

(2008) 05 PAT CK 0059

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2916 of 2000

Kalyanpur Cement Ltd.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 20-05-2008

Acts Referred:

Citation : (2008) 05 PAT CK 0059

Judgement

Chandramauli Kumar Prasad, J.—In this writ application, prayer of the Petitioner is to declare the Explanatory Note appended to Rule 3 of the Bihar Sales Tax Supplementary (Deferment of Tax) Rules, 1990 as ultra vires and inconsistent with the provisions of the Bihar Finance Act, 1981 and the Industrial Policy Resolution, 1989. Its further prayer is to quash the order dated February 3, 2000 of the State Level Committee whereby it had held that the Petitioner shall be entitled for the incentive of deferment, not on the additional production but on the incremental production above the installed capacity.

2. A Division Bench of this Court by judgment dated September 17, 2001 Kalyanpur Cement Ltd. Vs. State of Bihar and Others dismissed the writ application. Aggrieved by the same, the Petitioner preferred Civil Appeal No. 1912 of 2002 before the Supreme Court. The Supreme Court by order dated November 28, 2007 set aside the judgment of this Court and remitted the matter back for fresh consideration in accordance with law.

3. Short facts giving rise to the present application are that the Petitioner is a company registered under the Companies Act and engaged in the business of manufacturing cement. With a view to accelerate the pace of industrial development, achieve dispersal of the industries out of the urban industrialized areas and to attract them to the under-developed and developing areas of the State, the State Government in exercise of the power u/s 23A of the Bihar Finance Act adopted a policy known as Sales Tax Incentive Scheme, 1989 by resolution dated 6th of September, 1989 (annexure 1). According to the Sales Tax Incentive Scheme, 1989, the incentive was to be available to the new

industrial units starting commercial production from April 1, 1989 and also to the existing industrial units undertaking expansion.

4. Clause 4 of the said policy which concerns the existing industrial units undertaking expansion, which is the subject-matter of this writ application, reads as follows:

Subject: Adoption of Sales Tax Incentive Scheme for rapid industrialization of Bihar.

In order to accelerate the pace of industrial development, achieve dispersal of industries outside the urban industrialized areas and to attract them to the under-developed and developing areas of the State, Government has taken the following decisions:

(1) to (3) . . .

(4) Existing industrial units undertaking expansion of 50 per cent of their capacity with a minimum fixed capital investment of Rs. 20 lakhs in fixed assets will also be eligible for the deferment of payment of sales tax.

(5) to (7) . . .

(8) The Sales Tax Deferment Scheme will be applicable from April 1, 1989 for a period of six years up to the end of the 8th Five Year Plan.

5. The Hindi version of the aforesaid resolution, however, reads as follows:

6. In order to give effect to the Sales Tax Incentive Scheme, 1989 the Governor of the State in exercise of the power u/s 7 of the Bihar Finance Act, 1981 framed the Bihar Sales Tax Supplementary (Deferment of Tax) Rules, 1990 (annexure 3), hereinafter referred to as the Rules.

Rule 3 of the aforesaid rule, which is relevant for the purpose, reads as follows:

3. Eligibility and extent of deferred payment of tax.--The following industrial units will be eligible for deferred payment of tax in respect of sale of goods produced or manufactured by them in such industrial units for a period and to the extent specified in Rules 4 and 5--

(a) new industrial units;

(b) existing industrial unit under expansion and which has come into commercial production on or after April 1, 1989 after such expansion subject to the following conditions:

(i) that the said expansion programme has been duly licensed, registered or approved by the competent authority;

(ii) that the investment in such expansion is not less than 50 per cent of the fixed capital investment and rupees twenty lakhs whichever is more;

(iii) that such expansion results in an increase of at least 50 per cent of the installed capacity of the unit; and

(iv) that the facility of deferment of tax shall be limited to the incremental production.

Explanatory Note.--"Incremental production" in relation to the above would mean production over and above the installed capacity:

Provided further that such deferment shall be limited to 90 per cent of the fixed capital investment in fixed capital assets at the time of grant of eligibility in the case of new industrial units and 90 per cent of the additional fixed capital investment in the case of existing industrial units undertaking expansion.

8. The words "incremental production" according to the Explanatory Note appended with Rule 3 of the Rules mean production over and above the installed capacity.

9. The prayer of the Petitioner for deferment of sales tax was considered by the State Level Committee in its meeting dated February 3, 2000. It took into consideration Clause 4 of the Sales Tax Incentive Scheme, 1989 as also Rule 3(b) of the Rules and observed that in industrial world the "incremental production" means production more than the actual production capacity, but in view of the meaning given to word "incremental production" by an Explanatory Note added to Rule 3 of the Rules, the prevalent concept in the industrial world in regard to the incremental production is not fit to be accepted. Accordingly it was constrained to reject the request of the Petitioner.

10. It is relevant here to state that while setting aside the judgment of this Court and remitting the matter back, the Supreme Court had observed as follows:

Before concluding, we may mention that there is conceptual difference between "actual production capacity" and "installed capacity". The concept of "installed capacity" is the goal which an entrepreneur seeks to achieve. We do not wish to express any opinion on the Policy of 1989. However, we request the High Court to keep this conceptual difference in mind while deciding the aforesaid points. We express no opinion on the merits of this case.

11. It is further not in dispute that the conditions necessary for grant of incentive, namely, existing industrial units undertaking expansion of 50 per cent of their capacity and fixed capital investment in fixed assets to the tune of not less than Rs. 20 lakhs have been fulfilled by the Petitioner and only controversy is as to whether the incentive under the Sales Tax Incentive Scheme, 1989 shall be available to the Petitioner on the incremental production calculated on the basis of the installed capacity or the actual production capacity.

12. Mr. Ajit Kumar Sinha, appears on behalf of the Petitioner, whereas the State is represented by the learned Advocate-General.

13. Mr. Sinha, submits that the Petitioner shall be entitled for deferment of the

sales tax on the incremental production which had occasioned on account of fulfilling the conditions for grant of incentive over and above the existing production and the Explanatory Note to Rule 3 of the Rules providing for giving the benefit to additional production above the installed capacity is contrary to the Sales Tax Incentive Scheme, 1989. He submits that Explanatory Note appended to Rule 3 of the Rules is repugnant to the Sales Tax Incentive Scheme, 1989. In support of his submission, he has placed on a judgment of the Supreme Court in the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, and Our attention has been drawn to paragraph 7 of the judgment which reads as follows (at page 273 of STC):

Coming to the second question, namely, the issuance of notification by the State Government in exercise of power u/s 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 u/s 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 u/s 7 of the Bihar Finance Act, if is found to be repugnant to the industrial policy declared in a Government resolution, then the said notification must be held to be bad to that extent. In the case in 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(i)(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(i) 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 u/s 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 authorize 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.

14. It has also been pointed out that while interpreting the policy decision the meaning which the industrial world gives to a particular expression has to be given weight than the technical rules of interpretation. He points out that from the proceeding of the State Level Committee it is evident that the industrial

world recognizes incremental production to be production more than the actual production capacity and not the installed capacity and, as such, the Explanatory Note explaining incremental production to mean production over and above the installed capacity is arbitrary and thus fit to be held to be ultra vires Article 14 of the Constitution of India.

15. In support of the submission, reliance has been placed on a Division Bench judgment of this Court in the case of *Suprabhat Steel Limited v. State of Bihar* (1999) 112 STC 258 (P&H) : (1995) 2 PLJR 536 and our attention has been drawn to the following passage from paragraph 12 of the judgment, which reads as follows (page 265 of STC):

... In my view, it is not possible to accept the rival contention, in a case of this nature where the court is concerned with an industrial incentive policy. Such policy decisions are not drafted with the same skill as is required while enacting a legislation. The precision and accuracy expected in a legislation is not expected when such policy decisions are announced by the Government and, therefore, it would not be appropriate to interpret a policy decision in the same manner as a law enacted by the Legislature is interpreted, in the sense that the technical rules of interpretation may not be applied with equal rigour. The policy decision must be read as a whole. If the language employed is clear and unequivocal, it must be given meaning and effect.

16. The learned Advocate-General, however, appearing on behalf of the State submits that there is no conflict between the Sales Tax Incentive Scheme, 1989 (hereinafter referred to as "the industrial policy") and the Rules. According to him, it is not possible to give each and every detail in policy and the field being open it defined "incremental production" by appending Explanatory Note in Rule 3 of the Rules.

17. In view of the rival submission, the question which requires consideration is as to whether the Explanatory Note appended to Rule 3 of the Rules is repugnant to the industrial policy or not.

18. Having appreciated the rival submission, I do not have the slightest hesitation in accepting the broad submission of the learned Advocate-General that in case the industrial policy is silent, the rule can explain what is meant by the industrial policy, but at the same time one cannot lose sight of the fact that while interpreting the industrial policy one has to bear in mind as to what incentive the industrial world thought the State Government intended to give. It is worthwhile to mention here that industrial policy is formulated by the State Government after the approval of the cabinet in exercise of power u/s 23A of the Bihar Finance Act and in order to give effect thereto rule is made by the Governor of the State in exercise of power u/s 7 of the said Act. While it is true that the State Government is not expected to give each and every detail in its policy and hence "rule" is framed laying down the extent to which the benefit can be given. However, at the same time while interpreting industrial policy the test

which governs the interpretation of legislation is not to be taken recourse to. It is further true that framing of rule u/s 7 of the Bihar Finance Act is necessary to entitle the industrial units to avail of the incentives and benefits declared by the State Government in its industrial policy. But in exercise of such power, it would not be permissible for the State Government to deny any benefit given in the industrial policy declared by it. Rule framed by the State Government in exercise of the power framed u/s 7 of the Bihar Finance Act is to give effect to the industrial policy and if found repugnant to the industrial policy declared in the Government resolution then to that extent the rule is rendered illegal and in such circumstance the industrial policy shall prevail. It has to be borne in my mind that while interpreting the contents of industrial policy what meaning is given to it by the industrial world may not be decisive but shall carry weight and that has to be adopted unless compelling reasons justify otherwise.

19. Bearing in mind the aforesaid principle, when I proceed to consider the industrial policy, I find that the Sales Tax Incentive Scheme, 1989 was aimed for rapid industrialization and it provided that existing industrial units undertaking expansion of 50 per cent of their capacity shall be eligible for the deferment of the payment of sales tax. Rule 3(b) of the Rules makes existing industrial unit eligible for deferment of payment of tax on fulfilment of certain conditions, including expansion. The Hindi version of the industrial policy clearly stipulates that deferment of sales tax shall be limited to the incremental production and not the entire production. This incentive of deferment of tax though limited to incremental production but whether that has to be calculated of the installed capacity or the actual production capacity. Explanatory Note appended to Rule 3 provides that incremental production would mean production over and above the installed capacity.

20. I am of the opinion that what the industrial world thought the policy intended to convey shall carry weight. What the industrial world thought about the policy is evident in the decision of the State Level Committee. It has observed that in no circumstance the actual production capacity can be compared with the installed capacity and majority of the industrial units do not produce to the extent of the installed capacity. In fact same is not practically possible to be achieved. The industrial policy cannot be interpreted applying the technical rules of interpretation and in case the language of the industrial policy is clear and unequivocal, it must be given effect to. I cannot lose sight of the wisdom of the Supreme Court, while remitting the matter back to this Court that there exists conceptual difference between the installed capacity and the actual production capacity. The policy of the State contemplating deferment of sales tax on the incremental production on account of expansion of the industrial unit meant production over and above the actual production capacity. I am of the opinion that the Explanation appended to Rule 3 of the Rules is repugnant to the industrial policy. The industrial policy has been resolved by the cabinet and rule in exercise of the power u/s 7 of the Bihar Finance Act is issued to carry out the objectives of the industrial policy. In my opinion, any rule made in exercise of the

power u/s 7 of the Bihar Finance Act, if found to be repugnant to the industrial policy, then the rule to that extent has to be held to be bad. Here I have found that the Explanatory Note appended to Rule 3 of the Rules to be repugnant to the industrial policy and, as such, same is declared illegal. The incentive of deferment of tax shall be limited to the incremental production, which would mean production over and above the actual production capacity. The view which I have taken finds support from the decision of this Court in the case of Suprabhat Steel [1999] 112 STC 258 : [1995] 2 PLJR 536 and of the Supreme Court in the case arising out of the aforesaid judgment of this Court, i.e., State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others,

21. The Respondents shall now proceed to process the claim of the Petitioner for deferment of sales tax bearing in mind the observation aforesaid.

22. In the result, the writ application is allowed; Explanatory Note appended to Rule 3 of the Rules is declared repugnant to the Industrial Policy Resolution, 1989. Resultantly the order dated February 3, 2000 of the State Level Committee holding that the Petitioner shall be entitled for the incentive of deferment on the incremental production above the installed capacity is set aside.

23. However there shall be no order as to costs.

24. Jayanandan Singh J.--I agree.