(2011) 04 GUJ CK 0161

In the Gujarat High Court

Case No : Special Civil Application No. 11754 of 2001

Search Chem Industries Ltd. APPELLANT

Vs

Sales Tax Officer Class-1 and Another RESPONDENT

Date of Decision : 15-04-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 50 VST 76

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : K.H. Kaji, for the Appellant; Maithili Mehta, Assistant Government Pleader, for the Respondent

Judgement

Ms. Harsha Devani, J.—By this petition under article 226 of the Constitution of India, the petitioner has challenged four assessment orders u/s 50 of the Gujarat Sales Tax Act, 1969 (the Act) for the period 1997-98 to 2000-01 levying purchase tax including interest of Rs. 14,05,07,434 and reducing the exemption limit by four per cent on the value of goods consigned to its branch within the State of Gujarat. The petitioner also seeks a direction that the first respondent be permanently restrained from levying purchase tax and interest and reducing exemption limit treating the said transactions as violative of conditions of exemption under entry 255. The facts of the case, as stated in the petition, are that the petitioner is established as a pioneer industry in a backward area of Zaghadia for the manufacture of caustic soda and other related speciality chemicals and for setting up a captive power plant for the purpose. Under the incentive schemes promulgated by the State Government for the year 1995-2000, the petitioner was eligible for various sales tax reliefs by way of sales tax exemption on the purchase of raw materials, processing materials, consumable stores or packing materials and also to exemption in respect of sales of manufactured products. The relevant policy was followed by a notification issued by the State Government u/s 49(2) of the Act containing entry 255 and later entry 69. Initially the petitioner was granted eligibility certificate by the

Industries Commissioner for Rs. 20 crores which came to be increased from time to time and lastly, the same came to be increased to Rs. 157.762 crores and the period of exemption was mentioned as March 25, 1996 to March 24, 2006.

2. The petitioner had applied for registration as pioneer unit at Zaghadia, a backward area in District Bharuch by an application dated June 21, 1994. Later on, it also applied for eligibility certificate. The petitioner was granted registration certificate provisionally by order dated July 25, 1996. Thereafter, the petitioner also informed the Industries Commissioner vide application dated January 10, 1997, that it would install a captive power plant for the project as electricity was a very important component for production of caustic chlorine project as well as the supply by Gujarat Electricity Board (GEB) was not continuous and irregular, it was considered desirable to have a captive power plant for the project. The Industries Commissioner, accordingly, issued a certificate of permanent pioneer registration dated March 5, 1999 under the incentive scheme 1990-95, inter alia, for the project, caustic soda, PCL, 3 Plant (2:4) DPC plant and power plant. The petitioner was also granted sales tax exemption certificate which came to be amended from time to time and lastly such exemption certificate was issued on November 5, 1999 for Rs. 15,762 lakhs.

3. The petitioner purchased various raw materials, processing materials, consumable stores, etc., for the purpose of the project and also purchased naptha as consumable stores for using the same as fuel for the captive power plant. The purchase of naptha was made against form 26 from the selling dealer and on that footing sales tax was payable by the selling dealer at the rate of 1/4 per cent as against the normal rate of 20 per cent. The 1/4 per cent sales tax was reimbursed by the petitioner to the selling dealer and form 26 was supplied. According to the petitioner, its finished products produced by the plant were sold and no sales tax was payable thereon as provided by entry 255(3).

4. The captive power plant was mentioned as one of the items of investment in the petitioner''s application to the Industries Commissioner for the eligibility certificate and it was shown as one of the items in the certificate of permanent pioneer registration dated March 5, 1999. The captive power plant was installed of requisite capacity keeping in view the requirement of electricity in future years with the expansion of the manufacturing plant of the petitioner. According to the petitioner, in the initial stages, the electricity plant produced more electricity than that which could be used by the petitioner in its captive power plant. According to the petitioner, the State Government had issued a list of ineligible industries which could not get the benefit of sales tax incentives under the scheme, one of which was "electricity generation (except captive electricity generation)". It is the case of the petitioner that as the petitioner had installed the captive power plant for use in its own industry, the production of electricity was not a banned industry and did not fall within the list of banned industries. The surplus electricity which remained with the petitioner after the use in its own plant had to be disposed of in accordance with the energy policy of the Government of

Gujarat. The Government of Gujarat by a resolution dated November 9, 1998 provided in detail the disposal of surplus electrical power by industries which had set up captive power plant. In the said resolution, it was provided that with the previous consent of GEB, surplus power could be supplied from such captive power plants to its group companies and sold to GEB as laid down in the said policy. The tariff for supply to the group companies would be on "no profit no loss" basis. Electricity was exempt from sales tax u/s 28 of Schedule I.

5. Thereafter, the petitioner received various notices from the Sales Tax Officer, Gass I, Flying Squad, Unit 1, Ahmedabad, the first respondent herein, in respect of the following two issues:

(i) Purchase of naphtha against form 26 under entry 255 by paying 1/4 per cent tax as against the normal tax of 20 per cent.

(ii) Consigning part of its manufactured product to its branch treating it as deemed sale.

6. Pursuant to the said show-cause notices, the first respondent after affording opportunity of hearing to the petitioner, passed an order u/s 50 of the Act holding as follows:

(VI) Conclusion and decision:

1. The dealer has committed breach u/s 50(1) and therefore he is liable to pay tax on its purchases of naphtha to the tune of the amount saved by effecting purchase at a reduced rate of tax in form 26. This office has calculated the proportionate amount of electricity sold to GEB/UPL and calculated the tax on the proportionate of amount of naphtha purchased in form 26. The calculation has been incorporated in form 39 enclosed herewith.

2. The dealer has effected branch transfer to Vapi unit and such portion has been calculated and purchase tax has derived after considering the proportionate of naphtha and branch transfer. This has been enumerated in the order in form 39.

3. Sr. No. (iii) of Explanation at 19 mentions that the aggregate amount of tax at four on the sale price of the goods transported by the eligible unit to his own place of business shall have to calculated for the purpose of arriving at the limit of tax exemption. Thus it has been decided to reduce the ceiling of tax exemption considering the sale price of sales effected to Vapi unit.

4. The dealer has been issued a notice under sub-section (2) of section 50 to assess the tax liability and therefore it has been decided to finalise the assessment proceedings u/s 50 of the GST Act.

5. Now so far assessment of taxes is considered local Act provides section 41 and section 50 for assessment both the section are independent section. Section 50 of the Act provides charging section and machinery section both. I have therefore decided to pass order u/s 50 of the Act.

6. The order shall be incorporated in form 39 and demand notice shall be issued in form 35.

7. Penalty u/s 45(6) shall be levied at the time of assessment of complete year.

7. Being aggrieved, the petitioner has filed the present petition challenging the aforesaid order.

8. Mr. K.H. Kaji, learned advocate for the petitioner, invited attention to the provisions of the Scheme to submit that to the extent of raw material used by an eligible unit in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat, the petitioner, an eligible unit was entitled to the benefit of sales tax to the extent it exceeded 1/4th of one per cent and to the extent the amount of general sales tax exceeded 1/4th of one per cent on the raw materials purchased by it. It was submitted that the petitioner had set up the captive power plant which was considered to be an eligible investment under the scheme and that the naphtha used for the purpose of generating electricity which was used in the manufacture of caustic soda, was raw material used in the manufacture of goods for sale as contemplated under the scheme and as such, the petitioner was entitled to the benefit of exemption from sales tax to the extent provided under the scheme in respect of naphtha used in generating electricity. It was submitted that the stand of the respondent that to the extent the electricity generated in the captive power plant had not been used by the petitioner for manufacturing of goods and had been sold to the GEB and supplied to the group companies, the petitioner is not entitled to the benefit under the scheme for the naphtha used in respect thereof, is not justified. It was submitted that it can never be that the captive power plant will produce the exact quantity of electricity required by the industry and some surplus particularly keeping in mind the future expansion is bound to be there. Therefore, if the major portion of the electricity produced is used by the industry setting up captive power plant, it cannot be said that setting up of captive power plant is a banned industry but it is one of the permitted industry allowed to be set up. It was submitted that the distinction sought to be drawn by the first respondent between the chemicals produced by the petitioner and the electricity produced by the captive power plant is not valid in law and the petitioner is entitled to the benefit of concession under entry 255 in respect of purchase of naphtha. It was submitted that the levy of purchase tax u/s 50 of the Act is illegal and without jurisdiction and on an entire misconception of the nature of industry set up by the petitioner though the eligibility certificate issued by the Industries Commissioner and the subsequent sale of surplus power to the petitioner''s group companies and to GEB in the State of Gujarat with the permission of GEB was totally in compliance with the industry''s policy as well as sales tax incentive schemes and there was no contradiction between the two schemes.

9. Insofar as the second issue is concerned, the learned advocate submitted that the first respondent had erred in treating the branch transfer of caustic soda to the branch of the petitioner within the State of Gujarat as being in violation of

condition No. 19(iii) of entry 255. Inviting attention to condition No. 19(iii), it was submitted that the said condition shows that the limit of tax exemption is to be reduced only when the goods are transported to the branch of the agent outside the State of Gujarat for sale there. In this case, admittedly, the branch transfer was within the State of Gujarat and, therefore, it was a total misreading on the part of the first respondent to treat it as violation of condition No. 19(iii) of the Scheme resulting in reduction of the exemption limit by four per cent of the value of goods so transferred.

10. On the other hand, Ms. Maithili Mehta, learned Assistant Government Pleader opposed the petition. It was submitted that under the scheme, the petitioner is entitled to the benefit of exemption from payment of sales tax to the extent indicated in the scheme in respect of raw materials used in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat. It was submitted that in the present case, insofar as the first issue is concerned, the petitioner had diverted part of the electricity produced by it to the GEB and its group concerns. Admittedly, the electricity so diverted was not used in the manufacture of goods for sale within the State of Gujarat. Hence, to the extent of naphtha used in the manufacture of electricity which was not used in the manufacture of caustic soda, the petitioner was not entitled to the benefit under the scheme and was liable to pay sales tax on naphtha under the normal rates and not by availing of the benefit under the scheme.

11. Insofar as the second issue is concerned, it was submitted that under condition No. 19(iii) of the conditions imposed under the scheme, the aggregate amount of tax at the rate of four per cent or at the rate applicable under the Gujarat Sales Tax Act, 1969 whichever is lower on the sale price of the goods transported by the eligible unit to his own place of business or to the place of business of his agent at any place in India but outside the State of Gujarat for sale there had to be taken into consideration for the purpose of arriving at the limit of tax exemption. It was submitted that in the present case, the petitioner has transferred goods in its branch at Vapi which does not fall under condition No. 19(iii) of the scheme and as such, to the extent of the goods so transferred, the petitioner was not entitled to the benefit of exemption under the scheme in respect of the raw materials used for manufacture of such goods. It was submitted that it is in these circumstances that the respondent has issued notice u/s 50 of the Act for breach of the conditions of the scheme. It was submitted that in the circumstances, the impugned order being just, legal and proper, there is no warrant for any intervention by this court.

12. In the backdrop of the aforesaid facts and contentions, it may be germane to refer to certain provisions of the Act as well as the scheme.

13. Section 49 of the Act makes provision for "exemptions". Sub-section (1) thereof provides for the classes of goods which are exempt from payment of the whole of tax payable under the provisions of the Act. Sub-section (2) thereof empowers the State Government, if it considers it necessary so to do in public

interest, by notification in the official gazette, to exempt any specified class of sales or of specified sales or of purchases from payment of the whole or any part of the tax payable under the provisions of the Act, subject to such conditions as it may impose.

14. In exercise of powers u/s 49(2) of the Act, the State Government has, by notification in the Official Gazette, inserted entry 255 exempting the following classes of goods from payment of tax to the extent specified thereunder. Entry 255 to the extent the same is relevant for the present purpose reads thus:

(2) Sales of raw materials, processing materials, consumable stores or packing materials by a registered dealer, to an eligible unit.

To the extent to which the amount of sales tax exceeds one fourth of one per cent and to the extent to which the amount of general sales tax exceeds one fourth of one per cent:

Provided that if on the same goods sales tax is leviable no general sales tax be levied.

(1) If the eligible unit furnishes to the selling dealer a certificate in form 26 appended hereto, obtain from the registering authority, declaring inter-alia that the goods are required for use by him within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat or as packing materials in the packing of the goods so manufactured.

(2) If the eligible unit fulfils the conditions specified hereunder and further conditions as may be laid down from time to time.

(3) Sales by an eligible unit of the goods manufactured by him.

Whole of sales tax or general sales tax or both as the case may be.

(1) If the eligible unit does not give any certificate in form No. 40 prescribed in the Gujarat Sale Tax Rules, 1970 to any dealer purchasing such goods from him and if he incorporates the following declaration in the bill, invoice or cash memo issued by him in respect of the sale of such goods, namely:

"This sale is exempt from tax under sub-entry (3) of entry No. 255 in the Schedule appended to Government of Gujarat, Finance Department Notification No. (GHN-8)/GST/1092/(S.49)/(249)- TH, dated March 5, 1992 and the buyer including any subsequent buyer purchasing these goods? (i) shall not be entitled to claim any drawback, set-off or refund under any of the provisions of the Gujarat Sales Tax Act, 1969 or the Rules, made thereunder, in respect of the purchase of these goods, and (ii) shall not give any certificate in form No. 40 under the Gujarat Sales Tax Rules, 1970 to any subsequent purchaser of these goods.

(2) If the eligible unit fulfils the conditions specified hereunder and further

conditions as may be laid down from time to time.

15. The Explanation to entry 255 defines the expression "eligible unit" to mean an industrial unit eligible for the sales tax incentives under the Sales Tax Incentive Scheme for Industries 1990-95 issued under the Government of Gujarat, Industries, Mines and Energy Department Resolutions detailed thereunder as amended from time to time and which has obtained an eligibility certificate for sales tax exemption from the appropriate authority of the Industries Commissioner.

16. A perusal of entry 255(2) indicates that for the purpose of availing of benefit under the said entry, the eligible unit is required to furnish to the selling dealer certificate in form 26, declaring, inter alia, that the goods are required for use by him within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat. In the present case, the petitioner has furnished to the selling dealer a certificate in form 26 declaring inter alia, that the naphtha purchased by it is required for use by it within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale as contemplated under the Scheme. However, to the extent of naphtha used for generating electricity which was not used in the manufacture of caustic soda, the eligible unit could not have furnished to the selling dealer a certificate in form 26. In the circumstances, respondent No. 1 was justified in holding that the petitioner had committed breach u/s 50(1) of the Act and was, therefore, liable to pay tax on its purchase of naphtha to the tune of the amount saved by effecting purchase at a reduced rate of tax in form 26.

17. Entry 255 also lays down the conditions subject to which the eligible unit would be entitled to exemption under the scheme. The relevant conditions for the purpose of the present petition are as under:

6. The eligible unit shall actually use the goods purchased within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat or as packing material in the packing of the goods so manufactured.

Explanation.-For the purpose of this condition, ''sale outside the State of Gujarat'' shall mean transportation of goods by the eligible unit to his own place of business or to the place of business of his agent, at any place within India but outside the State of Gujarat for sale there.

19. For the purpose of arriving at the limit of tax exemption, the aggregate of the following shall be considered:

(i) The aggregate amount of tax calculated at the rate of tax mentioned against the goods sold or purchased in column 3 or 4 to Schedule IIA, IIB or III or the lower rate as specified by the notification u/s 49(2) of the Gujarat Sales Tax Act, 1969 after deducting therefrom the amount of tax paid on the purchases effected on the strength of a certificates in form 26.

(ii) The aggregate amount of tax payable on inter-State sales at the rate of four per cent if the sale are effected to a dealer registered under the Central Sales Tax Act, 1956 on furnishing a certificate in form 29 appended hereto and at the rate of ten per cent (including additional tax) of the rate applicable under the Gujarat Sales Tax Act, 1969 whichever is higher in respect of sales made to a dealer not registered under the Central Sales Tax Act, 1956 is four per cent, or below four per cent the amount shall be calculated at four per cent or lower rate (including additional tax) as applicable irrespective of the fact whether the sales are effected to a dealer registered under the Central Sales Tax Act, 1956, or not.

(iii) The aggregate amount of tax at the rate of four per cent or the rate applicable under the Gujarat Sales Tax Act, 1969, whichever is lower on the sale price of the goods transported by the eligible unit to his own place of business or to the place of business of his agent at any place within India but outside the State of Gujarat for sale there.

18. A perusal of condition No. 6 of entry 255 makes it apparent that the same mandates that for the purpose of availing of the benefit under the said entry, the eligible unit is required to actually use the goods purchased within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat or as packing materials in the packing of the goods so manufactured. Clause (2) of entry 255 which is relevant for the present purpose, lays down that an eligible unit shall be entitled to avail of exemption from payment of sales tax on raw materials, processing materials, consumable stores or packing materials as provided under column No. 3 and A purchased by it from a registered dealer if the conditions specified in column No. 4 are satisfied by it. The condition subject to which the benefit under entry 255 can be availed of is that the eligible unit shall furnish to the selling dealer, a certificate in form 26 declaring, inter alia, that the goods are required for use by him within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat or as packing materials in the packing of the goods so manufactured. The eligible unit is also required to fulfill the other conditions specified under entry 255 as well as further conditions as may be laid down from time to time.

19. Thus, the scheme is clear and unambiguous insofar as the controversy involved in the present case is concerned. Under the Scheme, the eligible unit is entitled to avail of the benefit of exemption from payment of sales tax to the extent laid down thereunder on the raw materials, packing materials and consumable stores purchased by it from a registered dealer, provided it uses the same for manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat or as packing materials for the goods so manufactured. Hence, if the raw materials or consumable stores so purchased are not used for the manufacture of goods, as contemplated under entry 255(2), the eligible unit

would not be entitled to exemption from payment of sales tax on such goods.

20. Section 50 of the Act makes provision for liability to pay tax in the event of breach of condition of exemption. Sub-section (1) thereof lays down that if any specified class of sales or of specified sales or of purchases is exempted u/s 49 from the whole or any part of any tax payable under the Act subject to any condition, then, in the event of a breach of such condition in respect of any goods so sold or purchased, the seller or purchaser responsible for such breach shall, notwithstanding anything contained in section 3, or section 3A, be liable to pay tax on such sale, specified sale or purchase as the case may be, to the extent to which it was exempted u/s 49 from the payment of tax. Sub-section (2) thereof provides that if the Commissioner has reason to believe that the seller or purchaser, as the case may be, has incurred liability to pay tax under sub-section (1), he shall serve on the seller or purchaser, as the case may be, a notice requiring him on a date and a place specified therein, either to attend and produce or cause to be produced all evidence on which such person relies in connection with his liability under the section or to produce such evidence as is specified in the notice. On the date specified in the notice, or as soon as may be thereafter, the Commissioner shall, after considering all the evidence which may be produced, assess to the best of his judgment, the amount of tax due from him within a period of not more than four years from the date on which the breach concerned has come to the notice of the Commissioner.

21. Examining the first issue in the light of the aforesaid statutory conditions, in the facts of the present case, it is an admitted position that naphtha has been used as a raw material for generating electricity which in turn is used in the manufacture of caustic soda which is manufactured for sale within the State of Gujarat or outside the State of Gujarat. Thus, under the scheme, the petitioner is entitled to exemption in relation to the raw material used by it in the manufacture of caustic soda. Hence, to the extent of naphtha used for generating electricity, for manufacture of caustic soda, the petitioner would be entitled to exemption under the scheme. However, to the extent of electricity, which is sold to the GEB or supplied to the group concerns, the same cannot be said to have been used in the manufacture of caustic soda. Hence, to the extent the naphtha used in generating electricity was not used in the manufacture of caustic soda, the petitioner would not be entitled to the benefit under the scheme. The first respondent was, therefore, justified in initiating action against the petitioner u/s 50 of the Act for breach of condition in respect of the goods (naptha) not used by it for the manufacture of caustic soda.

22. The above view taken by this court finds support in a decision rendered by a Division Bench of this court on February 26, 2010 in the case of AMI Pigments Pvt. Ltd. v. State of Gujarat (2010) 32 VST 97 (Guj) rendered in Special Civil Application No. 9169 of 2006 and other cognate matters wherein the court has held thus (page 155 in 32 VST):

126. Before we conclude, we make it clear that though we have held that fuels

consumed by the industry to generate electricity which is used in the manufacture of end-product is considered to be raw material or processing material or consumable stores for the purpose of section 15B, rule 42A or exemption notifications issued from time to time under the Act, as per the decision of the apex court in the case of Maruti Suzuki Ltd. Vs. Commissioner of Central Excise, Delhi-III, , the excess electricity used for any other purpose including by grid for distribution or by joint ventures or by vendors, etc., and that too for a price (sale), the process and the user test fails to this extent. In such a case, the nexus between the process and the use gets disconnected. In such a case, it cannot be said that the electricity generated is used in or in relation to the manufacture of final product. Therefore, to the extent of use of electricity for the purposes other than manufacturing activities or not connected therewith would not be considered as raw materials, processing materials or consumables stores.

23. Insofar as the second issue is concerned, respondent No. 1 has held that Sl. No. (iii) of condition No. 19 mentions that the aggregate amount of tax at four per cent on the sale price of the goods transported by the eligible unit to its own place of business shall have to be calculated for the purpose of arriving at the limit of tax exemption. Thus, it has been decided to reduce the ceiling limit of tax exemption considering the sale price of sales effected at Vapi unit.

24. As can be seen from clause (2) of entry 255, an eligible unit is entitled to exemption provided under the said entry in relation to goods manufactured by it for sale within the State of Gujarat or outside the State of Gujarat. As to what is the "sale outside the State of Gujarat", is defined under the Explanation to condition 6 of entry 255, to mean transportation of goods by the eligible unit to his own place of business or to the place of business of his agent, at any place within India but outside the State of Gujarat for sale there. Thus, sale under entry 255 is either an actual sale within the State of Gujarat or transportation of goods by the eligible unit to its own place of business or to the place of business of its agent or any place within India but outside the State of Gujarat for sale there. In the facts of the present case, the petitioner has transferred goods to its branch at Vapi. Under entry 255, the eligible unit is entitled to the benefit thereunder in respect of goods manufactured for sale within the State of Gujarat or outside State of Gujarat. Evidently, transfer of goods so manufactured to a branch within the State of Gujarat would not be a sale of the goods so manufactured. In the circumstances, to the extent of goods which are transferred to the branch, it cannot be said that the same have been sold within the State of Gujarat so as to be eligible for the benefit of the scheme. Hence, it is apparent that in respect of the goods which have been transferred to the branch, the petitioner would not be entitled to the benefit under entry 255(2) in respect of the raw material used in the manufacture of such goods. In the circumstances, the provisions of section 50 of the Act would clearly be attracted and the respondent was justified in initiating proceedings thereunder for breach of the provisions of the scheme.

25. However, as submitted by Mr. Kaji for the petitioner, the goods which were transferred to the branch may have been subsequently sold either within the State of Gujarat or may have been transferred to a branch outside the State of Gujarat so as to be eligible for the benefit under the scheme. However, since the matter has not been considered from that angle, the said facts have not been brought on record. Hence, unless the petitioner is given an opportunity to show how the goods transferred to the Branch at Vapi had been dealt with, it would not be possible to decided the issue correctly. However, the breach if any, is of the provisions of entry 255(2) and not of condition No. 19(iii) as held by first respondent. Condition No. 19 only lays down the factors which are required to be taken into consideration for the purpose of arriving at the limit of tax exemption. Thus, the aggregate amount of tax at the rate of four per cent or at the rate applicable under the Act, whichever is lower on the sale price of the goods transported by the eligible unit to his own place of business or to the place of business of his agent at any place within India but outside the State of Gujarat for sale there is also required to be taken into consideration while computing the limit of tax exemption.

26. However, by transporting the goods to its branch, there is no breach of condition No. 19(iii). The breach, if any, is of the basic condition for availment of benefit under entry 255(2), viz., the goods are required by the eligible unit for use by him within the State of Gujarat as raw materials, processing materials or consumable stores in the manufacture of goods for sale within the State of Gujarat or outside the State of Gujarat. In case of goods which are not manufactured for sale, the benefit of the exemption would not be available. In the circumstances, to the extent of the goods which are not sold within the State of Gujarat or outside the State of Gujarat, the petitioner would not be entitled to the benefit of entry 255(2). The respondent, therefore, was justified in invoking the provisions of section 50 of the Act in respect of the said breach. However, the first respondent while passing the impugned order has misdirected himself by placing reliance upon condition No. 19(iii) of the conditions and in reducing the ceiling of tax exemption considering the sale price of sales effected at Vapi unit. The first respondent is not empowered to reduce the ceiling limit of exemption in case of breach of any condition of exemption.

27. By virtue of the provision of sub-section (2) of section 50 of the Act, the commissioner after serving on the seller or purchaser, as the case may be, a notice as specified thereunder and considering all evidence which may be produced, assess to the best of his judgment, the amount of tax due from him within the period specified thereunder. In the present case, it appears that the assessing officer instead of making best judgment assessment in respect of the breach committed by transferring goods by way of branch transfer, appears to have computed the purchase tax on the raw materials used for manufacture of such goods as well as naphtha used in generating electricity for manufacture of such goods and has reduced the ceiling limit of exemption to that extent. Insofar as the ceiling limit of exemption is concerned, the same is granted to the

petitioner by virtue of sales tax exemption certificate issued under the scheme. Breach of the provisions of the scheme as aforesaid, may entail payment of tax to the extent the petitioner has committed a breach of provisions of the scheme. But the first respondent has no power to reduce the ceiling limit of exemption granted under a certificate issued under the provisions of the scheme which is based upon the eligible investment made in setting up the unit. Thus, the respondent has proceeded on a totally erroneous footing and instead of passing an order for breach of provisions of the scheme under entry 255(2), has proceeded on the basis that there is a breach of condition No. 19(iii) of the conditions. In fact, in relation to the second issue, the impugned order passed by the first respondent is incomprehensible.

28. In the light of the aforesaid discussion, the impugned order is confirmed as regards the first issue, viz., to the extent it holds that the petitioner has committed breach of sub-section (1) of section 50 of the Act and is, therefore, liable to pay tax on its purchases of naphtha to the extent the same has been used for generating electricity which was sold to GEB/UPL. However, insofar as reduction of the exemption limit by the first respondent is concerned, the same being without jurisdiction, cannot be sustained. The impugned order, therefore, to the extent the same reduces the ceiling of tax exemption considering the sale price of sales effected to Vapi unit cannot be sustained. However, it appears that the first respondent had issued notice under sub-section (2) of section 50 of the Act in respect of the said branch transfer. But, somewhere on the way, he has misdirected himself and placed reliance upon condition No. 19(iii). In the circumstances, the said issue is required to be restored to the file of the first respondent to be decided afresh in accordance with law after giving an opportunity of hearing to the petitioner. The first respondent shall, accordingly, issue a fresh notice in respect of the second issue setting out all facts in detail and thereafter pass a fresh order in accordance with law. It shall be open for the petitioner to produce evidence to indicate how the goods transferred to the branch had been dealt with subsequent to such transfer in support of its case that it is entitled to the benefit of the scheme in respect of the said goods. The petition, therefore, succeeds to the aforesaid extent and is accordingly partly allowed. The impugned order to the extent the same holds that that the petitioner has committed breach of section 50(1) and is, therefore, liable to pay tax on its purchases of naphtha to the extent the same has been used for generating electricity which was sold to GEB/UPL is confirmed. However, to the extent the same reduces the ceiling of tax exemption considering the sale price of sales effected at Vapi unit is hereby quashed and set aside. The matter is remitted to the first respondent to decide the second issue afresh after giving an opportunity to the petitioner to produce evidence in support of its case and after affording an opportunity of hearing as stated hereinabove. Rule is made absolute accordingly in the aforesaid terms with no order as to costs.

