

CASE NO.:
Appeal (civil) 1215 of 2007

PETITIONER:
Commnr.of Sales Tax, Orissa & Ors

RESPONDENT:
Crown Re-roller (P) Ltd. & Ors.

DATE OF JUDGMENT: 08/03/2007

BENCH:
S.B. Sinha & Markandey Katju

JUDGMENT:
J U D G M E N T
(Arising out of SLP (C) No. 7300 of 2004)
WITH
CIVIL APPEAL NOS. 1216 /2007 @ S.L.P.(C)Nos. 14707-14708/2005

S.B. SINHA, J.

Leave granted.

Respondent herein, a company registered under the Indian Companies Act, known as M/s. Crown Re-rolling (P) Ltd., is the owner of a Re-rolling mill. It is a re-rolling mill manufacturing M.S. rounds and flats, out of iron and steel scrap materials. Indisputably, the State of Orissa made an industrial policy wherefor a resolution was adopted on 13.5.1986, pursuant where to and in furtherance where of, exemption was granted from payment of sales tax on raw materials sold to or purchased by a registered dealer and certified by the General Manager, District Industrial Corporation to be a small scale industry set up on or after 1.4.1986 and commencing commercial production thereafter. It is furthermore not in dispute that by reason of a notification dated 22.12.1989, the State Government in exercise of its powers conferred upon it under Section 8 of the Orissa Sales Tax Act, 1947, notified 'Iron and steel' to be taxable at the first point of sale, in a series of sale by successive dealers, when such sale is effected by a dealer liable to pay tax under the Act. It is also not in dispute that prior to issuance of the said notification the taxable event was the last purchase. It has not been denied or disputed before us that the exemption notification dated 13.5.1986 is applicable in the case of the assessee. It is also not in dispute that the said exemption relates to transaction of purchase or sale of raw material which go into the composition of the finished product manufactured by the assessee in the State.

Respondent had been making purchases from the Rourkela Steel Plant of the Steel Authority of India Ltd. Admittedly, the benefit of the exemption notification in respect of such purchases have been granted to the respondent-assessee. Admittedly, Respondent had made purchases also from the registered dealers of iron scrap. However, the problem arose in obtaining the said exemption as on and from 1.1.1990 steel was made taxable at the first sale point by reason of the said notification dated 22.12.1989 issued under Section 8 of the Act. The mechanism for availing of exemption was by way of statutory declaration by the buyer/manufacturer to the taxable seller, thereby purchasing the raw material free of tax.

It is furthermore not in dispute that the respondent had purchased tax paid raw materials. He filed an application for refund of the sales tax purported to be in terms of Section 14 of the Orissa Sales Tax Act, 1947 (for short, 'the Act') which reads as under :-

"14. Refunds -

The Commissioner shall, in the prescribed manner, refund to a dealer applying in this behalf any amount of tax penalty or interest paid by such dealer in excess of the amount due from him under this Act, either by cash payment or by deduction of such excess from the amount of tax, penalty or interest due in respect of any other period :

Provided that no claim to refund of any tax, penalty or interest paid under this Act, shall be allowed unless it is made within twenty-four months from the date on which the order of assessment or order imposing penalty, as the case may be, was passed or from the date of the final order passed on appeal, revision or reference in respect of the order earlier mentioned, whichever period is later:

Provided further that no claim to refund of any tax, penalty or interest paid under this Act shall be allowed in cases where there is an order for re-assessment, until the re-assessment is finalized."

As the said prayer of the respondent was denied, he filed a writ petition before Orissa High Court praying inter alia for the following reliefs-

"Further direct the Opposite Party No.5 & 6 to refund the entire amount of Sales Tax collected from the petitioner amounting to Rs. 15 lacs approximately pursuant to the notification vide Annexure-5."

The said writ petition was allowed holding :

"6. In view of the aforesaid undisputed position, since the petitioner has already lodged representation for refund and no decision has been taken on it, we dispose of the writ application by directing that on the petitioner filing application in the prescribed form, opposite parties 5 and 6 without taking any objection of limitation will consider the question of the exact amount of refund to which the petitioner is entitled to under the Industrial Policy Resolution, 1986 and the Finance Department Notification No 5389 dated 13.2.1987 and communicate their decision within a period of three months of receipt of the application in the prescribed form."

However, the assessing officer in its order dated 18.12.1997 upon examining the matter opined that :-

"...Being asked whether the sellers from whom he purchased the "Iron and Steel" are the first or subsequent sellers, Sri Agarwal expressed his inability to say whether they were first or subsequent sellers. His only submission was that they have purchased "tax paid" materials.

On scrutiny of the refund applications with reference to relevant purchase bills of "Iron & Steel" and other connected documents furnished by the dealer and after giving him reasonable opportunity of being heard, it is found that :-

Firstly, the dealer M/s. Crown Re-rollers (P) Ltd. has not paid any amount of Orissa Sales Tax on purchase

of any goods which are declared U/s. 14 of the Central Sales Tax Act, 1956. He has purchased "first point tax paid" Iron & Steel from registered dealers of Orissa who are the subsequent sellers. The sellers have not collected any sales tax from the instant dealer which is evident from the purchase bills furnished by him. The dealer himself has simply calculated 4% tax on such purchase of "Iron & Steel" and claimed refund.

Therefore, the claim of the dealer vide Col.2 and 5 of his refund applications relating to date of payment of tax and the amount of tax paid U/s. 5 of the O.S.T. Act respectively is not based on any documentary evidence and as such found to be incorrect. In fact, the amount of tax paid by the dealer U/s. 5 of the O.S.T. Act is found to be "Nil".

Questioning the legality or validity of the said order, another writ petition was filed by the respondent herein before the High Court which by reason of the impugned judgment dated 21.11.2003 was allowed holding :-

"13. Hence, the applications of the petitioner should not have been made in Form XII-A under rule 42-A. The petitioner will have to make fresh applications for refund in Form XII under Rule 39 of the Orissa Sales Tax Rules, 1947 for refund of tax under Section 14 of the Orissa Sales Tax Act, 1947. Since the petitioner himself had not submitted the applications in the correct form and under the correct rule, the petitioner will not be entitled to interest from the date of the applications as claimed by him in this writ petition.

14. For the aforesaid reasons, we quash the impugned order dated 18.12.1997 of the Sales Tax Officer, Rourkela Circle-II, Panposh in Annexure-1 to the writ petition and direct that the petitioner will submit fresh applications for the periods in question in Form XII under Rule 39 of the Orissa Sales Tax Rules, 1947 and the Sales Tax Officer, Rourkela Circle-II, Panposh will compute the amount of tax paid by the petitioner on the tax paid goods purchased by it as raw materials for its industry on the basis of the copies of the purchase bills produced before him by the petitioner and determine such amount to be refunded and refund the same to the petitioner within 90 (ninety) days from the date of such application failing which the petitioner will be entitled to interest at the rate mentioned in Section 14-C of the Orissa Sales Tax Act, 1947 with effect from the date of expiry of the said period of ninety days."

The High Court, however, did not grant any interest in favour of the respondent-assessee. Both the parties are, thus, before us.

Mr. Joseph Vellapally, the learned senior counsel appearing on behalf of the appellant, in support of this appeal raised the following contentions :-

1. The High Court committed a manifest error in passing the impugned judgments insofar as it failed to take into consideration that the taxable event in sales tax law being the transaction of sale, exemption to pay tax, if any, would be available only where a transaction is taxable.
2. Exemption notification would apply only when the manufacturer establishes that he had purchased raw material from a registered dealer which had gone into the composition of the finished product manufactured by it in the State.

3. The order of the High Court passed in OJC No. 8052/1992 did not confer any right on the assessee to get any specific amount by way of refund and, thus, the High Court misdirected itself in assuming that it was so entitled.

4. Exemption notification read with the Industrial policy does not give any right to claim refund from the State as the Sales Tax Officer being a creature of Statute can grant refund only in the event the conditions therefor are fulfilled and not otherwise.

5. The problem had arisen on account of the taxable seller having sold the goods to another dealer of steel from whom the assessee have purchased the scrap and the application for grant could have been allowed subject to the proof of the respondent that the raw material used by it for manufacturing purposes was the goods in respect whereof the tax was paid by the first seller.

6. There is no practical way in which either the assessee or the department can ascertain as to whether any tax has been paid in the State of Orissa on the precise quantity of steel purchased by the assessee from non-taxable dealer; nor there is any practical way to quantify and determine the exact amount of tax paid by the first seller on the steel in question as the identity or the quantum of sales turn over is not known to the department.

Mr. B.A. Mohanty, learned senior counsel appearing on behalf of the respondent, on the other hand, would submit that admittedly the respondent had purchased goods from the registered dealers and the goods in question are tax paid goods. Drawing our attention to the earlier judgment of the High Court dated 23.6.1997, the learned counsel contended that the application filed by the respondent for refund of tax should have been considered in terms of the observations made by the High Court and in that view of the matter the assessing authority could not have sat in appeal over the judgment of the High Court on the following grounds :

a) The Finance Department Notification provides for exemption from payment of tax on purchase of raw material and not refund.

b) The respondent has not paid any tax on purchase of raw material from subsequent dealers as such raw material had already suffered first point tax an earlier event of sale and therefore the respondent is not entitled to any refund.

c) The application of the respondent for refund was in the wrong form i.e. form no. XII A and Rule 42-A of the Orissa Sales Tax Rules, which are applicable to refund of tax paid on declared goods sold in the course of inter state trade and commerce under Section 14-B of the Orissa Sales Tax Act, which was therefore not applicable to the respondents.

Applicability of the exemption notification, in the instant case, is not in dispute. The fact that the dealers, from whom the respondent had made purchases of raw material are registered, is also not in dispute. The goods purchased by the respondent are tax paid goods. Taxable event, however, under sales tax laws is the transaction of sale. Exemption, thus, would be available only where such a transaction takes place. So long as the taxable event was the last purchase, no problem arose. The State, however, altered the taxable event. The validity of the notification altering the taxable event at the first sale point by notification dated 22.12.1989 with effect from 1.1.1990 cannot also be disputed.

In Re. The Bill to Amend S. 20 of the Sea Customs Act, 1878, and S. 3 of the Central Excises and Salt Act, 1944 [(1964) 3 SCR 787] this Court held :

"This will show that the taxable event in the case of duties of excise is the manufacture of goods and the duty is not directly on the goods but on the manufacture

thereof. We may in this connection contrast Sales Tax which is also imposed with reference to goods sold, where the taxable event is the act of sale. Therefore, though both excise duty and Sales Tax are levied with reference to goods, the two are very different imposts; in one case the imposition is on the act of manufacture or production while in the other it is on the act of sale. In neither case therefore can it be said that the excise duty or Sales Tax is a tax directly on the goods for in that event they will really become the same tax. It would thus appear that duties of excise partake of the nature of indirect taxes as known to standard works on economics and are to be distinguished from direct taxes like taxes on property and income."

We will assume that the application for refund of tax, filed by the respondent, was maintainable. The question, however, is what should be the methodology therefor. The dealer effecting the first sale point may have sold the raw materials at a price 'A'. The subsequent dealer might have sold at a price to 'B'. Respondent might have purchased from 'C' who had in turn purchased the raw material from 'B'. In terms of Section 14 of the Central Sales Tax Act, the rate of tax is 4%. The tax was paid on the value of goods sold by the dealer effecting first point sale. The amount of tax realized for the purpose of refund thus must be on the said basis. The value of the goods of substantive transactions, upon which no tax was paid, thus could not have been taken into consideration for the purpose of grant of exemption. If that be so, the respondent for the purpose of establishing its claim for refund was required to establish : (1) what is the quantum of tax paid to the Department by the dealer effecting first point of sale and; and (2) whether the tax paid goods have been utilized for the purpose of manufacture of its product by the respondent.

The question of refund could arise provided tax has been paid, the logical corollary whereof would be that the claim for the refund of the tax must be calculated on the basis of the value of the goods at the first point of sale and not thereafter.

The respondent had claimed the amount of refund being a sum of Rs.15 lacs only on the basis that as the goods purchased by it are the tax paid once, 4% thereof should be directed to be refunded as if the actual tax paid was on the price paid by it. It is not so. It is no doubt true that as the point of levy of tax was the first point of sale which being exempted from the notification, none of the subsequent sales thereof could be subjected to levy of sales tax.

In State of Bihar & Others v. Suprabhat Steel Ltd. and Others, (1999) 1 SCC 31 this Court has held :-
"7. Coming to the second question, namely, the issuance of notification by the State Government in exercise of power under Section 7 of the Bihar Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State Government in its own industrial incentive policy. But in exercise of such power, it would not be permissible for the State Government to deny any benefit which is otherwise available to an industrial unit under the incentive policy itself. The industrial incentive policy is issued by the State Government after such policy is approved by the Cabinet itself. The issuance of the notification under Section 7 of the Bihar Finance Act is by the State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in the industrial policy itself. In this view of the matter, any notification issued by government order in exercise of power under Section

7 of the Bihar Finance Act, if it is found to be repugnant to the industrial policy declared in a government resolution, then the said notification must be held to be bad to that extent. In the case in hand, the notification issued by the State Government on 4-4-1994 has been examined by the High Court and has been found, rightly, to be contrary to the Industrial Incentive Policy, more particularly, the policy engrafted in clause 10.4(i)(b). Consequently, the High Court was fully justified in striking down that part of the notification which is repugnant to sub-clause (b) of clause 10.4(i) and we do not find any error committed by the High Court in striking down the said notification. We are not persuaded to accept the contention of Mr Dwivedi that it would be open for the Government to issue a notification in exercise of power under Section 7 of the Bihar Finance Act, which may override the incentive policy itself. In our considered opinion, the expression "such conditions and restrictions as it may impose" in sub-section (3) of Section 7 of the Bihar Finance Act will not authorise the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the general policy resolution itself. In this view of the matter, we see no illegality with the impugned judgment of the High Court in striking down a part of the notification dated 4-4-1994."

But, we have no doubt in our mind that the exemption could be granted on the basis of the price of the goods on first sale thereof. We, however, do not accept the submissions of Mr. Vellapally based on the decision of this Court in *Amrit Banaspati Co.Ltd. & Anr. vs. State of Punjab & Anr.* (1992) 2 SCC 411 that although the respondent was entitled to exemption from payment of tax, it was not entitled to any refund. In *Amrit Banaspati* (supra), this Court held :-

"11. Exemption from tax to encourage industrialization should not be confused with refund of tax. They are two different legal and distinct concepts. An exemption is a concession allowed to a class or individual from general burden for valid and justifiable reason. For instance tax holiday or concession to new or expanding industries is well known to be one of the methods to grant incentive to encourage industrialization. Avowed objective is to enable the industry to stand up and compete in the market. Sales tax is an indirect tax which is ultimately passed on to the consumer. If an industry is exempt from tax the ultimate beneficiary is the consumer. The industry is allowed to overcome its teething period by selling its products at comparatively cheaper rate as compared to others. Therefore, both the manufacturer and consumer gain, one by concession of non-levy and other by non-payment. Such provisions in an Act or Notification or orders issued by Government are neither illegal nor against public policy.

12. But the refund of tax is made in consequence of excess payment of it or its realization illegally or contrary to the provisions of law. A provision or agreement to refund tax due or realized in accordance with law cannot be comprehended. No law can be made to refund tax to a manufacturer realized under a statute. It would be invalid and ultra vires. .."

In that case, the issue was as to whether the manufacturer of Banaspati had set up an industry in the State of Punjab, on the assurance that the sales tax amount actually collected by it from the ultimate purchasers, would be refunded to it by way of incentive, can be enforced by a court of law. Such a prayer was declined on the ground that refund of tax is made in consequence of excess payment of it. This case, however, deals with completely different situation as despite the exemption notification issued in terms of a statute, the respondent was compelled to pay tax through its purchase price when it purchased the scrap material from subsequent sellers. The State cannot resile itself from the statutory provisions of exemption made by it. In our opinion, in equity, the State in a situation of this nature, must act in letters and spirit of the Act. However, State can only refund what it actually collected and not any amount which it had not collected. We, therefore, are of the opinion that the interest of justice would be subserved if an opportunity is given to the respondent to produce evidence before the assessing authority in regard to existence of the legal requirements, as noticed hereinbefore, for maintaining its claim of refund. The assessing authority shall give an opportunity to the respondent to place all materials in connection therewith or in relation thereto. It would also be open to the assessing authority, if any situation arises therefor, to call for any record from the Rourkela Steel Plant or any other 'dealer'. We, furthermore, are of the opinion that the respondent would not be entitled to any interest on the refund amount for the present as the quantum thereof is yet to be determined.

These appeals are accordingly allowed to the extent mentioned hereinbefore and with the above directions. However, in the facts and circumstances of the case, there shall be no order as to costs.