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(2013) 01 RAJ CK 0121

In the Rajasthan High Court

Case No : Civil Writ Petition No. 9645 of 2009

Rama Phosphates Ltd. APPELLANT

Vs

State of Rajasthan and Others RESPONDENT

Date of Decision : 16-01-2013

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2013) 198 ECR 35 : (2013) 2 RLW 1456 : (2013) 58 VST 511 : (2013) 1 WLN 490

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : Tribhuvan Gupta, for the Appellant; V.K. Mathur, for the Respondent

Judgement

Vineet Kothari, J.—The petitioner-company, Rama Phosphates Ltd., has filed the present writ petition challenging the impugned assessment order and the order passed by learned Additional Commissioner (Inspection, Audit and Recovery), Sales Tax Department, Jaipur, annexure 18 dated November 19, 2008, inter alia, denying the benefit of Incentive Scheme, 1987, notified u/s 4 of the Rajasthan Sales Tax Act, 1954. The petitioner-company, upon making eligible investment within the State of Rajasthan was given the requisite eligibility certificate under the said Incentive Scheme, 1987 vide annexure P/3 for the period January 20, 1998 to January 20, 2005 for the eligible investment to the extent of Rs. 390.28 lacs. The petitioner availed of the said benefit of exemption from the sales tax under the said Incentive Scheme in pursuance of the said eligibility certificate granted to it in the contemporary period between January 21, 1998 to January 20, 2005.

2. Thereafter the petitioner-company unfortunately turned sick and was registered with the BIFR under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985, and a scheme of rehabilitation was framed for the petitioner-company by the BIFR constituted under the provision of said Act.

3. After the period of eligibility certificate was over, the respondents-authorities

of Commercial Taxes Department, initiated the impugned assessment and recovery proceedings against the petitioner-company on the ground that during the financial year 2005-06, after the incentive period of the petitioner was over on January 20, 2005, the petitioner-company had made more than 20 per cent of its production as branch transfers of goods for sales outside the State of Rajasthan, namely, SSP (single super phosphate) and GSSP (granulated single super phosphate) by it, and thus it breached the condition No. 4(e) of the said Incentive Scheme of 1987; and therefore, denying the benefit of the exemption under the Incentive Scheme from the sales tax for the past period, which was already availed of by it, the due sales tax was liable to be recovered from the petitioner-company. Accordingly, the assessing authority undertook the assessment proceedings against the petitioner-company and raised demand of tax, interest and penalty against the petitioner. The petitioner-company had to approach, in these circumstances by way of present writ petitions, a batch of 9 writ petitions which are being decided by this common order today.

4. Mr. Tribhuvan Gupta, learned counsel for the petitioner-company in the first instance submits that he does not press the challenge made to the validity of the said clause 4(e) of the Incentive Scheme, 1987 vide prayer clause No. (b) made in the writ petition since he has already made a prayer in the alternative in prayer clause No. (c) that the condition No. 4(e) deserves to be interpreted in the manner that it was only effective for the period of the scheme itself.

5. He further submitted that the Scheme does not restrict or prohibit the extent of branch transfers or sales outside the State of Rajasthan of more than 20 per cent of its production beyond the period of scheme itself. Admittedly, the Incentive Scheme, 1987, had the operative period up to March 31, 1997. He also urged that in the rehabilitation scheme framed by the BIFR under the provisions of the SICA Act, 1985, the State Government has, inter alia, also undertaken to exempt the petitioner-company from the provisions of clause 4(e)(ii) of the Rajasthan Sales Tax Incentive Scheme, 1987, copy of the said rehabilitation scheme is annexure 3 to the writ petition. Mr. Gupta, therefore, urged that since clause 4(e) of the Incentive Scheme does not put any such restriction of not making the branch transfers of the goods manufactured by it over 20 per cent of the total production for all times to come, beyond the period of the scheme or beyond the period of eligibility certificate granted in favour of the petitioner-company, in such circumstances, the whole foundation of the impugned action taken by the respondent-Commercial Taxes Department, against the petitioner-company for raising demand in question on the alleged ground of breach of condition No. 4(e) after the period of incentive was over on January 20, 2005, viz., during the financial year 2005-06, is misconceived and the demands impugned in the writ petition deserve to be quashed. He also submitted that such a restriction cannot be imported or read into the provisions of the Incentive Scheme, 1987 or the eligibility certificate and denying the exemption or benefit of the said scheme, the recovery of arrears of sales tax dues for the past period, cannot be made against the petitioner-company.

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6. Per contra, Mr. V.K. Mathur, learned counsel for the respondent-Revenue raised an objection that despite availability of alternative and efficacious remedy to the petitioner against the assessment order by way of regular appeal, the petitioner has approached to this court under writ jurisdiction, therefore, the writ petition deserves to be dismissed.

7. I have heard learned counsel for the parties at length and given my thoughtful consideration to the rival contentions raised by the learned counsels for the parties and scanned the material placed on record and the statutes including the Incentive Scheme, 1987.

8. The said Incentive Scheme, 1987, under the provisions of section 4 of the Rajasthan Sales Tax Act, 1954, which Act now stands repealed and replaced by the Rajasthan Sales Tax Act, 1994, which also got repealed and replaced by the Rajasthan Value Added Tax Act, 2003, exempted, inter alia, industrial units from payment of tax on the sales from goods manufactured by them within the State to the extent of eligible investment made by them within the State upon grant of eligibility certificate, after scrutiny of its application filed before the competent District Level Screening Committee or the State Level Screening Committee, depending upon the extent of investment. The clause 4(e) of the said scheme relevant for the present controversy reads as under:

Clause 4(e): The deferment of tax referred to above shall be subject to the condition that the beneficiary industrial unit after having availed the benefits of the Incentive Scheme,--

(i) shall continue its production at least for the next 5 years not below the level of the average production for preceding five years; and

(ii) shall not make sales outside the State including branch transfers of the goods manufactured by it exceeding 20 per cent of its total production.

Explanation.--The expression ''sales outside the State'' does not include the sales made in the course of inter-State trade or commerce.

9. The condition as per clause 4(e) for availing of the benefit under the said Incentive Scheme is in two folds. Firstly, that the eligible unit shall continue its production at least for next five years not below the average production for the preceding five years; and secondly that the units shall not make sales outside the State including the branch transfer of goods manufactured by them exceeding 20 per cent of its total production. The purpose of the twin conditions stipulated in this clause is obvious, namely, requiring the industrial unit in question to maintain the average production, so that the industrial investment does not go waste and the average production brings consequential revenue for the State and secondly restricting the branch transfers for making sales outside the State would yield a minimum assured revenue for the State of Rajasthan, if remaining 80 per cent sales are made within the State, such due sales tax on 80 per cent sales was only to be set off against the quantum of incentive

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determined on the basis of eligible investment made by the assessee. It is also noteworthy that clause (i) of sub-clause (e) of clause 4 came to be deleted by the Notification No. F. 12 (12) FD/Tax/07-09 dated April 11, 2007, after the Rajasthan Value Added Tax Act, 2003, came into force, however, sub-clause (ii) of clause 4(e) continued to remain on the statute book during the contemporary period.

10. The significant difference between the two clauses or the twin conditions is that a compliance in the future period of five years was envisaged under clause (i), namely, to maintain the average production for next five years at par with preceding five years; whereas no such time period of future was stipulated in clause (ii) requiring the industrial unit to restrict its branch transfers of goods manufactured by it not exceeding 20 per cent of its total production. Obviously, upon branch transfers of goods, no local sales tax under the State law is imposable on the branch transfers made by the unit and if such sales are made outside the State of Rajasthan later on by dealers concerned outside the State of Rajasthan, that also does not bring any revenue to the State of Rajasthan and that is why such restriction was placed. But, the period during which such restriction could operate is obviously the period of the scheme itself or the period of incentive available to the petitioner-unit for which the requisite eligibility certificate has been granted to it. The period for which the petitioner-unit has been given EC in the present case is January 20, 1998 to January 20, 2005 whereas the operative period of incentive scheme itself ended on March 31, 1997 as per clause (1) thereof since it made eligible investment in the State prior to March 31, 1997 or during the operative period of the Incentive Scheme itself. The scheme was in force for approximately ten years from March 31, 1987 to March 31, 1997 and after its initial period ended on March 31, 1995, it was extended for two years up to March 31, 1997. The State also came out with another incentive scheme known as Sales Tax Incentive Scheme, 1989, also the operative period of which was March 5, 1987 to March 31, 1998.

11. Since the goods are obviously sold upon its production during the contemporary period only, the restriction under clause (ii) of clause 4(e) can be held to be operative only for the period of eligibility certificate itself and not beyond that. The initiation of the proceedings against the petitioner-company in the present case is apparently based on a foundation, which was not available to the respondent-authorities at all. The allegation against the petitioner-company is that it made branch transfers of goods beyond 20 per cent of its production capacity for the financial year 2005-06. Admittedly and indisputably, the period of eligibility certificate of the petitioner-company ended on January 20, 2005. Thus, it was apparently a total misinterpretation and wrong application of clause (ii) of clause 4(e) of the Incentive Scheme of 1987 by the respondent-authorities, to initiate proceedings of recovery of the tax from the petitioner denying the benefit of Incentive Scheme for the past period of which it had already availed of the exemption of incentive scheme under a validly granted eligibility certificate in its favour.

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12. There is no explanation from the side of the Revenue in the reply or in the impugned orders justifying such action against the petitioner-company on this ground, nor any such reason is otherwise discernible from the side of the Revenue.

13. Therefore, this court is clearly of the opinion that the entire case of the Revenue set up against the petitioner-company for withdrawing or denying the benefit of Incentive Scheme, 1987 is based on an erroneous assumption of facts and on a total misinterpretation of clause (ii) of clause 4(e) of the said scheme. The petitioner-company has been unnecessarily made to litigate against all these proceedings for all these years and unfortunately having turned sick is now in the shelter of the SICA Act, 1985, before the BIFR.

14. In this perspective, the contention raised by the learned counsel for the Revenue, Mr. V.K. Mathur, about the availability of alternative remedy to the petitioner-company is not acceptable and the same deserves to be rejected. Moreover, since the highest authority under the Act of the Department side, the Additional Commissioner, had passed the impugned order, the availing of remedy by way of appeal before a lower authority than him against the impugned assessment order would have been meaningless even otherwise.

15. This is besides the legal position that availability of alternative remedy is not a bar of jurisdiction but a rule of discretion while exercising the extraordinary jurisdiction under article 226 of the Constitution of India. Therefore, it has to necessarily depend upon the facts and circumstances of each case, when such a bar of discretion has to be invoked by the court and when it has to be ignored or overcome. In the present case, this court is satisfied that such an objection from the side of the Revenue cannot be sustained. The same is, accordingly, rejected.

16. On merits and upon a purposive interpretation of clause 4(e)(ii) of the Incentive Scheme, 1987, this court does not find any such breach of condition on the part of the petitioner-company and there is no allegation against the petitioner that it made excessive branch transfers of its goods manufactured by it during the period in which it availed of the benefit of incentive scheme or beyond 20 per cent of its total production during the operative period of eligibility certificate. Consequently, this writ petition deserves to be allowed, the same is accordingly allowed. The orders passed by the assessing authority raising demand on this premise, are quashed and the order passed by the Additional Commissioner of respondent-Department, annexure P/18, dated November 19, 2008 is also quashed. All the demands raised against the petitioner-company of tax, interest and penalty on this ground for this period in question in which availed of such benefit of Incentive Scheme, 1987, are also hereby quashed. Costs easy.

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