

(1999) 09 OHC CK 0033

In the Orissa High Court

Case No : O.J.C. No. 3659/99 and No. 16744 of 1998

Konark Cylinders and Containers (P) Ltd.

APPELLANT

Vs

Bhubaneswar Municipal Corporation and Others

RESPONDENT

Date of Decision : 15-09-1999

Acts Referred:

Orissa Municipal Act, 1950 — Section 131(1), 188(A)

Citation : (1999) 09 OHC CK 0033

Hon'ble Judges : A. Pasayat, Acting C.J.; B.P. Das, J

Bench : Division Bench

Advocate : Y. Das, N.C. Mohanty, R. Sahu-3, B.P. Mohapatra, P. Panda and P. Kr. Dhal, for the Appellant; S.N. Mishra, A.S. Naidu, R.C. Praharaj, B. Dash and A.G.A. in O.J.C. No. 3659/99, K.P. Panda, R.P. Nanda, S.N. Mishra, B. Dash and A.G.A. in O.J. C. No. 16744/98., for the Respondent

Final Decision : Dismissed

Judgement

B.P. Das, J.—Both the writ petitions being identical in feature, they were heard together and are being disposed of by this judgment.

2. The Petitioner is a private limited company having its industrial unit at Mancheswar Industrial Estate in Bhubaneswar. It is engaged in the business of manufacturing L.P. G. cylinders and for the said purpose, the Petitioner purchases L.P.G. steel sheets from the Steel Authority of India Limited (SAIL) and Tata Iron and Steel Company (TISCO) at their depots in Bhubaneswar. "The Petitioner states that it enjoyed holiday in imposition of octroi duty by virtue of the Industrial Policy Resolution of 1994 of the Government of Orissa, and in accordance with the said I.P.R., the Bhubaneswar Municipal Corporation issued an order vide Annexure-1 granting exemption from payment of octroi tax on the raw materials mentioned therein and making the order effective from 20-11-1998 till 28-2-1999 so far as O.J. C. No. 3659/99 is concerned, and from 28-8-1997 till 31-7-1998 so Jar as O.J.C. No. 16744/98 is concerned.

It would be profitable to extract hereunder the aforesaid order granting

exemption so far as O.J.G No. 3659/99 is concerned:

In exercise of power conferred under Clause (b) of Sub-section (1) of Section 188(A) of Orissa Municipal Act. 1950 (Act 23rd of 1950) find by virtue of order. No. 37417/HUD Dated 11-09-90 it is hereby ordered for exemption of Octroi. Tax on the raw materials as mentioned below" to "be procured from.out side limits of Bhubaneswar Municipal Corporation by M/s. KONARK CYLINDERS & CONTAINERS (P) LTD., M.I.E. Bhubaneswar, as, per recommendation of the Project Manager. D.I. C, Bhubaneswar vide their letter No. 4403/DICB. bated 03-08-1998.

This Order shall remain force till Dt. 28-02-1999.

List enclosed in separate sheet.

The main plank of contention of the Petitioner is that though it was exempted from payment of octroi duty by the Bhubaneswar, Municipal Corporation (in short "the Corporation") by virtue of the - order in Annexure-1 the, Petitioner while purchasing the raw material, i.e. L.P. G. steer sheet from SAIL and TISCO, the aforesaid two companies charged octroi duty and the same was collected from the Petitioner on the plea that since the Corporation had allowed exemption of octroi duty to the Petitioner it was the Corporation which would reimburse the octroi and/or refund the octroi charged by them on their invoices. It is also contended by the Petitioner that the Petitioner.was forced to pay the octroi duty on the L.P.G. sheet in order to continue its production but the authorities of the Corporation on spite of filing of refund applications by the.petitioner thorn time to time did not refund the octroi so paid by the Petitioner to the SAIL and TISCO, which in their turn, deposited the same with the; Corporation. The further case of the Petitioner is that it also purchased various other exempted raw materials from other business houses and was similarly compelled to pay the octroi charged there for. Although the Petitioner asked for refund of the octroi duty the Corporation did not refund the same. Hence the Petitioner has filed these writ petitions.

3. The Petitioner submits that the benefit so granted by the State Government through the I.P. R. of 1994 has, in fact, been taken away by the Corporation causing irreparable loss and damage to the Petitioner. The case of the Petitioner is that the Corporation also conducted itself in similar manner in the past for which the Petitioner approached this Court in O.J. C. No. 3852/88, which was disposed of on 20-9-1989, with a direction for refund-of the octroi duty which was collected from the Petitioner under similar circumstances. Against the aforesaid order of this Court, the Corporation preferred a SLP before the Apex Court and the same was dismissed "at the threshold. The Petitioner was forced to file another writ petition in O.J. C. No. 17868/97, which was disposed of on 2-7-1998, in the light of the direction given In O.J. C. No. 3852/88. Counsel for the Petitioner vehemently argues that the matter is no more res integra as it has already been decided successively by two decisions of this Court and, therefore, the Corporation has no legal right to withhold refund of octroi amount so

collected. The Petitioner contends that as per Clause 25 (1) of the Bhubaneswar Municipal Corporation Octroi Bye-laws, refund of octroi duty is to be made within fifteen days from the date of such claim" failing which interest, " 6% shall be charged. The Petitioner, therefore, claims that it "has paid a sum of Rs. 19,08,494.75 for the period from August, 1997 to August, 1998 and prays for refund of Rs. 12,27,955.47 in O.J. C. No. 3659/99, and in O.J. C. No. 16744/98 it claims refund of Rs. 19,08,494.75 again during the period from August, 1997 to August, 1998. But on perusal of Annexure-2 in O.J. C. No. 3659/99, it is noticed that the period for which the octroi was alleged to have been collected is from September, 1998 to 28-2-1999 and in O.J. C. No. 16744/98, Annexure-2 reveals the said period from 6-8-1997 to 4-4-1998. This indicates that there is gross discrepancy between the averments made in the writ petitions and the figures in the documents so annexed.

4. The Corporation and its Octroi Superintendent have entered appearance and have filed their counter affidavit refuting the claim of the Petitioner on the ground that the goods so purchased by the Petitioner was not in accordance with Annexure-I and as no octroi had been collected by the Corporation from the Petitioner the question of refund does not arise. As the Corporation has collected the octroi from SAIL and TISCO in accordance with law the Corporation is justified in not refunding the same. Further case of the Corporation is that the order dated 20-9-1989 passed by this Court in O.J. C. No. 3852/88. as referred to by the Petitioner is in fact not an adjudication but based on the Concession made by the counsel for the Corporation. Hence, the legality of the claim of the Petitioner is yet to be decided and therefore, the said decision cannot be held as" a precedent.

Though notice was duly served on TISCO, no return has been filed by it.

5. From the facts narrated above, the questions that fall for determination in both the writ petitions are as follows:

(i) Whether any octroi duty has been collected from the Petitioner?

(ii) Whether the Petitioner is entitled to get refund of the octroi duty pursuant to Annexure-1 ?

(iii) Whether this matter has already been decided by this Court so that the Corporation shall only have to refund the amount even without any further adjudication?

6. Before proceeding to examine the merits of the matter let us first see the provision in Section 131(1)(kk) of the Orissa Municipal Act. 1950 (in short, "the Act") which speaks as follows:

131. Power to impose taxes:

(1) The municipality may from time to time at a meeting convened expressly for the purpose of which due notice shall have been given subject to the provisions

of this Act., impose within the limits of the Municipal area the following taxes and fees or any of them-(a) to (k) xxx (kk) an octroi on goods brought within the limits of a municipal area for consumption use or sale therein.

The exemption of octroi was granted to the Petitioner in exercise of the power conferred by Section 188-A of the Act and accordingly Annexure-1 was issued. Said Annexure-1 clearly indicates that the raw materials described therein to be procured from outside the limits of Bhubaneswar Municipal Corporation were to be exempted from payment of octroi duty. In other words octroi duty can be exempted only in cases where goods are procured by the party from outside the municipal limits and brought into the municipal limits for consumption use or sale.

7. Let us see whether in these cases the Petitioner had procured the goods in pursuance of Annexure-1 or not.

At the same time we have also to probe into the fact whether the goods had suffered octroi duty at the hands of the Petitioner or not. The fact remains that the Petitioner had never brought the goods into the municipal limits of the Corporation "for consumption, use or sale. On the other hand it is TISCO and SAIL which had brought the goods from outside the municipal limits and paid the octroi duty at the entry point and the said octroi duty had been duly passed on to the Petitioner on being added to the cost of the procured goods. It appears from the averments made in the writ petitions as well as in the counter affidavits at the Corporation, that it is the SAIL and TISCO which suffered the octroi duty and not the Petitioner. So, it is a far cry "to conclude therefrom that as the goods were brought by SAIL and TISCO for consumption, use or sale of the Petitioner, the Petitioner is entitled to get refund of the octroi so paid by SAIL and TISCO solely on the strength of the exemption granted in Annexure-I. The language of Annexure-1 is very clear and it is an admitted fact that the Petitioner had not procured the raw material from outside the limits of the Corporation. Hence, the question of collection of octroi duty from the Petitioner by Corporation obviously does not arise, so also the question of refund.

8. Coming to the next question, as it appears from the foregoing discussions, the octroi duty was paid by SAIL and TISCO, it cannot be construed to have been paid by the Petitioner, merely because the burden of such octroi tax had been passed on to the hands of the Petitioner. The Petitioner's further case is that previously the Court directed the opposite parties to make refund and the opposite party-Municipal Corporation having failed in the Apex Court in the SLP is now estopped from saying that the refund cannot be made by the Corporation, For better appreciation, it is necessary to extract here in below the relevant portion of the judgment rendered in O.J. C. No. 3852/88:

In reply Mr. Indrajit Ray, the learned Counsel for opposite party No. I, has submitted that opposite party Nos. 4 and 5 who have their depots at Bhubaneswar bring inside the municipal area sheets in bulk for supply to various persons, nor all of which are exempt from paying octroi on the sheets. So far as

the octroi realised by opposite party No. 1 from the Petitioner is concerned, having regard to the exemption it has no objection to refund the amount realised from the Petitioner. The amount collected from the Petitioner is. Rs. 54,415.35. If the Petitioner makes an application giving the details the same shall be refunded.

From the above, it appears that the learned Counsel for the Corporation conceded that it had no objection to refund the octroi realised from the Petitioner. The order passed in O.J. C. No. 3852/88 relates to the year 1987-88. Relying on the aforesaid judgment, an order was passed on the same line by this Court in O.J. C. No. 17868/97 for the period from August! 1995 to July 1997. It is well settled that in a taxing statute the principles of res judicata do not apply. Moreover, in the particular case the period of collection and refund being separate and different from that of the period of transaction which was subject-matter in O.J. C. No. 3852/88 and O.J. C. No. 17868/97,) (See Instalment Supply (P.) Ltd. and Another Vs. The Union of India (UOI) and Others,) the emphasis of the Petitioner that once the authorities of the Corporation had conceded for refund of octroi duty to a third party, they are bound to refund the octroi duty to the petitioner so collected for subsequent years, does not hold good. In addition to that in our view there is sufficient force in the argument of the learned Counsel for the Corporation that in the previous cases there was no adjudication so far as the legality of the claim for refund is concerned. Apart from that the law regarding refund of taxes so collected is quite well settled. In this type of cases, the Petitioner has to make out a case that it had not added the octroi duty so paid to the cost of the end-product and the same has not been passed on to the ultimate consumers. The writ petitions are totally silent regarding this aspect of the matter. It has been held by several judicial pronouncements, and in the present cases, there can be a safe presumption that the octroi duty paid by the Petitioner would naturally have been passed on to the ultimate consumers. In this regard, we rely on a decision of the Apex Court in Indian Aluminium Company Limited Vs. Thane Municipal Corporation, . Similar view was also taken in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , wherein the majority view was that refund can only be allowed where the manufacturer has not passed on the burden of tax to third party. i.e. consumer. The preemption is of passing on the burden to the consumers the burden lies on the manufacturer to rebut the presumption by establishing to the contrary. This Court in Rungta Sons Private Ltd. Vs. State of Orissa and Another, while dealing with the question of refund rejected a similar prayer on the ground that the Petitioner nowhere had stated that the octroi so paid by it had not been collected from the ultimate consumers. It has been observed in the aforesaid case that on the basis of tax collected and also with the aid of the State Government budget is prepared and developmental works are taken up. So, octroi already collected by the Municipal Council must have been spent for the benefit of the people. In these premises, when the Petitioner itself has failed to make out a case rebutting the presumption that the octroi duty so paid by Petitioner to TISCO/SAIL/other organisations had not been passed on to

the ultimate consumers, there is no scope for directing refund of the said octroi. That apart, while the Petitioner in para 6 of the writ petition (O.J. C. No. 3659/99) has stated that it is entitled to get refund of Rs. 19,08,494.75, in the prayer it claims refund of Rs. 12,27,955.47. From the documents annexed to the writ petition as Annexure-2 series, we do not find how and wherefrom the Petitioner has arrived at the figure of Rs. 12,27, 955.47, which is reflected in the prayer. In the other writ petition, i. e., O.J.C. No. 16744/98, it is stated that the Petitioner is entitled to get refund of Rs. 19,08,494.75. It is needless to say that there are also discrepancies and errors apparent on the contents of both the writ petitions so far as the periods for which the Petitioner claims for refund. The period so described in the body of the writ-petitions does not go along with Annexure-2 series in both the cases. Both the writ Petitioners, as it appears, have been filed with confusing facts and figures and, therefore, the irresistible conclusion is that the Petitioner itself is not sure how much amount it had paid and how much it is entitled to get refund.

9. In view of the discussions made above, both the writ petitions fail and are dismissed. There shall be no order as to costs.

A. Pasayat, A.C.J.

10. I agree.

Writ petitions dismissed.