
(2003) 04 KL CK 0006

In the High Court Of Kerala

Case No : O.P. No's. 32947 and 32807 of 2000 and 23472 of 2001

Peekay Re-Rolling Mills (P.) Ltd.

APPELLANT

Vs

Secretary to Government and Others

RESPONDENT

Date of Decision : 10-04-2003

Acts Referred:

Kerala General Sales Tax Act, 1963 — Section 10, 10(3), 2

Citation : (2004) 138 STC 198

Hon'ble Judges : C.N. Ramachandran Nair, J

Bench : Single Bench

Advocate : C. Natrajan and V. Giri, for the Appellant; Raju Joseph, Special Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

C.N. Ramachandran Nair, J.—The issue involved in the three original petitions filed by the very same petitioner is one and the same and therefore the Original Petitions are heard together and I proceed to dispose of the same by this common judgment.

2. I have gone through the original petitions, counter-affidavit filed by the Government, the reply and documents filed by the petitioner and I have heard Senior Counsel, Sri C. Natarajan, and Advocate, Sri V. Giri, for the petitioner, and Sri. Raju Joseph, Special Government Pleader for the respondents. The parties, and exhibits referred to in this judgment are in relation to O.P. No. 32947 of 2000.

3. The petitioner is a medium scale industrial unit engaged in the manufacture of iron ingots, iron rods and bars. Petitioner obtained registration of its industry with the Government of India under exhibit P1 dated September 6, 1991. The industry was first set up to solely manufacture iron rods and bars from ingots procured by the petitioner elsewhere. Petitioner being a new medium scale industrial unit was entitled to sales tax exemption on the products manufactured

by it for a period of seven years from the date of commencement of commercial production based on the investments made in building, plant, machinery, etc., under exhibit P2 notification. The petitioner started commercial production on March 31, 1995 and based on petitioner's application sales tax exemption was also granted on the investments made vide exhibit P3 proceedings dated December 19, 1997. The total sales tax exemption granted was for Rs. 2,65,70,965 and the period of exemption was from March 31, 1995 to March 30, 2002. However the grievance of the petitioner is against disallowance of sales tax exemption for additional investments made in the setting up of scrap iron melting unit for making iron ingots which is the raw material for manufacture of iron rods and bars. According to the petitioner the additional investments under the Backward Integration Scheme will also qualify for sales tax exemption in terms of exhibit P2 notification. However, the third respondent disallowed petitioner's claim for sales tax exemption on additional investments based on notification, G.O. Ms. No. 149/93/ID dated November 26, 1993, produced as exhibit P8, whereunder "power intensive units" were brought under negative list disabling such industries whether new or existing ones on expansion, modernisation or diversification from claiming sales tax exemption, state investment subsidy, electricity tariff-concession, and other incentives from the Government. Final order under challenge is exhibit P12 whereunder the petitioner's claim for sales tax exemption for additional investments under expansion/diversification scheme was disallowed by the State Level Committee headed by the Director of Industries and Commerce. Eventhough two other original petitions filed by the petitioner were disposed of by this Court earlier, there was no decision touching upon the merit of the claim and therefore the matter is getting decided by this Court on merits only now.

4. The first contention raised by the petitioner is that petitioner is entitled to sales tax exemption on the value of entire investments in plant, machinery, etc., made during the course of seven years commencing from the date of commencement of commercial production under exhibit P2 notification issued by the Government u/s 10 of the KGST Act. According to the petitioner, exhibit P8 and the amendment to it vide exhibit P9 and the clarification issued to the notifications do not have the effect of amending exhibit P2 notification, and therefore the petitioner's rights under exhibit P2 are not affected by these notifications. Special Government Pleader, on the other hand, contended that Section 10(3) of the KGST Act gives specific power to the Government to cancel or modify any notification issued u/s 10(1) of the Act and therefore the modifications or amendments effected vide exhibits P8 and P9 will have the effect of amending exhibit P2. According to him, the very same issue came up before the Supreme Court in Pournami Oil Mills and Others Vs. State of Kerala and Another, , where in the Supreme Court held that when the Government has statutory power to issue a notification, any notification issued without reference to such provisions of the statute should be deemed to be issued in exercise of such power. It is seen from exhibit P8 that the said notification was issued not

only for withdrawing sales tax exemption but also for withdrawing various Government incentives such as financial assistance, concession in electricity tariff, sales tax exemption, etc. When a comprehensive notification is issued dealing with various subjects, it is not possible for the Government to refer the provisions of one statute alone and therefore so far as withdrawal of sales tax exemption is concerned, exhibit P8 notification should be taken to have been issued u/s 10(3) of the KGST Act and will have the effect of amending exhibit P2 and going by the above decision of the Supreme Court, the petitioner's argument to the contrary cannot be sustained and therefore I reject this contention. Petitioner has also relied on the decision of the Supreme Court in K.M. Chikkaputtaswamy and Others Vs. State of Andhra Pradesh and Others, , for the proposition that notification granting exemption cannot be cancelled or withdrawn, except by issuing another notification. In this context, there is no dispute that exhibit P8 was published by the Government in the gazette even though Sub section (3) of Section 10 is not referred to therein. I do not think petitioner's contention can be accepted particularly in view of the decision of the Supreme Court in Pournami Oil Mills" case (supra) referred above.

5. The next contention raised by the petitioner is that exhibit P8 does not affect the petitioner because of exhibit P10 clarification of the Government stating that exemption will continue to be available to all industries which were provisionally registered before December 31, 1993. According to the petitioner, it is further stated in exhibit P10 that so far as medium scale industrial units are concerned, the date of provisional registration is SIA registration obtained by the unit which in the case of petitioner is exhibit P1 registration dated September 6, 1991. Therefore the contention of the petitioner is that since the petitioner has obtained SIA registration from the Government of India prior to December 31, 1993, petitioner is entitled to get sales tax exemption and other incentives on investment made after withdrawal of exemption by exhibit P8 notification. I do not think this position canvassed by the petitioner will help the petitioner to get exemption for additional investments made under expansion/diversification scheme after the withdrawal of such benefits under exhibit P8. The relevant clause of exhibit P8 which applies to the petitioner is as follows :

3. Expansion/modernisation/diversification of existing units in the areas included in the list above shall also not be eligible for any financial assistance/loan/tax exemption from Government unless application has been made by the unit for the purpose and received on or before the cut-off date, viz., December 31, 1993.

It is clear from the above that eventhough notification withdrawing sales tax exemption and other benefits vide exhibit P8 is dated November 26, 1993, the benefits will be available on additional investments only if the investments are made and application made before December 31, 1993. In other words, notification eventhough provides for withdrawal of exemption, it has given reasonable time and opportunity to those industries which were engaged in expansion/ modernisation/diversification to complete the same and to make the

application before December 31, 1993 to avail the benefit, inspite of the withdrawal of exemption. Therefore the Government ensured that those who were in the process of making investments should not be denied the benefit without advance-notice. So much so, clause (3) of exhibit P8 is only a beneficial provision which gives more than one month's time from the date of notification to industries to complete the additional investments and claim the benefit on such additional investments to get the benefit. So far as the petitioner is concerned, petitioner cannot have any grievance because the petitioner's all investments were granted exemption vide exhibit P3 proceedings and disallowance is only in respect of additional investments made after July 1, 1995, that is two years after the publication of the notification disabling industries in the negative list from claiming exemption and incentives on such additional investments. In fact it is pertinent to note that petitioner made additional investments in plant and machinery under expansion/diversification scheme only after power intensive units were brought under the negative list vide exhibit P8 notification. Therefore the petitioner which made additional investments knowing fully well that power intensive units are not entitled to sales tax exemption on such additional investments cannot put forward this contention. In fact the benefits of exhibit P10 clarification is already granted to the petitioner because the petitioner was allowed to enjoy the sales tax exemption on all investments upto July 1, 1995 for the full period of seven years from March 31, 1995 to March 30, 2000 in spite of withdrawal of exemption vide exhibit P8 on November 26, 1993. Clause (3) of exhibit P8 only means that those industries which have been registered before December 31, 1993 can avail the benefit for the investments made till then and additional investments made thereafter by the industries brought under the negative list will not qualify for exemption. In fact the petitioner's industry was not in the negative list an on the date of exhibit P8 notification, but came under the negative list only by virtue of additional investments made by the petitioner after July 1, 1995 under the Backward Integration Scheme which has increased its contract demand from 1,500 KVA to 4,500 KVA. Therefore it is not a question of existing industry in the negative list making additional investments and claiming sales tax exemption thereon, but by making additional investment the petitioner brought its industry in the negative list. The whole effort of the petitioner is only speculative because petitioner at the time of investment made after July 1, 1995 knew very well that no incentive including sales tax exemption will be available to it as such additional investment.

6. The next contention raised by the petitioner is that petitioner's industry is not a power intensive industry because it's cost of production attributable to cost of power is less than 25 per cent. The clause pertaining to this issue in exhibit P8 is as follows :

7. Power intensive units based on electro thermal/electro chemical processors or units where total power requirement exceeds 2,500 KVA of contract load and where cost of power is more than 25 per cent of cost of production of the items manufactured except where the units generate there power requirements in

excess of 2,500 KVA of contract load by own captive power.

The above clause has been clarified by the Government under exhibit R3(a) produced along with the counter-affidavit in the following lines :

(a) All the units based on electro thermal/electro chemical processes are not coming under the negative list.

(b) Units having total connected load more than 2,500 KVA but cost of power is less than 25 per cent of cost of production are coming under negative list.

(c) Units having total connected load less than 2,500 KVA but cost of power is more than 25 per cent of the cost of production are also coming under negative list.

(d) The units having total connected load of less than 2,500 KVA and also cost of power less than 25 per cent of the cost of production will not come under negative list.

According to the petitioner, the State Level Committee has rejected the petitioner's claim based on the clarification, which should not be applied to the petitioner. In support of this contention petitioner has produced statement prepared by the Auditor on the cost of production showing the cost of production attributable to power charges below 25 per cent of the actual production cost. The activity of the petitioner is melting iron scrap in electric furnace to make ingots and to draw up iron rod and bars from ingots by issuing power. It is a very strange proposition that the cost of conversion with the sole aid of power attributable to power charges is less than 25 per cent of the actual production cost. Another interesting aspect is that the electricity tariff rate applied by the petitioner in this accounting jugglery on production cost is the pre-1992 tariff. Anyhow there is no need to go into the correctness of this fantastic and apparently unrealistic working on "production-cost" because going by the interpretation I assign to the relevant clause in exhibit P8 referred above, the issue can be decided with reference to connected load and not cost of production attributable to power charges. Even though the word "and" is used in clause 7 of exhibit P8, I do not think the two conditions namely, "contract load at above 2,500 KVA" and the "cost of power at more than 25 per cent" of the cost of production have to be cumulatively applied to treat a unit as a power intensive unit. I feel the meaning assigned to this clause in exhibit R3(a) clarification is consistent with the object of the notification and unless the word "and" is given a disjunctive meaning, the same will defeat the purpose of the notification itself. It has been held in the case reported in A.G. Beauchamp (1920) 1 KB 650 and R.V. Oakes (1959) 3 All 92 that if a literal reading of the word produces an unintelligible or absurd result "and" may be read for "or" and "or" for "and" eventhough the result of so modifying the words is less favourable to the subject provided that the intention of the Legislature is otherwise quite clear. (See page 272 of Chapter V of "Principles of Statutory Interpretation" by Justice G.P. Singh). The contract load in the case of the petitioner on diversification/

expansion has increased from 1,500 KVA to 4,500 KVA. There is no dispute that the general presumption under clause (7) of exhibit P8 is that industrial units having a contract load above 2,500 KV are treated as "power intensive units" and all that the subsequent limb of clause says is that eventhough the contract load is below 2,500 KVA the unit will be treated as power intensive unit if 25 per cent or more of cost of production accounts for power charges. Therefore the clarification in exhibit R3(a) is consistent with the object and meaning of the notification and the petitioner's contention that its cost of production attributable to power charges is below 25 per cent of the total cost of production assume it is so does not merit any consideration. Admittedly petitioner has increased the contract load from 1,500 KVA to 2,500 KVA with connected load of 4,402.1 KW and therefore I hold that the petitioner is a "power intensive unit" brought under the negative list by exhibit P8 and the meaning of exhibit P8 is the same even without the clarification. Therefore the petitioner's contention on this also is not acceptable.

8. The petitioner has also relied on the principle of promissory estoppel and relying on many decisions including the decision of the Supreme Court in I.T.C. Bhadrachalam Paperboards and Another Vs. Mandal Revenue Officer, A.P. and Others, the petitioner contended that since the petitioner is registered before exhibit P8 notification, petitioner is entitled to full benefit under exhibit P2. In other words, petitioner cannot be disallowed sales tax exemption on additional investments made. I do not think, there is any violation of principle of promissory estoppel at least so far as the petitioner is concerned. The petitioner is granted sales tax exemption vide exhibit P3 dated December 31, 1997 for all investments made till the industry commenced commercial production. In fact petitioner came under the negative list of industries only after the petitioner made additional investments after July 1, 1995. The additional investments were made by the petitioner after being well aware of the fact that by virtue of exhibit P8, the petitioner on making additional investments will become a "power intensive unit" making it ineligible to claim government incentives including tax exemption. Since additional investments were made much after exhibit P8 notification, it was open to the petitioner to challenge the notification before the additional investments were in fact made and to make investments only if the petitioner succeeds in such challenge. On the other hand, petitioner after withdrawal of sales tax exemption went on making additional investments thereby making it a "power intensive" unit in the negative list for benefits, cannot later claim exemption based on promissory estoppel because when the additional investments were made there was no promise as exhibit P2 stood amended by exhibit P8. Therefore the principle of promissory estoppel will not come to the rescue of the petitioner, which has brought itself in the negative list for incentives by making additional investments, and because all the additional investments were made after withdrawal of sales tax exemption and other incentives. The withdrawal of exemption vide exhibit P8 notification also cannot be challenged because Section 10(3) specifically authorise the Government to

withdraw or modify exemption notification issued u/s 10(1) of the K.G.S.T. Act. Since in petitioner's case the withdrawal applies prospectively and after due notice, the petitioner cannot make additional investments after withdrawal of sales tax exemption and then claim principle of promising estoppel based on earlier notification which stand modified.

In the circumstances, original petitions fall and are dismissed. However, in view of the huge amount of tax involved petitioner is granted ten weeks' time to clear arrears of tax.

Order on CMP No. 11708 of 2001 in O.P. No. 32947 of 2000 (V) dismissed.

Order on CMP No. 56006 of 2000 in O.P. No. 32807 of 2000 (E) dismissed.

Order on CMP No. 38472 of 2001 in O.P. No. 23472 of 2001 (T) dismissed.