

(2010) 03 OHC CK 0051
In the Orissa High Court

Naba Bharat Ferro Alloys Ltd. and Another	APPELLANT
Vs	
State of Orissa and Others	RESPONDENT

Date of Decision : 10-03-2010

Acts Referred:

Orissa Sales Tax Act, 1947 — Section 7

Citation : (2010) 1 OLR 976

Hon'ble Judges : S.C. Parija, J;B.P. Das, J

Bench : Division Bench

Final Decision : Allowed

Judgement

S.C. Parija, J.—These batch of four writ petitions are directed against the orders of reassessment for the years 2000-01, 2001-02, 2002-03, and 2003-04, passed by the Sales Tax Officer, Dhenkanal Circle, Angul, disallowing the benefit of deferred payment of sales tax extended by the State Government under Industrial Policy Resolution, 1992, which had been allowed in the original orders of assessment and confirmed in appeals and demanding tax for the entire period.

2. The facts of the case as detailed in the writ petition are that the Government of Orissa in the Industries Department formulated the Industrial Policy Resolution, 1992, (for short "IPR-1992"), which was published in the Orissa Gazette on 1.8.1992. The policies outlined in IPR-1992 was intended to encourage the flow of investment and development of entrepreneurship in the State of Orissa. While financial assistance to the potential entrepreneurs in the form of subsidies and post-production benefits was envisaged, the main thrust of the policy was on creating an environment conducive to the smooth setting up and successful functioning of industries. The said policies detailed in IPR-1992 offered several incentives to the new industries as well as for expansion/modernization/diversification of existing industrial units, with effect from 1.8.1992, including the incentive for exemption/deferment of sales tax.

3. Para 7.4 of the IPR-1992 provided for sales tax incentive, which reads as

under;

Exemption/deferment of Sales Tax on raw materials, spare parts, and finished products of Small, Medium, Large Scale and Pioneer Industrial Units:

New small, medium and large scale industrial units including pioneer units will be eligible for exemption of sales tax on raw materials, spare parts, and finished products for a, period of 5 years subject to a ceiling of 100 percent of fixed capital investment if the unit is located in Zone-A, 75 percent if located in Zone-B and 60 percent if located in Zone-C. New medium and large industrial units may also opt to defer payment of sales tax on their finished products for a period of 5 years subject to a maximum of 100 percent of fixed capital investment if the unit is located in Zone-A, 75 percent if located in Zone-B and 60 percent if located in Zone-C from the date of commercial production. Deferred amounts in respect of each year will be repaid in fully after the expiry of the period of deferment annually. Period of exemption/deferment allowed for deferent Zones shall be extended by two years for pioneer units. However, defaulters of OSFC/IPICOL dues shall be eligible only after they clear such dues.

4. In furtherance of the said objectives of IPR-1992, the State Government in the Finance Department issued notification vide S.R.O. No. 1093/92, dated 23.9.1992, in exercise of powers conferred u/s 7 of the Orissa Sales Tax Act, 1947 (for short "OST Act"), providing therein that the classes of registered dealers who are certified by the Director of Industries, Orissa, as Medium/Large Scale/Pioneer industrial units in Form E-(92), where fixed capital investment in land, buildings, plant and machinery and other equipment of permanent nature has been made in the State of Orissa on or after the 1st August 1992, shall be allowed to defer payment of sales tax collected and payable in the return prescribed under the OST Act and the Rules made thereunder, on the sale of finished products manufactured/processed by the said industrial units in Orissa subject to conditions and restrictions laid down in the Schedule, which reads as under:

SCHEDULE

SI. Class of Industrial Units Conditions and restrictions of No. (Dealers) deferment (1) (2) (3) 1. Medium/Large scale industrial 1. Deferment of Sales Tax shall units were fixed capital investment be allowed for a period of i.e. investment in land, buildings, five years from the date of plant and machinery and other commercial production each equipment of permanent nature year i.e. a period of 365 has been made in Orissa on or consecutive days. The period after 1st August 1992, as certified shall be extended by two by the Director of Industries, year for pioneer units. Orissa in Form E(92). 2. The amount of deferment of Sales Tax which shall include Sales Tax payable to Government under the Orissa Sales Tax Act, 1957 and the Central Sales Tax Act, 1956 taken together shall not exceed the sum calculated at 100% in Zone-A, 75% in Zone-B and 60% in Zone-C of the investment of the unit in plant and machinery,

land, building and other equipments of a permanent nature. xxx xxx xxx

5. Similar notification vide S.R.O. No. 1094/92, dated 23.9.1992, was issued by the State Government in the Finance Department providing for deferment of sales tax collected under the Central Sales Tax Act, (for short "CST Act"), for the same period, subject to the same limitations, conditions and exceptions governing such deferment as provided in the aforesaid notification vide S.R.O. No. 1093/92 made under the OST Act.

6. Pursuant to the incentives and benefits extended by the State of Orissa under IPR-1992, the petitioner Company set up a Ferro Alloys plant at Khadagprasad in the district of Dhenkanal, Orissa, for manufacturing 50,000 MT of Ferro Alloys with two furnaces of 13.25 MVA each and got itself registered under the OST Act and CST Act and was allotted registration Nos. DL-2999 and DLC-1252 respectively. The petitioner Company having established a Large Scale industrial unit in the district of Dhenkanal, which comes within Zone-C, was eligible to opt for deferment of sales tax on their finished products for a period of five years, subject to maximum of 60% of its fixed capital investment, from the date of commencement of commercial production. The deferred amount in respect of each year was required to be repaid annually in full, after the expiry of period of deferment.

7. That due to recession in the market and non-availability of captive mines, the petitioner Company decided to enter into a conversion agreement dated 1.4.1997 with M/s. TISCO Ltd., Jamshedpur, to convert Chromite Ore and Coke into High Carbon Ferro Chrome, on receipt of conversion charges. The Chrome Ore and Coke were to be supplied free of cost by M/s. TISCO Ltd. and the petitioner Company, as per the terms of the agreement, was not permitted to transfer the finished products to any person other than M/s. TISCO Ltd.

8. In order to enable the petitioner Company to undertake such conversion of Chromite Ore and Coke into High Carbon Ferro Chrome, it had approached the Director of Industries, Orissa, for issue of necessary certificate and accordingly the petitioner Company had been issued with a certificate dated 13.4.1999 wherein the date for commencement of commercial production had been shown to be 1.10.1997. Subsequently, as the petitioner Company started its own commercial production of Ferro Alloys with effect from 20.1.2000, the petitioner Company approached the General Manager, District Industries Centre, Dhenkanal, who after inspection of the industrial unit, recommended to the Director of Industries, Orissa, that the petitioner unit has started its own production and selling of its product with effect from 20.1.2000. Accordingly, the Director of Industries, Orissa vide its letter dated 18.9.2000 clarified that the petitioner Company started manufacturing and selling of their own products, with effect from 20.1.2000. The clarification letter of the Director of Industries, Orissa, dated 18.9.2000, reads as under:

In continuation to this office order No. 4967/dt.13.4.99, this is to clarify that M/

s. Nava Bharat Ferro Alloys limited, Kharagprasad, Near Meramundali, Rly Station sub-Divn. Dhenkanal, Dist: Dhenkanal, Orissa, is an industrial unit under Medium/Large scale sector. The unit started production from 1.10.97 as a conversion agent of TISCO Ltd. for processing of (1) Carbon Ferro Chrome (of more than 4% carbon)(2) Ferro Silico Manganese/Ferro Silicon. Subsequently from 20.1.2000, the unit started manufacturing and selling the above products on their own account.

9. Pursuant to the aforesaid clarification, the Director of Industries, Orissa, issued necessary certificate in Form-E(92) to the petitioner Company, for availing sales tax exemption /deferment under IPR-1992, showing the date of commercial production on its own account and subsequent sale as 20.1.2000. In terms of such certificate in Form-E(92), the petitioner Company was issued with certificate of eligibility for sales tax deferment on finished product by the Director of Industries, Orissa, dated 20.10.2000, the relevant portion of which reads as under:

This unit has made first investment in fixed capital on or after 1.8.92 and started production from 1.10.97 as a conversion agent of TISCO Ltd. Subsequently from 20.1.2000 the unit started manufacturing and selling the above products on their own account.

3. The fixed capital investment of the unit as on the date of commercial production is Rs. 37,92,04,393/-.

6. This unit located at Kharagprasad in Dhenkanal Sub-Division of Dhenkanal District being Large/medium Industrial unit, having opted for deferment of sales tax eligible to deferment of sales tax admitted as payable on the sale of finished products manufactured for a period of 5 years from the date of commercial production as mentioned in Para.2, subject to the restriction and conditions laid down in F.D. Notification No. 1093 & No. 1094 dt.23.9.92 as amended from time to time up to a ceiling limit of 80% and the unit is fulfilling the criteria prescribed under SRO No. 140/ Dt. 17.2.2000 of Finance Department.

60% of the Fixed capital investment being located under Zone-C.

7. The certificate is issued for 5 years from the date of commercial production.

10. Pursuant to issue of such eligibility certificate by the Director of Industries, the petitioner Company filed necessary application in Form-A(92) before the Sales Tax Officer, Dhenkanal Circle, Angul, for grant of deferment of sales tax on finished products. The petitioner Company being a Large Scale industrial unit, entered into an agreement with Industrial Promotion & Investment Corporation of Orissa Limited (for short "IPICOL"), in Form-B(92) acknowledging the benefit of deferment of sales tax that may be conferred on it by the State Government and agreed to pay the sales tax dues in instalments as detailed in the schedule to the agreement, which reads as under:

SCHEDULE

Installments The year for which Payable by Sales Tax is allowed To be deferred
1st Installments For the year 2000-01 By 19.01.2006 2nd Installments For the
year 2001-02 By 19.01.2007 3rd Installments For the year 2002-03 By
19.01.2008 4th Installments For the year 2003-04 By 19.01.2009 5th
Installments For the year 2005-06 By 19.01.2010

11. The petitioner Company filed a copy o the agreement entered into with
IPICOL before the Sales Tax Officer, Dhenkanal circle, requesting him to issue
certificate in Form-C(92) as required under aforesaid notification vide S.R.O. No.
1093/92, dated 23.9.1992, for availing deferment of sales tax with effect from
20.1.2000.

12. The Sales Tax Officer, Dhenkanal Circle, completed the assessment for the
years 2000-01, 2001 -02, 2002-03 and 2003-04 under Rule 12(4) of the Central
Sales Tax (Orissa) Rules (for short "CST (O) Rules") and while allowing
deferment of payment of sales tax, demanded CST and surcharge in respect of
certain sale transactions, due to non-submission of requisite Form-"C against
sale of Ferro Chrome.

Being aggrieved by the orders of assessment for the years 2000-01 to 2003-04,
passed by the Sales Tax Officer, Dhenkanal Circle, the petitioner Company filed
First Appeals before the Asst. Commercial of Sales Tax, Cuttack-II Range,
Cuttack. The said appellate authority while allowing the appeals and reducing the
tax demand on production of requisite Form-"C, confirmed the deferment of tax
allowed to the petitioner Company.

13. While the matter stood thus, the Sales Tax Officer, Dhenkanal Circle, issued
notice under Rule 10 of the CST (O) Rules for reopening of the assessment for
the years 2000-01 to 2003-04. Pursuant to such notice, the petitioner Company
appeared before the said assessing officer and requested him to drop the
proceedings. The Sales Tax Officer, Dhenkanal Circle, completed the
reassessment proceedings under Rule, 12(8) of the CST (O) Rules, for the
assessment years 2000-01, 2001-02, 2002-03, and 2003-04, disallowing the
benefits of deferment of sales tax to the petitioner Company and demanding
payment of tax for the entire perjod. The assessing officer, referring to the
agreement entered with IPICOL in Form-B(92), came to hold as under:

This agreement has taken 20.1.2000 as the date of commercial production. But
the notification dt. 23.9.92 as referred to earlier stipulates that the period of
deferment will start from the date of commercial production and will extend up to
five years from the date of such commercial production and in the instant case it
should have been from 1.10.97 which is the date of commercial production.
Hence the agreement in form B-92 is defective as it has not been issued for the
period 1.10.97 onwards and therefore no certificate in form C-92 can be issued
to the dealer. Hence the application in form A-92 not being maintainable no
deferment is possible under the scheme.

14. Learned Counsel for the petitioners submitted that under the IPR-1992

published by the State Government in the Industries Department and the subsequent notification issued under the OST Act and CST Act, the petitioners industrial unit was eligible to avail the incentives of deferred payment of sales tax. Accordingly, the petitioner's unit was granted necessary certificate in Form-E(92) and eligibility certificate in Form II by the Director of Industries, Orissa. On the basis of such certificates, the assessing authority had allowed deferment of sales tax in the original assessment orders, which have been confirmed by the appellate authority. Hence, the assessing officer had no competence or authority to ignore the certification granted by the Director of Industries, Orissa and disallow deferment of sales tax by resorting to reassessment. In this regard, it is submitted that under the IPR-1992 and the subsequent notifications issued under OST Act and CST Act, as the Director of Industries is the competent authority to certify the eligibility and entitlement of a industrial unit to avail the incentives of deferment of payment of sales tax for five years from the date of actual commencement of commercial production, the assessing officer had no authority to hold otherwise and disallow such incentives. Moreover, as the petitioners unit started its actual commercial production and sale of finished products only from 20.1.2000, as certified by the Director of Industries, Orissa, there was no scope for the assessing officer to interpret the same and hold otherwise, while disallowing the incentive of deferment of sales tax.

Coming to the question of power of the assessing authority to reopen the assessment, learned Counsel for the petitioners, with reference to Rule 12(8) of the CST (O) Rules submit that such reassessment merely on the change of opinion of the assessing officer is not permissible in law. In this regard, it is submitted that as the said assessing officer had passed the original order of assessment, allowing deferment of sales tax, the impugned orders of reassessment disallowing such deferment amounts to review of his earlier orders of assessment, which is not permissible. Further the original assessment orders allowing the benefit of deferment of sales tax having been confirmed in appeals, the same were not available to be reopened, having merged with the appellate orders.

Learned Counsel for the petitioner further submitted that the entire deferred amount of sales tax has already been paid in full by the petitioner Company, after the expiry of period of deferment, as per the installments prescribed in the schedule to the agreement entered into with IPICOL in Form-B(92).

15. Learned Counsel for the Revenue, with reference to the counter affidavit, submits that the petitioner Company was admittedly issued with a certificate by the Director of Industries, Orissa, dated 13.4.1999, which clearly mentioned that the industrial unit commenced its commercial production with effect from 1.10.1997. Hence, even if the Director of Industries, Orissa, by way of subsequent clarification indicated that the petitioner's industrial unit had only undertaken conversion of Chrome Ore and Coke into High Carbon Ferro Chrome, none the less, the eligibility period of exemption of five years would start to run

from 1.10.1997. In this regard, it is submitted that the Director of Industries, Orissa, while issuing certificate of eligibility on 21.10.2000, stating therein that the petitioner's industrial unit have opted for deferment of sales tax for a period of five years from the date of commercial production, has not mentioned in the said certificate that the date 20.1.2000 should be taken as the starting point, for the purpose of availing the benefits of deferment of sales tax, as provided in IPR-1992.

It is further submitted that as the period of five years for availing exemption/deferment of sales tax is to commence from the date of commercial production of an industrial unit and admittedly the petitioner's unit had been certified to have commenced its commercial production with effect from 1.4.1997, as per the certificate granted by the Director of Industries, Orissa, the said date could not have been postponed, merely because the petitioner Company had not sold its product. Accordingly, learned Counsel submits that the impugned orders of reassessment cannot be faulted.

16. From the pleadings of the parties, it reveals that the petitioner's industrial unit was initially issued with a certificate by the Director of Industries, Orissa, certifying the date of commencement of commercial production to be 1.10.1997, which had been obtained by the petitioner's unit for the purpose of undertaking job work as a conversion agent of M/s. TISCO Ltd. The petitioner's unit did not manufacture any product of its own, which could be sold in the market. Only when the petitioner's industry was in a position to commence commercial production of its own product, necessary application was made and after inspection of the industrial unit, the General Manager, DIC, Dhenkanal, issued a communication dated 5.7.2000, wherein it had been clearly mentioned that the petitioner's industrial unit started its commercial production with effect from 1.10.1997, as a conversion agent of M/s. TISCO Ltd., as per their agreement dated 1.4.1997 and that they have effected sale of their own product only with effect from 20.1.2010. In the said letter, it was further mentioned that the activities undertaken during the period from 1.10.1997 to 19.1.2000 were only processing of goods as a job worker on receipt of job charges and that the unit started its own production and selling its product only with effect from 20.1.2000. Accordingly, the Director of Industries, Orissa, issued clarification in continuation to its earlier certificate dated 13.4.1999, clearly stating therein that the petitioner's industrial unit started production from 1.10.1997 as a conversion agent of M/s. TISCO Ltd. and subsequently from 20.1.2000, the industrial unit started manufacturing and selling its own product. On the basis of such clarification the Director of Industries issued Form-E(92), as required under IPR-1992, clearly specifying therein that the petitioner's industrial unit commenced its commercial activities on 1.10.1997 on conversion basis and started its own commercial production and sale with effect from 20.1.2000. The eligibility certificate in Form-II was issued by the Director of Industries, Orissa, for enabling the petitioner's industrial unit to avail the benefit of deferment of sales tax, wherein it had been categorically mentioned that it was only from

20.1.2000; that the petitioner's industrial unit started manufacturing and selling its own product.

17. On the basis of such certificates issued by the Director of Industries, Orissa, who was the competent authority under IPR-1992, the Sales Tax Officer, Dhenkanal Circle, in his order of assessment for the years 2000-01, 2001 -02, 2002-03 and 2003-04, had allowed deferment of sales tax to the petitioner Company, which have also been confirmed by the first appellate authority.

18. The very aim and object of IPR-1992 was to provide various incentives by way of financial assistance in the form of subsidies and post-production benefits by way of exemption/deferment of sales tax to facilitate rapid industrial growth in the State. In furtherance of such objectives of IPR-1992, the State Government in the Finance Department, issued notifications dated 23.9.1992 both under the OST Act and CST Act, providing benefits of deferment of sales tax to medium/large scale industrial units to be certified by the Director of Industries, Orissa. The operational guidelines issued by the State Government pursuant to IPR-1992 clearly specified that sales tax benefits are available to eligible industrial units only on the basis of certificate to be issued by the Director of Industries in respect of large/medium scale and pioneer industries. Accordingly, the said authority having certified that the petitioners unit had commenced commercial production and sale of its own product with effect from 20.1.2000 and is eligible to get the benefit of deferment of sales tax, the same could not have been interfered with and/or denied by the assessing officer, while exercising power of reassessment, by giving a restricted meaning to the term "commencement of commercial production". Moreover, the benefits of exemption/deferment of sales tax extended by the State Government under IPR-1992, was required to be construed liberally so as to make it real and substantial and a narrow pedantic interpretation was neither warranted nor desirable, as the same would defeat the very intent and purpose for which such incentives were granted. What was intended under IPR-1992 was to provide sales tax incentives and benefits to industrial units in respect of their finished product and as the petitioner's industrial unit admittedly manufactured and sold its own product only from 20.1.2000, the same would be the date of commencement of commercial production of the industrial unit and the Director of Industries had rightly issued Form-E(92) and eligibility certificate, indicating therein 20.1.2000 to be the date from which the petitioner unit commenced commercial production and sale of its own product.

19. A Division Bench of this Court in the case of Teleworks Private Limited Vs. Steel Authority of India Limited and Others, , while dealing with a similar question with regard to the date from which an industrial unit is entitled to get exemption from sales tax under IPR-1980, had observed that such exemption from sales tax being in the nature of incentive offered by the State Government, it was intended to be real and substantial. The relevant findings of this Court reads as under:

xx xx xx The exemption from sales tax being in the nature of an incentive offered by the State Government it is intended to be real and substantial. The need for purchase of raw material arises when the industrial unit is ready to go into commercial production. No entrepreneur will unnecessarily invest in purchasing raw material before his industry is ready to go into production. It is common knowledge that a provisional certificate is granted to enable the entrepreneur to approach banks and other financial " institutions for sanction of loan to apply for lease of land and to take other preliminary steps for setting up the industry. Therefore, on a fair reading and giving a harmonious construction which is in accord with intent and purpose of the provision, the phrase "for a period of five years from the date of certification of the unit" in item 26-A means five years from the date of certification of the unit having commenced commercial production. If the construction sought to be given by the opposite parties is accepted, it will mean that though the State Government promised on the one hand that an entrepreneur will enjoy exemption from sales tax for a period of five years, in reality the period will be a much shorter one. Such interpretation will go against the sense of fairness and propriety of the State Government and will affect its credibility in the industrial field. Therefore such an interpretation, in our view, is to be avoided.

On the above analysis, we have no hesitation to hold that the petitioner is entitled to enjoy the exemption from sales tax on sale or purchase of raw materials for the period of five years from the date of commencement of commercial production that is 10th of August, 1983, as stated in the certificate (annexure 1).

20. The expression "commercial production" had come up for consideration before a Division Bench of Punjab and Haryana at Chandigarh, in the case of Ballarpur Industries Limited Vs. State of Haryana and Another, , wherein the Hon"ble Court had held as under:

xx xx xx The expression "commercial production" has not been defined in the Rules but as understood in common parlance it means when the unit starts sale of its products in the market. The units very often go into trial production which would be different from commercial production but when the product is sought to be sold, it is then only that the unit will be said to have gone into commercial production. In other words, the moment the eligible unit issues the first sale voucher it would go into commercial production for the purpose of this rule and the application for exemption.... xx xx

21. In the case of Vadilal Chemicals Ltd. Vs. The State of Andhra Pradesh and Others, , the Supreme Court while considering a similar question, observed that the exemption was granted with a view to give a fillip to the industries in the State. It was further observed that a liberal interpretation of the term "manufacture" should have been adopted by the State authorities, more particularly, when the State authorities had granted the certificate of eligibility after due consideration of the facts. The Hon"ble court proceeded to hold as

follows:

Further more, under the incentive scheme in question, there was only one method of verifying the eligibility for the various incentives granted including sales tax exemption. The procedure was for the matter to be scrutinized and recommended by the State Level Committee and District Level Committee and the certification by the Department of Industries and Commerce by issuing an eligibility certificate. There was no other method prescribed under the scheme for determining an industrial unit's eligibility for the benefits granted. The Department of Industries and Commerce having exercised its mind, and having granted the final eligibility certificate (which was valid at all materials times), the Commercial Taxes Department could not go beyond the same. More so when the Commissioner, Sales Tax had accepted the eligibility certificate issued to the appellant and had separately notified the appellant's eligibility for exemption under the 1993 G.O. In these circumstances the DCCT certainly could not assume that the exemption was wrongly granted nor did he have the jurisdiction u/s 20 of the State Act to go behind the eligibility certificate and embark upon a fresh enquiry with regard to the appellant's eligibility for the grant of the benefits. The counter-affidavit filed by the respondents-sales tax authorities is telling. It is said that the Sales Tax Department had decided to cancel the eligibility certificates for sales tax incentives. As we have said the eligibility certificates were issued by the Department of Industries and Commerce and could not be cancelled by the sales tax authorities.

22. A similar view has been expressed by the Supreme Court in the case of Pondicherry State Cooperative Consumer Federation Ltd. v. Union Territory of Pondicherry, [2007] 10 VST 630 SC, wherein the Hon''ble Court while affirming the view taken in Vadilal Chemicals case (supra), has held that as the exemption in that case was granted to all small and large scale industries registered with Director of Industries and since the assessee therein was recognized and certified as a small industrial unit, engaged in the activity of re-packing of edible oil and further since the exemption was granted with the open eyes to that particular industry, the State cannot be allowed to turn around and take a stance that the appellant-assessee was not entitled to the exemption on the ground that it did not manufacture any goods.

23. Coming to the question as to whether the assessing officer had the power to reopen the assessment in respect of the petitioner's Company on mere change of the opinion with regard to the period from which the petitioner's industrial unit is entitled to the benefit of deferment of sales tax on its product, it is seen that such power to reopen the assessment has been provided under Rule 12(8) of the CST (O) Rules, which prescribes that such power of reassessment can be exercised to reopen a concluded assessment, only if the turnover of a dealer for any period has escaped assessment or the dealer has been under assessed. Rule 12(8) of the CST(O) Rules reads as under:

If for any reason the turnover of a dealer for any period has escaped assessment

or has been under-assessed, the Commissioner; may, at any time within five years from the expiry of the year to which the period of assessment relates, call for a return after complying with the provisions of Rule 10, assess the amount of tax due from the dealer and may also direct, in cases where such escapement or under-assessment is due to the dealer having concealed particulars of his turnover or having without sufficient cause furnished incorrect particulars thereof, that the dealer shall pay, by way of penalty, in addition to the tax assessed under this sub-rule, a sum not exceeding one and a half times of the said tax so assessed:

xx xx xx xx xx xx xx xx xx xx xx

24. In the present case, admittedly there being no concealment of turnover by the petitioner Company or discovery of any material particular regarding such turnover for any period and the assessing officer having confirmed the original order of assessment regarding the turnover of the petitioner Company for the years 2000-01, 2001-02, 2002-03 and 2003-04, the impugned orders of reassessment does not satisfy any of the statutory requirements provided u/s 12(8) of the CST (O) Rules, so as to authorize the assessing officer to reopen the assessments already concluded. Further more, the same assessing officer having already accepted the entitlement of the petitioner Company to the benefits of deferred payment of sales tax, in its original assessment orders for the years 2000-01, 2001-02, 2002-03 and 2003-04, which have been confirmed by the appellate authority, it was not open for the assessing authority to reopen the said assessments merely on the change of opinion. Such action of the assessing officer would amount to review of its earlier orders of assessment, which is not permissible in law.

25. The question whether reassessment is permissible on mere change of opinion of the assessing officer came up for consideration before a Division Bench of Delhi High Court in *Hoshyar Singh Suresh Chandra Sarees Pvt. Ltd. v. Commissioner, Sales Tax, New Delhi* and Anr. [2004] 136 STC 173 (Delhi). The Hon"ble Court held as under:

We are also of the opinion that in the instant case there was no fresh material with the assessing officer and there was no information with the assessing officer nor is there anything to show that the assessee concealed some material from the assessing officer so as to enable him to reopen the case. In view of the law which we have discussed above and other decisions it is clear that merely because the assessing officer has changed his opinion, the assessing officer cannot call upon the assessee for reassessment and cannot issue coercive notice.

26. In the case of *Binani Industries Limited v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and others*, [2007] 6 VST 783 (SC), while dealing with the question as to whether the assessing officer had the power to reopen an assessment merely on change of opinion, the Hon"ble Court held as follows:

The issues can be looked at from a different angle. Undisputedly, the 1996 circular was binding on the revenue authorities as is spelt but in the case of April 12, 1996 and October 23, 1999 circulars. The assessments were completed on the basis of the April 12, 1996 circular. Merely because the Commissioner changes his view/ opinion and according to him it was review of the earlier decision that cannot have any effect on any assessment which has been completed on the basis of the 1996 circular.

That being so, the question of reopening the assessment by mere change of opinion is entirely impermissible.

27. In a recent decision in the case of Commissioner of Income Tax, Delhi v. Kelvinator of India Limited, (Civil Appeal Nos. 2009-2011 of 2003), decided on 18.01.2010, the Supreme Court while considering the question whether the assessing officer has the power to re-assess merely on the change of his opinion, under the provisions of Income Tax Act, has proceeded to hold as under:

xx xx xx The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer, xx xx xx

28. Even otherwise, the original orders of assessment for the years 2000-01 to 2003-04, granting deferment of sales tax having stood confirmed in appeals, reassessment was not permissible in law. An assessment order gets merged with the appellate order by operation of the doctrine of merger. If the assessing officer initiates proceeding u/s 12(8) of the CST (O) Rules in respect of an assessment which has merged with the appellate order, it would be without jurisdiction. (See-State of Orissa v. Ugratara Bhojanalaya [1993] 9 STC 76 (Oh.).

For the aforesaid reasons, the impugned orders of reassessment for the years 2000-01, 2001-02, 2002-03 and 2003-04, passed by the Sales Tax Officer, Dhenkanal Circle, Angul, are hereby quashed.

Writ Petitions are accordingly allowed. No costs.

B.P. Das, J.

I agree