/ -

Total Rs. 2,22,000/ -

Note: If the Sales Tax payable on such motor vehicle is less than the Entry Tax paid, then the Sales Tax payable will be nil.

(2) When an importer of goods specified in Part III of the Schedule to the Act than motor vehicle, liable to pay tax under this Act is also a dealer liable to pay tax under the Sales Tax Act, then the Sales Tax payable on the sale of goods shall be reduced to the extent of Entry Tax paid in the same manner as illustrated under the Sub-rule (1).

10. The heading of Section 4 of the O.E.T. Act gives a broad idea regarding the provision of set off by way of "reduction in tax liability". Sub-sections (1) and (2) of Section 4 of the O.E.T. Act provided for reduction of liability under the Orissa Sales Tax Act.

11. It is well settled that the objective of framing rules is to fill up the gaps in a statutory enactment so as to make the statutory provisions operative. Rules also clarify the provisions of an Act under which the same are framed. (A) Subordinate legislation has been fictionally called the delegation of power to fill up the details. In *Khambalia Municipality and Another Vs. State of Gujarat*, it was pointed out that the legislature may, after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. Sub-rule (1) of Rule 18 of the O.E.T. Rules, in consonance with the heading of Section 4 of O.E.T. Act lays down that a motor vehicle importer's "tax liability under the Sales Tax Act shall be reduced to the extent" of Entry Tax paid. The illustration appended to Sub-rule (1) of Rule 18 of the O.E.T. Rules specifically indicates that Sales Tax payable by a dealer is Sales Tax due less the amount of Entry Tax paid. The inconsistency or ambiguity, if any, between the language of Section 4 of the O.E.T. Act and Sub-rule (1) of Rule 18 of the O.E.T. Rules gets removed by the language in c, which provided that, "the Sales Tax payable on the sale of goods shall be reduced to the extent of Entry Tax paid in the manner illustrated under Sub-rule (1)."

12. From the aforesaid provisions it is clear that the O.E.T. Act and O.E.T. Rules provide for set off of Entry Tax paid from the amount of Sales Tax payable by a dealer. In such view of the matter, the controversy in the present applications is confined to the question as to what constitutes "Sales Tax payable" under the O.S.T. Act.

13. Section 4 of the O.S.T. Act is the charging Section attracting liability to pay Sales Tax "on sales and purchases effected". Section 5 of the O.S.T. Act provides for rate of Sales Tax. Therefore, on a plain reading of the provisions under the O.S.T. Act and the O.E.T. Act, set off has to be made by way of reduction of the Sales Tax payable to the extent of Entry Tax paid. There is no scope for the Revenue to urge that surcharge paid u/s 5-A of the O.S.T. Act has also to be taken into account in computing the dealer's tax liability under the O.S.T. Act. Such a conclusion is apparent from the provision of Section 5-A of the O.S.T. Act as it stood during the periods of assessments under the reference in the present applications.

5-A. Surcharge -

(1) Every dealer shall, in addition to the tax payable by him under this Act, also pay a surcharge -

(a) at the rate of ten per centum of the total amount of tax so payable, if his gross turnover during any year exceeds rupees ten lakhs but does not exceed rupees one crore; and

(b) at the rate of fifteen per centum of the total amount of tax so payable, if his gross turnover during any year exceeds rupees one crore xxx xxx xxx.

Sub-section (1) of Section 5-A is very specific in laying down that surcharge is payable "in addition to the tax payable" under the O.S.T. Act. Clauses (a) and (b) of Section 5-A of the O.S.T. Act provide for calculation of surcharge at the prescribed rate of 10% or 15% also on the amount of "tax so payable".

14. A harmonious reading of Rule 18 of the O.E.T. Rules as well as Sections 4, 5 and 5-A of the O.S.T. Act with Section 4 of the O.E.T. Act reveals no conflict or inconsistency. In fact, the letter of clarification dated 31.5.2001 issued by the Commissioner of Sales Taxes (O) is in consonance with a harmonious construction of the above said provisions under the O.S.T. Act, O.E.T. Act and O.E.T. Rules. The provisions made under Rule 18 of the O.E.T. Rules lay down the modality of making the provision of reduction of tax liability, as contemplated u/s 4 of the O.E.T. Act and commonly termed as "set off", functional or operative. That apart, Rules are to be construed to have been made for furtherance of the cause for which the statute is enacted and not for the purpose of bringing inconsistencies. The apex Court has observed that a subordinate legislation such as rules or regulations made under a statute becomes part of that statute and hence, such Rules and Regulations must be for furtherance of cause for which the statute is enacted.

15. During the course of argument, the Revenue made an attempt to find fault with the provision in Rule 18 of the O.E.T. Rules and more specifically with the illustration appended to Rule 18(1) of the O.E.T. Rules. The said Rule is not under challenge in the present application; rather there is a presumption of validity in support of the legislation as well as the subordinate legislation. The subordinate legislation is presumed to be valid unless and until it is declared invalid by a Court in a proceeding initiated by proper person. The consequence of declaration of invalidity is to render the same incapable for ever having had any legal effect. But till the presumption of validity continues, it has to be obeyed (See (1974) 2 All ER 1128 (HL): *La Roche and Co. A.G. and Ors. v. Secretary of State for Trade and Industry*).

16. The principle is that consideration of the vires of subordinate legislation should start with the presumption that it is intra vires which means that if subordinate legislation under consideration is open to two constructions, one of which would make it bad and the other good, the Court must adopt that construction which makes it good. Also Rules made under the statute are treated for the purpose of construction as if they were in the enabling Act and are to be of the same effect as if contained in the Act (See - c and c

17. In excluding the surcharge under the O.S.T. Act from the purview of the expressions "Sales Tax payable", "tax liability under the Sales Tax Act" and "liability under the Sales Tax Act" as provided u/s 4 of the O.E.T. Act and Rule 18 of the O.E.T. Rules as well as the expression "in addition to the tax payable" u/s 5-A of the O.S.T. Act, in the case of *Associated Cement Companies Ltd. Vs. State of Bihar and Others*, , it was held that the question of exemption arises only when there is a liability to tax and not otherwise. Exigibility to tax is not a same as liability to pay tax. While the former depends on the charge created by statute, the latter depends on computation in accordance with the provisions of the statute and rules, if any, framed thereunder. In the said decision, it was also found that liability of importer of cement under the Act shall be reduced to the extent of tax paid under the Entry Tax Act, wherein such importer becomes liable to pay tax under the Act by virtue of sale of scheduled goods.

18. Thus, from a harmonious reading of the relevant provisions of the O.S.T. Act, O.E.T. Act and O.E.T. Rules, it is evident that "tax payable", as contemplated u/s 5-A of the O.S.T. Act, means tax payable after set off of Entry Tax from the Sales Tax assessed on a dealer. The modality adopted by the taxing authorities in computing surcharge on the gross tax assessed instead of tax payable after reduction to the extent of Entry Tax paid is not in accordance with the provisions under the O.S.T. Act, O.E.T. Act and O.E.T. Rules. The letter of clarification dated 20.11.2001 issued by the Government is misconceived and has no legal sanctity.

19. In the result, therefore, the writ petitions are allowed; the impugned letter dated 20.11.2001 and the extra tax demand made on the Petitioners on the basis of such letter of clarification are quashed. No cost.

B.P. Das, J.

20. I agree.