

(2001) 09 PAT CK 0053
In the Patna High Court
Case No : C.W.J.C. No. 2916 of 2000

Kalyanpur Cement Ltd.

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 17-09-2001

Acts Referred:

Citation : (2001) 09 PAT CK 0053

Judgement

Nagendra Rai, J.—The petitioner, a company registered under the Companies Act and engaged in manufacturing cement, has filed the present writ application for declaration that the explanatory note in Clause 3 of the Bihar Sales Tax Supplementary (Deferment of Tax) Rules, 1990 (hereinafter referred to as "the Rules") explaining the meaning of incremental production, is arbitrary and inconsistent with the Industrial Policy Resolution, 1989 contained in No, 46 AIDC, Government of Bihar, Department of Industries, dated September 6, 1989, for quashing the part of the decision taken by the State Level Committee on February 3, 2000 holding that the petitioner is entitled to incentive of deferment of sales tax only on the additional production made pursuant to the expansion of the company above the installed capacity and not on the additional production above the production prior to expansion and for a direction to the respondents to give the benefit of the deferment of sales tax on the additional production above the production which was being made prior to expansion by it.

2. The factual matrix necessary for disposal of the present application are that the State Government with a view to accelerate the pace of industrial development, achieve dispersal of industries outside the urban industrialised areas and to attract them to the under-developed and developing areas of the State, came out with a policy of sales tax incentives scheme for industrialisation of Bihar. The said scheme is known as Sales Tax Deferment Scheme. Under the aforesaid scheme, incentives were given to the new industrial units which would start commercial production from April 1, 1989 and thereafter, or to the existing industrial unit undertaking for expansion. Regarding existing industrial units undertaking Clause 4 of the said Policy provides that the 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 deferment of payment of sales tax. A copy of the English version of the said policy has been annexed as annexure 1 to the writ application, and the Hindi version thereof has been annexed as annexure 1/A to the writ application. In Hindi version of the said policy, Clause 4 further provides that the benefit of deferment of sales tax will be available to the existing industries on expansion only with regard to the additional production and not with regard to entire production made by it.

3. The Governor of Bihar in exercise of power under Sub-section (1) of Section 58 of the Bihar Finance Act, 1981 framed the Rules to give effect to the aforesaid Industrial Policy dated August 6, 1989. Clause 3 of the aforesaid Rules contains provision with regard to eligibility and extent of deferred payment of tax. Clause 3(b) contains provision with regard to existing industrial unit under expansion. It required certain conditions to be fulfilled for the benefit of deferment of payment tax. The relevant conditions are that the investment in such expansion should not be less than 50 per cent of the fixed capital investment or rupees twenty lakhs, whichever is more and such expansion will result in an increase of at least 50 per cent of the installed capacity of the unit and the facility of deferment of tax will be limited to the incremental production. Explanatory note was also appended to the said clause wherein incremental production was defined to mean production over and above the installed capacity. The Rules also provide that existing industrial unit undertaking has to obtain a certificate of eligibility in accordance with the procedure provided under the Rules for claim of deferment of payment of tax. Such eligibility has to be granted in accordance with the provision either by the District Level Committee or the State Level Committee whichever is applicable in the case of a particular unit.

4. According to the petitioner, after the announcement of Industrial Policy of 1989 providing deferment of sales tax to the new industrial units or the existing industrial unit, it decided to establish a plant and machinery for increasing the production to take the benefit of the Industrial Policy and as a matter of fact increased the production and commenced its production on March 18, 1994. In terms of the aforesaid Policy, the petitioner was entitled to avail the full benefit of this Policy to the extent of its additional production as compared to its production prior to its expansion. There was no provision in the Policy that the benefit of sales tax deferment scheme, will be available to the existing industrial unit on its additional production over and above the installed capacity. Later on, the State Government framed Rules which published on 11th February, 1991 in the gazette wherein provisions were made with regard to eligibility for grant of deferred payment of tax and the matters connected therewith. The State Government by the aforesaid Rules has narrowed down the scope of the Industrial Policy announced in the year 1989 as it is mentioned in Clause 3(b)(iv) that the facility of deferment of sales tax will be limited to the incremental production which was not at all mentioned in the Industrial Policy. The Rules also contain an

Explanatory Note to the aforesaid clause defining the incremental production means the production over and above the installed capacity. Thus, the provision contained in the Rules putting restriction to the extent that the benefit of deferred sales tax will be available to the industrial unit on its additional production only over and above the installed capacity is contrary to the Industrial Policy and the same cannot negate the incentives and benefit thereof which it was entitled under the Industrial Policy Resolution of 1989.

5. The petitioner applied for grant of eligibility certificate in terms of the aforesaid Rules before the State Level Committee and the said Committee in its meeting held on February 3, 2000 decided that the petitioner's unit is entitled to the benefit of deferred sales tax with regard to additional production over and above the installed capacity of 4,02,000 metric tonne per annum and, accordingly, directed for issuance of eligibility certificate. The petitioner has challenged the aforesaid explanatory note Under Clause 3 of the Rules defining incremental production as well as the decision of the State Level Committee on the ground that the same is contrary to the policy decision of 1989.

6. The stand of the State is that the State Government came out with the aforesaid policy for accelerating the industrial progress and Clause 4 of the said Policy confers the benefit of deferment of payment of tax on the existing industrial unit undertaking expansion and the said benefit was limited to the extent of additional/increased production of the units undertaking expansion and not on total production. The term additional or increased production was not defined in the Industrial Policy of 1989. The Government of Bihar thereafter framed the Rules to give effect to the said Industrial Policy and Under Clause 3 it provided the conditions to be fulfilled for grant of the benefit of the scheme and that benefit will be given to the industrial unit on incremental production meaning thereby the production above the installed capacity. The Rules were also framed by the State Government u/s 58 of the Bihar Finance Act and it in no way has narrowed down the provisions of the Industrial Policy of 1989. Both, the Industrial Policy and the Rules, have been approved by the cabinet and thereafter they were issued and published. The State Level Committee considered the matter in the light of the aforesaid provision and rightly held that the petitioner is entitled to the benefit of the scheme on additional or incremental production over and above the installed capacity.

7. The question which falls for consideration in this case is as to whether the petitioner is entitled to benefit of deferment of payment of sales tax on the additional production above the production prior to its expansion or additional production over and above the installed capacity prior to its expansion.

8. The answer to this question depends upon the scope of the policy decision of 1989 and the relevant provisions of the Rules framed to give effect to the aforesaid policy. In that view of the matter, it is necessary to refer to the relevant provisions.

9. The relevant Clause 4 of the aforesaid Industrial Policy of 1989 in English version runs as follows :

"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".

The Hindi version of Clause 4 of the aforesaid policy runs as follows :

^^dk;Zjr vkS|ksfxd bdkbZ;ka ftUgksaus vius vpy iwath ds 50 izfr"kr vkSj de ls de 20 yk[k dk vfrfjDr iwathfuos"k fd;k gks] oSlh bdkbZ;ksa dks gh okf.kT;dj LFkxu dh ;g lqfo/kk bdkbZ }kjk foLrkj ds QyLo:i vfrfjDr mRikfnr oLrqvksa ij ud fd dqy mRikfnr oLrqvksa ij ns; gksxhA**

10. From perusal of the aforesaid industrial policy as contained in both versions, it appears that in Hindi version apart from the matters which have been stated in Clause 4 in English version of the said Policy, it is further stated that the benefit of the scheme will be available to the existing industrial unit undertaking expansion only with regard to additional production and not with regard to entire production of the unit.

11. Clause 3 of the Rules dealing with the eligibility and extent of deferred payment of tax runs 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 1st April, 1989 after such expansion subject to the following conditions :--

(i) that the said expansion programme has been duly licenced, 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."

12. The learned counsel for the petitioner submitted that according to the policy decision of 1989 only two conditions are to be fulfilled for grant of incentives, namely, existing industrial units undertaking expansion of 50 per cent of their capacity and fixed capital investment in fixed assets should not be less than 20 lakhs. In Hindi version, the said Policy clarified the matter that the benefit of the scheme will be available to the additional production as a result of expansion. There was no condition put in the industrial policy that the benefit will be accrued to the existing unit under expansion on the additional production above the installed capacity. Thus, the provision made Under Clause 3 of the Rules, that benefit will be given only to incremental production meaning thereby the additional production above the installed capacity runs contrary to the Policy decision and as such the same should be declared ultra vires and consequently that part of the decision taken by the State Level Committee granting benefit of the scheme on additional production above the installed production be quashed and a direction be given to issue eligibility certificate for giving the benefit of the scheme on the additional production above the production prior to its expansion. In support of his submission, he has relied upon a decision of the apex Court in the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, .

13. Learned counsel appearing for the State on the other hand submitted that there is no conflict between the Policy and Rules. The Rules were framed to give effect to the provisions of the Policy. The Policy decision was silent to the determination of additional or increased production and contained only a broad and general policy. It was not expected for the State Government to give each and every detail in its policy decision and accordingly Rules were framed laying down the detailed procedure for eligibility and extent of deferred payment of tax. It defined additional or incremental production under the explanation appended to Clause 3 of the Rules. There is no difference between the word additional production and incremental production. Thus, the Rule has only clarified the policy decision.

14. It is well-settled that the State has greater latitude in taxation matters and in particular, with regard to grant of sales tax exemptions (see Orissa Sponge Iron Ltd. and Another Vs. State of Orissa and Others, .

15. The State Government, being policy makers, came out with a policy decision to give benefit of deferment of payment of sales tax to the new industrial unit as well as the existing unit undertaking expansion on the fulfilment of conditions mentioned in the policy decision. The policy decision only provided that expansion has to be to the extent of 50 per cent of their capacity and minimum fixed capital investment should be rupees twenty lakhs. The Hindi version of the

said policy decision as stated above, shows that benefit was available to the extent of the additional production as a result of expansion. The policy was silent as to the meaning of additional production, that is to say, neither it provided that the unit is entitled to the benefit of additional production above the production prior to expansion nor does it contain provision that the benefit of the scheme will be available to the additional production over and above the installed capacity of the unit.

16. The Rule was framed to give effect to the provisions of the Policy of the State Government. The State Government in Clause 3 of the Rules has laid down the conditions for grant of benefit of the scheme to the existing industrial unit undertaking expansion. It has been clarified that the expansion undertaking by the existing unit should result in an increase of at least 50 per cent of the installed capacity of the unit and the facility of deferment of tax shall be limited to the incremental production which means the production over and above the installed capacity. It was for the policy maker to decide as to the conditions to be fulfilled for the grant of benefit in terms of the policy decision. Unless it is shown that conditions for obtaining the benefit of the scheme provided under the Rules are either arbitrary or would negate the industrial policy, the said provision cannot be declared ultra vires.

17. The very purpose of giving the incentives to the industrial unit was to accelerate the pace of industrial growth. The Policy decision of 1989 laid down the broad principles. The Rules were framed to give benefit to the said policy wherein the said policy has been explained, and detailed provisions for eligibility and extent of deferment of tax has been provided. So far as the existing industrial units are concerned, the State Government decided to give benefit of the scheme only to those units who after expansion increased their capacity up to 50 per cent of their installed capacity and as a result of which the additional production was over and above the installed capacity. The provision contained under the Rules cannot be said to be either arbitrary or impermissible in law. The same cannot be said to be contrary to the policy decision of 1989. The said decision, as stated above, laid down broad principles and the Rules contained an elaborate procedure regarding eligibility for grant of such scheme and other matters. I am further of the opinion deferment of sales tax is only with reference to production beyond the installed capacity on account of extension flows from Clause 4 of the Industrial Policy itself. Clause 4 of Industrial Policy, inter alia, provides that benefit shall be available to the unit for the additional production, resulting from extension and not on the total production. In my opinion, installed capacity can be achieved without any extension and as such, increase in production may be after extension within installed capacity, same cannot be attributed to it. Thus according to the Industrial Policy, additional production, on account of extension, shall mean production beyond the installed capacity.

18. The decision rendered by the apex Court in the case of State of Bihar and Others Vs. M/s. Suprabhat Steel Limited and Others, , has no application in the

present case. In that case, the Industrial Policy contained a clear provision under Clause 10.4(i)(b) that old industrial units whose investment in plant and machinery did not exceed Rs. 15.00 crores on April 1, 1993 shall be entitled to the benefit of the scheme of Bihar Industrial Incentive Policy, 1993. However, the notification issued u/s 7 of the Bihar Finance Act, denied the tax exemption to the old industrial units whose investment in plant and machinery did not exceed the prescribed ceiling on April 1, 1993. Dealing with the said matter, the apex Court held that the incentive and benefit which was given to the industrial unit under general policy resolution of the State Government cannot be taken away by the Notification u/s 7 of the Bihar Finance Act. Such is not the case here. The Rules do not deny the benefit which otherwise available to the Industrial unit under the Industrial Policy. On the other hand, the Rules contained a detailed procedure to give effect to the industrial policy and meaning of additional production has been clarified/explained by providing that the additional production would mean the production over and above the installed capacity of the unit.

19. There is yet another impediment in the way of the petitioner. Explanatory note to Rule 3 of the Bihar Sales Tax Supplementary (Deferment of Tax) Rules, 1990 was published on February 11, 1991 and came into force on January 30, 1990. Petitioner has chosen to challenge the same in the present application filed on March 30, 2000. This rule had held the field for a decade and the rights and liabilities of parties I presume, must have been adjudicated in the meantime. Interference by this Court at this stage would unsettle many settled issues.

20. Thus, the relevant provision of Clause 3 of the Rules and explanation appended thereto in no way takes away the benefit of scheme given in the Industrial Policy and as such explanatory note cannot be declared ultra vires of the Policy decision of 1989. The decision taken by the State Level Committee on the basis of the provision contained in Clause 3 of the Rules thus, cannot be faulted on the ground urged on behalf of the petitioner.

21. In the result, there is no merit in this writ application and the same is dismissed.

Chandramauli Kr. Prasad, J.

22. I agree.