
(2008) 11 OHC CK 0029
In the Orissa High Court

Indian Aluminum Company Ltd.

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 24-11-2008

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 24(1), 5, 5(1)

Citation : (2009) 1 OLR 51 : (2009) 91 SCL 119

Hon'ble Judges : B.S. Chauhan, C.J;B.N. Mahapatra, J

Bench : Division Bench

Judgement

B.N. Mahapatra, J.—The Orissa Sales Tax Tribunal, Cuttack (hereinafter referred to as "the Tribunal") has referred the following two questions of law u/s 24(1) of Orissa Sales Tax Act, 1947 (hereinafter referred to as "OST Act") at the behest of the petitioner-Indian Aluminum Company Limited.

(1) Whether on the facts and in the circumstances of the case, stock transfer of manufactured products to other State prepared out of raw-materials purchased on the strength of Form-IV could attract the mischief of the provisions contained in fifth proviso to Section 5(1) of the Orissa Sales Tax Act?

(2) Whether on the facts and circumstances of the case, the Tribunal was justified in treating a sum of Rs. 6,05,803/- being the amount of subsidy paid in running the canteen, as receipt of sale price or valuable consideration for the alleged sale of food stuffs to the workers?

2. Shorn of unnecessary details, the brief facts of the case are that during the year 1984-85 the dealer-petitioner effected purchase of raw-materials of Rs. 15,35,146.48 by paying concessional rate of tax at the rate of 4% on furnishing declaration in Form-IV. The raw-materials so purchased were utilized for manufacturing of the finished product (ingots). Since the finished goods manufactured were sent outside the State of Orissa by way of branch transfer, the Assessing officer held the dealer to have contravened the conditions of declaration. Invoking the mischief of fifth proviso to Section 5(1) of the OST Act

he levied the differential tax at the rate of 4% on value of raw-materials in addition to 4% tax already paid at the time of purchase. In First Appeal, the Assistant Commissioner of Sales Tax (hereinafter called "the ACST") found that out of such despatch of finished goods (ingots), Calcutta Branch had sold ingots worth Rs. 2,17,812/-. Since the finished goods were sold by the branch of the petitioners as such, he held that the mischief of fifth proviso to Section 5(1) of OST Act was not attracted to that extent. But as regards to other despatches which were ultimately converted into plates of different sizes and thickness and sold by the units outside the State of Orissa, the dealer held to have contravened the provisions contained in fifth proviso to Section 5(1) of the OST Act. Against such order of ACST, the petitioner as well as the State has filed second appeal before the Tribunal. The Tribunal by a common order dated 11.12.1990 confirmed the assessment order passed by the Assessing Officer who levied the differential rate of tax of 4% on the value of raw material purchased at concessional rate by furnishing form-IV. The dealer was also running a canteen providing tiffins and meals to its employees at subsidized rate, and received a sum of Rs. 47,057/- from the employees. Treating the said amount to be sale turnover in respect of sales effected in the canteen, the dealer paid tax thereon. It was found that the dealer was paid a subsidy of Rs. 6,05,803/- during the year in question to run the canteen. The Assessing Officer has held that the subsidy amount of Rs. 6,05,803/- given for running the canteen shall constitute part of the sale price on which the petitioner was liable to pay the tax. In appeal, the ACST found that under the Labour Welfare Regulations renewed in 1985, the dealer-appellant bound to sell a meals to a labourer at the rate of 36 paise. A cup of tea or a piece of Kachuri was supplied to the labourer only for 5 paise. Even free snacks and tea on certain occasions were given to the labourers. So, he deleted the levy of tax on the amount of subsidy of Rs. 6,05,803/-. The learned Tribunal in a majority view confirmed the assessment treating the subsidy amount as part of the sale price. However, the Chairman of the Tribunal in a descending view held that the petitioner is liable to pay tax only on the amount received from the employees/labourers and the subsidy price given did not form a part of the sale price. Thereafter, a petition u/s 24(1) of the OST Act was moved before the Tribunal to refer the questions of law enumerated above for opinion of this Court. The learned Tribunal relying on the decision of this Court in Orissa Cement Ltd. and Anr. v. State of Orissa in OJC Nos. 3800 of 1987, 431 of 1988, 4333 of 1989 and 2090 of 1991 disposed of on 02.12.1991 referred the first question of law for opinion of this Court. Since there was difference of opinion on the second issue between the members and the Chairman, the learned Tribunal also referred the second question of law for the opinion of this Court. The said reference was initially numbered as S.J.C. 115 of 1992 and subsequently converted to STREV 127 of 2007.

3. Mr. A.K. Parija, learned Senior Counsel appearing for the petitioner vehemently argued that the mischief of fifth proviso to Section 5(1) is not attracted since the raw-materials purchased at concessional rate on the strength

of form-IV were used in manufacture of finished product inside the State of Orissa even though the finished product was sent to outside Orissa on branch transfer basis. In support of his contention, he relied on the judgment of this Court in M/s. Orissa Cement Ltd. (supra).

4. On the contrary, Mr. Kar, learned Counsel for the Revenue, strenuously argued that in view of the judgment of the Hon'ble Supreme Court in ICI India Ltd. and Another Vs. State of Orissa and Others, the mischief of fifth proviso to Section 5(1) of the OST Act is attracted. The matter pertains to tax concession. When the claim of tax concession is taken into consideration these provisions are to be construed strictly.

Mr. Parija, further submitted that issue involved in second question has been decided by the Hon'ble Apex Court in TISCO General Office Recreation Club Vs. State of Bihar and Others, goes in favour of the present petitioner.

Mr. R.P. Kar, learned Counsel for the Revenue has not seriously objected to the submission made by Mr. Parija.

5. To deal with first question it is necessary to know what is contemplated in fifth proviso to Section 5(1) of the OST Act, Entry 48 of List "C" and Form-IV. The relevant provisions are quoted below:

5. Rate of tax.- (1) The tax payable by a dealer under this Act shall be levied on his taxable turnover at such rate, not exceeding twenty five per cent, and subject to such conditions as the State Government may, from time to time, by notification, specify.

xx xx xx xx

Provided further that where a registered dealer purchases goods of the class or classes specified in his certificate of registration as being intended for use within the State of Orissa by him in the manufacture or processing of goods for sale or in mining or in generation or distribution of electricity or any other form of power at concessional rate of tax or free of tax after furnishing a declaration in the prescribed form, but utilizes the same for any other purpose or outside the State of Orissa, he shall pay the difference in tax or the tax, as the case may be, payable had he not furnished the declaration.

Entry Serial No. 48 of List-C : Goods of the class or classes specified in the certificates of registration of the registered dealer purchasing the goods as being intended for use by him in the manufacture or processing or packing of goods for sale or in mining or in the generation or distribution of electricity or any other form or power subject to the production of true declaration by the purchasing registered dealer or his authorized agent in form IV.

Form IV, which is appended to the list of taxable goods, is in the following language:

I/we...hereby declare that the goods purchased by me/us in cash memo/bill

No....dated the.... From...shall be used in the manufacture/processing or packing of goods for sale/in mining/generation or distribution of electricity or any other form of power.

Dealer/authorized agent.

6. M/s. Orissa Cement Ltd. [supra], this Court has interpreted the fifth proviso to Section 5(1) of the OST Act and held that a bare reading of the proviso makes it clear that in order to constitute a contravention, any goods of the class or classes specified in the certificate of registration, which were purchased on the concessional rate or free of tax after furnishing the requisite declaration, as being intended for use in the manufacturing or processing, within the State of Orissa is utilized, for any other purpose, or outside the State. If raw material is purchased on concessional rate or free of tax on furnishing a declaration, and the articles are not utilized for the purpose of manufacture or processing of goods and/or are utilized outside the State of Orissa, the differential tax shall be recovered. If the finished goods, wherein the materials purchased were utilized, are transferred by way of stock transfer, the fifth proviso has no application. It is only where the goods indicated in the provision in question themselves are utilized in a manner other than that being utilized in manufacturing or processing or are not utilized within the State, the consequences indicated flow.

7. In ICI India Ltd. (supra) this Court also had occasion to interpret the fifth proviso to Section 5(1) of the OST Act. The question arose for consideration by this Court was whether the dealer who purchased raw materials for manufacture/processing of "bulk premix" for sale on the strength of declaration can be said to have violated the declaration form-IV when the "bulk premix" was transferred to its different branches for manufacture of "bulk explosive". This Court held that the Sales Tax authorities were justified in demanding differential tax as provided in fifth proviso to Section 5(1) of the Act on the raw materials purchased by furnishing declaration form-IV by paying concessional tax at the rate of 4%. The Hon"ble Supreme Court interpreting fifth proviso to Section 5(1) of the OST Act has held that if the goods manufactured have not been sold but have been transferred, there is a violation of the terms of declaration and the dealer is liable for payment of differential tax payable on the raw materials purchased at concessional rate of tax by furnishing form-IV. The use of the expression "within the State of Orissa" in fifth proviso makes the provision clear that the raw materials purchased must be used for manufacture of goods in the State of Orissa. The said provision indicates the purpose for which the goods are intended to be used, i.e., for manufacture/processing of goods for sale. The raw materials purchased for manufacture of "bulk premix" have not been used for any other purpose. But the manufactured product, i.e., "bulk premix" has not been sold but has been transferred to other branches of the dealer situated inside as well as outside the State of Orissa. The transfer clearly falls within the expression "any other purpose" mentioned in the fifth proviso to Section 5(1) of the Act.

8. A conjoint reading of fifth proviso to Section 5(1), Entry SI. No. 48 of List-C

and form-IV and decision of the Hon''ble Apex Court in ICI India Ltd. (supra) make it amply clear that a manufacturer in order to avail concessional rate of tax on purchase of raw materials furnishing declaration form-IV, must use the raw materials purchased at concessional rate of tax in the manufacture/processing of goods within the State of Orissa for sale. In the present case, even though the raw materials purchased on the strength of form-IV at concessional rate were used in manufacturing the finished product, the same were not sold either inside the State of Orissa or in course of inter-state trade from Orissa. The substantive condition for availing concessional rate of tax thus stands violated and consequently the mischief of fifth proviso to Section 5 is attracted. The dealer, in such fact situation, is liable for payment of differential tax payable on value of raw materials purchased at concessional rate by furnishing Form-IV.

9. So far as second question is concerned, the very issue has been decided by the Hon''ble Supreme Court in TISCO General Office Recreation Club (supra). The facts of that case are that TISCO General Office Recreation Club was a dealer under the provisions of the Bihar Sales Tax Act. It ran a canteen and a library for the benefit of the officers and employees of Tata Iron and Steel Company Limited. It appears that the appellant had agreed to sell food items to the officers and employees of TISCO in the canteen. The prices of the food items so sold were being fixed by the managing committee from time to time in consultation with the canteen, Hotel and Restaurant Worker's Union, Jamshedpur. It is an admitted fact that the prices so fixed were below the cost price which resulted in a deficit. The difference between the income earned and the expenditure incurred by the dealer used to be made good every month by TISCO. The sales tax authorities treated the subsidy given to the dealer as a part of the sale price and added it to the turnover and levied sales tax. Having been unsuccessful before the sales tax authorities and the High Court, the dealer-appellant filed appeal by special leave before the Hon''ble Supreme Court.

10. In that case, the Hon''ble Apex Court held that what were sold by the dealer were the items of food and in respect of the said items, the sale prices were fixed by reason of agreement between the managing committee of the dealer and the workers union. The prices which were fixed were less than the cost price but the valuable consideration in respect of the supply of items of food in the canteen was the prices so fixed. For running the canteen, different types of expenses were incurred and at the end of the month when the income and expenditure account was prepared, the excess expenditure over the income was made good by giving subsidy to the dealer. The subsidy so given cannot be said to be directly relatable to any item of food or goods sold. It is not possible to accept that the subsidy can possibly be regarded as valuable consideration in respect of sale or supply of goods.

11. In view of the above, in the present case, the learned Tribunal is not correct to hold that the subsidy amount will form part of the sale price and the dealer-petitioner is liable to pay sales tax on such subsidy amount.

12. In the result, question No. 1 is answered in affirmative in favour of the Revenue and question No. 2 in negative, i.e., in favour of the dealer.

13. The Tax Revision is allowed to the above extent. No costs.

Dr. B.S. Chauhan, C.J.

14. I agree.