

(1990) 05 OHC CK 0013
In the Orissa High Court
Case No : O.J.C. No. 1712 1989

Crown Re-rollers Pvt. Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 08-05-1990

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 5(1), 6

Citation : (1990) 2 OLR 7

Hon'ble Judges : D.P. Mohapatra, J;A. Pasayat, J

Bench : Division Bench

Advocate : B. Mohanty and Akhil Mohapatra, for the Appellant; Additional Government Advocate Standing Counsel (C.T.) and Addl. Standing Counsel (C.T.), for the Respondent

Final Decision : Allowed

Judgement

D.P. Mohapatra, J.—The moot question that arises for determination in this case is whether the Petitioner is entitled to the benefits of exemption from payment of sales tax purchase tax under the Industrial Policy Resolution formulated by the State Govt. which came to be enforced with effect from 1-4-1986. According to the Petitioner the question should be answered in the affirmative, while according to the opp. Parties, the answer is in the negative since the Petitioner comes within the Industrial Policy Resolution, 1980 and not the one formulated in 1986.

2. The Petitioner, a private limited company registered under the Companies Act, 1956 runs an industrial unit in Rourkela which is engaged in manufacture and processing of M.S. Rounds, Plats and for steel and cuttings of defective/rejected steel ingots, slabs and semi-rolled into re-rolled sizes. For its work the Petitioner requires rejected slab, plate cutting from HSM, Semi-rolled plates, rejected and mini steel ingots. In this writ petition the Petitioner mainly challenges action of the opposite parties, particularly opp. Parties 3 to 6, that is, the Director of Industries, Orissa, the project Manager, District Industries Centre, Sundargarh,

the Commissioner of Commercial Tax, Orissa and Sales Tax Officer, Rourkela-II Circle in withdrawing the facility of exemption from payment of sales tax on purchase of raw materials, one of the incentives offered in the Industrial Policy Resolution, 1986 (hereinafter referred to as IPR, 1986) (Annexure-6), which facility was being enjoyed by the Petitioner till the impugned order dated 31-3-1989 of the Project Manager, District Industrial Centre, Rourkela (Annexure 10) was communicated to it. From the said order it appears that the Project Manager ordered that the Petitioner's Industrial Unit is entitled to get exemption from payment of sales tax on purchase of raw materials as per Industrial Policy Resolution of 1980 and the clarification issued vide Government Order No. 5638/1 dated 28-2-1981 and in pursuance of Government order Finance Department Notification No. 38638-OTA-101/80 F.D. dated 31-7-1980 and No. CTA-68/86-57241/F dated 1-2-1986 for the period of one year from 2-10-1987 to 1-10-1988 and the Sales Tax Exemption Certificate earlier issued under IPR vide this letter No. 381 dated 19-1-1988 and 5084 dated 27-10-1987 are treated as cancelled.

3. The gist of the Petitioner's case is that the Private limited Company was registered and incorporated under the Companies Act, 1956 on 25-4-1984. Thereafter it applied for allotment of a plot to the Industrial Infrastructural Development Corporation. By then the unit was provisionally registered as a Small Scale Industrial Unit with the District Industries Centre at Rourkela. The Orissa State Financial Corporation sanctioned a term loan of Rs. 30 lakhs by its letter dated 16-4-1986. Thereafter on completion of the unit the permanent registration certificate was issued by the Project Manager on 9-10-1987 (Annexure-1) wherein it was clearly stated that the unit went into commercial production on 2-10-1987. On being moved by the Petitioner the Project Manager himself wrote to the authorities of the State Electricity Board to grant the Petitioner the facility of exemption of electricity duty under the I.P.R. 1986 (vide Annexures 2 and 3). The authorities of the Orissa State Financial Corporation also sanctioned subsidy to the extent of 10% on the total cost of the project in pursuance of the said policy resolution (vide Annexure 4). Further, the opp. Party No. 4, the Project Manager, the District Industrial Centre issued the certificate of Sales Tax exemption bearing No. 381, dated 19-1-1988 in favour of the Petitioner entitling the Petitioner's unit to enjoy tax exemption for five years from the date of production with effect from 2-10-1987 (Annexure 5). This was followed by the impugned order dated 31-3-1989 cancelling the certificate on the ground that the Petitioner's unit was entitled to enjoy the incentive offered in the Industrial Policy of 1980 and not the I.P.R. 1986. The Petitioner challenges the action as erroneous, illegal, arbitrary and unreasonable.

4. The State Govt. in the Department of Industry and Finance and the functionaries in the Industries and Commercial Department are impleaded as opposite parties in the writ petition. In separate returns filed on behalf of the opposite parties 2, 5 to 6 and opp. Parties 3 and 4 have taken substantially similar stands. It is contended that the Petitioner's industrial unit cannot be said

to have been "set up" after 1-4-1986. It was a continuing industrial unit by 1-4-1985. According to the opposite parties a new industrial unit as defined in IPR 1986 is one where investment in land, building, plant and machinery has been made during the operative period of this scheme and excludes a continuing industry, and continuing industry is one in which any kind of investment has been made before the effective date or which has availed of any incentive or facility under the Industrial Policy of 1980. Regarding eligibility it is contended that IPR, 1986 provides "inter alia, that all new industrial units for which investment will be made after the effective date will be eligible for the package of incentives under this policy. According to the opposite parties the certificates were erroneously issued to the Petitioner taking its industrial unit to be a new unit set up after 1-4-1985. The said error having been detected the order in Annexure-10 was issued rectifying the error.

5. A preliminary objection which was raised in the counter affidavit and reiterated by the learned Counsel for the opposite parties at the hearing of the case was that the question whether the Petitioner's unit is entitled to enjoy the incentive under I.P.R., 1980 or I.P.R., 1986 was raised in course of the assessment proceeding before the opp. Party No. 6 and also the first appellate authority under the Orissa Sales Tax Act. Having negatived the contention raised by the Assessee-Petitioner, the matter is now pending in Second Appeal before the Sales Tax Tribunal. In this background the opposite parties contend that this Court should not adjudicate on the point at this stage. The Petitioner should be directed to raise the point, if it is so advised, before the Sales Tax Tribunal and may raise the point before this Court in appropriate manner, after disposal of the case by the Tribunal, if necessary.

6. We will take up the objection to the maintainability of the writ petition first. The core question to be determined in this case, relates to eligibility of the Petitioner's exemption from sales-tax, under the IPR, 1986. To be more specific, the question is whether the Petitioner's unit is a "new industry" or a "continuing industry" as contemplated under the said Policy Resolution. The determination of this point turns on interpretation of the stipulations in the Industrial Policy Resolution and, the Finance Department Notification dated 13th February, 1987 (Annexure-7). We are not concerned in this Case with the correctness or validity of any assessment proceeding under the Orissa Sales Tax Act. The question raised in this case arises very often in proceedings before this Court involving exemption from sales tax, octroi tax and other incentives offered by the State Government under different Industrial Policy Resolutions from time to time. Such a question of general application, in our view, cannot be said to be within the exclusive domain of the authorities under the Orissa Sales Tax Act, though the question may arise for determination in a particular assessment proceeding. Therefore we are not persuaded to hold that mere pendency of the assessment proceeding before the statutory forum should deter us from considering and determining the question: As such, the preliminary objection raised on behalf of the opposite parties to the maintainability of the writ application is rejected.

7. Coming to the question as formulated earlier, it will be convenient to notice certain relevant clauses in the IPR, 1986 (Annexure-6). On perusal of the document it appears that the State Government in order to attract entrepreneurs to set up new industrial units and to expand the existing units decided to offer certain incentives. In paragraph 5-B under heading "Definition" Clause (b)-If Industrial Unit" provides that all industries eligible for central investment subsidy will qualify for incentives, under the policy. Clause (e) which deals with new industries provides" that new industrial unit is one where investment in land, building, plant and machinery has been made during the operative period of the scheme and excludes a continuing industry. Under Clause (d) the effective date for the Industrial Policy of 1986 is "1-4-1986 from which date the incentives available under the Industrial Policy Resolution of 1980 and other relevant policy resolution will cease to be operative except for the continuing industries to which this policy will not apply. In the said clause it is further provided that continuing industries are those which have made any kind of investment before the effective date or have availed of any incentive or facility under the Industrial Policy, 1980. Clause (e) which deals with eligibility provides, inter alia, (i) all new industrial units for which investment Will be made after the effective date will be eligible for the package of incentives under this policy &(ii) expansion/modernization/diversification of an existing industrial unit will also be eligible, for the incentives if the total capital Investment of plant and machinery In the expansion, modernisation or diversification, as the case may be, is More than 25 per cent for the total fixed capital investment of the existing unit. It is made clear that the fact that the existing unit had availed itself or incentives will not disqualify the expansion/modernisation/diversification project to get incentives for the extra investment made. The term "Fixed capital investment" will mean the investment made on land, building, plant and machinery. In paragraph "c" of the Resolution the incentives are enumerated. Under Clause (d) the concessions relating to sales tax are dealt with. In Sub-clause (i) thereof exemption of sales tax on raw materials is provided; it is laid down therein that all new village, cottage and small industries will be exempted from sales tax on purchase of spare parts of machinery, raw materials and packing materials for a period of five years from the date of their commercial production and all new, medium and large industries will be eligible for similar facility for three years in Zone-B and Zone-C and for five years in Zone-A. In other subclauses of Clause (d) exemption of sales tax on finished products, sales tax deferment scheme etc. are dealt with Clause (f) deals with exemption from octroi and Clause (g) deals with interest subsidy.

The notification dated 13th February, 1987 which was issued by the Finance Department in exercise of powers conferred by Section 6 of the Orissa Sales Tax Act, 1947 subsequent to the IPR, 1986 and was given retrospective effect from 1st April, 1986 seeks to amend the earlier notification issued by the Department on 23rd April, 1976. It does not mention anything about new industries or continuing industries. Against serial No. 26-D dealing with purchase or sale in Column 3 under condition and exception subject to which exemption has been

allowed, it is provided that the exemption shall be allowed for a period of five years from the date of commercial production to be certified by the concerned General Manager, D.I.C., irrespective of change in the ownership, if any. It is provided in Column 2 that exemption is available on raw materials, spare parts of machinery and packing materials when they are sold or purchased by a registered dealer who is certified by the concerned General Manager, D.I.C. as village/cottage small industry set up on or after the 1st April, 1986 and starting commercial production thereafter inside the State. Against Serial No. 30-FF, sale of goods produced by Small Scale Industries set upon or after the 1st April, 1986 and starting commercial production thereafter inside the State and certified by the concerned General Manager, D.I.C. as such is entitled to the exemption for a period of five years from the date commercial production to be certified by the concerned General Manager, D.I.C. irrespective of the change of ownership, if any.

8. The question is whether the State Government intended to lay down in the policy resolution, IPR 1986, that any investment made prior to 1st April, 1986, notwithstanding its nature, extent and purpose, will disentitle the unit to the incentives provided in the 1986 Resolution. During argument it was contended that in certain cases wherein the entrepreneurs have invested small amounts of money for applying for allotment of land/shed in the industrial estates set up by the State Government or have made some initial deposits for getting loan from Banks, they have been held to be disentitled to the incentives under IPR, 1986.

Reading the Policy Resolution in its entirety and keeping in view the intent and purpose to be achieved by it We do not think that such an interpretation will be resemble. In our view it will result in defeating the very purpose for which the incentives are being offered, that is, to ensure rapid industrialisation in the State. The incentives offered are of varied nature and are meant to be enjoyed at different stages; for example, purchase of machineries arises after construction of building has been completed and other preliminary arrangements for setting up the plant have been made; similarly, purchase of raw materials arises only when the plant and machineries have been set up and the unit is ready to, go into commercial production. It is common knowledge that no entrepreneur will invest money in purchase of raw materials when the building has not been constructed or the machineries have not been installed, Therefore, the meaning attributed to the phase "new Industry" by the opposite parties that excludes any industrial unit for which any Sort of investment has been made prior to 1st April, 1986 in the very nature of things, will be an article one and in many cases may give rise absurd situations its acceptance will also expose the policy resolution of the State Govt. to the criticism that It is a hollow and misleading one. In our opinion this view gains support from the finance Department Notification as per Annexure-7 wherein, as noted earlier, the term "set up" is used while dealing with the exemption from sales tax. The term "set up" came to be considered by the Supreme Court in the case of Commissioner of Wealth-tax Madras Vs. Ramaraju Surgical Cotton Mills Ltd., wherein the Court made the following

observations:

The High Court held that unless a factory is erected and the plants and machinery installed therein, it cannot be said to have been set up. The resolution of the Board of Directors, the orders placed for purchasing machinery, licence obtained from the Government for constructing the machinery, are merely initial stages towards setting up, however necessary and essential they may be to further the achievement of the end. It is not, however, the actual functioning of the factory or its going into production that can alone be called setting up of the factory. The setting up is perhaps a stage anterior to the commencement of the factory. Thereafter, the High Court referred to a decision of the Bombay High Court in *Western India Vegetable Products Ltd. Vs. Commissioner of Income Tax, Bombay City*, and on its basis concluded that the proper meaning to be assigned to the expression "set up" in Section 5(1)(xxi) would be "ready to commence business". We are unable to agree with the learned counsel for the Commissioner; that in arriving at this view, the High Court committed any error. A unit cannot be said to have been set up unless it is ready to discharge the function for which it is being set up. It is only when the unit has been put into such a shape that it can start functioning as a business or a manufacturing organization that it can be said that the unit has been set up. The expression used in the proviso, under which the period for which the exemption is available is to be determined, is not the same as used in the principal clause. In the proviso, the period of five successive years of exemption has to commence with the assessment year next following the date on which the company commences operations for the establishment of a unit. Operations for the establishment of a unit, from the very nature of that expression, can only signify steps that have to be taken to establish the unit. The word "set up" in the principal clause, in our opinion, is equivalent to the word "established" but operations for establishment cannot be equated with the establishment of the unit itself or its setting up. The applicability of the proviso has, therefore, to be decided by finding out when the company "commenced operations for establishment of the unit" which operations must be antecedent to the actual date on which the company is held to have been set up for purposes of the principal clause.

9. Considering the facts and circumstances of the present case, the intent and purpose of the I.P.R., 1986, we hold that the industrial unit set up by the Petitioner is entitled to the incentives offered by the State Government in its Industrial Policy, 1986 and consequentially the exemptions stipulated out in the Finance Department Notification dated 13th February, 1987 (Annexure-7) are applicable to the Petitioner. It therefore, follows that the impugned order of the Project Manager, District Industries Centre, Rourkela dated 31-3-1989 (Annexure-10) which was passed under the erroneous impression that the Petitioner's industrial unit was not a "new industry" But a. "continuing industry" as stipulated in the I.P.R., 1986 is unsustainable.

10. In the result, the writ application is allowed in part. The Petitioner's

industrial unit is entitled to enjoy the incentives under the I.P.R., 1986 in the manner and to the extent specified therein and the impugned order dated 31-3-1989 (Annexure-10) is quashed. There will however be no order for costs.

A. Pasayat, J.

11. I agree.

Writ application allowed.