

(1988) 02 CAL CK 0040
In the Calcutta High Court
Case No : Matter No. 205 of 1987

Baliaghata Plywood Manufacturing Co. Pvt. Ltd. APPELLANT
Vs
Additional Commissioner, Commercial Taxes RESPONDENT

Date of Decision : 25-02-1988

Acts Referred:

Bengal Finance (Sales Tax) Act, 1941 — Section 2(c)
Bengal Finance (Sales Tax) Rules, 1941 — Rule 3(66)

Citation : (1989) 73 STC 425

Hon'ble Judges : Baboo Lall Jain, J

Bench : Single Bench

Advocate : R.N. Dutt and P.K. Mallik, for the Appellant; S.N. Bose, for the Respondent

Judgement

Baboo Lall Jain, J.—The petitioner No. 1, Baliaghata Plywood Manufacturing Co. Pvt. Ltd. (hereinafter referred to as "the petitioner"), was incorporated on 14th September, 1979. After installation of machinery and trial production it started manufacturing plywood tea chest and other materials. The petitioner was also registered as a small-scale industrial unit having permanent registration number. The petitioner is also a dealer within the meaning of Section 2(c) of the Bengal Finance (Sales Tax) Act, 1941 (hereinafter referred to as "the said Act").

2. The petitioner claimed that the manufacturing unit, being a newly set up small-scale industry, was entitled to claim deduction in gross turnover in respect of the sales of the said new unit under Rule 3(66) of the Bengal Sales Tax Rules, 1941.

3. The petitioner No. 1, was granted eligibility certificate, under the said Rule 3(66) for the period from 1st April, 1980 to 31st March, 1981 which in turn entitled him to such deduction. The petitioner No. 1 carried on the said new business during the period from 1st April, 1981 to 31st March, 1982 and incurred loss of Rs. 1,02,639.82. Thereafter during the financial year 1982-83, the said small-scale industrial unit had to be closed and also the capital assets had to be sold. The petitioner No. 1 claims that it was entitled to the renewal of the

eligibility certificate for the period from 1st April, 1981 to 31st March, 1982. It applied for such renewal and the application was rejected by an order dated 28th December, 1984 by the Assistant Commissioner of Commercial Taxes (South Circle).

4. The petitioner thereafter applied for revision. By an order dated 18th November, 1986, the Additional Commissioner of Commercial Taxes upheld the said order dated 28th December, 1984 and rejected the revision petition on the ground that the said new unit had been closed down during the subsequent year and as such the incentive had lost its purpose.

5. The petitioners have come up before this Court claiming that the said decisions are both liable to be quashed as they were made on extraneous grounds which did not subsist during the relevant period.

6. As the present matter relates to the interpretation and the effect of the said Rule 3(66), the same is set out hereunder :

3. In calculating his taxable turnover a dealer liable to pay tax u/s 4 or 8(3) of the Act may deduct from his gross turnover, his turnover on the following, namely :-

(66) * * *

(i) Sales by a newly set up small-scale industry of goods manufactured by it during the period of five years, if the said industry is situated within the area of the Calcutta Metropolitan District as described in the Schedule to the Calcutta Metropolitan Planning Area (Use and Development of Land) Control Act, 1965, or seven years, if it is situated elsewhere in West Bengal, since the date of its first sale of such manufactured goods :

Provided that the dealer claiming the benefit of this clause will be so eligible only if he keeps separate accounts in respect of such newly set up small-scale industry, issues serially numbered cash/credit memos for sales of goods manufactured in such industry, keeps vouchers and other documents for purchases of plant and machinery for establishment of such industry and maintains other records to prove that sales claimed exempt under this clause were of goods manufactured in such an industry set up by him and that no amount by way of tax under the Act has been realised by him in respect of such sales :

Provided further that the dealer claiming the benefit of this clause will be so eligible, if he possesses a valid certificate of eligibility in form No. XXXVI granted by the appropriate Assistant Commissioner in this behalf, for such period as mentioned in the said certificate :

Provided also that in the case of a dealer claiming the benefit of this clause on account of sales of manufactured goods, which had been specified by a notification u/s 25 of the West Bengal Sales Tax Act, 1954 (West Bengal Act IV of

1954) but were subsequently specified by another notification u/s 27 of that Act, the period of such benefit of five years or seven years, as the case may be, as referred to in this clause, shall be reduced by the period during which the dealer was entitled to similar benefit of exemption of tax on the sales of such goods (specified as notified commodities) u/s 4AA of that Act.

* * *

(ii) The certificate of eligibility referred to in the second proviso to Sub-clause (i) shall be granted on application and shall be valid for a period not exceeding twelve months from such date as may be specified therein, but may, at the discretion of the authority granting the certificate, be renewed from time to time for a period not exceeding twelve months at a time :

Provided that the certificate of eligibility shall not be granted or renewed if the dealer sells any capital assets otherwise than in the ordinary course of business, violates any conditions referred to in Sub-clause (i), or does anything which adversely affects the economic viability of the newly set up industry.

(iii) The authority granting the certificate of eligibility referred to in Sub-clause (ii) may, for good and sufficient reasons to be recorded in writing and after giving the holder of such certificate a reasonable opportunity of being heard, declare such certificate invalid from such date as he may specify.

(iv) A dealer shall apply for a certificate of eligibility on or before the 14th April, 1983, or for renewal thereof ordinarily within a month from the date from which such certificate is required to be (...) renewed for the purpose of this rule.

Provided that only a registered dealer may apply for a certificate of eligibility on or after the 1st April, 1983.

7. By and under a Memo No. 8204 A.C. (S) dated 23rd December, 1980, the Assistant Commissioner of Commercial Taxes, South Circle, issued an eligibility certificate (hereinafter also referred to as "E.C.") under Rule 3(66) to the petitioner and it was mentioned therein that the dealer fulfilled the conditions laid down in Rule 3(66) of the Bengal Sales Tax Rules, 1941. It was also mentioned that the first certificate was effective from 25th March, 1980 and that the said certificate of eligibility was valid from 1st April, 1980 to 31st March, 1981.

8. The petitioner applied for renewal of the eligibility certificate for the period from 1st April, 1981 to 31st March, 1982. The said application of the petitioner was rejected by an order dated 28th December, 1984, passed by the Assistant Commissioner of Commercial Taxes (South Circle). The said order was on the basis that the dealer had closed down the business sometime in 1982, as it incurred heavy losses. In the year 1981-82 the net loss incurred by the dealer was to the extent of Rs. 1,02,639.82. As a result, the business was closed down and the plant and machinery was sold away to repay the loan taken from the State Bank, Hyderabad, Burrabazar Branch. The Assistant Commissioner of

Commercial Taxes, South Circle, therefore, came to the conclusion that the economic viability of the dealer was affected adversely which resulted in the huge loss of the business and ultimate closure of the business. The plant and machinery also had to be sold to meet the bank's debts and hence he declined to issue the eligibility certificate. Against the said order the petitioner made a revision application u/s 20(3) of the Act.

9. The said revisional application was also rejected by the order of the Additional Commissioner of Commercial Taxes, West Bengal, dated 18th November, 1986. The case of the petitioner No. 1 before the Additional Commissioner was that the petitioner No. 1 did not close down its business during the period for which renewal of the eligibility certificate was sought, nor were the plants and machinery sold during the relevant period, as such the grant of E.G. to him for that period could not be rejected on that ground.

10. The Additional Commissioner of Commercial Taxes observed as hereunder:

In the present case the petitioner does not seem to have violated any condition specified in law; instead, the petitioner's business admittedly had to be closed down for incurring loss of a large amount during the period for which renewal of eligibility certificate was sought.

...The petitioner could not deny that they incurred a loss from their business during the period for which renewal of eligibility certificate was sought and incurring of that loss ultimately forced them to close down their business in the year immediately after 31st March, 1982. So the closure of business was not an abrupt incident, the event taking place even prior to the period for which renewal was sought or during the period even when there was indication that the unit had been losing its economic viability and taking a definite turn for ultimate closure of the business.

...There is no denying the fact that if the petitioner had incurred any loss it was due to own contribution in managing the force of the business which led to not only closure of the business but to sell out of entire plant and machinery ultimately....At the time of the hearing of the petitioner's application for renewal when the Assistant Commissioner came to know that their business had already been closed down but incentive by way of allowing exemption from sales tax could not play any role for their existence, were so the purpose of which this provision have been made frustrated or defeated.

11. The Additional Commissioner, therefore, held that the Assistant Commissioner was justified in rejecting the petitioner's application for renewal of E.C. for the period 1st April, 1981 to 31st March, 1982 and as such he declined to interfere with the impugned order.

12. In the case of Dwarkesh Engineering Works and Another Vs. Assistant Commissioner, Commercial Taxes and Others, , as relied on by the petitioner, Suhas Chandra Sen, J., held as follows:

By virtue of Rule 3(66a) of the Bengal Sales Tax Rules, 1941, the sales of goods by a "newly set up small-scale industrial unit" are available for deduction from the gross turnover of the dealer. To be eligible for the deduction, the dealer must obtain an eligibility certificate, which is to be issued on full compliance with the conditions laid down in the proviso to Rule 3(66a)(i). The certificate is valid for a period not exceeding twelve months from such date as may be specified in the certificate and the dealer has to apply every year for the certificate. If a dealer fulfils all the requirements of the rule, he cannot be refused the eligibility certificate on the ground that the certificate was not issued to him on an earlier year for violation of one of the conditions in the first proviso to Rule 3(66a)(i). The question whether a dealer is entitled to the eligibility certificate must be considered afresh every year. Whether the dealer fulfils all the conditions has to be examined at the time of original grant of the certificate and also at the time of renewal of the certificate.

The petitioner-firm's application for a certificate of eligibility of its small-scale industry under Rule 3(66a) of the Bengal Sales Tax Rules, 1941, for the period of one year from July 1, 1984, was rejected on the ground that during the period it had realised sales tax. In June, 1985, the petitioner again made an application for a certificate of eligibility for a year beginning on July 1, 1985, giving an undertaking that it would not collect sales tax from July, 1985. This application was also rejected on the ground that the petitioner had during the earlier year charged sales tax. On a writ petition :

Held accordingly, that the mere fact that the petitioner was refused a certificate in the first year on the ground that it had realised sales tax in respect of sales of the newly set up small-scale industrial unit did not make the petitioner ineligible for a certificate for all time to come.

13. Rule 3(66a) is substantially identical in terms with Rule 3(66), so far as the provisions relevant for this application are concerned.

14. The above case therefore is an authority for the proposition that eligibility certificate may be granted under Rule 3(66a) (of course on satisfying the requirement thereof for the relevant period) even if the petitioner was disqualified during the earlier period due to collection of sales tax. In my opinion, relying on the said judgment and also for the same reasons it can equally be said that if the petitioner was qualified for grant of eligibility certificate during a particular period during which he had complied with all the requirements for the grant of such certificate, then he cannot be refused the grant of eligibility certificate merely on the ground that he became disqualified on a later date.

15. In my opinion the disqualification, if any, for the purposes of refusal to the grant or renewal of eligibility certificate is to be operative prospectively and not retrospectively. Admittedly Rule 3(66) provides for an incentive in the shape of tax holiday, in respect of sales by a newly set up industry, during a specified number of years. This incentive is available to all those who come within the

ambit of the rule and comply with the conditions required by the rule. The renewal is to be granted unless, he commits violation of the prescribed requirement of law. By its very nature a violation should be operative from the date it takes place and until it is continued. If the violation or disqualification is removed and the conditions are satisfied, the dealer again becomes entitled to the benefit. Furthermore, the said rule specifically provides that the said benefits, in the shape of tax exemption, can be claimed only upon compliance with various essential requirements, viz., (i) that he possesses a valid certificate of eligibility, (ii) issues serially numbered cash/credit memos for sales of goods manufactured in such industry, (iii) keeps vouchers and other documents for purchases of plant and machinery, (iv) maintains other records to prove that sales claimed exempt under this clause were goods manufactured in such industry set up by him and (v) that no amount by way of tax under the Act has been realised by him in respect of such sales. If a dealer has satisfied all the conditions aforesaid during a particular period and does not collect sales tax relying on the provisions of this rule, then it is unreasonable that he should not get the exemption for that period. If in future he becomes disqualified then the disqualification can operate from the time it is incurred till it subsists. That is quite consistent with the language used in the said rule. I am, therefore, of the opinion that if a person complies with all the requirements of the said rule during a particular period and thereafter becomes disqualified during a subsequent period, the same cannot be a ground for not granting him the benefit, even for the period during which he complied with the said requirements and came within the ambit thereof.

16. Furthermore, one of the essential requirements to get the tax exemption is that the petitioner should not collect any tax under the Act in respect of the sales made by him during the period for which he claims exemption. This benefit operates as a benefit to the dealer inasmuch as he can offer his products at a lower or competitive rate. But at the same time if a dealer in view of the tax holiday granted by the said rule does not collect sales tax and also complies with other requirements of the rules, then and in that event if he is ultimately required to pay sales tax, simply because the undertaking faced a closure, later on due to reasons beyond his control, then it will operate very harshly upon the dealer and the whole intention of giving incentive to newly set up industrial units will be frustrated. Moreover, the rule itself provides that the application for renewal of E.C. has to be made within a month from the date from which such certificate is required to be renewed. The said rule also provides that the authority granting the certificate of eligibility has the power to declare the certificate invalid from such date as the authority may specify.

17. A certificate already granted for a period of twelve months may be declared as invalid from a particular date apparently on the ground of non-compliance with requirements or disqualification incurred. All these requirements go to show that an establishment is entitled to the incentive during the period of entitlement and if it incurs disqualification in the meantime, the authority may for good

reasons declare such E.C. invalid from such date as it may specify, which apparently has to be on and from the date of disqualification. Rule 3(66)(iii) also thinks of cancellation of eligibility certificate prospectively from a specified date, for good and sufficient reasons, which can only be the date from which the disqualification taken place.

18. Taking all these things together the scheme of the said rule is that the same provides for a tax holiday for newly set up industrial under-takings for a certain period and for the purpose of getting the said benefit there are certain essential requirements and conditions to be carried out and/or to be fulfilled. In the case of *Dwarkesh Engineering Works* [1987] 65 STC 37 (Cal) it has been held that if a particular petitioner for eligibility certificate is disqualified for some violation of the essential requirements and is not issued the certificate for the period during which he was disqualified, later on, when he fulfils the requirements, he cannot be refused grant of eligibility certificate. Similarly, if an eligibility certificate is granted for a particular period, it is for the benefit under the scheme of incentive for that period but if the petitioner commits any violation of the essential requirements or does something which is prohibited under the scheme then he will lose the benefit on and from the date of such violation and/or for the commission of such prohibited acts, but it can only be on and from the date of such disqualification and during its subsistence.

19. The petitioner further relies upon a judgment in the case of *Shri Shiv Kumar Bajaj Vs. Additional Commissioner of Commercial Taxes and Others*, . In that case *Umesh Chandra Banerjee, J.*, held as follows:

that the duty and obligation of the statutory authority was to adhere to the requirement of statute and no extraneous matter ought to be taken note of. The creatures of the statute in taxing statutes were to follow the rigours of law and no extraneous matter ought to be taken into consideration in interpreting a taxing statute. In that view the eligibility certificate could only be refused in the event of violation of the condition laid down in the notification itself read with the provisions of Section 4-AA of the Act. Cancellation of eligibility certificate for good and sufficient reasons did not envisage cancellation on any other consideration but on the basis of conditions laid down in the notification.

20. In that case as the departmental authorities in refusing to grant the eligibility certificate considered extraneous matter, they were directed to consider the matter afresh and the order as passed by the authority and the earlier order were quashed and set aside.

21. The learned counsel appearing on behalf of the sales tax authorities submitted that the benefits under Rule 3(66) of the Bengal Sales Tax Rules, 1941 were granted with the object that the Government will give this benefit to newly set up small-scale industry during the first few years so that ultimately that will grow up and will pay greater taxes to the sales tax authorities.

22. No doubt the rule gives incentive in the shape of tax free years as specified

but that is with the object to enable them to grow up in the face of competition. If such benefit is given to, let us say, 100 such industries, 80 or 90 of them may grow into healthy units with the help of this benefit and some of them may not be able to grow up and may, even, in spite of the said benefit and in spite of every intention on the part of the entrepreneur, come to closure or halt. Such closure of the business may be due to a variety of reasons which might include non-availability of market for the product, non-availability of materials at competitive rates, non-co-operation of the labourers and/or industrial troubles or disputes, non-availability of proper power supply and so on and so forth.

23. The submission of the learned counsel for the sales tax authorities was that if an establishment has come to a closure then it is not eligible for the benefit even for the earlier years. I do not find any support for this proposition in the rules themselves and I am not inclined to accept the submission that simply because a business has come to a closure, the entitlement for the earlier period can also be withheld, under the said rule.

24. The grounds on which an eligibility certificate can be refused are specifically given within the rule itself. Furthermore, the essential requirements on the basis whereof eligibility certificate has to be granted are also specified within the rule and, in my opinion, the renewal of eligibility certificate can only be refused on the grounds as specified within the statute itself.

25. I am further of the opinion that such disqualification is to operate on and from the period when the petitioner becomes disqualified, namely, if he sells any capital assets otherwise than in the ordinary course of business or violates any conditions referred to in Sub-clause (i) or does anything which adversely affects the economic viability of the newly set up industry. Furthermore such disqualification can only be operative during the period it subsists and not after the same comes to an end.

26. The learned counsel for the Revenue authorities relied on the judgment of Bhagabati Prasad Banerjee, J., in the case of Promode Kumar Chowdhury v. Commercial Tax Officer, Taltala in CO. No....(W) of 1988 dated 13th January, 1988 (Calcutta High Court). In that case the learned Judge held that eligibility certificate should not be renewed if anything is done which adversely affects the economic viability of the newly set up industry. While interpreting the said prohibition, His Lordship held that renewal has to be granted to an industry which can continue as economically viable. That, I am afraid, is not the provision of the statute. His Lordship further held that the subsequent closure of the business was held by the Assistant Commissioner of Commercial Taxes to be a good ground for declining renewal. It is regrettable that the two earlier judgments in the case of Dwarkesh Engineering Works and Another Vs. Assistant Commissioner, Commercial Taxes and Others, and Shri Shiv Kumar Bajaj [1986] 63 STC 354 (Cal) do not appear to have been cited before His Lordship.

27. In my opinion when the statute itself provides the circumstances under which

the renewal of a certificate may be refused, then the existence of such circumstances is necessary in order to bring up this disqualification. Furthermore, since the statute itself provides for certificate for split periods not exceeding 12 months and since the statute also provides for declaration of the certificate as invalid on and from a particular date, the whole scheme of the rule is to give the tax benefit during the period until which, such act of disqualification is not committed and to withdraw the said benefit on and from the date such act of disqualification is committed, until the date it continues.

28. In the instant case the order of the Assistant Commissioner dated 28th December, 1984 proceeds wholly on the basis that as the business was closed down subsequently and as the plants and machinery were sold subsequently during the subsequent year, the economic viability of the dealer was affected adversely and as such the application for renewal was declined. There is no finding that any of the conditions for disqualification as specified in the said rule had taken place during the period.

29. Neither in the order of the Assistant Commissioner dated 28th December, 1984 nor in the order of the Additional Commissioner, there is any finding of fact that the petitioner No. 1 did anything of the nature during the period for consideration, which adversely affected the economic viability of the newly set up industry. The reasoning of the Additional Commissioner that if loss was incurred, it was due to the own contribution of the dealer is erroneous. Loss and/or closure of the business, may be due to variety of reasons, for which the dealer may not be responsible at all. It does not stand to reason that in all cases of loss and in all cases of closure of industry, any positive act of the dealer is an essential prerequisite. What is required under the rule is that the dealer is not entitled to an eligibility certificate if he does anything which adversely affects the economic viability of the newly set up industry. For coming to a finding of this nature a positive act of the dealer is essential and such act should adversely affect the economic viability of the newly set up industry. Simply because an industry has incurred loss during a given period, it does not and cannot mean that the dealer has done anything which adversely affected the economic viability of the newly set up industry. Similarly simply because a business has closed it cannot be said that the dealer "has done anything which adversely affected the economic viability of the newly set up industry". The closure in the instant case however took place after the expiry of the relevant period.

30. I am unable to accept the submissions made on behalf of the sales tax authorities, that if a unit has come to a closure, then, in that event, the benefits for the earlier period are to be considered as lost, simply by virtue of such closure. The rule does not provide for any such thing and an interpretation of this nature will lead to serious prejudice to the small-scale units who relying on the provisions of Rule 3(66), do not charge or collect any sales tax from their purchasers. A refusal to renew the E.C. on the ground of subsequent closure will visit the dealer with liability to pay sales tax even for the period he did not collect

any such sales tax from his customers and even though he was fully qualified for the grant thereof during the earlier period. Such a situation is not conceived by the said rule. The impugned orders were on the basis of subsequent closure, though the application related to the earlier period. In my opinion the said impugned orders were made on the basis of totally extraneous matters, which were not relevant for consideration.

31. In that view of the matter the impugned order dated 18th November, 1986 passed by the Additional Commissioner, Commercial Taxes, West Bengal, as also the order dated 28th December, 1984 passed by the Assistant Commissioner, Commercial Taxes, are quashed and the Assistant Commissioner is directed to pass a fresh order in accordance with law. If the petitioner fulfilled all the conditions contained in Rule 3(66) during the relevant period and if the petitioner had not incurred any disqualification during the relevant period, then the petitioner will be entitled to get an eligibility certificate for the said period until the date such disqualification did not take place. The Assistant Commissioner is directed to pass a fresh order in accordance with law and in view of the observations as aforesaid preferably within a period of 12 weeks from the date of communication of this order to him, or so soon thereafter as may be practicable.

32. Learned counsel for the petitioner prays that his client should be allowed a fresh hearing and should be permitted to produce his relevant records before the Assistant Commissioner, at the hearing to be granted. The petitioner will be at liberty to ask for such an opportunity and the Assistant Commissioner will allow the petitioner an opportunity to be heard and to produce any relevant records. If, however, the petitioner does not receive any notice for fixing of any date of hearing, within six weeks from the date of communication of this order, then and in that event, the petitioner will be at liberty to move an application before the Assistant Commissioner, in writing through Advocate or personally, for fixing of a date of hearing. If no such application is made by the petitioner as within the time aforesaid, then the Assistant Commissioner will be at liberty to decide the matter on the materials on record, with him.

33. Let a certified copy be issued as expeditiously as possible.

34. There will be no order as to costs.