
(2007) 01 OHC CK 0025
In the Orissa High Court

L.G. Electronics (India) Ltd.

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 05-01-2007

Acts Referred:

Orissa Entry Tax Act, 1999 — Section 4
Orissa Sales Tax Act, 1947 — Section 5A(1)(b)

Citation : (2007) 103 CLT 358 : (2007) 1 OLR 425 Supp

Hon'ble Judges : B.P. Das, J;A.K. Parichha, J

Bench : Division Bench

Final Decision : Allowed

Judgement

A.K. Parichha, J.—The Petitioner-company in this Writ Petition challenges the illegal computation of the surcharge dues payable by a dealer under the Orissa Sales Tax Act, 1947 (in short, the "OST Act") with the allegation that the relevant provisions of the said Act and the Orissa Entry Tax Act, 1999 (hereinafter called as the "OET Act") have been misinterpreted.

2. The Petitioner is a Public Limited Company engaged in manufacture and sale of electronics goods carrying its business in Orissa and for the purpose is registered under the OST Act. In course of business, the Petitioner regularly imports goods specified in Part-III of the schedule by way of branch transfer or other wise paying Entry Tax as per the provision of Section 3(2) of the OET Act and in its Sales Tax Return claims set off of the Entry Tax amount already paid against the Sales Tax payable under the OST Act. The Petitioner's case is that it had submitted annual Sales Tax Returns for the year 1999-2000 claiming set off of the Entry Tax already paid against the tax due and on the net amount of tax after such set off it paid surcharge " 15% in obedience to provision of Section 5-A(1)(b) of the OST Act. But about 3 months of submission of the said return Opp. Party No. 3 by his letter dated 21.9.2000 threatened the Petitioner to take penal action against it u/s 11 of the OST Act read with Rule 10 of the OET Rules for its omission to pay surcharge on the amount claimed as set off in the returns.

The Petitioner claims that on enquiry, it learnt that a letter of Govt. of Orissa addressed to the Commissioner of Commercial Tax and circulated to all the Range Officers and Sales Tax Officers has been issued wherein a direction has been given that surcharge under the OST Act is to be computed on the payable amount of tax demand before deduction of the Entry Tax. According to the Petitioner, this letter of the Government is in total contrast to Rule 18 of the OET Rules and clarification letter dated 31.5.2001 issued by the Commissioner of Commercial Tax and is, therefore, nonest in the eye of law. The Petitioner has thus prayed for quashing the aforesaid circular letter of the State Government dated 20th November, 2001 as well as the notice issued by the Assessing Officer making extra tax demand and contemplating penal action.

3. Opposite parties while supporting the legality of the impugned notification and notices, have taken the stand that computation of the sales tax and surcharge thereon is to be undertaken according to the provisions of the OST Act and Rules and the provision of the OET Act or Rules has nothing to do with such exercise. According to them, Section 4 of the OET Act and Rule 18 of the OET Rules simply provide for reduction of the tax liability of the dealer by the amount of entry tax paid and there is nothing in these provisions to indicate that they will govern or regulate the assessment of surcharge in any manner. Opposite parties claim that the tax payable under the OST Act is completely different from the amount to be arrived at after reduction of the tax liability stipulated u/s 4 of the OET Act and 59 assessment of the surcharge can never be after the grant of reduction contemplated u/s 4 of the OET Act. Opposite parties assert that Orissa Sales Tax Act and Rules being the charging legislation for the assessment and realization of sales tax and surcharge and Section 4 of the OET Act and Rule 18 of the O.E.T. Rules providing for reduction of the tax payable under the OST Act, the above provisions of the OET Act and Rules have to be read harmoniously with Principal Act and Rules which are the OST Act and Rules and any provisions which are inconsistent with the provisions of OST Act and Rules must be ignored. The plea of the Opposite Parties in essence is that assessment of surcharge u/s 5-A of the OST Act is an act preceding the process of set off contemplated u/s 4(1) of the OST Act and Rule 18 of the OET Rules.

4. Learned Counsel appearing for the Petitioner took the stand that the provision of Section 4 of the OET Act provides for reduction of tax liability under the OST Act to the extent of entry tax paid under the OET Act and in Notification in SRO No. 149 of 2001 the Government have also directed that the rate of tax in Sales Tax Act shall be subject to Section 4 of the OET Act, 1999, which are indicative of the fact that the reduction of the entry tax amount is to be given at the stage of computation of the gross sales tax liability. Indicating the illustration of Rule 18 of the OET Rules in this regard, he argued that when the Government have framed the Rule and have explained the mode of computation of surcharge, the same Government in Finance Department has no locus standi to insist that surcharge is levyable on sales tax payable before the set off of the entry tax amount. He postulated that surcharge is to be computed on the amount of sales

tax payable after the deduction contemplated u/s 4 of the OET Act is made and in this regard indicated a letter of clarification issued by the Commissioner of Commercial Tax on 31. 5. 2001 that surcharge is to be computed on the net sales tax payable after the set off of the entry tax paid in respect of the purchase value of the goods. To fortify his contention Learned Counsel relied on the cases of Prabhat Solvent Extraction Industries Pvt. Ltd. v. The State of Gujarat (1982) 49 STC 322 (Guj); Commissioner of Sales Tax Vs. Burmah Shell Refineries Limited, ; Commissioner of Sales Tax v. Bharat Petroleum Corporation Ltd. 1985 STC 220 (SC); Commissioner of Sales Tax Vs. Jai Hind Oil Mills Co., ; Saraswati Oil Mills v. State of Gujarat (1966) 18 STC 163 (Guj); C.A. Abraham v. Income Tax Officer 1941 ITR 425 (SC).

5. Mr. A. Mohanty, Learned Senior Standing Counsel (Sales Tax), on the other hand, argued that Section 5-A of the OST Act is the charging Section for assessment of surcharge on the sales tax payable by a dealer; whereas Section 4 of the OET Act and Rule 18 of the OET Rules provide for reduction of the sales tax amount payable by a dealer to the extent of entry tax already paid by the said dealer; and so the provision or the illustration contained in OET Act and Rules cannot in any way govern or regulate the computation and assessment of sales tax and surcharge. According to him, a harmonious reading of the provisions of Section 4 of the O.E.T. Act along with Section 5-A of the OST Act would indicate that the sales tax and surcharge are to be first assessed as per the provision of OST Act and thereafter a reduction on the same is to be given as per Section 4 of the OET Act, i.e., computation of surcharge amount u/s 5-A of O.S.T. Act has to precede the exercise of set off of the entry tax amount as per Section 4 of the OET Act. Mr. Mohanty pointed out that the above interpretation also finds support from Section 4(3) of the OET Act, which says that reduction in tax liability as contemplated u/s 4(1) of the OET Act to a dealer will not be allowed unless the entry tax paid and the sales tax payable are shown separately on the cash-memos, bills, invoices issued by him for the sales by virtue of which such liability accrues. Regarding Rule 18 of the OET Rules and the illustration contained therein, he argued that the said Rule has to be read harmoniously with the provisions of Section 4 of the OET Act and Section 5-A of the OST Act and in case any conflict arises between the two, then the provisions of the Act would prevail under the accepted norm that a river cannot rise above the source. In support of his contention Mr. Mohanty cited cases of The Central Bank of India Vs. Their Workmen, ; Collector, Central Excise, Guntur v. Andhra Sugar Ltd. (1988) 73 STC 21 6 (SC); Organo Chemical Industries and Anr. v. Union of India and Ors. AIR 1979 SC 1803; Mary Angel and Others Vs. State of Tamil Nadu, and Directorate of Enforcement Vs. Deepak Mahajan and another, .

6. From the rival submissions of the Learned Counsel for the parties, it can be gathered that the only controversy is whether surcharge u/s 5-A of the OST Act is to be computed before giving the reduction of the entry tax amount as contemplated u/s 4(1) of the OET Act or from the net amount of sales tax payable after grant of such reduction. To resolve this controversy, interpretation

of provisions of Section 5-A of the OST Act, Section 4 of the OET Act, 1999 and Rule 18 of the OET Rules is necessary. For this purpose, it will be worthwhile to note the said provisions. Section 5-A of the OST Act reads as follows:

5-A. Surcharge - (1) Every dealer shall, in addition to the tax payable by him under this Act, also pay a surcharge-

(a) at the rate of ten per centum of the total amount of tax so payable, if his gross turnover during any year exceeds rupees ten lakhs but does not exceed rupees one crore; and

(b) at the rate of fifteen per centum of the total amount of tax so payable, if his gross turnover during any year exceeds rupees one crore....

Section 4 of the OET Act reads thus: -

Section 4. Reduction in tax liability - (1) Where an importer of motor vehicles liable to pay tax under Sub-section (3) of Section 3 being a Dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicles then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

Explanation - For the purpose of this Sub-section the chassis and the vehicle with body build on the chassis shall be treated as one and the same goods.

(2) When an importer or manufacturer of goods specified in Part-III of the Schedule except motor vehicles pays tax under Sub-section (1) of Section 3 or Section 26 of this Act, being a Dealer under the Sales Tax Act becomes liable to pay tax under the said Act by virtue of sale of such goods then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

7. From a plain reading of Section 5-A of the OST Act along with Section 4 of the said Act, it can be seen that Section 5-A creates a charge and imposes liability on every dealer under the OST Act to pay surcharge " 10% on the total amount of tax so payable by him under the OST Act if his gross turnover for the year does not exceed Rs. 1 Crore and 15% if such gross turnover for the year exceeds Rs. 1 Crore. The wordings of Section 5-A indicate in no manner that the surcharge is payable on any tax other than the tax payable under the OST Act. Similarly, a close reading of provision of Section 4(1) of the OET Act would show that it simply prescribes for reduction of the tax amount payable by the dealer to the extent of entry tax already paid for the same articles for which Sales Tax is payable. The Section does not contemplate anything, which would indicate in any manner that the provisions of OET Act or Rule have been taken into consideration while assessing the surcharge. Learned Counsel for the Petitioner, however, expressed his disagreement with the above propositions relying on the provisions contained in Rule 18 of the OET Rules and highlighted the illustration given in the said rule. He also relies on the letter of clarification issued by the Commissioner of Commercial Tax dated 31st May, 2001 wherein it has been indicated that the surcharge is payable on the amount of any tax which remains

payable by a dealer after set off of entry tax paid for such goods. According to him, when the State Government itself framed the Rule through legislation and issued clarification letter through their own Commissioner, there is no scope left for any other interpretation. He also argued that a Rule enacted through legislation cannot be superceded by the executive direction contained in the impugned notification.

8. The counter argument from the side of the Revenue is that the OST Act is a self contained Act, which prescribes the mode of computation of Sales Tax and surcharge thereon and so, the provisions of the said Act cannot be superceded or influenced by any Rules or Notification formulated under another Act. It was also argued that the provision and illustration contained in Rule 18 of the OET Rules simply explains about set off of the entry tax against the Sales Tax and surcharge and the said provision can never regulate the process of taxation under the OST Act. Mr. Mohanty also submitted that whenever any Rule or Notification becomes inconsistent with the provisions of the parent or principal Act, then the said Rule or Notification has to be harmoniously read and such part of the Rule or Notification would be accepted, which are in harmony with the provisions of the Act.

9. "Set off is a protection measure and a mode of relief granted under the law to a dealer paying tax. In *Prabhat Solvent Extraction Industries Pvt. Ltd. v. State of Gujarat* (supra), it was held that set off means adjustment or reduction of tax payable by purchasing dealer to the Government of the amount to be returned to such purchasing dealer in respect of purchase tax paid by him or as representing the amount of sales tax or general sales tax collected by his vendor. In *Commissioner of Sales Tax v. Jai Hind Oil Mills Co.* (supra) and *Godrej Boyce Manufacturing Co. Ltd. v. Commissioner of Sales Tax* (1992) 87 STC 186, the term "set off" was interpreted as a measure to provide relief to the dealers to the extent of purchase tax paid when he purchased raw materials and he is again obliged to pay the sales tax when he sells goods manufactured by him out of the said raw materials. The judicial pronouncements as narrated above analysed the term "set off", i.e., it is intended to avoid double taxation by allowing deduction of tax already paid from the amount of tax liability. The provisions made in the Rules lay down the modality of set off. It is worthwhile to mention here that D.S.T. Act and D.E.T. Act are two separate and independent legislations. While the former was legislated in 1947, the latter at a much later stage in 1999. The provision of set off has been made in the O.E.T. Act and the Rules framed thereunder, i.e., O.E.T. Rules, and not in the O.S.T. Act. So, when the O.E.T. Act and Rules were framed, the lawmakers and rule-framers had taken into consideration the provisions made in the O.S.T. Act, which was an earlier statute. The principle of set off and for which amount, it would be set off, have been provided under the O.E.T. Act and Rules. The relevant provisions of Section 4 of the O.E.T. Act (since omitted by Orissa Act 2 of 2004) and Rule 18 of the O.E.T. Rules (since omitted by the Orissa Entry Tax (Amendment) Rules, 2004) were as follows:

Section 4. Reduction in tax liability:

(1) Where an importer of motor vehicle liable to pay tax under Sub-section (3) of Section 3 being a Dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicles then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

Explanation - For the purpose of this sub-section the chasis and the vehicle with body built on the chasis shall be treated as one and the same goods.

(2) When an importer or manufacturer of goods specified in Part-III of the schedule except motor vehicles pays tax under Sub-section (1) of Section 3 or Section 26 of this Act, being a Dealer under the Sales Tax Act becomes liable to pay tax under the said Act by virtue of sale of such goods then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

Rule 18. Set off of Entry Tax against Sales Tax-

(1) When the importer of a motor vehicle liable to pay tax under Sub-section (2) of Section 3 of this Act being a dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicle, his tax liability under the Sales Tax Act shall be reduced to the extent of the tax paid under these rules.

Illustration - Assuming Entry Tax Rate and Sales Tax Rate to be 10%.

(1) Purchase value of Motor vehicle Rs. 2,00,000/- (2) Entry tax payable " 10% Rs. 20,000/- _____ Total Rs. 2,20,000/- (3) Sales Price of the Motor vehicle Rs. 2,20,000/- (4)(a) Sales Tax due " 10% Rs. 22,000/- Deducted Entry Tax paid Rs. 20,000/- Sales Tax payable Rs. 2,000/- Total Rs. 2,22,000/-

Note : If the Sales Tax payable on such motor vehicle is less than the Entry Tax paid, then the Sales Tax payable will be nil.

(2) When an importer of goods specified in Part III of the Schedule to the Act than motor vehicle, liable to pay tax under this Act is also a dealer liable to pay tax under the Sales Tax Act, then the Sales Tax payable on the sale of goods shall be reduced to the extent of Entry Tax paid in the same manner as illustrated under the Sub-rule (1).

10. The heading of Section 4 of the O.E.T. Act gives a broad idea regarding the provision of set off by way of "reduction in tax liability". Sub-Sections (1) & (2) of Section 4 of the O.E.T. Act provided for reduction of liability under the Orissa Sales Tax Act.

11. It is well settled that the objective of framing rules is to fill up the gaps in a statutory enactment so as to make the statutory provisions operative. Rules also clarify the provisions of an Act under which the same are framed. (A) Subordinate legislation has been fictionally called the delegation of power to fill

up the details. In *Khambalia Municipality and Another Vs. State of Gujarat*, it was pointed out that the legislature may after laying down the legislative policy, confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of the policy. Section 4 of the O.E.T. Act is totally in consonance with the provisions of Sub-rule (2) of Rule 18 of the O.E.T. Rules, which provides that sales tax payable on the sale of goods shall be reduced to the extent of entry tax paid in the manner illustrated under Sub-rule (1).

12. From the aforesaid provisions it is clear that the O.E.T. Act and O.E.T. Rules provide for set off of Entry Tax paid from the amount of Sales Tax payable by a dealer. In such view of the matter, the controversy in the present applications is confined to the question as to what constitutes "Sales Tax payable" under the O.S.T. Act.

13. Section 4 of the O.S.T. Act is the charging Section attracting liability to pay Sales Tax "on sales and purchases effected". Section 5 of the O.S.T. Act provides for rate of Sales Tax. Therefore on a plain reading of the provisions under the O.S.T. Act and the O.E.T. Act, set off has to be made by way of reduction of the Sales Tax payable to the extent of Entry Tax paid. There is no scope for the Revenue to urge that surcharge paid u/s 5-A of the O.S.T. Act has also to be taken into account in computing the dealer's tax liability under the O.S.T. Act. Such a conclusion is apparent from the provision of Section 5-A of the O.S.T. Act as it stood during the periods of assessments under reference in the present applications.

5-A. Surcharge-

(1) Every dealer shall, in addition to the tax payable by him under this Act, also pay a surcharge-

(a) at the rate of ten per centum of the total amount of tax so payable, if his gross turnover during any year exceeds rupees ten lakhs but does not exceed rupees one crore; and

(b) at the rate of fifteen per centum of the total amount of tax so payable, if his gross turnover during any year exceeds rupees one crore xxx xxx xxx.

Sub-Section (1) of Section 5-A is very specific in laying down that surcharge is payable "in addition to the tax payable" under the O.S.T. Act. Clauses (a) & (b) of Section 5-A of the O.S.T. Act provide for calculation of surcharge at the prescribed rate of 10% or 15% also on the amount of "tax so payable".

14. A harmonious reading of rule 18 of the O.E.T. Rules as well as Sections 4, 5 and 5-A of the O.S.T. Act with Section 4 of the O.E.T. Act reveals no conflict or inconsistency. In fact, the letter of clarification dated 31.5.2001 issued by the Commissioner of Sales Taxes (a) is in consonance with a harmonious construction of the above said provisions under the O.S.T. Act, O.E.T. Act and O.E.T. Rules. The provisions made under Rule 18 of the O.E.T. Rules lay down the

modality of making the provision of reduction of tax liability, as contemplated u/s 4 of the O.E.T. Act and commonly termed as "set off", functional or operative. That apart, Rules are to be construed to have been made for furtherance of the cause for which the statute is enacted and not for the purpose of bringing inconsistencies. The Apex Court in Reserve Bank of India and Ors. v. Timex Finance and Investment Co. Ltd. and Ors. (1992) 2 SCC 344 observed that a subordinate legislation such as rules or regulations made under a statute becomes part of that statute and hence, such Rules and Regulations must be for furtherance of cause for which the statute is enacted.

15. During the course of argument, the Revenue made an attempt to find fault with the provision in Rule 18 of the O.E.T. Rules and more specifically with the illustration appended to Rule 18(1) of the O.E.T. Rules. The said Rule is not under challenge in the present application; rather there is a presumption of validity in support of the legislation as well as the subordinate legislation. The subordinate legislation is presumed to be valid unless and until it is declared invalid by a Court in a proceeding initiated by proper person. The consequence of declaration of invalidity is to render the same incapable for ever having had any legal effect. But till the presumption of validity continues, it has to be obeyed See (1974) 2 All ER 1128 (HL) : La Roche & Co. A.G. and Ors. v. Secretary of State for Trade and Industry.

16. The principle is that consideration of the vires of subordinate legislation should start with the presumption that it is intra vires which means that if subordinate legislation under consideration is open to two constructions, one of which would make it bad and (he other good, the Court must adopt that construction which makes it good. Also Rules made under the statute are treated for the purpose of construction as if they were in the enabling Act and are to be of the same effect as if contained in the Act See The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyya, and State of Tamil Nadu Vs. Hind Stone and Others, .

17. In excluding the surcharge under the O.S.T. Act from the purview of the expressions "Sales Tax payable", "tax liability under the Sales Tax Act" and "liability under the Sales Tax Act" as provided u/s 4 of the O.E.T. Act and Rule 18 of the O.E.T. Rules as well as the expression "in addition to the tax payable" u/s 5-A of the O.S.T. Act, in the case of Associated Cement Companies Ltd. Vs. State of Bihar and Others, , it, "was held that the question of exemption arises only when there is a liability to tax and not otherwise. Exigibility to tax is not a same as liability to pay tax. While the former depends on the charge created by statute, the latter depends on computation in accordance with the provisions of the statute and rules, if any, framed there under. In the said decision, it was also found that liability of importer of cement under the Act shall be reduced to the extent of tax paid under the Entry Tax Act, wherein such importer becomes liable to pay tax under the Act by virtue of sale of scheduled goods.

18. Thus, from a harmonious reading of the relevant provisions of the O.S.T. Act,

O.E.T. Act and O.E.T. Rules, it is evident that "tax payable", as contemplated u/s 5-A of the O.S.T. Act, means tax payable after set off of Entry Tax from the Sales Tax assessed on a dealer. The modality adopted by the taxing authorities in computing surcharge on the gross tax assessed instead of tax payable after reduction to the extent of Entry Tax paid is not in accordance with the provisions under the O.S.T. Act, O.E.T. Act and O.E.T. Rules. The letter of clarification dated 20.11. 2001 issued by the Government is misconceived and has no legal sanctity.

19. In the result, therefore, the Writ Petition is allowed; the impugned letter dated 21.9.2000 (Annexure-2) and the extra tax demand made on the Petitioner on the basis of such letter are quashed. No cost.

B.P. Das, J.

20. I agree