**(2005) 04 KAR CK 0032**

**In the Karnataka High Court**

**Case No :** Writ Petition No. 34908 of 2003 (T-KST)

Kailash Auto Builders Limited, Bangalore — APPELLANT

Vs

State of Karnataka and Others — RESPONDENT

**Date of Decision :** 08-04-2005

**Acts Referred:**

Karnataka Sales Tax Act, 1957 — Section 19C
Karnataka Sales Tax Rules, 1957 — Rule 20C

**Citation :** (2005) 59 KarLJ 54

**Hon'ble Judges :** Anand Byrareddy, J

# Judgement

1. The petitioner has sought for a declaration that the petitioner''s investment made under the scheme of expansion would be entitled to the deferment of tax as envisaged by the Government Order dated 15-3-1996 vide Annexure-B, and further to declare that the notification dated 15-11-1996 at Annexure-C cannot be applied to the case of the petitioner and to hold that the notification dated 15-11-1996 is violative of Article 14 of the Constitution of India and for a consequential direction in the nature of a writ of certiorari to quash the order of assessment dated 10-4-2003 as per Annexure-D, dated 10-4-2003, for the assessment year 1999-2000.

2. The facts are as follows:

Petitioner is a registered dealer under the Karnataka Sales Tax Act, 1957 (''KST'' for short) and the Central Sales Tax Act, 1956 (''CST for short), engaged in manufacturing of Tippers, Trucks, Tanker Bodies and fabricated components. The petitioner had under taken an expansion program by investing Rs. 1.06 Crores, in creation of fixed assets and commenced its commercial production subsequent to such scheme of expansion as on 2-9-1997. The Joint Director of District Industries Centre, Department of Industries and Commerce has issued a certificate dated 27-7-1998, that the petitioner was eligible for availing of sales tax deferment, both under the KST and CST Acts, on the sale of finished goods for a period of 8 years with effect from 2-9-1997 and limited to 80% of the investment made on fixed assets. It is the petitioner''s case that the Government Order dated 15-3-1996 envisages the package of incentives and concessions and sub-clause (d) to the Chapter 5 of Annexure-II to the Government Order dated 15-3-1996 reads as follows:

"(d) Sales Tax Concession for existing units making New Investments under expansion/diversification:

Industrial units in specified categories set up in developed areas, and the units set up in developing area including Growth Centres, undertaking new Industrial Investments, for expansion/diversification shall be eligible for Sales Tax Exemption/Sales Tax Deferment -"mutatis mutandis" as applicable to new Industrial units and as detailed below:

The benefit shall be available only for additional production created out of such investment. Existing production, on which tax liability would continue, would be computed based on average production of three years prior to commencement of commercial production of expansion project".

3. It is the further case of the petitioner that respondent 3, who is the Assessing Authority has passed an order of assessment under the provisions of KST and CST Acts for the assessment year 1999-2000, as per Annexure-D to the writ petition and disallowed deferment of the sales tax claimed by the petitioner and it is in this background that the petitioner is before this Court.

4. Sri R.V. Prasad, learned Counsel for the petitioner would submit that the respondent 3 was bound by the certificate dated 27-7-1998 at Annexure-A, as held by this Court in Wipro Infotech Limited, Mysore v Additional Deputy Commissioner of Commercial Taxes (Assessments-II), Mysore and Others, 1998(44) Kar. L.J. 627 (HC) (DB), and that the respondent 3 has applied notification dated 15-11-1996, which according to the petitioner runs counter to the Government Order dated 15-3-1996, to the extent it relates to granting of tax deferment to an Industrial unit undertaking investment in expansion. According to him, in terms of the Government Order dated 15-3-1996, the Industrial unit would be entitled to the benefit of sales tax deferment after the unit has recorded additional production out of such investment and the deferment would be available to the additional production so created. Whereas, in the notification dated 15-11-1996, the tax liability eligible for deferment would be the difference between the total tax liability of the average total tax liability of the three years immediately preceding year in which the investment for such expansion has taken place. The notification dated 15-11-1996, according to the petitioner, is ultra vires the Government Order dated 15-3-1996. The learned Counsel would emphasise the mischief caused by the notification dated 15-11-1996, while pointing out that prior to undertaking the scheme of expansion, the petitioner had a larger turnover under the KST Act, compared to under the CST Act. Subsequent to the undertaking of the scheme of expansion, the turnovers under the CST Act have been substantially higher when compared

to the turnover under the provisions of the KST Act. Since the turnovers under the CST Act relate to sale of goods effected against the declarations in Form C, the rate of tax being concessional, the tax quantified thereunder will certainly be less, even though the turnovers may be very high. He would further contend that though the quantum of goods sold are much higher after undertaking the scheme of expansion, the total tax quantified may still be low as compared to the figures returned for the period prior to undertaking the scheme of expansion. He would thus conclude that after the notification dated 15-11-1996 if applied to the case of the petitioner would lead to arbitrariness and hence, the said notification which directs calculation of three years average tax liability for the purpose of conferment of deferment of tax to an industrial unit undertaking investment in expansion is violative of Article 14 of the Constitution of India. He would contend that by stipulation of a formula of adoption of three years average tax liability, the very scheme announced by the Government stands defeated and the promise held out by the Government is sidelined. It is not permissible, according to him, as laid down by the Supreme Court in the case of State of Bihar and Others v Suprabhat Steel Limited and Others, (2004)3 SCST 3291 and accordingly prays that the petition be allowed.

5.Per contra, the learned Government Pleader Sri Kempanna, appearing for the State Government sought to sustain the impugned assessment order and further contended that the Division Bench of this Hon''ble Court in Writ Appeal No. 3716 of 1999 in the case of Deputy Commissioner of Commercial Taxes (Assessments), Bellary and Others v Bellary Steels and Alloys Limited, Bellary, 2004(5) Kar. L.J. 321 (HC) (DB), had occasion to consider an identical situation as has arisen in the present petition, namely, that a notification dated 11-10-1995 could not deny the benefit that the State Government in terms of the notification dated 28-8-1993 had conferred, to wit, the benefit of sales tax exemption for a period of five years from the date of commencement of commercial production of industrial units, subject to celling of 80% of the amounts invested on fixed assets for modernisation. Subsequently, the State Government by a further notification dated 11-10-1995 had substituted item (iii) to the Explanation II to the notification dated 28-8-1993.

6. The question that arose was whether the subsequent notification dated 11-10-1995 had the effect of denying the benefit of exemption that was available to an industrial unit under the earlier notification. A Division Bench of this Hon''ble Court, after careful examination of the respective notifications, has held that the subsequent notification is merely clarificatory and it does not have the effect of taking away any benefit conferred under the first notification and has accordingly allowed the appeal and set aside the order of the learned Single Judge. The learned Government Pleader would contend that the said judgment applies on all fours to the present case and prays that the petition be dismissed.

7. I have carefully considered the respective contentions. The State has not filed its Statement of Objections. However, as stated above, it is the principal

 

contention on behalf of the State Government that the matter is covered by the judgment aforesaid.

8. To appreciate the contentions of the parties, it would be in order to extract the relevant portion of the Government Order dated 15-3-1996, bearing No. CI 30 SPC 96, which reads as follows:

"(d) Sales Tax Concession for existing units making New Investments under expansion/diversification:

Industrial units in specified categories set up in developed areas, and the units set up in developing area including Growth Centres, undertaking new Industrial Investments, for expansion/diversification shall be eligible for Sales Tax Exemption/Sales Tax Deferment - "mutatis mutandis" as applicable to new industrial units and as detailed below:

The benefit shall be available only for additional production created out of such investment. Existing production, on which tax liability would continue, would be computed based on average production of three years prior to commencement of commercial production of expansion project.

Zones Tiny and Small Scale Industries Medium and Large Industries

No. of Years Ceiling(Rs.) No. of Years Ceiling(Rs.)

I. Developed** Areas 4(6) 60% value of fixed assets 4(6) 60% value of fixed assets

II. Developing Areas 6(8) 80% value of fixed assets 5(7) 80% value of fixed assets

III. Growth Centres 7(8) 80% value of fixed assets 6(8) 80% value of fixed assets

**Only the specified categories as in Appendix II".

9. The relevant portion of the notification dated 15-11-1996, bearing No. FD 32 CSL 96(I), reads as follows:

"(iii)(a) Tax exemption or tax deferment to an industrial unit undertaking Investment in Expansion, shall be available only to the ''additional capacity'' created by it out of such investment, subject to the respective ceiling specified in Table-B above.

(b) The tax liability eligible for exemption or deferment under clause (a) above, shall be the difference between the total tax liability (i.e., the tax liability of the unit under the KST Act, 1957 together with the tax liability under the CST Act, 1956), and the average total tax liability of the three years immediately preceding the year in which investment for such expansion has taken place.

(iv)(a) The tax exemption or deferment of tax to an industrial unit undertaking investment in diversification shall be available to the additional capacity created by it out of such investment subject to the respective ceilng specified in Table B.

(b) Tax liability eligible for exemption or deferment under clause (a) above shall be restricted to the tax liability of the unit under the KST Act, 1957, together with tax liability under the CST Act, 1956, on sale of goods manufactured by way of additional capacity under investment for such diversification".

10. It is to be noted, as contended by Sri Prasad, that the present case on hand and the decided case in Writ Appeal No. 3716 of 1999, do not pertain to the same period. Secondly, in the present case, the Government Order dated 15-3-1996, itself prescribes the manner in which an industrial unit would be entitled to the benefit of deferment of tax liability and it relates to the additional production created out of such investment. Whereas in the decided case referred to by the learned Government Pleader, there was no such indication in the first instance and it was in this light that the Court came to the conclusion that the second notification issued was merely clarificatory and it did not have the effect of taking away any benefit conferred under the first notification. Whereas in the present case, the notification dated 15-11-1996 employs expressions, which run counter to the relevant clause under the Government Order 15-3-1996. This is clear from a plain reading of the respective clauses under the Government Order and the subsequent notification. The Supreme Court of India in the case of Suprabhat Steel Limited, while dealing with an identical situation with reference to a notification issued by the Finance Department of the State Government of Bihar, which denied the declared benefits to industrial units under its incentive policy, held as follows at para 7 of the judgment:

"Coming to the second question, namely, the issuance of notification by the State Government in exercise of power under Section 7 of the Bihar Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the incentive policy itself. The Industrial Incentive Policy is issued by the State Government after such policy is approved by the Cabinet itself. The issuance of the notification under Section 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in the industrial policy itself. In this view of the matter, any notification issued by the Government Order in exercise of power under Section 7 of the Bihar Finance Act, if is found to be repugnant to the Industrial Policy declared in a Government Order resolution, then the said notification must be held to be bad to that extent. In the case on hand, the notification issued by the State Government on April 4, 1994 has been examined by the High Court and has been found, rightly, to be contrary to the industrial incentive policy, more particularly the policy engrafted in Clause 10.4(1)(b). Consequently, the High Court was fully justified in striking down that part of the notification which is repugnant to sub-clause (b) of Clause 10.4(1) and we do not find any error committed by the High Court in striking down the said notification. We are not persuaded to accept the contention of Mr. Dwivedi that it would be open for the Government to issue a notification in exercise of power under Section 7 of the Bihar Finance Act, which may override the incentive policy itself. In our considered opinion the expression "such conditions and restrictions as it may impose" in sub-section (3) of Section 7 of the Bihar Finance Act will not authorise the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the General Policy Resolution itself. In this view of the matter, we see no illegality with the impugned judgment of the High Court in striking down a part of the notification dated April 4, 1994".

11. In my opinion, this decision squarely applies to the present case and accordingly the petition is liable to be allowed as prayed for. The notification dated 15-11-1996 at Annexure-C to the writ petition, insofar as it relates to prescription of a formula of adoption of average three years tax liability in order to be eligible for deferment of tax to an industrial unit undertaking investment in expansion is concerned is quashed. Ordered accordingly. No costs.