

(2008) 10 BOM CK 0035

In the Bombay High Court

Case No : Sales Tax Application No. 8 of 2007 in Reference Application No. 90 of 2001

Commissioner of Sales Tax

APPELLANT

Vs

Pec Vee Textile Ltd.

RESPONDENT

Date of Decision : 13-10-2008

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 41BB, 61
Bombay Sales Tax Rules, 1959 — Rule 31B

Citation : (2009) 26 VST 281

Hon'ble Judges : J.P. Devadhar, J; D.K. Deshmukh, J

Bench : Division Bench

Advocate : V.A. Sonpal, A.G.P, for the Appellant; Rafiq Dada instructed by RMG Law Associates, for the Respondent

Judgement

J.P. Devadhar, J.—The Commissioner of Sales Tax, Mumbai, has filed this application u/s 61 of the Bombay Sales Tax Act, 1959 against the decision of the Maharashtra Sales Tax Tribunal, Mumbai ("the Tribunal", for short) dated April 13, 2007 in R. A. No. 90 of 2001 whereby the Tribunal has declined to refer the following questions of law for the opinion of this Court:

(i) Whether, on the facts and circumstances of the case, the Tribunal was justified in law in declaring that the conditions in paragraph (i) and (m) of the certificate of entitlement dated January 25, 2000 be deleted ab initio?

(ii) Whether, on the facts and circumstances of the case, the Tribunal was justified in law in going a step further in declaring that proportionate benefits theory is not applicable to expansion units covered under 1993 Package Scheme of Incentives, when it was not asked for by the applicant (appellant sic) and their prayer was simply to delete the conditions from the certificate of entitlement?

2. The application is admitted on the aforesaid questions of law and by consent of both sides, the application is allowed and the sales tax application itself is

treated as statement of the case drawn by the Tribunal and is heard on merits on the aforesaid questions of law.

3. The relevant facts are that the respondent (hereinafter referred to as, "the assessee") is engaged in the manufacture and sale of cotton/synthetic yarn at its unit situated at Jamb, Taluk Samudrapur, District Wardha and is duly registered under the provisions of the Bombay Sales Tax Act, 1959 ("the BST Act", for short) as well as the Central Sales Tax Act, 1956 ("the CST Act", for short).

4. It may be noted that the State Government, with a view to achieve dispersal of industries outside the Bombay-Thane-Pune belt so that new industries with maximum capital investment get attracted to the backward areas, has announced from time to time since 1964 a scheme known as "package scheme of incentives". As per the scheme, sales tax incentives are given either in the form "exemption" from tax liability or in the form of "deferral" of tax liability to the eligible units on the purchases of raw materials and on sale of finished goods.

5. The assessee had applied for and obtained eligibility as well as entitlement certificate under the 1988 scheme of incentives in respect of its manufacturing unit at Jamb situated at Wardha District. As per the said entitlement certificate the assessee was entitled to deferment benefits for a period of ten years from June 1, 1990 to May 31, 2000 subject to the monetary ceiling of Rs. 4,15,59,650.

6. After having enjoyed the "deferral" mode of incentives up to March 31, 1993, the assessee opted to switch over to the "exemption" mode of incentives for the unexhausted portion of the monetary ceiling provided under the aforesaid certificates. The assessee was accordingly permitted to avail of "exemption" mode of incentives up to the remaining period of the eligibility from April 1, 1993 to May 31, 2000 or till exhausting the unexhausted portion of the monetary ceiling, whichever is earlier.

7. While enjoying the "exemption" mode of incentives under the 1988 scheme, the assessee modernised its existing plant by making additional investment of Rs. 884 lakhs and applied for further incentives under the 1993 package scheme of incentives as amended on July 6, 1994. There is no dispute that the additional investment made by the assessee for modernisation and upgradation of the existing plant did not result in increase in the production capacity of the plant. In other words, even after modernisation, the production capacity of the existing unit has remained the same.

8. The implementing agency, namely, SICOM considered the application of the assessee and on being satisfied, issued a separate eligibility certificate on July 29, 1999 for a period of eight years from January 1, 2000 to December 31, 2008 subject to the monetary ceiling of Rs. 596.70 lakhs.

9. Based on the aforesaid eligibility certificate dated July 29, 1999 issued by SICOM, the Deputy Commissioner of Sales Tax issued an entitlement certificate in favour of the assessee on January 25, 2000 valid for the period from January

1, 2000 to December 31, 2008 subject to the monetary ceiling of Rs. 596.70 lakhs. In the entitlement certificate the Deputy Commissioner of Sales Tax, however, incorporated the following two conditions (i) and (m) which read thus:

(i) It is claimed by the unit that separate accounting production of goods related to each eligibility and entitlement certificate is difficult to maintain and as such the request is made for pro rata basis of investment as a criterion to claim the benefits in terms of the provisions contained in the 1993 package scheme.

(m) Since the unit claims identification and maintenance of accounts for production from existing unit in first expansion is difficult to comply with, the option exercised by them within the provisions of the package is of pro rata basis of investment for computation of proportionate benefits. It has given following basis:

It would thus be clear that from January 1, 2000, onwards the production to the extent of 59.84 per cent of the total production shall be available for benefits in first expansion from this entitlement certificate. The 40.16 per cent of the total production shall be liable to tax on expiry of eligibility certificate of existing unit. The same proportion shall be equally applicable to procurement of raw materials against the declaration for exemption from payment of tax. The entitlement certificate, based on the ratio of investments for pro rata computation of the benefits shall be valid till the time period or the monetary ceiling, whichever gets exhausted early.

10. As a result of the above two conditions, the incentives quantified under the 1993 scheme at Rs. 596.70 lakhs could be availed of by the assessee from January 1, 2000 only to the extent of 59.84 per cent of the total quantity of goods produced per each year till December 31, 2008 or till achieving the monetary ceiling of Rs. 596.70 lakhs, whichever is earlier. In respect of the balance 40.16 per cent of goods produced per year, the assessee was liable to pay tax after the unutilised incentives granted under the 1988 scheme were exhausted within the time stipulated therein.

11. The assessee challenged the above two conditions imposed in the entitlement certificate by filing an appeal before the Tribunal, inter alia, on the ground that neither the assessee had sought availment of the incentives on pro rata basis nor was there any provision under the Act or under the 1993 scheme (as amended) which empowered the Deputy Commissioner of Sales Tax to impose such conditions in the entitlement certificate.

12. By its judgment and order March 17, 2001, the Tribunal allowed the appeal and directed that the conditions (i) and (m) incorporated in the entitlement certificate dated January 25, 2000 be deleted, inter alia, on the ground that the said conditions were not consistent with the 1993 scheme as amended on July 6, 1994.

13. Thereupon, the Commissioner of Sales Tax, Maharashtra State, Mumbai ("the

applicant", for short) filed a reference application requesting the Tribunal to forward the aforesaid two questions for the opinion of this Court. By an order dated January 25, 2006, the Tribunal referred the matter to a Special Bench to consider the maintainability of the reference application filed by the applicant u/s 61 of the BST Act. Accordingly, a Special Bench was constituted and by a judgment and order dated December 22, 2006 the Special Bench of the Tribunal held that the reference application was maintainable.

14. Thereafter, the reference application filed by the applicant was heard and by the impugned order dated April 13, 2007 the Tribunal rejected the reference application, inter alia, on the ground that no referable questions of law arise from the order of the Tribunal dated March 17, 2001. Hence the above application is filed by the applicant which is treated as statement of the case and heard on merits by consent of the parties.

15. The short question to be considered herein is, whether the Deputy Commissioner of Sales Tax was justified in imposing conditions (i) and (m) in the entitlement certificate so as to place ceiling on the utilization of the quantum of incentives proportionately to the extent of 59.84 per cent of the total quantity of finished products produced per year till exhausting the incentives quantified under the 1993 scheme or till the date specified therein, whichever is earlier.

16. It is pertinent to note that the 1993 Scheme was initially made applicable only to the new units/pioneer units/prestigious units established in the backward area. However, para 3.8(1)(i)(c) of 1993 scheme reads as follows:

3.8 Gross fixed capital investment

(I) Gross fixed capital investment shall mean and include, in the case of:

(i) New fixed assets--The value of new fixed assets acquired at site and paid for
Explanation--

(a)...

(b)...

(c) Any acquisition of new fixed assets outside the project scheme accepted by the implementing agency can be considered for the purposes of proportionate incentives during the residual eligible period provided such acquisition is not less than 25 per cent of the gross fixed capital investment at the end of the previous financial year of the eligible unit.

17. Thus, para 3.8(1)(i)(c) of the 1993 scheme envisaged grant of proportionate incentives to a unit acquiring new fixed assets outside the project scheme, provided such acquisition was not less than 25 per cent of the gross fixed capital investment.

18. In the light of the representation received from the industries particularly the existing units, the State Government deleted para 3.8(1)(i)(c) and substituted a

new para 3.8.(1)(i)(c) by issuing Government Resolution dated July 6, 1994. The newly substituted para 3.8(1)(i)(c) reads as follows :

3.8(I)(i)(c)

Any acquisition of the new fixed assets outside the project scheme accepted by the implementing agency can be considered for incentives, other than special capital incentives, provided such acquisition is not less than 25 per cent of the gross fixed capital investment at the end of the previous financial year. A separate eligibility certificate will be issued for availing of such benefits with eligibility period as admissible to new unit in the relevant area and for the relevant category of units as per the scheme. However, for the purpose of sales tax benefits, the quantum of entitlement will be limited to 75 per cent of that admissible to a new unit in the relevant area and for the relevant category of units as per the scheme. A unit cannot, however, claim benefits for acquisition of new fixed assets under this clause more than twice.

Explanation.--Existing units will also be entitled for benefits under this clause, provided acquisition of new fixed assets by such units is not less than 25 per cent of the gross fixed investment at the end of the previous year.

19. As per the newly substituted para 3.8(I)(i)(c) not only the units acquiring new fixed assets outside the project scheme but also the existing units acquiring new fixed assets not less than 25 per cent of the gross fixed assets became entitled to the incentives under the 1993 scheme irrespective of the fact that the acquisition of the new fixed assets resulted in increase in the production capacity or not. However, in such cases, the quantum of incentives was limited to 75 per cent of the incentives available to a new unit in the relevant area and for the relevant category of units. Thus, as per the newly inserted para 3.8(I)(i)(c) of the 1993 scheme, the eligible units were required to obtain a separate eligibility/entitlement certificate from the SICOM/sales tax authorities with the quantum of incentives which the existing unit is entitled to and the period within which those incentives could be availed. Neither para 3.8(1)(i)(c) nor any other provision under the 1993 scheme nor any provision under the BST Act/CST Act provides for utilization of the incentives in each year proportionately on the finished products attributable to the fixed assets newly acquired by the existing unit.

20. In these circumstances, the question to be considered is, whether the Deputy Commissioner of Sales Tax after determining the quantum of incentives and the time period during which the said incentives could be availed of, was justified in inserting conditions (i) and (m) in the entitlement certificate so as to impose ceiling on the utilization of the incentives per year? In other words, the question is, if the grant of incentives to an existing unit under the 1993 scheme is based on newly acquired fixed assets and not on the production capacity of the newly acquired fixed assets, whether the Deputy Commissioner of Sales Tax could impose conditions to the effect that the said incentives can be availed of proportionately to the production of the finished products attributable to the

newly acquired fixed assets.

21. While admitting that there is no specific provision in the 1993 scheme for availing of the incentives on proportionate basis, it is contended on behalf of the applicant that since the incentives are given to an existing unit on acquisition of certain additional fixed assets and the said incentives are to be utilized on the tax payable on the finished products, it must be held that the incentives under the 1993 scheme are to be availed of on the finished products attributable to the new fixed assets acquired by the existing unit. It is contended that in the present case, the assessee had expressed its inability to maintain separate books of account. As a result, identification of the finished products attributable to the newly acquired fixed assets was not possible and, therefore, the Deputy Commissioner was justified in determining the proportionate quantity of finished products attributable to the newly acquired fixed assets at 59.84 per cent of the total production and accordingly direct the assessee to avail of the incentives on 59.84 per cent of the total production till the time period set out in the entitlement certificate or till the quantum of incentives granted under the 1993 scheme is exhausted, whichever is earlier.

22. We see no merit in the above contentions. Admittedly, there is no provision in the entire 1993 scheme as amended on July 6, 1994 requiring the existing unit to avail of the incentives proportionate to the finished products attributable to the newly acquired fixed assets. In fact, unlike in the 1988 scheme, where the basis for grant of incentives was increase in the installed capacity, in the 1993 scheme, the basis for grant of incentives is acquisition of new fixed assets and not increase in the production capacity. If increase in the production capacity is not the criteria for grant of incentives under the 1993 scheme, then there is no question of availing of the quantum of incentives under the 1993 scheme proportionately to the products attributable to the newly acquired fixed assets. In the present case, admittedly, the acquisition of new fixed assets has not resulted in increase in the production capacity of the existing unit. In such a case, the question of availing of the incentives on the finished products attributable to the newly acquired fixed assets does not arise at all.

23. It is pertinent to note that para 3.8(I)(i)(c) as it stood originally, did provide for availing of the incentives by a unit acquiring new fixed assets outside the project scheme on proportionate basis. However, that para has been substituted with effect from July 6, 1994 and in the newly substituted para 3.8(1)(i)(c) the provision for availing of the incentives on proportionate basis has been completely omitted. Thus, the 1993 scheme as amended in 1994 makes a specific departure from the earlier schemes and provides for availing of the incentives not on the proportionate basis but on the total production of the existing unit. In these circumstances, imposing conditions for availing of the incentives on pro rata basis would be contrary to the 1993 scheme of incentives.

24. It is, however, contended by the learned A.G.P. that since the incentives as per para 5.1(I)(A)(iii) of the 1993 scheme are available on the finished products

and definition of the term "finished products" contained in para 3.6 of the 1993 scheme read with Rule 31B of the Bombay Sales Tax Rules, 1959 ("the BST Rules", for short) requires every unit to maintain separate books of account in respect of the finished products/it is abundantly clear that the incentives under the 1993 scheme are to be availed of on the finished products attributable to the newly acquired capital assets and, therefore, in the absence of any possibility of maintaining books of account for identification of the finished products attributable to the newly acquired fixed assets, the Deputy Commissioner was justified in incorporating the impugned conditions in the entitlement certificate.

25. There is no merit in the above contentions, because, firstly, neither para 5.1 nor para 3.6 nor any other provision in the 1993 scheme provides that the incentives available to an existing unit acquiring new fixed assets must be availed of against the finished products attributable to the newly acquired fixed assets. Merely because an existing unit is entitled to the incentives on acquisition of requisite new fixed assets and merely because the incentives are to be availed of on the finished products, it cannot be presumed that the incentives under the 1993 scheme are to be availed of on the finished products attributable to the fixed assets newly acquired by the existing unit. Secondly, since increase in the production capacity of the existing unit acquiring new fixed assets, is not the criteria for entitlement of incentives under the 1993 scheme, availing of the incentives under the 1993 scheme proportionate to the production attributable to the newly acquired fixed assets does not arise at all. Thirdly, the requirement of maintaining separate books of account under Rule 31B of the BST Rules would be, inter alia, relevant, where production attributable to the newly acquired fixed assets is the relevant criteria. Rule 31B is intended to facilitate due compliance of the conditions in the entitlement certificate. As noted earlier, for grant of incentives under the 1993 scheme, increase in production is not the criteria. In fact, Rule 31B itself provides for availing of the incentives on sale of finished products manufactured by an eligible unit within the prescribed monetary limit and the time-limit. Moreover, Rule 31B does not provide for availing of the incentives under the 1993 scheme in proportion to the production attributable to the newly acquired fixed assets. In these circumstances, the Deputy Commissioner could not have directed that the incentives be availed of on pro rata basis by following an artificial method which is not contemplated under the 1993 scheme.

26. Strong reliance was placed by the counsel for the applicant on the decision of the apex court in the case of Commissioner of Trade Tax, U.P. v. Kajaria Ceramics Ltd. reported in [2005] 141 STC 406. That decision is wholly distinguishable on facts. In that case, the dispute related to the quantum of incentives available to an existing unit undertaking expansion/diversification/modernisation on account of additional fixed capital investment, whereas in the present case, there is no dispute regarding the quantum of incentives available to the assessee. Moreover, in that case, it was a condition of the scheme that on acquisition of the additional fixed assets the production capacity of the existing unit must be increased by at

least 25 per cent, whereas, in the present case, there is no such requirement of increase in the production capacity on account of acquisition of new fixed assets. Therefore, reliance placed on the decision of the apex court in the case of Kajaria Ceramics Ltd. [2005] 141 STC 406 is totally misplaced.

27. It is argued by the counsel for the applicant that the decision of the Tribunal is mutually contradictory, because, in para 12 of its judgment the Tribunal has accepted the argument of the Department and held that the assessing officer at the time of assessment could adopt proportionate method of availing of the incentives but in para 14 of its judgment the Tribunal has erroneously recorded that the 1993 scheme does not provide for availing of the incentives on pro rata basis. There is no merit in this argument because, what is stated by the Tribunal in para 12 of its judgment is that where a unit manufactures both eligible finished products as well as non-eligible finished products and if separate accounts are not maintained, then in such a case, at the time of assessment it would be open to the assessing officer to adopt pro rata method for the purpose of availing of incentives. In other words, the question of availing of the incentives proportionately would arise only when there are eligible finished products and ineligible finished products or where the incentives are relatable to the increase in production attributable to the newly acquired fixed assets. As noticed earlier, an existing unit is entitled to the incentives under the 1993 scheme irrespective of the increase in the production capacity. Thus, there is no conflict in the findings recorded by the Tribunal.

28. It is further contended by the learned A.G.P. that if the assessee is allowed to avail of the incentives in respect of the total production, instead of availing of the incentives on pro rata basis, it would mean enjoying illegal acceleration of the entitlement and in that event the State would suffer revenue loss. There is no merit in this contention, because, the State Government has taken a conscious decision to abandon the method of granting incentives based on the increase in the production capacity of the existing unit and decided to grant incentives merely on acquisition of certain fixed capital assets and accordingly amended the 1993 scheme. In such a case, utilization of the incentives would be in respect of the total production of the finished products till exhaust on or the quantum of incentives or till the prescribed period, whichever is earlier: Even if the assessee accelerates its production on account of there being no ceiling on utilization of the incentives, there would be no revenue loss, because, once the incentives are exhausted, the assessee is bound to pay tax on the total production of the finished products. Therefore, in the facts of the present case, it cannot be said that there is illegal acceleration in the enjoyment of incentives or any loss to the Revenue.

29. It is pertinent to note that with a view to impose ceiling on the utilization of incentives by an eligible unit under different schemes, by the Finance Act, 2001 Section 41BB has been inserted into the BST Act, thereby empowering the State Government to prescribe different ratios for different classes of dealers under

different schemes. In the Statement of Objects and Reasons for inserting Section 41BB in the BST Act, it is clearly stated that the said Section is introduced with a view to restrict grant of incentives in proportion to the goods manufactured in the expansion unit located in the backward areas of the State. However, for the reasons best known to the State Government, till date no rules have been framed prescribing different ratios for different class of dealers under different schemes. In these circumstances, the argument that the Deputy Commissioner was justified in imposing ceiling on the utilization of the incentives under the 1993 scheme in proportion to the production attributable to the newly acquired fixed assets cannot be accepted.

30. It is contended by the learned A.G.P. that Section 41BB is a general provision and is not relevant in the context of availing of incentives under the 1993 scheme. Relying upon the decision of the apex court in the case of Mahim Patram Private Ltd. v. Union of India reported in [2007] 6 VST 248, it is contended that even though the State Government has not framed the rules and prescribed the ratio for availing of the incentives, the Deputy Commissioner was justified in imposing ceiling for availing of the incentives under the 1993 scheme on pro rata basis. We see no merit in the above contention. In the case of Mahim Patram [2007] 6 VST 248 (SC), the provisions of the CST Act clearly provided that till the Central Government frames rule under the CST Act for determination of the turnover in relation to inter-State works contracts, determination of the turnover may be carried out by the assessing officer in a State in terms of the rules made by that State Government. In the present case, neither the 1993 Scheme nor the BST Act nor the BST rules contain a provision for availing of the incentives on pro rata basis. Moreover, Section 41BB inserted to the BST Act by the Finance Act, 2001 specifically requires the State Government to prescribe the ratio for availing of the incentives on pro rata basis and admittedly, till date the State Government has not prescribed the ratio for availing of the incentives by different classes of dealers under different schemes. Thus, the decision of the apex court in the case of Mahim Patram Private Ltd. [2007] 6 VST 248 is wholly distinguishable on facts. Therefore, in the absence of any provision under the 1993 scheme and alternatively, in the absence of any ratio prescribed by the State Government by framing rules, it was not open to the Deputy Commissioner of Sales Tax to direct the assessee to avail of the incentives under the 1993 scheme in proportion to the production attributable to the newly acquired fixed assets.

31. For all the aforesaid reasons, the decision of the Tribunal in holding that the impugned conditions are contrary to the 1993 Scheme and accordingly directing the sales tax authorities to delete condition Nos. (i) and (m) incorporated in the entitlement certificate issued to the assessee cannot be faulted. The second question raised by the Revenue is also without any merit, because, the conditions (i) and (m) imposed in the entitlement certificate could be directed to be deleted only after recording a finding that the 1993 scheme did not empower the Deputy Commissioner of Sales Tax to impose such conditions.

32. In the result, both the questions are answered in the affirmative, i.e., in favour of the assessee and against the Revenue.

33. The Reference is disposed of in the aforesaid terms with no order as to costs.