

CASE NO.:
Appeal (civil) 4342 of 2007

PETITIONER:
State of Orissa & Ors

RESPONDENT:
M/s. Tata Sponge Iron Ltd

DATE OF JUDGMENT: 18/09/2007

BENCH:
S.B. Sinha & Harjit Singh Bedi

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 4342 OF 2007
[Arising out of SLP (Civil) No. 4659 of 2007]

S.B. SINHA, J :

1. Leave granted.
2. Interpretation of an exemption notification in regard to payment of sales tax is involved in this appeal which arises out of a judgment and order dated 9.8.2006 passed by the High Court of Orissa in O.J.C. No. 2213 of 2001.
3. Before embarking upon the said question, we may notice the basic fact of the matter.

Respondent herein which is a large industrial unit had set up a Sponge Iron Factory at Bileipada, Joda in the district of Keonjhar, Orissa. Indisputably, it is classified as a large scale industry in terms of Industrial Policy Resolution (IPR), 1980 adopted by the State. In or about 1989, IPR was adopted for existing industries classified under IPR, 1980 wherein benefits for exemption from payment of sales tax on finished products were to be granted subject to the terms and conditions laid down therein including repayment of loan availed under IPR, 1980. Before the benefits of the said IPR could be obtained by the respondent, the Government of Orissa announced IPR, 1992 in terms whereof the existing industrial units could obtain exemption or deferment of sales tax on finished products and capital investment subsidy provided it had undergone an expansion/ modernization/ diversification of its unit.

For our purpose, we may only notice paragraphs 7.4 and 7.5 of IPR, 1992 which are in the following terms:

"7.4 Exemption / Deferment of Sales Tax on raw materials, spare parts, and finished products of small, medium large scale and Pioneer Industrial Units.

New Small, medium & Large scale industrial units including, pioneer units will be eligible for exemption of sales tax on raw materials, spare parts, & finished products for a period of 5 years subject to a ceiling of 100 per cent of fixed capital investment if the unit is located in zone-A 75 per cent. If located in zone \026 B and 60 per cent if located in zone-C. New medium and large industrial units

may also opt to defer payment of sales tax on their finished products for a period of 5 years subject to a maximum of 100 per cent of fixed capital investment if the unit is located in zone-A 75 per cent if located in zone-B and 60 per cent if located in zone-C from the date of commercial production. Deferred amounts in respect of each year will be repaid in full after the expiry of the period of deferment annually. Period of exemption / deferment allowed for different zones shall be extended by two years for Pioneer units. However, defaulters of OSFC/IPI COL dues shall be eligible only after they clear such dues.

7.5 Exemption / Modernization / Diversification.

The incentive by way of exemption or deferment of sales tax on finished products shall be available for expansion / modernization / diversification of existing units taken up after the effective date subject to a limit of 60 per cent of the additional capital investment in plant and machinery only in zone-C, 75 per cent in zone-B and 100 per cent in zone-A provided that such expansion / modernization / diversification has been undertaken on the basis of separate project report duly appraised by the financial institutions and provided further that subject to the provisions of the Sales Tax Act, the benefit of exemption / deferment shall not have the effect of reducing the sales tax paid by the unit prior to commencement of the expansion / modernization / diversification programmes. In other words, the benefit shall be applicable to incremental sales."

4. Respondent contended that in view of paragraph 7.5 of IPR, 1992 it was entitled to the benefit of deferment of payment of sales tax on finished products in respect of incremental sale over and above the immediate preceding year as it existed prior to expansion of the industrial unit upto a limit of Rs. 49.45 crores being 75% of the fixed capital investment in the plant and machinery. It was furthermore claimed to be entitled to capital investment subsidy. As the said benefits were denied to the respondent, it filed a writ petition before the High Court of Orissa, Cuttack which was marked as O.J.C. No. 2213 of 2001.

5. By reason of the impugned judgment, a Division Bench of the Orissa High Court allowed the said writ petition directing:

"1. Opposite party No.2 \026 The Director of Industries, Orissa is directed to reconsider the petitioner's application for re-evaluation of its investment for expansion of the unit and determine afresh, the extent to which the petitioner is entitled to the sales tax incentives and also to make necessary amendment to the eligibility certificate granted by it in accordance with the IPR, 1992.

2. The stipulation of a 'time period' in the certificate of eligibility granted to the petitioner in Form No.II-A under Annexure-4 to the writ petition is declared ultra vires the IPR, 1992 and shall have no effect. Necessary amended "Eligibility Certificate" in terms of directions in Paragraphs 1 & 2, be issued to the petitioner, within two months from the date of

communication of this judgment.

3. After issue of the revised eligibility certificate as directed above, the petitioner company is directed to produce the same before the Sales Tax Officer, Keonjhar Circle, who on receipt of the same along with the revised returns that may be filed by the petitioner as a consequence of revision of the eligibility certificate, shall pass appropriate order of assessment and direct refund of excess tax deposited on ascertainment of the assertion of the petitioner that it has not collected sales tax from the purchasers but had paid the same from its own re-source, within a period of two months from the date of production of the "Revised Eligibility Certificate".

4. Opposite part No.1 is directed to reconsider the petitioner-company's application for grant of capital investment subsidy in terms of the direction contained herein and release the "Capital Investment Subsidy" as is due to the petitioner within a period of two months from the date of communication of this order."

6. Mr. Vikas Singh, learned Additional Solicitor General appearing on behalf of the appellant, restricted his submissions only in regard to the exemption for payment of sales tax. The learned counsel submitted that although no period for obtaining the benefit thereof had been fixed in the original policy, the operational guidelines issued in that behalf will clearly point out that the said benefit was to be granted for a period of five years in case of new industries and for a period of seven years in case of pioneer industries. In this behalf, our attention has been drawn to paragraph 5 of operational guidelines in respect of grant of sales tax concession under IPR, 1992, which reads as under:

"The Sales Tax exemption / deferment certificate for raw material, spare parts and finished products shall be issued for a period of 5/7 year at a time. The Director of Industries Orissa and Director of H & CI can however, inspect the unit and withdraw the certificate in case of non-fulfillment of the conditions. The beneficiary unit should also maintain necessary records and registers for this purpose as may be prescribed by the Director of Industries, Orissa."

It was pointed out that the purported operational guidelines had been circulated by reason of a circular letter dated 8.02.1993 by the Government of Orissa to all concerned which is in the following terms:

"I am directed to enclose herewith a set of "operational guidelines" relating to Sales Tax concessions admissible under Industrial Policy Resolution 1992 (IPR 1992) effective from 1.8.92 for your information and necessary action.

You are requested kindly to bring it to the notice of all concerned for proper implementation of the provisions of IPR 1992"

The learned Additional Solicitor General would submit that the respondent herein made expansion of its undertaking in the year 1997 and it having asked the benefit in terms of IPR, 1992 for a period of five years only as would be evident from its application filed in prescribed Form II-A dated

26.05.1999 which is in the following terms:

"This certificate is issued for 5 (five) years of its commercial production or expansion / modernization / diversification and is valid from the date of 7.9.98 to 6.9.2003.";

it is estopped and precluded from contending otherwise, and, thus, it cannot be permitted to change its stand by seeking an amendment therefor as has been sought to be done by its letter dated 7.04.2000 and, thus, it was rightly rejected by the Government of Orissa in terms of its letter dated 17.05.2000.

The said letter dated 17.05.2000 reads as under:

"Paragraph 7.4 and 7.5 (Part II) of IPR'92 are co-related. Though paragraph 7.5 is silent about the period of sales tax benefit, it refers to the previous paragraph of 7.4. Moreover, while considering to extend the S.T. benefit, one has to go by the provisions of paragraph 6.1 (part-II) of the IPR'92 which states as follows:

"Subject to operational guidelines / instructions and procedure, sales tax incentives shall be allowed after the unit has gone into commercial production and from the date of commercial production."

In the operational guidelines, issued to Industries Deptt. vide Letter No.4068 dtd. 8.2.93 under the IPR'92 the period of exemption / deferment for E/M/D has been clearly mentioned as 5 years. Accordingly the Director of Industries, Orissa has issued eligibility certificate for a period of 5 years w.e.f.7.9.98 to 6.9.2003.

I trust that the above clarification will remove your doubt."

7. Mr. A.K. Ganguli, learned senior counsel appearing on behalf of the respondent, on the other hand, submitted that the exemption benefit was limited to the finished products and not to the raw-materials and, thus, there is no infirmity in the impugned judgment.

8. The High Court passed the impugned judgment inter alia on the premise that operational guidelines being in the nature of a subordinate sub-delegated legislation, the same was required to be in consonance with the IPR and by reason thereof no other or further condition could have been stipulated so as to prevail over the policy decision itself holding:

"...If we accept the contention advanced by the learned Counsel for the Revenue that the 'operational guidelines' provide a "limitation" or "time period" for sales tax incentives, it would tantamount to accepting a principle that by sub-delegated legislation, a delegatee may also effectively amend or supplant legislation, which it is clearly incompetent to do. On a reading of the said 'operational guidelines' and the terms thereof would clearly indicate that the stipulations regarding time period find mention in Clause-5 of the 'operational guidelines'. It would be clear that the said stipulation would relate only to those industries covered under Para 7.3 and 7.4 of the IPR 1992 and would be limited to apply to those industries only to which "time periods" have been stipulated in the IPR itself and not to the industries / activities covered under Paragraphs \026 7.2 and 7.5.

Since the petitioner's industry is covered in the EMD category under Para-7.5 of the IPR 1992 read with Entry No.44 of SRO No.1091 of 1992, Clause 5 of the 'operational guidelines' cannot be said to apply to it. We are of the view that Clause-5 of the 'operational guidelines' and stipulation in the Eligibility Form (the eligibility certificate), to the extent that it provides for a period of time is not in consonance with the IPR, 1992, is clearly without jurisdiction / without sanction of law and is also ultra vires to the IPR 1992.

(c) The operational guideline and / or instructions were made for administration of incentive contained in the Policy and not for the purpose of imposing any new stipulation and / or conditions alien to and /or not in consonance with the passing of the 1992 Policy. Such a stipulation cannot be in law be read into and allowed to operate since it would frustrate the very objective sought to be achieved by the 1992 Policy Declaration."

It was furthermore held:

"Drawing an analogy from the aforesaid principles of law, we are of the view that for the incentive under paragraph 7.5 read with entry No.44 as notified in S.R.O No. 1019 of 1992, exemption of tax did not provide any period of limitation. Neither the IPR, 1992 nor the Finance Department Notification in SRO No.1019 of 1992 provided any stipulation as to how long the exemption from sales tax would remain in force and therefore, the position that emerges therefrom, is that, such exemption granted under the Notification was to remain operative till the industry utilizes / exhausts the incentive granted to it. The petitioner is entitled to such benefit till such time such exemption is allowed to remain in force without being withdrawn by the subsequent notification. It is important to point out here that no such notification withdrawing such exemption has been brought to our notice in course of hearing."

9. Indisputably, pursuant to or in furtherance of the aforementioned IPR, 1992, the State Government amended the provisions of the Orissa Sales Tax Act. Section 6 of the said Act reads as under:

"6. Tax Free Goods \026 The State Government may, by notification, subject to such conditions and exceptions, if any, exempt from tax the sale or purchase of any goods, or class of goods and likewise withdraw any such exemption."

10. Indisputably, again pursuant to or in furtherance of the aforementioned provision, the Finance Department of the State of Orissa had issued notification bearing SRO No. 1091 of 1992 dated 23.09.1992 and inserted Entry 44 in terms whereof the respondent became entitled to exemption. Entry 44 of the said notification reads as under:

"44. Sale of finished products of an existing industrial unit, located in Orissa i.e. an industrial unit which has gone into production before 1st August, 1992, and which has undertaken

expansion / modernization / diversification of the said unit after the 1st day of August, 1992 on the basis of separate project report duly appraised by the financial institution, and a certificate to this effect that is, regarding expansion / modernization / diversification of the unit is produced from the concerned General Manager, Project Manager, District Industries; Centre in case of Small Scale Units and a certificate in Form E (92) is produced from the Director of Industries, Orissa in case of Medium, Large and pioneer Units.

The exemption of sales tax shall be limited to 60 per cent of the additional capital investment, in plant and machinery only in Zone-C, 75 per cent of the additional capital investment in plant and machinery only in Zone-B and 100 per cent of additional capital investment in plant and machinery only in Zone-A.

Explanation \026I:- Additional capital investment in plant and machinery means additional investment of 50 per cent of more of the undepreciated book value of fixed capital investment of an existing unit in acquisition of plant and machinery for expanding / modernization / diversifying the production of the said unit.

Provided that the benefit of exemption is admissible only on the incremental sales arising out of such expansion / modernization and diversification.

Provided further that no exemption as indicated above shall be allowed to the following categories of industries, namely:

1. Rice Hullers and Rice Mills.
2. Flour Mills including manufacture of Besan, Pulse Mill and chuda mills.

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5. Further, the eligibility certificate granted for sales tax concession on sale of finished products categorically states that exemption may be available as per Finance Department Notification No. SRO 1091 of 1992 as amended from time to time up to a ceiling amount of:

1. 100% of the additional capital investment in plant and machineries being located inZone-'A'
2. 75% -do-Zone-'B'
3. 60% -do-Zone-'C'

11. It is not in dispute that in the said entry, during which the same would remain operative, no period far less the period of five or seven years had been mentioned. The only limitation prescribed thereby was that only 75% of the additional capital investment in Zone B would be allowed where the unit of the respondent is situate.

12. In terms of Clause 5 of IPR, 1992, the respondent became entitled to exemption from payment of sales tax on finished products for an amount of Rs. 49.45 crores being 75% of Rs. 63.95 crores invested in plant and machinery.

13. We may notice that the Finance Department of the State of Orissa passed a consequential order in IPR, 1992 bearing SRO No. 1091 of 1992 dated 23.09.1992 which was given effect from 1.08.1992.

A bare perusal of the said notification would clearly show that whenever the period upto which the exemption, could be obtained was required to be stated had specifically been done therein, as for example Sl. Nos. 30A, 41, 42A and 43A etc. We may, furthermore, notice that against the Entry 44, however, what is mentioned is the extent to which such exemption would be granted. No period during which such exemption is to be obtained was stated. In other words, no period of limitation was fixed thereby.

14. In view of the clear legal provision as also the aforementioned notification dated 23.09.1992, there cannot be any doubt whatsoever that the exemption in respect of deferment of sales tax having been provided for under the Orissa Sales Tax Act as also the notification issued thereunder, the High Court, in our opinion, is correct in taking its view.

15. It is furthermore a well settled principle of law that an exemption notification must be liberally construed. [See Commissioner of Customs (Imports), Mumbai v. Tullow India Operations Ltd., (2005) 13 SCC 789, Tata Iron & Steel Co. Ltd. v. State of Jharkhand and Others, (2005) 4 SCC 272, Government of India and Ors. v. Indian Tobacco Association, (2005) 7 SCC 396, Commnr. Of Central Excise, Raipur v. Hira Cement, JT 2006 (2) SC 369. and P.R. Prabhakar v. Commnr. of Income Tax, Coimbatore, 2006 (7) SCALE 191]. The said principle, therefore, applies in all fours in the present case.

16. For the reasons aforementioned, there is no merit in this appeal which is dismissed accordingly with costs. Counsel's fee assessed at Rs. 25,000/-.