(2011) 06 GUJ CK 0011

In the Gujarat High Court

Case No : Special Civil Application No. 4886 of 2006

Butani Cotton Industries APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 24-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Gujarat Sales Tax Act, 1969 — Section 12, 13, 32, 49, 49(2)

Citation : (2013) 57 VST 59

Hon'ble Judges : R.M. Chhaya, J;Harsha Devani, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; Maithili Mehta, Assistant Government Pleader, for the Respondent

Judgement

Harsha Devani, J.—By this petition, under articles 226 and 227 of the Constitution, the petitioner has challenged the order dated 10th January, 2006, passed by the Gujarat Sales Tax Tribunal (hereinafter referred to as, "the Tribunal") in Revision Application Nos. 115 and 116 of 2002 (annexure G to the petition). The facts, as appearing in the petition, are that the petitioner is a firm duly incorporated under the provisions of the Indian Partnership Act, 1932 and is engaged in the business of cotton and cotton seeds. The petitioner is a registered dealer as per the provisions of the Gujarat Sales Tax Act, 1969 (hereinafter referred to as, "the Act").

2. The Government of Gujarat in its Industries Mines and Energy Department, by a resolution dated May 6, 1986 framed a scheme known as "Special Incentive for Pioneer Unit-86" (hereinafter referred to as "the scheme"). The scheme was to come into operation with effect from April 1, 1986 and was to remain in force for a period of five years up to March 31, 1991. The petitioner was registered under the aforesaid beneficial scheme as an eligible unit for the purposes of obtaining the sales tax incentive under the said scheme. The petitioner was issued an eligibility certificate dated September 21, 1989 by the District Industries Centre

granting benefit to it to the tune of Rs. 2,41,000. The product mentioned in the said certificate was cotton and cotton seeds. Pursuant thereto, the petitioner made an application dated September 26, 1989 before the Assistant Sales Tax Commissioner for granting it sales tax exemption certificate for cottonseeds. By a certificate dated March 14, 1990 the petitioner was granted sales tax exemption to the extent of Rs. 2,41,000 under entry 175 in respect of the cotton seeds only.

3. It is the case of the petitioner that in compliance with the sales tax exemption certificate issued by the respondent-authority, the petitioner availed of the tax exemption from 1990-91 up to 1993-94 on cotton seeds. For the year 1993-94, the petitioner had claimed exemption on the sale of cotton seeds and for its other sales of cotton, no exemption was claimed by the petitioner and the same were sold against the requisite forms in accordance with law and consequential tax thereon had also been paid. The assessment of the petitioner for the said year was completed and the same was accepted.

4. Subsequently, respondent No. 2 initiated proceedings for revision of the assessment of the petitioner in exercise of powers u/s 67 of the Act and by an order dated September 16, 2002, revised the assessment order holding that the petitioner had claimed exemption only for cottonseeds whereas it should also have claimed exemption for cotton. The exemption to the extent of Rs. 66,755 along with interest thereon came to be disallowed and penalty as well as interest came to be levied thereon. Being aggrieved by the aforesaid order passed by the revisional authority, the petitioner preferred Revision Application Nos. 115 and 116 of 2002 before the Tribunal. By the impugned order dated January 10, 2006 the revision applications came to be rejected holding that although there was no exemption on cotton in the exemption certificate, the sales tax authorities should not have granted such certificate which was not as per eligibility certificate and, therefore, it defeats the purpose of the scheme. Being aggrieved, the petitioner has filed the present petition.

5. In response to the petition, the respondents have filed an affidavit-in-reply controverting the contentions raised in the petition.

6. Mr. K.H. Kaji, learned advocate appearing on behalf of the petitioner, submitted that though the eligibility certificate issued by the respondent-authorities was in respect of both cotton and cotton seeds, the petitioner had filed exemption application only qua cotton seeds and the sales tax authorities had accordingly granted a certificate of exemption only in respect of the cotton seeds. It was submitted that the petitioner had two options before it, either to avail of benefit under the scheme or to avail of benefit under the regular provisions of the Act. The petitioner opted for the benefit of the provisions of the scheme in relation to the cotton seeds whereas in relation to the cotton, the petitioner chose to be governed by the regular provisions of the Act. It was submitted that since the petitioner had not claimed any exemption in respect of sale of cotton, the petitioner availed of the benefit of section 13 of the Act by submitting the prescribed form 17B in respect of such sales. Inviting the

attention to the provisions of entry 175 of the concessions and incentives u/s 49(2) of the Act, it was submitted that the breach alleged against the petitioner is in relation to condition 9 thereof. It was submitted that condition 9 of entry 175 would not be attracted in the facts of the present case inasmuch as the petitioner was not exempted as per sub-entry (3) of the said notification in relation to cotton and as such, there was no bar against the petitioner in claiming deduction under any certificate under sections 12 and 13 of the Act or other entries of the notification in relation to sales of cotton made by it. Inviting attention to the orders made by the revisional authority as well as the Tribunal, it was submitted that the revisional authority had specifically observed that the exemption certificate granted to the petitioner was proper. It was further submitted that the exemption certificate granted to the petitioner was only in respect of cotton seeds and so far as cotton is concerned, it would not be governed by the provisions of the Scheme as no exemption had been granted in respect of sales of cotton. It was submitted that neither the revisional authority nor the Tribunal has set aside the exemption certificate granted under the Scheme on the ground that the same could not have been issued qua cotton seeds only. Therefore, so long as the exemption certificate stands, the petitioner would be governed by the scheme only in respect of cotton seeds and as such the respondents are not justified in holding that there was breach of condition 9 in respect of the sale of cotton which was not governed by the scheme. It was submitted that the exemption certificate is consciously restricted only to cotton seeds and in the circumstances the petitioner is entitled to open another door for exemption qua cotton as it is not covered by the exemption certificate and the petitioner is accordingly entitled to avail of the benefit of the provisions of section 13 of the Act and sell cotton against form 17B. Thus, the petitioner cannot be saddled with liability for acting in accordance with law by holding it liable for an error on the part of the Government authority. According to the learned advocate the Tribunal had overlooked that there is no monetary loss to the Revenue either on the exemption claimed by the petitioner relying upon their own certificate or on the sale of cotton against requisite forms since the revenue does get tax thereon. In fact, the subsequent purchaser pays more tax on sale in Gujarat since there is price/ value addition to the product.

(1) It was further submitted that the petitioner is a specified manufacturer only qua the certificate granted by the respondent-authorities. No authority has cancelled the certificate or said that it is wrong. Both, the revisional authority as well as the Tribunal say that the certificate was proper as the application was only for cotton seeds. It was contended that if the certificate is valid and proper, it only covers cotton seeds, in which case the petitioner falls under sub-entry (3) of entry 175 only in relation to cotton seeds and not in relation to cotton. It was further submitted that implementation of the Scheme was in three stages: the first stage was when the petitioner applied for eligibility which was granted in respect of both cotton as well as cotton seeds. In the second stage, the petitioner applied for sales tax exemption only in respect of one of the products,

viz., cotton seeds. It was submitted that at the third stage of deciding the said application, the officer could either have granted exemption in respect of both the products, viz., cotton and cotton seeds or only in respect of one product as requested by the petitioner or could have asked him to apply for both. It was urged that rightly or wrongly the concerned officer granted exemption in respect of the cotton seeds alone. The certificate granting exemption in relation to the cotton seeds has not been touched either by the lower authorities or by the Tribunal and has not been set aside. According to the learned advocate for the petitioner, condition No. 9 applies only to sales which are wholly exempted, and it is only then that the disqualification applies. It was urged that only in cases where sales are wholly exempted that disqualification under condition No. 9 of entry 175 would apply. It was submitted that under the certificate in question it was only cotton seeds which were exempted under the sales tax and since cotton was not exempted under the certificate, entry 175 would not be applicable to the sale of cotton.

(2) Lastly, it was submitted that in case the court is inclined to hold against the petitioner on the question of exemption on sales of cotton, even in that case, in the light of the exemption certificate granted by the respondent-authorities, the petitioner was entitled to entertain a bona fide belief that it could make sales against form 17B in relation to the cotton sold by it and as such in any case this is not a fit case for levying of penalty. In conclusion, it was submitted that the impugned order passed by the Tribunal is not in consonance with the provisions of the scheme and as such deserves to be quashed and set aside.

7. On the other hand, Ms. Maithili Mehta, learned Assistant Government Pleader, opposed the petition by placing reliance upon the reasoning adopted by the revisional authority as well as by the Tribunal. It was submitted that the petitioner had by an application dated September 26, 1989 sought for exemption only in respect of the one product, viz., cotton seeds. That pursuant to the application, the respondents issued necessary certificate of sales tax exemption under entry 175 of section 49(2) of the Act only in respect of the cotton seeds. It was submitted that the District Industries Centre had issued eligibility certificate to the petitioner for getting benefit of sales tax exemption for two different products, viz., cotton and cottonseeds. However, the petitioner had made the application before the sales tax authority for getting benefit of sales tax exemption only in respect of the cotton seeds. That it was in these circumstances that an exemption certificate had been issued to the petitioner only in respect of the cotton seeds. It was submitted that the petitioner had violated the provisions of condition 9 of entry No. 175 inasmuch as under condition 9 sales of the specified manufacturer are wholly exempted as per sub-entry (3) of the notification and deduction against any of the certificate under sections 12 and 13 or other entries of the notification issued under sub-section (2) of section 49 of the Act cannot be granted. It was submitted that in the present case it was noticed that certain transactions entered into by the petitioner were in violation of condition 9 of entry No. 175 and hence, action was initiated u/s 67 of the Act.

Referring to the impugned order of the Tribunal, it was submitted that the Tribunal has rightly recorded that sale against form 17B or 20, as the case may be, defeats the spirit and purpose of the scheme and the same is in violation of the conditions of the tax exemption certificate.

(1) Reiterating the reasoning adopted by the revisional authority as well as the Tribunal, the learned Assistant Government Pleader submitted that the impugned order passed by the Tribunal is just, legal and proper and does not warrant any interference by this court.

8. The Government of Gujarat in its Industries Mines and Energy Department has, by a Resolution No. INC-1086-706(2) I dated 6th May, 1986 introduced a scheme known as "The Sales Tax Incentives Scheme for Industries, 1986". The scheme was to come into operation with effect from April 1, 1986 and was to remain in force for a period of five years up to March 31, 1991. Under the said scheme, a new industrial unit has been defined to mean an industrial unit which commences commercial production during the operative period of the scheme. Under the scheme, the eligible units had the option to choose the benefit of either sales tax exemption or sales tax deferment. Under the sales tax exemption incentive an eligible unit was entitled to purchase free of sales tax, raw materials, packing materials and processing materials utilised for the purpose of manufacturing goods. In addition to this, it was also exempted from payment of sales tax on sale of goods manufactured by it. Annexure C to the scheme provides for the quantum of sales tax exemption. The note below the said annexure provides that if a unit reaches the admissible amount mentioned in columns 2, 3, 5 or 6 during the time-limit fixed in column 4 or 7 thereof, it will not be eligible for incentive thereafter. Thus, under the Scheme, a unit is entitled to exemption from payment of sales tax to the extent of the percentage of fixed capital investment made in terms of the Scheme.

9. Sub-section (2) of section 49 of the Act lays down that subject to such conditions as it may impose, the State Government may, if it considers it necessary so to do in the public interest, by notification in the Official Gazette, exempt any specified class of sales or of specified sales or of purchase, from payment of the whole or any part of the tax payable under the provisions of the Act.

10. In exercise of powers under sub-section (2) of section 49 of the Act, the State Government inserted entry 175 granting exemption u/s 49(2) of the Act as specified in the said entry.

11. Under sub-clause (3) of entry 175 sales by a specified manufacturer of goods manufactured by him are exempted from the whole of tax payable thereon. The aforesaid exemption is subject to certain conditions. Under condition No. 2 thereof the specified manufacturer should fulfil the conditions specified in annexure 1 thereto. The conditions enumerated under annexure 1 to entry 175, inter alia, provide that the specified manufacturer should establish the new

industry in the designated areas. The specified manufacturer should have obtained an eligibility certificate from the Industries Commissioner, or as the case may be, the General Manager of District Industries Centre concerned, stating, inter alia, that the new industry has been commissioned on the date specified therein, being any date during the period commencing on the April 1, 1986 and ending on the March 31, 1991 in any of the designated areas and after obtaining the eligibility certificate, has applied for the exemption certificate to the Commissioner of Sales Tax. Condition No. 9 of the said conditions which is relevant for the present purpose lays down that as sales of the specified manufacturer are wholly exempted as per sub-entry (3) of the said notification, deduction against any of the certificate under sections 12 and 13 or other entries of the notification issued under sub-section (2) of section 49 of the Act shall not be granted. Condition No. 10 lays down that the specified manufacturer shall be eligible for exemption from the tax to the extent of the monetary limits specified in annexure V. Condition No. 11 provides that when the limit of tax exemption specified in annexure V exceeds, then the subsequent purchases and sales of the specified manufacturer shall cease to be exempt against a declaration provided under the said entry.

12. The expression "specified manufacturer", for the purpose of entry 175 has been defined under clause (a) of annexure II as under:

(a) The expression ''specified manufacturer'' means a person in the State of Gujarat who--

(i) establishes the new industry on or after April 1, 1986 but not after March 31, 1993 in any or the designated areas,

(ii) is a registered dealer not holding recognition u/s 32 of the Act or where he holds such recognition, surrenders it for cancellation before issue of certificate by Commissioner of Sales Tax.

(iii) has not already obtained any exemption under entry 118 or has not opted for the scheme of sales tax deferment specified in para 6 of the Government of Gujarat, Industries, Mines and Energy Department Resolution No. INC-1086-706(2) I dated May 6, 1986.

(iv) is certified by the Commissioner of Sales Tax, for this purpose by issue of necessary certificate specifying the date on which new industry is commissioned or from the date specified by the Commissioner of Sales Tax in the certificate as may be opted in writing by the person commissioning the new industry.

13. "New industry" has been defined to mean an industry which has been commissioned at any time during the period beginning from April 1, 1986 and ending on March 31, 1991 and includes expansion or diversification.

14. Thus, an overall reading of the scheme indicates that the benefit under the scheme is granted to a new industrial unit which has been established during the operative period of the Scheme and commences commercial production during

the operative period. In the present case the benefit granted to the new industry is in relation to the sales by the specified manufacturer of the goods manufactured by him.

15. Insofar as the facts of the present case are concerned, the petitioner established a new unit at Manavadar and obtained eligibility certificate in respect thereof under the provisions of the scheme for the benefit to the tune of Rs. 2,41,000. The products mentioned in the said certificate were cotton and cotton seeds. Under the terms of the scheme, the petitioner was a specified manufacturer who had established a new industry in terms of the scheme and was certified by the Commissioner of Sales Tax for the said purpose by issuing necessary certificate in this regard. Thus, since the new industry established by the petitioner was granted the benefit to the tune of Rs. 2,41,000 under the eligibility certificate issued by the District Industries Centre, the petitioner was entitled to exemption from payment of sales tax in respect of the goods manufactured by it in the said new industry, viz., cotton and cotton seeds up to the limit of Rs. 2,41,000 based upon the capital investment made by it in setting up the said new industry. However, while making the application for exemption certificate to the Sales Tax Department, the petitioner applied for exemption in relation to the cotton seeds only. Under the Scheme, the goods manufactured by the specified manufacturer are wholly exempted from the payment of sales tax. However, since the petitioner had applied only in relation to cotton seeds, the Sales Tax Department issued a certificate granting sales tax exemption to the extent of Rs. 2,41,000 only in relation to the cotton seeds. Thus, the limit of Rs. 2,41,000 was accordingly computed only in relation to the sale of cotton seeds.

16. It is the case of the petitioner that since cotton was not exempted from the payment of sales tax, the petitioner availed of the benefit of section 13 of the Act by furnishing form 17B against the sale of cotton made by it. According to the petitioner, since the exemption certificate related to only cotton seeds and the petitioner had availed of the benefit of the Scheme only in relation to cotton seeds, the conditions laid down under entry 175 would not be attracted insofar as sales of cotton is concerned.

17. As noticed hereinabove, under the Scheme, it is the new industrial unit which is the eligible unit. The exemption granted under the Scheme is to the goods manufactured by the specified manufacturer, which in the present case are cotton and cotton seed. For the purpose of computing the exemption limit, the fixed capital investment made in establishing the unit as a whole would have been taken into consideration, which includes the unit manufacturing cotton seeds as well as cotton. Thus, the conditions laid down under entry 175 would be applicable to the goods manufactured by the specified manufacturer in the new industry. The contention of the petitioner that since it had not availed of exemption in relation to the cotton and that since exemption was granted in relation to the cotton seed alone, the conditions laid down under entry 175 would not be attracted qua sale of cotton is contrary to the provisions of the Scheme

inasmuch as the conditions enumerated under entry 175 apply to the sales by a specified manufacturer of goods manufactured by him in the new industry, irrespective of whether the manufacturer claims exemption in respect of only one or all the goods manufactured therein. Ultimately, whether the specified manufacturer avails of the benefit of exemption in respect of one product only or in respect of all products manufactured by him, the limit of exemption would remain the same, being based upon the total capital investment made by him in establishing the new industry.

18. It may be noted that the limit of exemption to which a new industry is entitled is of a percentage of fixed capital investment made by it. Whether the petitioner availed of the exemption limit both, in relation to the cotton and cotton seed or only in relation to the cotton seed alone, the limit remains the same. When the manufacturer opts for exemption only qua one product, he avails of exemption to the total extent admissible under the Scheme in relation to one product only. In other words, in the present case the petitioner has availed of the benefit of exemption in relation to cotton seeds alone, nonetheless the limit of exemption is Rs. 2,41,000. Had the petitioner availed of the benefit of exemption qua both cotton seeds and cotton, even then the limit of exemption would be Rs. 2,41,000. In the circumstances, had the petitioner availed of the exemption in respect of both the products the exemption limit would have been exhausted earlier. By not availing of the benefit of exemption in relation to cotton, the petitioner is not in any manner prejudiced inasmuch as the petitioner is in a position to avail of the benefit of exemption from payment of sales tax in relation to the entire fixed capital investment made by it on the sale of cotton seed. The specified manufacturer who avails of the benefit under the Scheme is bound by the conditions laid down thereunder in relation to the goods manufactured in the new industrial unit set up by it condition 9 prohibits a specified manufacturer from availing of deduction under any certificate under sections 12 and 13 or other entries of the notification issued under sub-section (2) of section 49 of the Act as sales of the specified manufacturer are wholly exempted as per sub-entry (3) of the notification. Thus, it is not as if the sale of cotton was not exempted from payment of sales tax under the scheme. The petitioner chose to avail of the exemption only qua the cotton seed. Thus, it was for the petitioner to opt for the product in relation to which the limit of sales tax exemption under the scheme should be computed. Merely because the petitioner has chosen the limit to be computed only qua sales of cotton seeds and not cotton, it does not mean that sales of cotton are not governed by the provisions of the Scheme, inasmuch as cotton is also one of goods manufactured by the specified manufacturer in the new industry.

19. Another aspect of the matter is that cotton is a product which is manufactured in the very industry in respect of which the benefit of sales tax exemption under the scheme has been obtained by the petitioner. Had the unit producing cotton been a different unit, and the capital investment in setting up the said unit not been taken into consideration while computing the extent of

benefit available under the scheme, the situation would have been different. In the present case it is one consolidated unit wherein both cotton and cotton seeds were manufactured. The limit of exemption has been computed in relation to the specified industry wherein both cotton and cotton seeds are manufactured. In the circumstances, the conditions under entry 175 would be applicable to both the products manufactured in the said industry. Thus, by making sale of cotton by availing of benefit of section 13 of the Act, it is apparent that the petitioner has committed breach of condition 9 of entry 175.

20. In the premises aforesaid, the contention that till the exemption certificate has been cancelled by either of the authorities or that till the exemption certificate stands only qua cotton seed, it cannot be said that there is breach of conditions of the notification does not merit acceptance. As noted hereinabove, it is the goods manufactured by the specified manufacturer which are covered under the scheme. It may be that the petitioner, who is a specified manufacturer under the scheme, may have opted to avail of the benefit of sales tax exemption only qua one product, viz., cotton seeds, but that does not mean that qua the other product, i.e., cotton which is also manufactured in the new industry, the petitioner is absolved of the conditions imposed under the scheme. The Tribunal was, therefore, justified in holding that the sale against forms 17B or 20, as the case may be, defeats the spirit and purpose of the Scheme and the same is in violation of the conditions of the tax exemption certificate and conditions of the Scheme.

21. However, as rightly pointed out by the learned advocate for the petitioner, apart from demanding sales tax in respect of the sale of cotton made by the petitioner, the petitioner has also been visited with penalty by the order dated September 16, 2002 made by the Assistant Sales Tax Commissioner. In the present case though the petitioner had been granted eligibility certificate in respect of both cotton and cotton seed, the petitioner, with a view to avail of benefit of section 13 of the Act, sought exemption under the scheme only qua cottonseeds. The concerned sales tax authority has also entertained the application made by the petitioner and granted exemption only qua cottonseeds. Thus, if on an interpretation of the provisions of the scheme it is found that there is a breach of condition 9 of entry 175, the petitioner cannot be attributed any mala fide intention or mens rea for committing such a breach inasmuch as in the light of the fact that exemption certificate was granted only qua cottonseed, the petitioner was entitled to entertain a bona fide belief that the conditions of the Scheme operate only qua the said product. In the circumstances, to the extent the penalty has been levied on the petitioner, the order passed by the revisional authority requires to be interfered with.

22. This view is fortified by the fact that under condition No. 5 of entry 175, it is provided that if the specified manufacturer contravenes any of the conditions stated therein or of the provisions of the Act or the Rules made thereunder, the exemption certificate issued to him by the Commissioner under the said entry

shall be liable (i) to be suspended for a period not exceeding six months and purchases and sales by the specified manufacturer shall cease to be exempt under the said entry and the amount of tax exemption admissible but for the suspension of the exemption certificates during suspension shall be deducted from the total amount of tax exemption and also the period from the total period of exemption specified in annexure V; (ii) to be cancelled and on such cancellation, the purchases and sales by the specified manufacturer shall cease to be exempt under the said entry. The record of the case indicates that no action has been initiated against the petitioner under condition No. 5 of entry 175 for breach of any of the conditions under the Scheme or any of the provisions the Act or the Rules made thereunder. Thus, even the respondents do not appear to have considered the breach committed by the petitioner to be of such serious nature so as to entail the consequences provided under condition No. 5 of entry 175. In the circumstances, the penalty levied by the revisional authority cannot be sustained.

23. For the foregoing reasons, the petition partly succeeds and is accordingly allowed to the following extent: The impugned order of the Tribunal to the extent it upholds the demand for sales tax and interest thereon is confirmed. However, to the extent the impugned order confirms the penalty levied on the petitioner, the same is quashed and set aside. Rule is made absolute to the aforesaid extent with no order as to costs.