(1990) 05 SHI CK 0010

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 151 of 1981

Mahesh Udyog and Another APPELLANT

Vs

State of H.P. and Others RESPONDENT

Date of Decision : 29-05-1990

Acts Referred:

Himachal Pradesh General Sales Tax Act, 1968 — Section 12, 12(2), 2, 4, 42(1)

Citation : (1990) 1 ILR HP 78

Hon'ble Judges : P.C.B. Menon, C.J;Bhawani Singh, J

Bench : Division Bench

Advocate : P.P. Rao and K.D. Sood, for the Appellant; Chhabil Dass, General and I.S. Panta, D.A.G., for the Respondent

Final Decision : Allowed

Judgement

P.C. Balakrishna Menon, C.J.—The first Petitioner is a small scale industrial unit (for short "S.S.I. unit" managed by a private limited company of which the second Petitioner is the general manager. The S.S.I. unit is engaged in the manufacture of Katha and cutch produced out of a particular type of timber available for purchase from the forest department of the government of Himachal Pradesh. The S.S.I. unit came into existence on 8-2-197 3 and it started production of Katha and cutch from that dale onwards. Annexure p 2, dated 21-2-1973 is the certificate of registration of the first Petitioners. S.I. Unit, issued by the district industries officer, Una. Annexure b. Dated 17-12-1979 is a certificate issued by the director of industries, Himachal Pradesh to show that the S.S.I. unit has started production from 8-2-1973. It further shows that it has remained in production for the period 1-12-1976 to 7-2-1978 and being a new unit is entitled to incentives given to small industries for the aforesaid period. Annexure-e is a similar certificate dated 13-2-1982 issued by the director of industries to show that the unit continued production, till 31-3-1982 and as per the government notification is entitled to incentives referred to therein. Annexure f is a certificate relating to the period 1-4-1982 to 31-3-1983 for the same purpose. These documents clearly show that the S.S.I. unit had come into existence on 8-2-1973 and had been enjoying concessions by way of incentives accorded by notifications issued by the government of Himachal Pradesh.

2. The industries department of the government of Himachal Pradesh issued notification No. 2-193/69-si for the grant of incentives to new and already established industries in the state. The incentives included exemption from sales tax for a period of five years in respect of industries established after the notification. With a view to give effect to the above incentives, the Himachal Pradesh general sales tax act was amended w.e.f. 12-4-1971 by act 2 of 1974. The words "or small scale industries" were inserted in Section 42(1) of the act to empower the government to issue the requisite notification under the said Section to extend the incentives to small scale industries. The expression ''small scale industries'' is defined in Section-2 (p) to mean "all industrial units with a "'' capital investment of not more than rupees 7.5 lakhs irrespective of the number of persons employed". There is no dispute that the S.S. I. Unit involved in the present case falls under the definition in Section 2(p) of the act. The government of Himachal Pradesh thereafter issued annexure p-1 notification on 27-5-1974 u/s 42(1) of the H.P. General Sales Tax Act, 1968, with retrospective effect from 12th April, 1971, in- corporation the same incentives as were provided for in the notification dated 12-4-1971 issued by the industries department"" of the government of Himachal Pradesh. The relevant part of the notification is extracted below:

In exercise of the powers conferred by Sub-Section (1) of Section 42 of the Himachal Pradesh general sales tax act, 1968, the governor, Himachal Pradesh with a view to mahesh udyog and anr. v. State of H.P. and Ors. 81 (P.C. Balakrishna Menon, C.J. And Bhawani Singh,J.) Providing incentive to the small scale industry, is pleased to grant exemption from payment of sale/purchase tax to the eligible small scale industries with effect from 12th April, 1971 subject to the following conditions:

(1) xxxx

(2) that the exemption from payment of sale/purchase tax in the case of small scale industries which came into being and are registered with the industries department as such after 12-4-1971 would be applicable for a period of 5 years commencing from the date of their coming into existence;

(3) to (7) xxxx

As per this notification, the Petitioner unit was accorded total concession from sales tax for the period up to 7-2-1978 (for five years from 8-2-1973 the date on which the S.S.I. unit came into existence). The industries department of the government of Himachal Pradesh on 4-10-1976 issued a notification containing rules regarding grant of revised incentives to industries in Himachal Pradesh. As per rule 3 (11) total exemption from sales/purchase tax was accorded to small scale industries set-up after 12-4-1971 and registered with the industries

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department of the government of Himachal Pradesh for a period of five years from the date on which the industry starts production. Concession by way of tax at reduced rates was accorded by annexure p-4, notification issued by the government of Himachal Pradesh u/s 6 of the H.P. General sales tax act. On 5-7-1978. This notification purports to be issued in exercise of the powers conferred u/s 6 of the act and provides for a confessional rate of tax at 5 % for S.S.I. units which had availed of the tax concession under the earlier notification for a, further period of five years. Annexure p-4 notification reads :

H.P. Gazette Notification (Rajpatra) (Pages 859-860)

EXCISE AND TAXATION DEPARTMENT

NOTIFICATION

No. 1-3-/71-E/T(Sectt.). In super session of this department, notification of even number, dated the 27th may, 1974 and 5th April, 1976 and in exercise of the powers conferred u/s 6 of the Himachal Pradesh general sales tax act, 1968, with a view to provide incentive to the small scale industries in Himachal Pradesh, the governor of Himachal Pradesh is pleased to levy the sales tax on the terms and conditions hereunder prescribed, with immediate effect:

(i) that the general sales tax shall be levied on the products manufactured by new small scale industrial units at the rate of 2% for the first five years and at the rate of 4 % for the next, five years in respect of goods livable to general sales tax at the rate of 7%. In case goods livable to general sales tax at the rate of more than 7 % sale tax will be payable at the rate of 3 % for the first five years and 5 % for the next five years.

(ii) That small scale industrial units which have availed holiday from sale/ purchase tax under the notification referred to above shall be eligible to confessional rate of tax at 4% on goods livable at the general rate of 7 % and 5 % on goods livable at the rate of more than 7 % for a further period of five years.

In case, of small scale industrial unit, enjoying tax holiday under the original scheme, such units will pay sales tax at the rate of 2% in case of goods livable at the rate of 7 % and 3 % in case of goods livable at the rate of more than 7 % for the remaining period of tax holiday.

(iii) that the above concession shall be admissible only to those small scale industries which are registered under the Himachal Pradesh general sales tax act, 1968 and comply with its provisions:

(iv) that small scale industry must continue to function for a period for which the concession has been availed, failing which it shall pay tax for the remaining period, equal to the amount which would have been paid during the said exempted period but for such exemption ;

(v) that the concession shall be available when the articles manufactured are sold exclusively by manufacturers themselves ;

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(vi) that the concession shall not be open for finished goods imported by the small scale industrial units for re-sale in the Pradesh; and

(vii) that the concession detailed above will be subject to the filing of certificate of genuineness with the assessing authority concerned by the 30th April every year; granted by the director of industries, Himachal Pradesh under his signatures.

3. There is no dispute that the Petitioner unit satisfies the requirements of clauses (in), (iv), (v) and (vii) of the notification.

4. The excise and taxation officer, una district, una, as per his letters Annexure p-6 and p-9 addressed to the D.F.O. una, had taken the view that the Petitioner unit is entitled to the benefits of confessional rate of tax under annexure p-4 notification and the tax liability on the timber purchased by it is only at 5%. He had, however, changed his stand and as per annexure p.] 1, letter dated 11-6-1981 required the D.F.O. una to collect sales tax at 25% and surcharge at 10% on the timber sold to the Petitioner. The relevant portion, of annexure p-l 1 is extracted below:

In this connection i am to say that the matter has been examined denovo. Since timber which includes the standing trees agreed to be severed is subject to levy of tax at the first stage of sales thereof Under Sub-Section(2) of the Section 6 of the H.P. general sales tax act, 1968 the notification No. 1-3-/71-ect, dated 5th July, 1978, does limit the tax exemption/concession to the sale of the products manufactured by the industrial units themselves. Therefore, the sale of standing trees made to this concern is subject to tax as usual i.e. 25% sales tax plus 10 % surcharge on sales tax thereon.

According to this interpretation, the benefit of concession is available to the S.S.I. unit in respect of the goods manufactured by it and the concession does not extend to the timber purchased from the divisional forest officer.

5. The Petitioner S.S.I. unit seeks the issue of an appropriate writ directing the respondents to accord to the unit the benefit of the incentives by way of sales/ purchase tax concession as per annexure p-4 notification.

6. Section 4 of the act is the charging Section under which subject to Sections 6, 7 and Sub-Section 2 of Section 12 every dealer whose gross turnover exceeds the taxable quantum is liable to pay tax under the act on all sales affected and purchases made. Section 6 of the act provides for the rate of tax and in respect of item(-) 34 in schedule ''a'' the rate of tax is 25 paisa in a rupee. Item 34 of schedule ''a'' is ''timber not including converted timber''. Sub-Section 3 of Section 6 defines the expression "taxable turnover" and it exempts interline sales of goods declared tax-free u/s 7 and also goods specified in the certificate of registration for-use in the manufacture of goods in Himachal Pradesh and for sale in the state. The definition of goods in Section 2 (e) would take in also timber and timber is defined in clause (11) of Section 2 to include trees fallen or felled

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or agreed to be felled. Section 42 of the act as it stood at the relevant period of time reads:

42. Power to exempt-(1) the government, if satisfied that it is necessary or expedient so to do in the interest of cottage industries, (or small scale industries) may, by notification, exempt any class of co-operative societies or persons from the payment of tax under this act on the purchase or sale of any goods subject to such conditions as may be specified in such notification.

(2) where a notification Under Sub-Section(i) has been issued by the government:

(a) a registered dealer shall not be entitled to charge tax on the sales made to such societies or persons ;

(b) such sales shall not be included in the taxable turnover of such registered dealer notwithstanding anything to the contrary contained in Sub-Section (3) of Section 6 ; and

(c) a registered dealer shall be entitled to deduct from his taxable turnover the purchase value of goods specified in schedule ''c to the extent such goods are sold by him to such societies or persons notwithstanding anything contained in Sub-Section (3) of Section 6,

7. Sub-Section (2) was omitted by Act 8 of 1985 which came into force on 13-8-1985. The tax concession claimed in the present case relates to the period 8-2-1978 to 7-2-1983. Sub-Section (2) of Section 43 (Section 42) of the act, therefore, applies to the present, case relating to a period prior to the commencement of the amending act 8 of 1985.

8. The learned advocate general on behalf of the respondents submits that the liability for sales tax on the sale of timber made by the forest department of the government of Himachal Pradesh is on the seller and annexure p-4 notification does not extend to sales effected by a dealer who is not a small scale industrial unit. The submission in other words is that there was no tax liability under the act on the purchase turnover of the Petitioner and hence he cannot claim any concession in respect of the tax liability of the dealer who sells the timber to the small scale industrial unit. Sub-Section (2) of Section 42 extracted above is a complete answer to this contention raised by the learned advocate general. Once there is a notification Under Sub-Section(1) of Section 42, a dealer selling the goods to a small scale industrial unit is not entitled to charge tax on the sales made to such a unit and such sales shall not be included in the taxable turnover of the selling dealer. The intention of the legislature appears to be clear that Under Sub-Section(2) of Section 42 of the act the selling dealer cannot charge tax on the j purchaser who falls under the exempted category Under Sub-Section(1). A partial exemption from tax effected as per'' notification issued Under Sub-Section (1) should on the same principle of interpretation extend the same benefits to the selling dealer.

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9. It is next contended by the learned advocate general that the notification in the present case is issued u/s 6(1) of the act fixing the rate of tax at a confessional rate and; since the S.S.I. unit is not the dealer liable to sales tax, the concession can apply only to goods manufactured and sold by the unit in the state of Himachal Pradesh. We see no merit in this submission also. Even though the notification purports to be issued u/s 6 of the Act, it is a notification granting partial exemption from tax liability in favour of S.S.I. units. The notification should therefore, be deemed to have been issued u/s 42(1) of the act on the principle! That even if the appropriate Section is not quoted in the noiification it should be considered as issued under the power conferred by the statute for the issue of such notification, vide Hukumchand Mills Ltd. Vs. The State of Madhya Bharat and Another, , J.K. Steel Ltd. Vs. Union of India (UOI), , v N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., and Pournami Oil Mills and Others Vs. State of Kerala and Another,

10. Section 13 of the Act empowers the selling dealer to pass on. The tax liability to the purchaser. The concession accorded under annexure p-4 notification will be rendered nugatory if sales tax at 25 paisa per rupee is to be levied on the timber sold to the S.S.S. unit by the forest department of the government of Himachal Pradesh. The notification annexure p-4 in sub stance and effect substitutes the rate of tax mentioned in the proviso to sub-Section (1) of Section 6 in respect of item 34 in Schedule ''a'' when it is sold to a S.S.I. unit. Such exemption is permissible Under Sub-Section (1) of Section 42 of the act and the source of power for the issue of such notification should be traced to the said specific provision in the act.

11. For the aforesaid reasons, we hold that the incentive by way of confessional rate of tax provided for in annexure, P-4 notification extends to the sale of timber effected by the |forest department of the government of Himachal Pradesh, to the Petitioner S.S.I. unit and the tax livable on such |sales is only at the rate provided for in the notification. A. Writ !of mandamus will, therefore, issue against the respondents from levying or collecting sales/purchase tax from the Petitioner in excess of the rates mentioned in annexure p-4 notification for the period covered by the said notification.

12. It is brought to our notice that as per interim orders dated 18-10-1984 passed by this Court in C. M. P. No. 1486 of 84, the Petitioner S.S.I. Unit has deposited fairly large amounts in the State Bank of India Gagret Branch, District Una, at the rate of Rs. 1.50,000/- for each truck load of its finished manufactured product to enable the unit to get the requisite export permits. These amounts are deposited in fixed deposits in the name of the Petitioner Company and had been pledged to the State of Himachal Pradesh by way of security for the tax due for the relevant periods. The second Respondent, the Excise and Taxation Officer, Una is directed to issue fresh orders of assessment to the Petitioner for the period covered by Annexure P-4 notification in the light of

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the directions contained in this judgment within a period of four months from today. On payment of the tax due as per the fresh orders of assessment the pledges made of the fixed deposits in favor of the State of Himachal Pradesh will stand automatically released and it is open to the Petitioner S.S.I. Unit to withdraw the amounts due under the fixed deposits. The writ petition is allowed as indicated above. The parties will suffer their respective costs.

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