

(2005) 11 AP CK 0018

In the Andhra Pradesh High Court

Case No : Tax Revision Case No's. 215, 217, 218 of 2004 and 48, 50 and 88 of 2005 and Writ Petition No's. 922, 5185, 5194, 6848, 6849, 11875, 13804, 15655 of 2004 and 1801, 1802 and 22933 of 2005

Orient Cement

APPELLANT

Vs

State of A.P.

RESPONDENT

Date of Decision : 29-11-2005

Acts Referred:

Citation : (2006) 147 STC 133

Hon'ble Judges : S. Ananda Reddy, J;B. Sudershan Reddy, J

Bench : Division Bench

Advocate : S.R. Ashok for P. Srinivasa Reddy, for the Appellant; A.V. Krishna Koundinya, Special Standing Counsel and Special Government Pleader for Commercial Taxes, for the Respondent

Judgement

S. Ananda Reddy, J.—These tax revision cases as well as the writ petitions are filed by the dealers aggrieved by the orders of the Sales Tax Appellate Tribunal (hereafter referred to as "the Tribunal") as well as the subsequent assessment orders where a common issue arises for consideration of this Court.

2. All the petitioners herein are the dealers under the provisions of the Andhra Pradesh General Sales Tax Act, 1957 (for brevity, "the APGST Act") as well as under the Central Sales Tax Act, 1956 (for brevity, "the CST Act") and are the manufacturers having established their manufacturing units in the State of Andhra Pradesh. In the assessments, all the dealers claimed the benefit of sales tax deferment with reference to the additional turnover in terms of quantity. The claim of the dealers was rejected by the lower authorities, therefore, they preferred appeals before the Tribunal. Before the Tribunal also, the dealers have advanced the contention that the benefit of deferment of sales tax in respect of expanded units have to be computed as and when a particular unit has achieved the base production in terms of quantity as defined under G.O. Ms. No. 108, dated May 20, 1996 and not with reference to either the turnover or with

reference to the level of sales tax paid or payable. But the said contention was not accepted by the Tribunal also. Hence all the dealers are with the present tax revision cases.

3. As identical issue is involved even for the subsequent assessment years and as the decision of the Tribunal is already known, as was decided for the earlier years, the dealers have come up directly with the writ petitions, as according to them, filing of the first appeal and the second appeal are only an empty formality, as the decision of the authorities including the Tribunal is already known. Hence the present writ petitions.

4. The question that arises for consideration in all these batch of tax revision cases and the writ petitions is the meaning to be assigned to the term "base turnover" as contained in para 7 of G.O. Ms. No. 108, dated May 20, 1996 for the purpose of computation of the benefit of deferral sales tax in respect of the expanded industrial units.

5. The term "base turnover" was used in respect of expansion of units, i.e., where the existing units have incurred an additional capital investment, thereby enhanced its capacity of production. The base turnover for this purpose shall be the best production achieved during three years preceding the year of expansion or the maximum capacity expected to be achieved by the industry as per the appraisal made by the financial institution before funding the project, whichever is higher. Before proceeding to consider this aspect, it would be proper to refer to the circumstances under which the said G.O. Ms. No. 108, dated May 20, 1996 was issued.

6. The Government of Andhra Pradesh, in order to encourage industrialisation in the entire State, has evolved various schemes from time to time and incentives were provided to the entrepreneurs, not only for the establishment of new units but also for the expansion of existing units. The incentives were provided by the State in various forms, such as subsidy, deferment or tax holiday on sales tax, rebate in electricity charges, interest subsidy, etc. For the purpose of providing such incentives for industrialisation of the State, Government orders were issued from time to time. In that process, orders were issued in G.O. Ms. No. 498, dated October 16, 1989, which was also preceded by some more G.O.s., which are referred to therein. Under the said G.O. Ms. No. 498, dated October 16, 1989 the Government provided investment subsidy at varying rates depending upon the backwardness of different districts in the State, apart from providing deferment/tax holiday on sales tax. Under the said G.O., all the districts in the State are classified into two categories, viz., Srikakulam, Anantapur and Adilabad are classified under one category where the benefit was extended up to 100 per cent while in respect of other districts, the benefit of deferment/tax holiday was extended from 50 per cent to 75 per cent of the fixed capital investment, and in both the cases, the period was ten years in respect of medium and large scale industries, while in the case of small-scale industries, the period of tax holiday was for five years in respect of the units established in the entire State as a

single unit. There was no provision of any benefit in respect of expanded units. The benefits under G.O. Ms. No. 498, dated October 16, 1989 are applicable only to the new industrial units which are holding valid registration/letters of intent and have taken steps for the first time on or before October 3, 1989 and the said G.O., shall be in force till October 2, 1992.

7. The abovesaid G.O. was followed by G.O. Ms. No. 117, dated March 17, 1993, which is effective from October 3, 1992 till March 31, 1997. The said G.O. was issued in the light of the new Industrial Policy Statement-1992 commenced in May, 1992. Under this Co., all the districts within the State, except the areas covered by the corporation, are classified into three areas for the purpose of conferment of the benefits and with reference to Area-I, 20 per cent of the total cost not exceeding Rs. 20,00,000 by way of investment subsidy; while in respect of Areas-II and III, it was only 15 per cent. Similarly, with reference to the deferment/tax holiday on sales tax, Area-I is entitled for 100 per cent of the fixed capital cost for a period of ten years, while in respect of Area-II, it was restricted to 75 per cent of the fixed capital for the same period ; and in respect of Area-III, it was 50 per cent for the same period ; while tax holiday was restricted to for a period of five years in respect of all the three areas subject to a ceiling of 100 per cent on fixed capital cost or Rs. 35,00,000 whichever is less. The deferred sales tax in respect of large and medium scale units have to be paid back in lump sum at the end of the tenth year with stipulation of belated payment with interest at 21.5 per cent. This G.O. also provides the benefits for expansion/modernisation/diversification of the industrial units, provided where the enhancement of capital investment is more than 25 per cent resulting in enhanced capacity by 25 per cent of the products. But however, the deferment period of ten years was restricted from the date of deferment in the original unit. The said G.O. Ms. No. 117, dated March 17, 1993 was followed by G.O. Ms. No. 386, dated September 26, 1994 which is stated to have been issued by way of amendment on the representations with reference to the terms contained in G.O. Ms. No. 117, dated March 17, 1993 in respect of the benefit conferred on the expansion/modernisation/diversification projects and in this G.O., Government has defined the various terms, which were used in the earlier G.O. Ms. No. 117, dated March 17, 1993. It was also provided that with reference to the expansions, the benefit shall be for a period of five years from the date of commencement of the commercial production to expansion/modernisation/diversification at the varying rates with reference to different areas, i.e., 100 per cent in respect of Area-I; 75 per cent in respect of Area-II; and 50 per cent in respect of Area-III. Subsequently, G.O. Ms. No. 34, dated January 31, 1996 was issued on the representation of the Commissioner of Industries, by way of amendment, defining the term "base turnover" as under:

Base turnover : The best production achieved during three years preceding the year of expansion or the maximum capacity expected to be achieved by the industry as per the appraisal made by the Financial Institution before funding the project, whichever is higher.

8. Again, the Government issued G.O. Ms. No. 75, dated March 14, 1996 which is also stated to have been issued by way of clarification as sought for by the Commissioner of Commercial Taxes and the relevant portion of the clarification reads as under:

After careful examination of the matter, Government hereby clarify that "tax deferral would be only on the amount of tax payable on additional local sales over and above the previous level of local sales before expansion. In case the local sales after expansion is less than or equal to the previous level, the actual tax liability on such lower sales will be payable and there will not be any scope for tax deferral as there would not arise any additional tax liability.

9. While so, the Government has come up with a new industrial policy called "TARGET-2000" and issued G. O. Ms. No. 108, dated May 20, 1996. Under this G.O., all the districts in the State excluding the areas covered by the Corporations have been treated as a single unit for the purpose of granting the benefit of incentives. In this G. O., reference was made to almost all the earlier G. Os., that were issued, except G. O. Ms. No. 75, dated March 14, 1996 and observed that in modification of all the earlier orders, the Government have decided to introduce the new industrial policy. In this G. O., investment subsidy was provided up to 20 per cent of the fixed capital not exceeding Rs. 20,00,000. Deferment and tax holiday is provided to the extent of 135 per cent of the fixed capital without any ceiling. Deferment was provided for a period of 14 years, while tax holiday was for a period of seven years. In respect of the deferment, deferred tax of the first year has to be repaid at the end of the 14th year without interest, and the deferment of the second year shall be paid in lump sum at the end of 15th year and so on. This is in variance with the earlier scheme where the deferred tax was payable in lump sum at the end of the deferred period of ten years. Rebate in electricity charges was provided to the extent of 25 per cent in power bills, for a period of three years, subject to a maximum of Rs. 50,00,000 in respect of large and medium scale units ; and Rs. 30,00,000 in respect of small-scale industries. Benefits to expanded projects is referred to in para 7 and as the same is under consideration now, the same is extracted hereunder:

7.00 Expansion projects.-Existing industrial units, in eligible areas, setting up expansion project in products other than those listed in annexure, involving enhancement of fixed capital investment by at least 25 per cent as well as enhancement of capacity by 25 per cent for the products of the same product-line, will be eligible for sales tax deferral or sales tax exemption for the enhanced turnover above the base turnover as defined for a period of 14 years or 7 years respectively, subject to a ceiling of 135 per cent of additional fixed capital investment made, from the date of commencement of commercial production by the expansion project. Base turnover for this purpose shall be the best production achieved during three years preceding the year of expansion or the maximum capacity expected to be achieved by the industry as per the appraisal made by the financial institution before funding the project, whichever is higher.

The same limits and conditions as specified in paras 6.03 and 6.05 above will apply.

10. This Scheme was effective from November 15, 1995 and was in operation up to March 31, 2000.

11. Pursuant to G.O. Ms. No. 108, dated May 20, 1996 all the petitioners were granted eligibility certificates with reference to their expansion projects conferring the benefit of deferment of sales tax to the extent of 135 per cent of the capital investment effected by them. Thereafter, in respect of their production in the expanded capacities, the petitioners claimed the benefit of deferment of the sales tax payable by them. This claim was, however, either rejected or restricted to a lesser amount while framing the assessments. During the course of assessment proceedings the petitioners/dealers claimed that they are entitled for the deferment benefit in terms of the G.O. Ms. No. 108, when once they crossed the base production level as contemplated under the G.O. Negating the said claim, the departmental authorities framed assessments taking the stand that the dealers are entitled for the benefit of deferment of sales tax not only after crossing the base level turnover but also if they exceed the level of sales tax both under the Andhra Pradesh General Sales Tax Act as well as the Central Sales Tax Act and not otherwise. Accordingly, the assessments were framed. Even before the Tribunal though the dealers were successful insofar as the Central sales tax level fixed by the authorities, but the Tribunal also took the view that the dealers have not only to comply with the base turnover in terms of eligibility certificate but also required to comply with the level of local sales tax payment and it is only thereafter, the dealers are entitled for the benefit of deferment. The said view is assailed by the dealers in the present proceedings.

12. The contention of the learned Senior Counsel Sri S.R. Ashok, appearing for the petitioners/dealers is that G.O. Ms. No. 108 was introduced though in modification as is read in the G.O., but totally a new industrial policy was laid and in that sense the said G.O., is totally an independent and complete code by itself conferring benefits and there is absolutely no need to refer to any of the earlier Government Orders issued for providing such benefits to provide any benefit contemplated under the present scheme. The learned Counsel contended that the G.O. provides all types of benefits that are intended to be provided to the industrial units by the State Government in its avowed object of industrialisation of the State. When the said G.O. provides every aspect of the matter wherever the State intended to benefit the industrial units, there is absolutely no necessity to treat G.O. Ms. No. 108 as part and parcel of the earlier G.O., issued for providing similar such benefits. The learned Counsel also referred to various clauses of the said G.O., dealing with different aspects, and in fact, contended that even with reference to the benefits to be conferred on the expansion projects, a definition has to be provided in respect of the base turnover vis-a-vis the expanded capacity of the unit in a different language than what was provided in G.O. Ms. No. 386, as clarified in G.O. Ms. No. 75. Therefore, there is

absolutely no justification for the departmental authorities to fall back on G.O. Ms. No. 386 or G.O. Ms. No. 75 to gather any meaning different from what is provided in its language, as contained in G.O. Ms. No. 108. The learned Counsel contended that the restrictions that are contained with reference to the benefit of deferment or tax holiday in respect of the expansion units are the requirement of a minimum investment of 25 per cent of the existing fixed capital as well as 25 per cent of the capacity increase in production, so as to get the benefit of deferment for a period of 14 years or tax holiday of 7 years subject to a ceiling of 135 per cent of the additional fixed capital investment made. Therefore, the learned Counsel contended that the stand taken by the departmental authorities as agreed to by the Tribunal is illegal and not based on any supporting material.

13. The learned Counsel also contended by referring to the counters filed on behalf of the Commercial Tax Department as well as the Industries Department that a different and exactly opposite stands have been taken, which clearly shows that the Commercial Tax Department was treating the G.O., as if it was only intended to gather the revenue to the State and not as providing industrial incentives for the industrialisation of the State. The learned Counsel also contended that the counter filed by the Assistant Director of Industries on behalf of the Commissioner of Industries clearly refers how the Industries Department understood the G.O. Ms. No. 108 for the purpose of granting the benefit of deferment in respect of the expanded units. It clearly supported the stand of the petitioners that the benefit of the G.O., for exemption or deferment is available if the unit crosses the best production in terms of the quantity fixed under the eligibility certificate. In the counter it was also specifically mentioned that the sale of the base turnover whether within the State or outside the State is immaterial. It was categorically admitted that with reference to G.O. Ms. No. 108 there is no mention of maintaining local sales and the unit is entitled to avail the sales tax benefit on achieving the base turnover of 25,000 metric tones with reference to the petitioner in W.P. No. 922 of 2004, viz., M/s. Sanghi Polyesters. The learned Counsel also contended that the Commercial Tax Department took totally a different and opposite view, stating that the base turnover should be with reference to the turnover in terms of value apart from the fact that the unit has to comply the local sales level as well as the sales level on inter-State transactions. The learned Counsel also contended that even though this Court has specifically directed the Commissioner to file a counter, as earlier counters were filed by the assessing officers, specifying the stand of the State, but, however, the Commissioner filed a counter expressing his own view without reference to the stand of the Industries Department, As per the stand of the Commissioner, since all the earlier G.Os., referred to while issuing G.O. Ms. No. 108, the contents of G.O. Ms. No. 108 cannot be read in isolation but has to be read along with other Government orders, and if so read, the best production must be interpreted to mean the turnover for the purpose of levy of tax, that is to say, in terms of monetary value but not production on quantity wise. This has been the constant view of the Government in the matter of tax incentives. The

learned Counsel, therefore, contended that the Commissioner has filed the counter without reference to the stand of the Industries Department presuming that he is alone representing the State with reference to the tax incentives, which is not even in conformity with the view taken by this Court, where it was held that G.O. Ms. No. 108, dated May 20, 1996 is a self-contained one, taking a contrary view both with reference to the base turnover as well as with reference to the local level of sales required to be made by the industrial units.

14. The learned Special Standing Counsel for the Commercial Taxes, Sri A.V. Krishna Koundinya, supported the stand of the department. The learned Counsel refers to the orders of the Tribunal and reiterated the stand of the Tribunal on the premise that series of Government orders are issued from time to time in modification of the earlier Government orders for the benefit of granting industrial incentives. The learned Counsel contended that the words used in G.O. Ms. No. 108 also indicate that the said G.O., was issued in modification of the earlier Government orders referred to therein, where all the Government orders are referred to. Therefore, the order in question is not an independent and altogether a new one, but was introduced in modification of the earlier schemes of the industrial incentives. The learned Counsel also contended that since G.O. Ms. No. 386 was referred specifically in G.O. Ms. No. 108 and further as G.O. Ms. No. 75 was issued clarifying certain aspects of G.O. Ms. No. 386, even in the absence of any specific reference to G.O. Ms. No. 75, the same would equally apply for the purpose of ascertaining the meaning of the "base turnover", which term has been used not only in G.O. Ms. No. 386, but also in G.O. Ms. No. 108, which was explained in G.O. Ms. No. 75. Therefore, it is not open to the petitioners to contend that the earlier Government orders have no application while considering the benefit of incentives under G.O. Ms. No. 108, and if all Government orders are read together, it is very clear that the "base turnover" would mean only the turnover in terms of the G.O., the best production preceding the three years of the expansion, and further that the dealer has not only to produce but also effect sales so as to cross the local level sales as well as the inter-State level to get the benefit of the incentives. If the industrial unit merely produces the quantity of goods, as claimed, the said unit is not entitled to the benefit of incentives unless and until the said produced goods is sold and the tax at the previous level is paid to the State. It is also the stand of the department that in order to get the benefit of incentives the industrial unit has to pay the sales tax at the higher level than it had during the period of three years immediately preceding the expansion. Therefore, the learned Counsel sought to reject the claim of the dealers.

15. From the above, it is to be considered whether the "base turnover" referred to in respect of expansion units would mean the turnover in quantity of the goods or in terms of its monetary value?

16. Before considering the said issue it would be proper to refer to the language used in para 4 of the G.O. Ms. No. 108. It reads,-

After careful review and examination of the package of incentives and all the other connected factors, in modification of all the earlier orders, Government have decided to introduce a New Industrial Policy, called "TARGET-2000" in order to accelerate industrial development of the State and issued it.

17. From the above it is clear that G.O. Ms. No. 108 was issued in modification of the earlier orders of Government. The word "modification" means-"a change made" (as per the Concise Oxford Dictionary, X Edition) ; "an alteration that does not change the general purpose and effect of that which is modified" (as per West's Legal Thesaurus/Dictionary) ; and, "a change and alteration or amendment, which introduces new element into the details or cancel some of them but leave the general purpose and effect of the subject-matter intact" (as per the Judicial Dictionary-by Justice L.P. Singh and P.K, Majumdar). If we consider the said meaning of "modification" with reference to other words used in the said para 4, it is clear that this scheme has been introduced in modification of the earlier schemes as a new industrial policy. Further from the body of the order also it is clear that wherever the Government felt it necessary to refer to the earlier G.Os., it had specifically referred to the earlier G.Os., such as to G.O. Ms. No. 149, dated March 31,1993; G.O. Ms. No. 238 dated November 26, 1993 ; G.O. Ms. No. 1331 dated April 13, 1994. Therefore, it would not be proper for the Commercial Tax Department to contend that the G.O., has to be read together with the earlier G.Os., in order to ascertain with reference to what the industrial incentives are to be extended. Further, the "base turnover" was defined in G.O. Ms. No. 386 differently with that of the definition contained in the present G.O. As per G.O. Ms. No. 386, the term "base turnover" : "The best annual turnover in terms of value in the preceding three years period to expansion/modernisation/diversification is termed as base turnover". In fact, this was amended by G.O. Ms. No. 34, dated January 31, 1996 and the same reads : "The best production achieved during three years preceding the year of expansion or the maximum capacity expected to be achieved by the industry as per the appraisal made by the financial institution before funding the project, whichever is higher." This was again clarified in G.O. Ms. No. 75, and the said clarification reads : "After careful examination of the matter Government hereby clarify that "tax deferral would be only on the amount of tax payable on additional local sales over and above the previous level of local sales before expansion. In case the local sales after expansion is less than or equal to the previous level, the actual tax liability on such lower sales will be payable and there will not be any scope for tax deferral as there would not arise any additional tax liability." While coming to the G.O. Ms. No. 108, the term is defined as "base turnover" for this purpose shall be the best production achieved during three years preceding the year of expansion or the maximum capacity expected to be achieved by the industry as per the appraisal made by the financial institution before funding the project, whichever is higher.

18. A perusal of the above variations and modifications brought out from time to time clearly shows that the "base turnover" was defined differently from that of

the earlier definitions given in various earlier orders. If it was the intention of the Government that what is provided in the earlier Government orders have to be read into, nothing prevented the State Government to adopt the same as is clarified in G.O. Ms. No. 75. In fact, even under G.O. Ms. No. 386, the State Level Committee was given liberty to adopt in the place of production, turnover in value. But no such liberty was provided either to the State Level Committee or to any other authority. Further, there is a lot of variation with reference to the term "base turnover" as defined in G.O. Ms. No. 386 vis-a-vis G.O. Ms. No. 108. G.O. Ms. No. 386 refers to the best annual turnover in value, but whereas in the present orders it provides only best production achieved, which signifies that the best production only in terms of the quantity of the goods that is being produced by the industrial unit. Further, if the turnover is fixed in terms of the value in the normal circumstances in view of the inflationary trends, one could reach production level fixed for the subsequent years even with a little less production level than what was earlier. But only in exceptional circumstances, where there is a fall in the value of the goods produced a situation may arise, that in order to reach the earlier level of turnover fixed a unit has to produce more in terms of quantity of the goods, which is not intended by the State, while conferring the incentives to the industrial units.

19. In fact, at the time of hearing, though we have specifically asked the counsel appearing for the department to specify which part of the earlier Government orders are applicable or which part of the earlier G.O., can be treated as part of the present G.O., to consider any specific benefit the learned Counsel was not able to specify the same, which would go to show that though the G.O., reads as if it was issued in modification of the earlier G.Os., but the scheme of incentives provided under this G.O., is totally new and independent containing all the terms as required for the determination and conferment of incentives. In fact, a division Bench of this Court to which one of us (BRSR, J.) was a party, on an earlier occasion in *Shv Energy South East Ltd. v. State Investment Promotion Board* [2004] 136 STC 100: [2003] 36 APSTJ 37, while considering the terms of this G.O., held that the G.O., is a complete code by itself covering all the areas where the State intended to grant or extend the benefit of incentives. Further, when a totally different definition was adopted as to the "base turnover" in the present G.O., there is absolutely no justification for the Department to rely upon the different definition provided in G.O. Ms. No. 386, which was further clarified in G.O. Ms. No. 75 to deny the benefits of tax deferral in respect of the expanded units. By the Government order what is contemplated is only that the unit has to achieve the "base turnover" as is contemplated under the Scheme, which is the best production within three years preceding the expansion or the maximum capacity expected to be achieved by the industries as per the appraisal made by the financial institution and not with reference to any turnover in terms of monetary value. The Co., also has no reference to any level of sales to be effected either locally or inter-State. A dealer would effect sales as per the markets" demands in its best interest and it would be impossible and

impracticable to fix up any levels of local sales or any other sales for conferring the benefit of incentives, and, in fact, no such restriction can be assumed or presumed in terms of the Co., as there is no such reference at all.

20. Under the above circumstances, the stand taken by the department as accepted by the Tribunal that the unit has to achieve the local level of sales in order to get the benefit of deferral is clearly illegal and unsustainable; as no such restriction is contemplated under G.O. Ms. No. 108. We, therefore, set aside the impugned orders of the Tribunal as well as the assessments and direct the assessing authorities to compute the benefit of deferral in sales tax taking into account the "base turnover" as best production in terms of the quantity of the goods produced or expected to be produced in terms of para 7 of the G.O.

21. In the result, the tax revision cases filed by the petitioners-assesseees and the writ petitions are accordingly allowed to the extent indicated. The tax revision cases filed by the department are accordingly dismissed. No costs.

22. That rule nisi has been made absolute as above.