
(2001) 10 P&H CK 0034
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 12093 of 1999

Jyoti Phoschem

APPELLANT

Vs

State of Punjab and Others

RESPONDENT

Date of Decision : 15-10-2001

Acts Referred:

Punjab General Sales Tax (Department and Exemption) Rules, 1991 — Rule 4, 4(3), 4(4), 4A, 4B
Punjab General Sales Tax Act, 1948 — Section 30A

Citation : (2002) 128 STC 466

Hon'ble Judges : Nirmal Singh, J;G.S. Singhvi, J

Bench : Division Bench

Advocate : B.K. Jhingan, for the Appellant; N.D.S. Mann, Deputy Advocate-General, for the Respondent

Final Decision : Allowed

Judgement

G.S. Singhvi, J.—The petitioner has invoked jurisdiction of this Court under Article 226 of the Constitution of India for grant of the following substantive relief :

"It is therefore respectfully prayed that appropriate writ or direction be issued that the condition imposed on deferment certificate of benefit of tax is on incremental basis be quashed and it be held that this condition cannot be imposed on units claiming tax benefits under Rule 6.3 read with Rule 2.5 of Rules known as Punjab Industrial Incentive Code under the Industrial Policy, 1996. Further Rule 4 of Punjab General Sales Tax (Deferment and Exemption) Rules, 1991 it be declared is not applicable to such cases ; if applicable the same be struck down as ultra vires Section 30A of the Punjab General Sales Tax Act, 1948 and Rule 6.3 read with Rule 2.5 of the Rules and Government policy as notified on June 1, 1996 and March 20, 1996."

2. The petitioner is engaged in the business of manufacture and sale of di-calcium phosphate and tri-calcium phosphate in its unit situated at 38, Focal

Point, Mehta Road, Amritsar. It is registered as a dealer under the Punjab General Sales Tax Act, 1948 (for short, "the 1948 Act") and the Central Sales Tax Act, 1956 (for short "the 1956 Act"). The unit of the petitioner went into commercial production in 1991. After complying with the formalities prescribed under the New Industrial Policy, 1989, it was granted eligibility certificate on March 19, 1991 for deferment of sales tax to the tune of Rs. 14,47,571 for a period of 9 years commencing from January 21, 1991. Thereafter, the Assistant Excise and Taxation Commissioner, Amritsar. issued deferment certificate in form ST (D and E)-II for grant of benefit of deferment under the Punjab General Sales Tax (Deferment and Exemption), Rules, 1991 (for short, "the 1991 Rules") up to January 21, 2000. In the year 1996, the petitioner applied for grant of eligibility certificate under the Punjab Industrial Incentive Code, 1996 (for short "the Incentive Code") in respect of the expanded portion of its existing unit by claiming that it had made investments for expansion in order to avail of the benefit of the new industrial policy which was notified on March 20, 1996. The General Manager, District Industries Centre, Amritsar, accepted its application and granted eligibility certificate for sale tax deferment to the tune of Rs. 30,75,000 by mentioning that the manufacturing unit went into production on October 17, 1997 after expansion. Thereafter, the petitioner applied to the authority prescribed under the 1948 Act for issuance of deferment certificate. By an order dated April 27, 1998, the Assistant Excise and Taxation Commissioner, Amritsar, granted benefit of deferment to the tune of Rs. 30,75,000 on incremental basis for a period spread over 10 years from October 17, 1997 to October 16, 2007 and instead of issuing fresh deferment certificate, he made an entry to this effect in the certificate dated May 5, 1992.

3. The petitioner has challenged the order passed by the Assistant Excise and Taxation Commissioner, Amritsar by contending that in view of the express provisions contained in Rule 2.5 read with Rule 6.3 of the Incentive Code the condition of incremental deferment cannot be applied to the expanded portion of its unit. According it, the rules embodied in the Incentive Code are applicable to the expanded portion of its unit and the authority concerned did not have the jurisdiction to impose the arbitrary condition of granting the benefit of deferment on incremental basis. The petitioner has also challenged the notice, annexure P6, issued by the Excise and Taxation Officer-cum-Asses sing Authority, Amritsar-I, u/ s 18 read with Section 11B of the 1948 Act requiring it to show cause against the proposed imposition of penalty and levy of interest by contending that such proceedings could not have been initiated on the basis of a void condition incorporated in the eligibility certificate.

4. In the written statement filed on behalf of the respondents, it has been averred that the writ petition filed against the show cause notice is not maintainable and the petitioner should be left to raise the objections before the Assessing Authority and avail alternative remedy of appeal, etc., if order adversely affecting its right or interest is passed. On merits, the respondents have averred that the Government had announced industrial policies in the years

1989, 1992 and 1996 for providing incentives of sales tax exemption/deferment to the newly industrial units for a specified period and specified amount depending on the location of the unit. According to them, the petitioner was granted deferment certificate on May 5, 1992 for an amount of Rs. 14,47,571 for a period of 9 years commencing from January 21, 1991 in respect of the industrial unit set up in 1990-91. Thereafter, it was granted deferment certificate dated April 27, 1998 for a sum of Rs. 30,75,000 for 10 years commencing from October 17, 1997 on incremental basis. The respondents have relied on the provisions of Rule 4(3) and (4) of the 1991 Rules framed u/s 27 read with Sections 10A and 30A of the 1948 Act and have averred that the petitioner cannot get the benefit of deferment on total production.

5. We have heard learned counsel for the parties and perused the record.

6. The question as to whether the concept of incremental production can be invoked by the Government while granting the benefit of sales tax deferment/exemption in terms of the 1996 Policy and the Rules titled as "The Punjab Industrial Incentive Code" under the Industrial Policy, 1996 (hereinafter described as the "Incentive Code, 1996") read with the 1991 Rules has been considered at length in C.W.P. No. 5726 of 2000-- Oswal Fats and Oils Vs. State of Punjab and Others, decided on December 15, 2000. In that case, the court made reference to the provisions of the Industrial Policy, 1989 and the rules framed for its implementation, the 1996 Policy, Incentive Code, 1996, Sections 10A, 27(1) and 30A of the 1948 Act and the 1991 Rules and then held as under :

"An analysis of the above extracted portions of the two industrial policies, the provisions of the rules framed for implementation thereof, the provisions of the 1948 Act and the 1991 Rules shows that with a view to achieve the objective of rapid industrialisation of the State and the consequential creation of job opportunities for unemployed youth, the State Government gave incentives to the new entrepreneurs and also to the existing industries in the form of capital subsidy, exemption or deferment of the sales tax, etc. Section 10-A which begins with a non obstante clause, empowers the State Government to defer the payment of tax by the particular class of industries in the interest of industrial development of the State and Section 30-A which empowers the State Government to grant exemption from payment of tax to the particular class of industries, were inserted in the 1948 Act with effect from March 19, 1990, vide Punjab Act No. 3 of 1990. Provisos and Explanations were inserted in Section 30-A vide Ordinance No. 4 of 1992 (which was replaced by Act No. 1 of 1993) in the light of the 1989 Policy and Electronics Policy, 1991. The 1991 Rules were framed by the President of India u/s 27 read with Sections 10-A and 30-A of the 1948 Act with a view to regulate the deferment and exemption of payment of tax envisaged by the 1989 Policy. Later on, these rules were amended keeping in view the provisions of Package of Incentives, 1992 and the 1996 Policy. The incentives in the form of sales tax exemption/deferment for expansion/modernisation of the existing industry envisaged in the 1989 Policy was to be

given on incremental production as defined in Rule 3.12 of the Incentive Code, 1989. For this purpose expansion and/or modernisation part of the existing industry was considered as an independent identity by virtue of Rule 6.2(4) of Incentive Code, 1989. Under that rule, the industrial unit was required to obtain separate sales tax registration certificate for the additional capacity and incremental production resulting from such expansion/modernisation. This was also unequivocally reflected in the 1991 Rules which were brought into force with effect from April 1, 1989 and made applicable to the units which came into production on or after 1st April, 1989. Rule 4(3) and (4) read with explanation appearing below Rule 4(4) provided for grant of benefit under Sub-rule (1) thereof on the basis of incremental production. Later on, Rule 1(3) was amended vide Notification No. G.S.R. 65/P.A. 46/48 dated September 21, 1992 and again vide Notification No. GSR/97 dated May 22, 1997 with effect from April 1, 1996 so as to make it applicable to the units which came into production on or after 1st day of October, 1992 and 1st day of April, 1996 respectively. Rule 4-A which begins with a non obstante clause was also inserted vide notification dated September 29, 1992 with a view to extend the benefit of deferment/exemption to the units coming into production on or after 1st day of October, 1992. The 1996 Policy made a clear departure from the 1989 Policy in the matter of grant of incentives in the form of sales tax deferment/ exemption inasmuch as the concept of incremental production was omitted from the said policy and the Incentive Code, 1996. Instead, the new concept of giving benefit of additional fixed capital investment was introduced. A corresponding change was also made in the 1991 Rules by inserting Rule 4-B with effect from April 1, 1996 vide notification dated May 22, 1997. This rule also begins with non obstante clause and Clause (ii) of Sub-rule (1) thereof lays down that group of industries which are set up in "B" category area (the petitioner falls in this category) on or after April 1, 1996 and the goods produced by them shall be eligible for grant of the benefit, at their option, of deferment of, or exemption from the liability to pay tax under the 1948 Act for a period of seven years commencing from the date of production subject to the condition that total amount of tax deferred or exempted shall not exceed 150 per cent of their fixed capital investment."

7. On the question of applicability of the concept of incremental production to the incentives granted under the 1996 policy, the court observed as under :

"A comparison of the 1996 Policy with the 1989 Policy shows that the 1996 Policy was framed to accelerate the level of growth, to attract fresh investment and also to facilitate the expansion of the existing industries. With this end in view, the package of the special incentives was devised. The most notable change made in the 1996 Policy which was implemented by framing the rules in the form of Incentive Code, 1996 was to drop the concept of incremental production and introduction of benefit based on additional fixed capital investment for expansion. This change was also incorporated in the 1991 Rules by inserting Rule 4-B.

A conjoint reading of Rules 1(2) and (3), 4(3) and (4), 4-A and 4-B of the 1991

Rules makes it clear that while the concept of incremental production was adopted for giving benefit of sales tax deferment/exemption envisaged by the 1989 Policy and the Incentive Code, 1989, the same was replaced by the concept of giving benefit in the form of sales tax deferment on the fixed capital investment under the 1996 Policy read with the Incentive Code, 1996. The use of expression "notwithstanding anything contained in any other provisions of these rules" in Rule 4-A(1) is clearly indicative of the intention of the rule-making authority not to invoke the concept of incremental production for grant of benefit of the incentives under the Package of 1992. The use of expression "notwithstanding anything contained in Rule 4-A and subject to the provision of Sub-rule (2)" in Rule 4-B and the language of Clauses (i)(a) and (ii) of Sub-rule (1) of Rule 4-B show that the benefit of exemption to the industries set up in "A" category area and "B" category area on or after 1st day of April, 1996 was made relatable to the fixed capital investment and not on the basis of incremental production. Therefore, the decision taken by the respondents to grant benefit of sales tax deferment to the petitioner by applying the concept of incremental production is liable to be declared ultra vires to the scheme of the 1996 Policy, the Incentive Code, 1996 and Rule 4-B(1)(ii) of the 1991 Rules."

8. The court then considered the effect of non obstante clauses contained in Rules 4-A and 4-B of the 1991 Rules and observed as under :

"The effect of a non obstante clause in a statute was considered by the Constitution Bench of the Supreme Court in *Kulathil Mammu Vs. The State of Kerala*, in the context of Articles 6 and 7 of the Constitution of India. The facts of that case were that one Aboobacker, who was born on March 5, 1936 in district Kozhikode, left India some time in 1948. He remained in Pakistan till 1954. In September, 1954, he came to India on Pakistani passport. Between November, 1954 and October, 1964, he off and on went back to Pakistan and came to India. In 1964, he was found living in district Kozhikode without valid travel documents. He was arrested. Writ petition filed on his behalf challenging his arrest was dismissed by Kerala High Court which held that Aboobacker will be deemed to have migrated to Pakistan within the meaning of Article 7 of the Constitution of India and thus, was a foreigner. While upholding the decision of the High Court, the majority of the Supreme Court referred to the non obstante clauses contained in Articles 6 and 7 and held as under :

"Article 6 begins with the words "notwithstanding anything in Article 5" and Article 7 begins with the words "notwithstanding anything in Articles 5 and 6". Articles clearly indicates that they were meant to deal with the abnormal situation and prescribe conditions as to who shall be deemed to be citizens of India on the date of the commencement of the Constitution (Article 6) and who shall not be so deemed (Article 7). It is also remarkable that both these articles are silent on the question of domicile and the presence of the non obstante clause in, the beginning of these articles clearly shows that the concept of domicile was not to be brought into them when deciding who shall be deemed

citizens of India (Article 6) or who shall not be deemed to be Citizens of India (Article 7). Therefore the Constitution-maker did not intend that the concept of domicile should be brought into Articles 6 and 7 notwithstanding that such concept was present in Article 5 which provides for the normal case of citizenship of India. In this situation it is clear that when Article 6 as well as Article 7 use the word migrated, the intention must have been to give the wider meaning to that word, namely, going from one territory to the other." (underlining Here italicised is ours).

In *General Insurance Corporation of India Vs. Commissioner of Income Tax, Bombay*, a division Bench of the Supreme Court considered the question as to whether the amount set apart by General Insurance Corporation for redemption of preference shares can be added back for computing profits and gains of business. The facts of that case show that the appellant-Corporation was formed as a Government company under the General Insurance Business (Nationalisation) Act, 1972. It carries on general insurance business in India. At the time of nationalisation, the then existing private companies which were carrying on the business of general insurance merged together in four subsidiaries of the appellant-Corporation. The Central Government contributed to the capital of the appellant in the form of preference shares and equity shares for the purpose of paying compensation to the shareholders and the management of the merged companies. The preference shares were to be redeemed in such time as the Board of Directors of the appellant-Corporation might deem fit. In profit and loss account for assessment year 1977-78, the appellant-assessee made a debit entry of a certain amount and, in accordance with Rule 2(2)(a) of the General Insurance Business (Nationalisation) Rules, 1973, (for short "the GIB Rules") transferred the same to the preference share capital redemption account. The I.T.O. added back that amount to the income of the assessee on the reasoning that in view of Rule 2(a) of the GIB Rules this amount was to be treated as revenue expenditure. The High Court upheld the action of the Revenue. While allowing the appeal of the Corporation, the Supreme Court held as under :

"The sum set apart as provision for redemption of preference shares could not have been treated as an expenditure. It is also not an expenditure or allowance of the nature covered by Sections 30 to 43-A of the Income Tax Act, 1961. The question of determining its admissibility by reference to Rule 5(a) of the First Schedule to the Income Tax Act, 1961 does not arise, nor could it have been added back by the assessing authority by purporting to exercise power under the said rule. The object of GIB Rules is quite different. The concept behind Rule 2(2)(a) of the GIB Rules is to permit the Corporation to enter the amount of reserve in the profit and loss account in the expenditure side which would not have been permissible otherwise because the amount set apart in a reserve cannot be expenditure. The rule puts a stamp of permissibility on something not permissible otherwise. This rule itself is suggestive of the fact that the amount set apart in a reserve is not an expenditure in its commercial sense. The extent

of the GIB Rules does not go beyond providing an accounting method. These Rules cannot be pressed into service for altering the basic character of the amount which is not an expenditure."

The object of Rule 2(2)(a) is to reduce the amount of profit of the Corporation by the amount set apart as reserve by artificially treating the amount of reserve as an item in the expenditure column. If the same amount was allowed to be added back to profits under Rule 5(a) of the First Schedule to the Income Tax Act, then the object sought to be achieved by Rule 2(2)(a) abovesaid is defeated. The non obstante clause with which Section 44 of the Income Tax Act opens and gives it an overriding clause with which Section 44 of Income Tax Act would earn an overriding effect on the provisions of another enactment also though Parliament has not chosen to give Section 44 of the Income Tax Act such an effect. Nor does Rule 2(2)(a) of the GIB Rules have an overriding effect on the provisions of the Income Tax Act. The two provisions contained in the two enactments have thus different purposes to achieve. The rule of harmonious construction would there sustain neither what the Income Tax Officer did nor the view of the law taken by the High Court. (Underlining Here italicised is ours).

By applying the propositions laid down in the aforementioned decisions to the facts of this case, we hold that non obstante clause contained not in Rule 4-B(1) overrides the provisions contained only in Rule 4-A, but also in Rule 4(3) and (4) of the 1991 Rules and, therefore, the concept of incremental production cannot be invoked for granting benefit of sales tax deferment to an industrial unit, like the petitioner which undertook expansion after April 1, 1996."

9. The argument of the learned Deputy Advocate-General that Rule 4(3) and (4) should be read as part of Rule 4-B was rejected in the following words :

"The argument of the learned Deputy Advocate-General that Rule 4(3) and (4) should be read as part of Rule 4-B because the non obstante clause contained in Sub-rule (1) of Rule 4-B is worded differently than the non obstante clause used in Rule 4-A appears to be attractive in the first blush, but lacks merit and deserves to be rejected. In this context, it is important to bear in mind that Rule 4-A was inserted vide notification dated September 29, 1992 for the purpose of giving effect to package of incentives announced by the Government in September, 1992 and by incorporating non obstante clause in it, the rule-making authority had made it clear that the benefit available under the package of the incentives will not be restricted by applying the concept of increment production. Rule 4-B, as observed above, was inserted for giving effect to the 1996 Policy and the rules contained in the Incentive Code, 1996. Therefore, the non obstante clause used in Sub-rule (1) of Rule 4-B will have the effect of overriding the provisions of Rule 4-A as also Rule 4(3) and (4) and being later in point of time, it would prevail over all other provisions of the 1991 Rules."

10. If the facts of the case in hand are examined in the light of the proposition laid down in C.W.P. No. 5726 of 2000-- Oswal Fats and Oils Vs. State of Punjab

and Others, . We do not find any difficulty in holding that the concept of incremental production could not have been invoked and applied for granting the benefit of sales tax deferment in terms of the 1996 Policy and Incentive Code, 1996 and the petitioner is entitled to the benefit of sales tax deferment on total production in terms of Rule 4-B of the 1991 Rules.

11. We are further of the view that the proceedings initiated by the concerned authorities under the 1948 Act are liable to be invalidated because they are based on the erroneous assumption that the petitioner was entitled to the benefit of tax deferment on incremental production only.

12. Hence, the writ petition is allowed. The condition imposed in the deferment certificate that the petitioner would be entitled to the benefit under the 1991 Rules on incremental basis is declared illegal and quashed. The petitioner shall get all consequential benefits.