
(1993) 10 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No. 1347 of 1985

Conwood Cement Co. Pvt. Ltd.

APPELLANT

Vs

M.G. Bagle and Others

RESPONDENT

Date of Decision : 21-10-1993

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 12A, 33

Citation : (1994) 2 BomCR 554

Hon'ble Judges : Sujata Manohar, J;M.G. Chaudhari, J

Bench : Division Bench

Advocate : Mahendra Shah, instructed by Vinod Mistry, for the Appellant; N.T. Saraf, for respondent Nos. 1, 2, 4 and 5, Shyam Mehta, instructed by Sunkarsett and Vaidya, for the Respondent

Final Decision : Dismissed

Judgement

Sujata Manohar, J.—The petitioners are a private limited company incorporated under the Companies Act, 1956. The company has its registered office at Goregaon (E), in Greater Bombay. It has a factory at village Dhansar, Taluka Palghar, District Thane in the State of Maharashtra. At the material time, the petitioners were engaged in production and manufacture of cement.

2. The State of Maharashtra by its Resolution dated 5th of January, 1980, Industries, Engineering and Labour Department published a Policy relating to the dispersal of industries in the backward regions of Maharashtra under a scheme known as the Modified Package Scheme of Incentives of 1979. The Scheme was designed to achieve dispersal of industries outside the Bombay-Thane-Pune belt. The Modified Package Scheme of Incentives, 1979 (hereinafter referred to as the 1979 Scheme) was to remain in operation from October 1, 1979 to March 31, 1983. Under the Scheme various areas were designated as falling under Groups A, B, C and D. Village Dhansar where the petitioners' factory is situated, falls in Group C category.

3. Under the said Scheme, those setting up new units in the backward areas designated in the Scheme were given, inter alia, Special Capital Incentives. For those in Group C, the Capital Incentive was in the form of payment of a lump-sum calculated at the rate of 12.5% of the Fixed Assets with a ceiling of Rs. 12.5 Lakhs. The Scheme also, inter alia, gave a Sales Tax Incentive as set out therein, as a result of which the industry in question would be entitled to exemption from payment of Sales Tax, General Sales Tax or Purchase Tax payable under the local Sales Tax Law, on purchase of raw materials and also on sales of finished products. There were similar incentives in respect of Central Sales Tax also. To an eligible unit falling under Group C, Sales Tax incentives would be available for a period of 5 to 7 years as set out therein.

4. The said Scheme provided for an Eligibility Certificate to be issued by the Implementing Authority under Part I of the Scheme. The Scheme provided that the Eligibility Certificate would be issued from the date of commencement of commercial production and the said date would be determined by the Implementing Agency as provided therein.

5. The Government of Maharashtra has also framed Procedural Rules for operation of the Modified Package Scheme of Incentives, 1979. These are under a Government Resolution of the Industries, Engineering & Labour Department dated 11th of August 1980. Chapter II of the Procedural Rules provides the manner of obtaining Eligibility Certificate under Part 1 of the 1979 Scheme. We will come to this a little later.

6. The petitioners desired to avail of the Package Scheme of Incentives of 1979. They therefore purchased land in Village Dhansar and obtained possession of the land on 12-8-1981. The petitioners built a factory on the said land in or about December, 1981 and installed plant and machinery in the said factory in or about December 1981 for the manufacture of Portland Cement conforming to I.S.I. specification and Clenkar Mortar. This was done around December 1981. According to the petitioners, commercial production in the said factory commenced on and from 15th January, 1982. The petitioners also obtained registration under the Bombay Sales Tax Act and the Central Sales Tax Act with effect from 9-11-1981 and 5-10-1981 respectively. According to the petitioners, they have invested an aggregate amount of Rs. 30 Lakhs in setting up the said factory in Dhansar Village.

7. The petitioners applied for an Eligibility Certificate for exemption from Sales Tax and for grant of Special Capital Incentives on 14-12-1981. The 3rd respondent has granted to the petitioners on 3-7-1982 a Certificate of Eligibility for Special Capital Incentive of Rs. 3,75,000. Along with the Eligibility Certificate, respondent No.3 also issued a Letter of intent dated 3-7-1982 for the purpose of obtaining Sales Tax Incentives. They also forwarded a copy of the proposed Eligibility Certificate for Sales Tax Incentives to the Sales Tax Authorities. The Letter of Intent and copy of Eligibility Certificate are required to be endorsed by the Sales Tax Authorities as set out in the Scheme before an Eligibility Certificate

for Sales Tax Incentives can be issued.

8. Ultimately the Sales Tax Authorities forwarded the documents to respondent No. 3 setting out the eligibility of the petitioners for Sales Tax benefits for the period 23-6-1983 to 22-6-1990. Accordingly, a Certificate of Entitlement dated 21-6-1983 was issued to the petitioners giving Sales Tax Incentives to the petitioners for the period 23-6-1983 to 22-6-1990.

9. The petitioners, in the present petition, claim that they should have been granted Eligibility Certificates for Sales Tax and for Capital Incentive with effect from 15th of January, 1982 - the date of their commencing commercial production. They have, therefore, prayed that the Entitlement Certificate should be modified to show the date as 15th of January, 1982. The petitioner, however, have not set out in their petition that the petitioners stopped production at their unit at Dhansar from June 1982. At the time when the above certificates were issued to the petitioners the Implementing Authority as well as the Sales Tax Authorities were unaware of this closure. According to the 3rd respondent, sometime in December, 1983 they learnt that the petitioners had stopped commercial production at their unit at Dhansar. The 3rd respondent thereupon addressed a letter dated 5th of December, 1983 to the Sales Tax Authorities requesting them not to issue the Entitlement Certificate to the petitioners. The Sales Tax Authorities, however, by their letter dated 19th of December, 1993 informed the 3rd respondent that the Sales Tax Authorities had already issued the Entitlement Certificate to the petitioners and that two copies of the Entitlement Certificate have been forwarded to the 3rd respondents. They also requested the 3rd respondent to immediately return the copies of the Entitlement Certificate to the Sales Tax Authorities for cancellation. The 3rd respondent thereafter called upon the petitioners to submit the copies of the Entitlement Certificate which had been collected by the petitioners, but not submitted to the 3rd respondent. Certificates were accordingly forwarded by the petitioners and the same have been subsequently cancelled. As a result, the respondents have not given to the petitioners any Sales Tax Incentives or the Special Capital Incentive.

10. The Sales Tax Officer, respondent No.1 herein, issued a notice of Assessment in Form 27 on the petitioners on 16-10-1984 u/s 33 of the Bombay Sales Tax Act, 1959 for the period 1-4-1981 to 31-3-1982. An order of assessment has been passed on 25-3-1985. The Sales Tax Authorities have declined to grant any benefit of exemption from Sales Tax to the petitioners, inter alia, on the ground that in any event, the Entitlement Certificate issued by the Deputy Commissioner of Sales Tax is valid only from 23-6-1983 to 22-6-1990 and any exemption under Entry 136 of section 41 of the Bombay Sales Tax Act would be for this period only. The petitioners have challenged this Order of Assessment dated 25-3-1985 and the Demand Notice dated 8-4-1985 issued to them pursuant to the said order.

11. In the first place, the petitioners have nowhere stated in their petition that

they had stopped production of cement from June, 1982 at their Dhansar unit. This is a very material fact which has been suppressed by the petitioners in the petition. On that ground alone we would have been justified in dismissing the petition. We have, however, heard the petitioners on the merits of their claim also, and therefore we propose to deal with the claim of the petitioners on merit.

12. It is necessary to refer to some provisions of the 1979 Scheme. Under Clause 4.6 of the Scheme, the incentives under the Scheme cannot be claimed unless Letter of Intent/Eligibility Certificate has been issued under the Scheme by the Implementing Agency concerned and the unit has complied with the stipulations/conditions of the Letter of Intent/Eligibility Certificate.

13. Under Clause 2.1(i) of the Scheme, the Eligibility Certificate under Part I of the Scheme will be issued with effect from the date of commencement of commercial production. This date has to be determined by the Implementing Agency. The Implementing Agency in the present case is the 3rd respondent, namely, the Development Corporation of Konkan Ltd. The application for eligibility under the Scheme is required to be filed under Clause 4.4 of the Scheme by the eligible unit after taking initial effective steps as defined in the Scheme. It should also complete all the effective steps on or before 31st of March, 1983. The petitioners applied for Eligibility Certificate in December 1981, after they had completed all the effective steps. Thereafter, there has been correspondence between the petitioners and respondent No. 3 whereby respondent No. 3 has asked the petitioners for various documents which have been set out in the correspondence.

14. According to the petitioners, they have been unnecessarily harassed by the 3rd respondent. The 3rd respondent has however contended that they had to ascertain as to whether there was any change, inter alia, in the management of the petitioners' unit. They had therefore asked for the names of all the Directors because in the Memorandum of Association, the names of five Directors were mentioned whereas in the application for eligibility certificate the petitioners had stated that the company had seven Directors. A clarification was sought by the 3rd respondent by their letter dated 23rd of June, 1982. By their reply dated 28th of June, 1982, the petitioners clarified the position regarding the appointment of two Additional Directors and forwarded certified true copies of the Resolutions in that connection. On receipt of the letter, the 3rd respondent issued the Eligibility Certificate for grant of the Special Capital Incentives dated 3rd of July, 1982 and they also issued a Letter of Intent for the purpose of grant of Sales Tax incentives also dated 3rd of July, 1982. According to them, there was no undue delay in issuing the Eligibility Certificate. The dispute in this regard is not of much consequence in the present case because by the time the Eligibility Certificate was issued, the petitioners had already stopped production at their Dhansar unit.

15. Under Clause 11.10 of the Procedural Rules, where an eligible unit which has availed of any Benefits/Notional Benefits under the relevant Scheme is closed

within a period of 7 years from the date of commencement of production, the unit shall be liable to repay forthwith the cumulative total amount of all the Benefits/Notional Benefits drawn under the relevant Scheme. The unit is also liable to pay interest at 12.5% per annum from the date of closure of the unit as determined by the Implementing Agency.

16. Clause 11.5 of the Procedural Rules deals with the closure of unit. It states that where the main manufacturing activities of an eligible unit for the carrying on of which it is set up are stopped/closed and the Implementing Agency is satisfied that there are no reasonable prospects of restarting those activities in the near future, the unit shall be treated as closed. The decision of the Implementing Agency in regard to the closure of the unit under this clause shall be final. In the present case from June, 1982 the main manufacturing activities of the petitioners unit at Dhansar had stopped. Therefore, the petitioners are not entitled to any benefit under the Modified Package Scheme of Incentives, 1979. Even if any benefit had, in fact, been conferred on the petitioners under the Eligibility Certificate/Entitlement Certificate, they would have been liable to return the same. The respondents are, therefore, justified in not granting any benefit to the petitioners.

17. In respect of the Capital Incentive of Rs. 3.75 lakhs, the petitioners contend that had this amount been paid and it was found that they had stopped normal production during any period, they would have had the benefit of Clause 11.17 under which the benefit obtained by them would have been deemed to be an interest free loan repayable after 12 years in six equal annual instalments. In the first place, this clause only applies to a situation where there is stoppage of normal production during any year. In the case of the petitioners the unit has closed, though the petitioners contend that they hope to revive it if they get the benefits as claimed by them. This, however, is not a ground for inviting the application of Clause 11.17. Clearly under the Scheme, a unit which has stopped production before even the Eligibility Certificate is granted, cannot claim the benefit of the incentives. To say that since the unit functioned from January, 1982 to June, 1982, it should get all the necessary incentives which can thereafter be claimed back by the respondents is, to say the least, disingenuous.

18. The petitioners have also contended that for the period January, 1982 to June, 1982 when the petitioners had carried on manufacturing activities and had effected substantial sales, they should have the benefit of the Sales Tax Incentives under the said scheme. This submission also suffers from the same defect as the submission relating to capital incentive. Both these incentives cannot be claimed by a unit which has closed down before the Eligibility Certificates and/or Certificates of Entitlement were granted to the unit. The petitioners have complained of delay in the issue of Certificate of Entitlement for the purpose of Sales Tax Incentives, as a result of which they were granted a certificate of Entitlement which was effective only from 23rd of June, 1983 for a period of 7 years. The petitioners contend that had this Certificate of Entitlement

been issued to them from 15th January, 1982 onwards, they could have availed of the Certificate for their assessment of Sales Tax for the period 1-4-1981 to 31-3-1982. In the first place, even if the petitioners had availed of such a benefit they would have been liable to return the same. Secondly, it is pointed out by Mr. Saraf, learned Counsel for the Sales Tax Department, that as per the procedure prescribed in the Procedural Rules referred to earlier, an Eligibility Certificate has first, to be issued by the Implementing Agency in respect of Special Capital Incentive. Thereafter a draft (copy) of Eligibility Certificate for the purpose of Sales Tax Incentive along with a letter of intent are required to be forwarded to the Sales Tax Department through the concerned unit. On receipt of these documents, the Sales Tax Authorities endorse the date for which the Certificate of Eligibility/Certificate of Entitlement can be issued for the purpose of Sales Tax incentive. These documents are then returned to the Implementing Agency which issues the requisite certificate to the unit.

19. In the present case, the unit did not present the requisite documents to the Sales Tax Authorities till June, 1983 and, hence, the Certificate of Entitlement mentioned the date 23rd June, 1983 to 22nd June, 1990. The petitioners, however, contend that it was for the Implementing Agency to directly forward the relevant documents to the Sales Tax Authorities. Be that as it may, the Procedural Rules provide that retrospective Certificate of Entitlement cannot be given in respect of Sales Tax Benefits.

20. Clause 2.12 of the Procedural Rules provides inter alia, that the Certificate of Entitlement shall be made effective from a prospective date so as to enable the Implementing Agency to arrange for the issuance of the Eligibility Certificate duly endorsed with the date of effect and the period of eligibility thereon to enable the eligible unit to claim exemption admissible under the Sales Tax Law. This is because Entry 136 in section 41 requires that a registered dealer who claims such an exemption, should incorporate certain declarations as set out therein in the sales bills or cash memorandum issued by him in respect of the sale in addition to the certificate u/s 12-A of the Bombay Sales Tax Act, 1959. The declarations are set out against the Entry. They, inter alia, provide that in respect of purchase of these goods no draw backs, set off or refund can be claimed under the Bombay Sales Tax Act. Nor can subsequent purchaser obtain any certificate in Form 31 under the Bombay Sales Tax Rules and so on. This is to ensure that subsequent purchasers do not get the benefit of tax which has not, in fact, been paid. Such declarations can be given only in respect of sales which have been effected after the Entitlement Certificate is issued. Therefore, retrospective date cannot be put in the Entitlement Certificate.

21. This submission has considerable force especially when Rule 2.12 contemplates only a prospective Entitlement Certificate. Clause 2.13 also contemplates that there may be a time lag between the date of commencement of production and the issue of an Entitlement Certificate. The contention, therefore, of the petitioners that the Entitlement Certificate should have

commenced from 15th of January, 1982 or in any event, from 3rd of July, 1982 which was the date on which they obtained the Eligibility Certificate for Capital Incentives, does not appear to be sustainable.

22. The petitioners have further contended that they have been deprived even of the benefits which a normal registered unit would have got, for the assessment period 1-4-1981 to 31-3-1982. This is denied by Mr. Saraf, learned Counsel for the Sales Tax Department. He has pointed out that in the assessment proceedings the petitioners have been granted all such benefits which a normal registered dealer would have been entitled to.

23. Looking to these circumstances, we do not see how any of the terms of the 1979 Scheme are violated by the respondents in any manner. The petitioners have referred to a decision of the Full Bench in the case of Tapti Oil Industries v. State of Maharashtra, reported in 1984 S.T.C. 193 (Bom.) : 1984 (1) Bom.C.R. 48 . The ratio of that judgment cannot be attracted when the petitioners have themselves committed a breach of the terms of the said Scheme and as a result, become disentitled to the incentives. The respondents have also relied upon a decision of the Supreme Court in the case of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, where the Court has said that subsequent events on account of which the Government claims to be exempt from the liability can be looked at and it would be for the Court to decide whether those events are such as to render it inequitable to enforce the liability against the Government.

24. In any event, in view of the terms of the Scheme itself, and the Rules framed thereunder, as also the conditions which have been set out in the Procedural Rules, the petitioners are not entitled to the benefits of the said scheme.

25. In the premises, the petition is dismissed with costs.