
(2008) 06 KL CK 0044

In the High Court Of Kerala

Case No : S.T. Rev. No's. 217 and 218 of 2007

Cochin Cements Ltd.

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 16-06-2008

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 10, 35, 5

Citation : (2008) 2 KLJ 582 : (2008) 3 KLT 202 : (2008) 18 VST 224

Hon'ble Judges : H.L. Dattu, C.J.;A.K. Basheer, J

Bench : Division Bench

Advocate : Joseph Vallappally, S. Anil Kumar and V.P. Sukumar, for the Appellant; Vinod Chandran (GP), for the Respondent

Judgement

H.L. Dattu, C.J.—Pursuant to the direction issued by the apex Court in Special Leave to Appeal (Civil) No. 12914/2007 dated 7-4-2008, to dispose of these revision petitions within two months, though the petitions are of the year 2007, they are taken up for final hearing and disposed of by this common order. The assessee is common in these two revision petitions, and the legal issue raised is also identical.

2. The assessee is a Public Limited Company. It is engaged in the manufacture and sale of "Portland Pozzalona cement".

3. The Central Government by circular dated September 1991 had suggested to the State Governments to grant incentives/tax concessions etc. for such of those industries which would use "fly ash" as the raw material for the manufacture of its products. Pursuant to the aforesaid circular, the State Government has issued SRO No. 388/1996, in exercise of its powers u/s 10 of the Kerala General Sales Tax Act (KGST Act for short), in supersession of its earlier notification, SRO No. 262/1996. By the said notification, exemption is granted in respect of tax payable u/s 5 of the Act to an industrial unit, manufacturing cement using fly ash generated in the State as raw material. The exemption that can be granted under the aforesaid notification shall not exceed 500% of the fixed capital investments

of the unit. The notification itself says, that, the exemption notification is subject to all the other conditions and restrictions imposed under the notification SRO No. 1729/93.

4. Pursuant to the aforesaid notification issued by the State Government, the assessee had approached the Director of Industries and Commerce by filing an application for grant to eligibility certificate so as to facilitate the industrial unit to approach Secretary, Board of Revenue (Taxes), Thiruvananthapuram to grant exemption from payment of sales tax for the products manufactured by it as envisaged in the notification. The Director of Industries and Commerce, after considering the application filed by the Petitioner, has issued eligibility certificate, certifying that the industrial unit satisfies the conditions prescribed in the notification issued by the Government. After obtaining the certificate from the Director of Industries and Commerce, as envisaged under SRO. No. 193/98, the assessee had approached the Secretary, the Board of Revenue (Taxes). Thiruvananthapuram for giving effect to the certificate issued by the Director of Industries and Commerce. The Secretary, Board of Revenue (Taxes) by his order No. C4. 28282/96/TX dated 6/7/1996 has exempted the petitioner's industrial unit from payment of sales tax under the Act. The order so passed is as under.

Order No. C4 28287/96/TX dated 6-7-"96

M/s. Cochin Cements Ltd., XIV/180, old Road, Kodimatha, Kottayam having been found eligible for Sales Tax Exemption under the notification cited are granted Sales Tax Exemption subject to the following conditions stipulated in the said notifications as per details given below:

5. Exemption is in respect of goods viz., Portland Pozzalona Cement and the period of exemption is with effect from 14-10-1995 to 13-10-2002 and the total amount of exemption is in a sum of Rs. 40,23,32,660.00 only. There is no other condition incorporated either in the eligibility certificate issued by the Director of Industries and Commerce or in the order of exemption granted by the Secretary, Board of Revenue (Taxes). There is no ambiguity about the class of persons or dealers to whom the notification would apply, no ambiguity about the class or description of goods and the transactions of sale which are exempt from tax. The exemption is relatable to manufacture of cement using fly ash as raw material.

6. For the assessment years 1999-2000 and 2000-2001, the assessee had filed its annual returns before the assessing authority and in that had claimed total exemption from payment of sales tax under the Act. In view of the exemption certificate that was issued by the Director of Industries and Commerce and the order passed by the Secretary, Board of Revenue (Taxes), the assessing authority had completed the assessment proceedings and in that had granted total exemption from payment of tax u/s 5 of the Act.

7. Since these two orders of assessment have been found to be irregular, illegal and prejudicial to the interests of the Revenue, the Deputy Commissioner of Commercial Taxes, in exercise of his powers u/s 35 of the Act, had issued notice

to the petitioner asking it to show cause, why the orders of assessment passed by the assessing authority for the aforesaid assessment years should not be cancelled and remit back to the assessing authority for a fresh disposal. For the disposal of these revision petitions, it is necessary to extract the notice issued by the revising authority. The same is as under:

Please take notice that your KGST assessment for the years 99-00 and 2000-01 were completed on 22-2-03 and 16-4-03 respectively. As per order No. C4-28282/96/TX dated 6-7-96 exemption for 7 years was granted for the manufacture and sale of Portland possalano cement under the brand name "Cochin Cements". But during 1999 you had entered into an agreement with M/s. ACC Cement to sell the cement under their brand name. While finalising the assessment, the entire tax was adjusted against available exemption amount instead of demanding tax.

In the case of Commnr. of Central Excise, Raipur Vs. Hira Cement, the Hon"ble Supreme Court held that "exemption not applicable if goods are manufactured with "brand name" or "trade name" of another.

Since you were manufacturing and selling cement in the brand name of ACC Ltd. you were not entitled for exemption during the above period. Thus the assessments already completed giving exemption to tax were prejudicial to the revenue.

It is therefore proposed to cancel the assessments for the year 99-00 and 2000-01 u/s. 35 of the KGST Act and remit back the case of assessing authority for fresh disposal.

Your objections if any to the above proposal, shall be filed within 7 days of receipt of this notice. You are also given an opportunity of being heard in person at 11 a.m. on any working day within the above time limit in my office at Collectorate building, Kottayam.

8. The reason for which the revising authority intended to revise the orders of assessment passed by the assessing authority was that the assessee was granted exemption from payment of sales tax u/s 5 of the Act for the manufacture and sale of Portland Possalano Cement under the brand name "Cochin Cements" but contrary to the conditions has entered into agreement with M/s. ACC Cements to sell the cements under their brand name and therefore, petitioner is not entitled for exemption from payment of tax u/s 5 of the Act. In support of his reasoning, the revising authority has relied on the decision of the apex Court in the case of Commnr. of Central Excise, Raipur Vs. Hira Cement, .

9. On receipt of the show cause notice issued by the Deputy Commissioner, Commercial Taxes dated 6-2-2007, the assessee has filed its detailed reply, inter alia, contending that in view of the eligibility certificate issued by the Director of Industries and Commerce and the order passed by the Secretary, Board of Revenue (Taxes), the assessee is entitled for exemption from payment of tax u/s

5 of the Act for a period of 10 years and therefore, the revising authority could not have issued any notice to revise the orders passed by the assessing authority. After receipt of the reply so filed, the revising authority has proceeded to confirm the proposal made by him in the show cause notice dated 6-2-2007.

10. Aggrieved by the orders passed by the revising authority, the assessee had carried the matter by way of appeals before the Sale Tax Appellate Tribunal, Additional Bench, Kottayam in T.A. Nos. 43 and 44 of 2007. The Tribunal by its order dated 29th of May 2007 has rejected the appeals. The reasoning and the conclusions reached by the Tribunal is as under:

(a) The Tribunal found that the decision of the Hon"ble Supreme Court in Commnr. of Central Excise, Raipur Vs. Hira Cement, was applicable to the facts of the case and therefore, the Deputy Commissioner was justified in following the said decision in canceling Annexure - V and VI orders (Para 14 of the Tribunal Order).

(b) Regarding the contention of the petitioner that an order of exemption passed by the Secretary. Board of Revenue (Taxes) cannot be nullified by the assessing authority, the Tribunal found that the Deputy Commissioner had only cancelled the assessments and he has not interfered with the exemption order issued by the Secretary. Board of Revenue (Taxes) and therefore the decision of the Hon"ble Court in Surya Refineries" case is distinguishable and there is no infirmity in the order passed by the Deputy Commissioner.

(c) Regarding the contention of the petitioner that it could not collect tax on account of exemption ordered by the Secretary, Board of Revenue (Taxes) and therefore the cancellation of exemption is illegal, it was held that the whole issue arose due to the use of the brand name ACC from 01-6-1999 and therefore, the appellant is fully responsible for the consequence.

(d) Though not in issue in the appeals filed before the Tribunal it went further and directed the assessing authority to examine whether there was actual use of fly ash after 01-06-1999.

11. Aggrieved by the orders so passed by the Tribunal., the assessee is before us in these Tax Revision Petitions. The assessee has framed the following questions of law for our consideration and decision. They are as under:

(i) Is not the Tribunal's finding that the exemption granted to the petitioner as per Annexure IV order was for manufacture and sale of Port land Pozzalona Cement under the brand name "Cochin Cements" only, perverse and patently contrary to the records?

(ii) Was the Tribunal justified in law in applying the decision of the Hon"ble Supreme Court in Commnr. of Central Excise, Raipur Vs. Hira Cement, to the facts of this case?

(iii) Is the Tribunal justified in law in holding that the Deputy Commissioner has

jurisdiction to cancel an assessment order granting exemption on the basis of an order of exemption issued by the Secretary. Board of Revenue (Taxes).

(iv) Is not the sales tax exemption as per Annexure IV order available to goods manufactured in the small scale/medium scale/large scale industries irrespective of the brand name of the goods manufactured?

(v) In the absence of a cross objection by the Revenue before them on the question of use of fly ash as a raw material for manufacture of cement by the petitioner, is the Tribunal justified in law in raising such a question suo motu?.

12. Sri. Joseph Vellappally, learned senior counsel appearing for the assessee would contend, that, since the assessee satisfies all the conditions envisaged under the notification, SRO No. 388/96, read with SRO No. 1729/93, the revising authority could not have initiated suo motu revisional proceedings to revise the order passed by the assessing authority for the two assessment years, viz. 1999-2000 and 2000-2001, on the ground that those orders are prejudicial to the interest of the Revenue. Secondly, the learned counsel would submit, that, without canceling the eligibility certificate issued by the Director of Industries and Commerce and the orders passed by the Secretary, Board of Revenue (Taxes) granting exemption from payment of tax u/s 5 of the Act, the revising authority could not have initiated any proceedings much less revisional proceedings to revise the orders passed by the assessing authority granting exemption to the assessee solely based on those two orders. Therefore it is stated that the orders passed by the revising authority is illegal, irregular, arbitrary and bad in law. The learned counsel would further submit that the Tribunal, without clearly appreciating the stand of assessee, has rejected the assessee's appeal. Therefore the said order also requires interference by this Court.

13. The learned Senior Counsel further submits that reliance placed by the Deputy Commissioner of Commercial Taxes to revise the orders passed by the assessing authority is wholly inapplicable to the facts and circumstances of this case and even on that ground also the order passed by the revising authority must be annulled by this Court.

14. Sri. Vinod Chandran, learned counsel appearing for the Revenue sought to justify the impugned order. According to the learned counsel since the assessee is using the brand name of ACC Cements, may be with the permission of the Associated Cement Company, the assessee cannot be a manufacturer of cement and therefore it is not entitled to exemption. Therefore according to the learned counsel, the revising authority is justified in invoking the suo motu revisional powers to revise the order passed by the assessing authority.

15. The one and the only question that arises for consideration and decision is, whether the revising authority viz., the Deputy Commissioner, Commercial Taxes and the Tribunal were justified in setting aside the orders of assessment passed by the assessing authority for the assessment years in question, who had simply followed the eligibility certificate issued by the Director of Industries and

Commerce and the order of exemption from payment of tax passed by the Secretary, Board of Revenue (Taxes).

16. The Central Government by its circular dated September 1991. taking into consideration the environmental impact of fly ash if it is not disposed of in a proper manner, had advised the State Governments to issue necessary instructions/notifications by providing incentives in the form of concessional rates, exemption of excise and customs duty for such of those industries which would use fly ash as a raw material for the purpose of manufacture of their finished products, viz. cement. Pursuant to the circular so issued, the State Governments in exercise of its powers u/s 10 of the Act, has issued the notification in SRO 388/96. The said notification is in the public interest. By the notification, the tax payable by the industrial unit manufacturing cement by using fly ash as a raw materials is granted exemption in respect of tax payable u/s 5 of the KGST Act. The total quantum of exemption is restricted to 500% of the fixed capital investment of the unit. The notification also suggests that all the other conditions and restrictions imposed in SRO 1729/93, other than that relating to the quantum of exemption shall be applicable to SRO No. 388/96. The notification issued by the State Government is as under:

KERALA GENERAL SALES TAX NOTIFICATIONS

Sl. No. 526:

Amendment of SRO 262/96

SRO No. 388/96:- In exercise of the powers conferred by Sec. 10 of the Kerala General Sales Tax Act, 1963 (15 of 1963) and in supersession of the notification in SRO 262/96 dated 11-3-1996. the Government of Kerala, having considered it necessary in the public interest to do, hereby make an exemption in respect of the tax payable under Sec. 5 of the Kerala General Sales Tax Act by industrial units manufacturing cement using Fly Ash generated in the State, as a raw material, subject to the condition that the total quantum of exemption shall not exceed 500% of the Fixed Capital Investment of the unit.

The exemption shall be subject to all conditions and restrictions imposed by notifications SRO 1729/93 (G.O.(P) No. 155/93/TD dated 3-11-1993) other than that relating to the quantum of exemption.

This notification shall be applicable to industrial units set up on or after 1-4-1993.

(Emphasis is supplied by us).

17. The notification issued by the State Government in SRO No. 1729/93 provides for tax exemptions to industrial units and/or reduction in the rate of tax payable on the sale or purchase, as the case may be, of goods by such industrial units, subject to certain conditions. Clause 10 of the notification provides conditions and restrictions for taking benefit under the notification. Clause 10(b) of SRO 1729/93 applies to the petitioner/assessee. The industry, in order to avail

exemption from payment of sales tax, firstly has to approach the Director of Industries and Commerce by filing an appropriate application for grant of Eligibility Certificate. In the instant case, it is not in dispute nor it can be disputed that the petitioner industry had approached the Director of Industries and Commerce for issuance of an eligibility certificate. After obtaining such a certificate, the industry had also filed an application before the Secretary, Board of Revenue (Taxes), Thiruvananthapuram, to pass an order of exemption from payment of sales tax u/s 5 of the KGST Act. Taking into consideration the certificate so issued by the Director of Industries and Commerce, the Secretary of Board of Revenue (Taxes) had issued an order of exemption which is available to the petitioner industry for a period of 10 years with effect from 14-10-1995.

18. The assessing authority for the assessment years 1999-2000 and 2000-2001, had passed an order of assessment and had granted exemption to the petitioner's industrial unit from payment of sales tax in view of the Eligibility Certificate issued by the Director of Industries and Commerce and the order of exemption passed by the Secretary of Board of Revenue (Taxes). The Deputy Commissioner of Commercial Taxes has initiated suo motu revisional powers by issuing notice u/s 35 of the Act. According to him the petitioner industry is not eligible and entitled for exemption from payment of sales tax, since the petitioner industrial unit is manufacturing the finished products by using fly ash with a brand name or Trademark of yet another industrial unit. Reliance is on the decision of the apex court in the case of Commr. of Central Excise, Raipur Vs. Hira Cement, . At the outset we would state that the dictum laid down by the apex Court in Hira Cement's case will not apply to the facts and circumstances of the present case. That was a case where Hira Cements claimed exemption from payment of excise duty in terms of the notification No. 1/93-CE dated February 28, 1993. Paragraph 4 of the notification specifically stated, that, the exemption contained in the notification shall not apply to the specified goods where a manufacturer affixes the specified goods with a brand name or trade name (registered or not) of another person who is not eligible for the grant of exemption under the said notification. The Department held that the assessee was not entitled to exemption, since the assessee was using the brand name of HI Ltd., which demonstrated financial relationship between them. The Apex Court while remanding the matter for fresh adjudication to the Appellate Tribunal, has observed that, even the use of a part of a brand name or trade name, so long as it indicated a connection in the course of trade, would be sufficient to disentitle the person from getting the exemption.

19. The notification issued by the State Government in SRO No. 388/96 makes it clear that exemption will be available to an industrial unit which manufactures cement by using fly ash generated in the State as raw material. It is not in dispute nor it can be disputed by the other side that petitioner is an industrial unit and it manufactures cement using fly ash which is generated in the State as raw material. The other conditions which are to be followed by the petitioner industrial unit to have the benefit of the notification SRO No. 388/96 is that, it

shall apply for an eligibility certificate from the Director of Industries and Commerce and obtain exemption from the Secretary of the Board of Revenue (Taxes), Thiruvananthapuram. A careful reading of the words employed in the notification No. 388/96 would not leave any manner of doubt for the purpose of interpretation/construction of the notification. It is well settled principles of rules of interpretation that every word used by the authority granting exemption by issuing notification has its own importance and the courts should not normally add something which the authority granting exemption never intended while issuing the notification. The State Government while issuing notification in exercise of the powers under the Act, has used the words "hereby make an exemption in respect of the tax payable u/s 5 of the KGST Act by industrial units manufacturing cement using "Fly Ash" generated in the State as a raw material". Under the notification, what is exempted is the sale of cement manufactured by a industrial unit using fly ash generated in the State as raw material. The notification does not refer to any other condition or circumstances limiting the exemption. The conditions prescribed are not inhibited by any further condition which may affect the exemption granted. The exemption notification is used to encourage industrial units manufacturing cement using fly ash generated in the State. The notification so issued is a beneficial notification and further in the public interest. Such exemption notification requires to be liberally construed and if the tax payers is within the plain terms of the exemption notification, he cannot be denied the benefits of the exemption. The exemption notification requires to be strictly construed at the stage of applicability and once found applicable requires to be construed liberally. Merely because petitioner's industrial unit uses the brand name of another person, it does not mean that the petitioner's industrial unit is not manufacturing cement using fly ash and effecting sale of such cement both within the State as well as outside the State. Since the industrial unit fulfils all the conditions that are stated in SRO No. 388/96 and 1729/93, the revisional authority/Deputy Commissioner of Commercial Taxes, merely relying upon a decision which has no bearing whatsoever on the facts and circumstances of this case, could not have initiated any proceedings for revising an order of assessment passed by the assessing authority for the two assessment years in question. Since we are granting relief to the petitioner on the first issue itself, we need not have to consider the other issues canvassed by the learned Senior Counsel, Sri Joseph Vellappally. In that view of the matter, the revision petitions requires to be allowed and the questions of law framed by the assessee requires to be answered in favour of the assessee and against the Revenue. Accordingly the revision petitions are allowed and the orders passed by the revisional authority and the Tribunal are set aside and the order of assessment passed by the assessing authority for the years 1999-2000 and 2000-2001 is restored.

Ordered accordingly.