

CASE NO.:
Appeal (civil) 1193-1194 of 2002

PETITIONER:
ICI India Ltd. & Anr

RESPONDENT:
State of Orissa & Ors

DATE OF JUDGMENT: 28/09/2007

BENCH:
Dr. ARIJIT PASAYAT & TARUN CHATTERJEE

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NOS.1193-1194 OF 2002

Dr. ARIJIT PASAYAT, J.

1. These two appeals assail correctness of the judgment rendered by a Division Bench of the Orissa High Court dismissing the writ petitions filed by the appellants. The two writ petitions i.e. OJC 16928 of 1998 and 1500 of 2000 were filed questioning correctness of the views expressed by the Sales Tax Authorities that the appellants had contravened the declaration given in Form IV to avail concessional rate as provided in the Orissa Sales Tax Act, 1947 (in short the 'Act') and the Orissa Sales Tax Rules, 1947 (in short the 'Rules'). In the first writ petition challenge was to the appellate order passed by the Assistant Commissioner of Sales Tax confirming the assessment made by the assessing officer for the assessment year 1997-98, whereas in the second writ petition challenge was to the assessment order passed by the Sales Tax Officer for the assessment year 1998-99.

2. Background facts sans unnecessary details are as follows:-

The ICI India Ltd. (hereinafter referred to as "the assessee") is a company incorporated under the Companies Act, 1956 having its registered office at ICI House, 34, Chowranghee Road, Calcutta. It is engaged, inter-alia, in the business of manufacture and sale of "Bulk Explosives". For the purpose of carrying on business at Rourkela in the State of Orissa, the appellant has set up an industry on Plot No. 77, Industrial Estate, Kalunga, and is registered as a dealer with the Sales Tax officer, Rourkela \026II Circle, Panposh (Respondent No.3). The certificate of registration granted under Section 9 of the Act indicates that the appellant requires, amongst others, "Ammonium Nitrate" to be used for manufacture/processing of "Bulk Premix" for sale. The appellant had set up and commissioned its third bulk emulsion premix manufacture unit at Rourkela in April, 1997. The principal raw material for manufacture of "Bulk Premix" is "Ammonium Nitrate Liquor". The principal supplier of the said raw material is the Rourkela Steel Plant of the Steel Authority of India (in short the 'SAIL') from whom the appellant purchases the same. The other raw materials are either purchased locally or purchased centrally at Gomia in Bihar and the stock is transferred to its Rourkela Plant. At the Rourkela Plant, all the raw materials are utilized for

manufacture of Emulsion Premix or Bulk Premix, which is an excisable product. For purchase of raw material from the Rourkela Steel Plant, the appellant gives declaration in Form No.IV to avail the concessional rate of tax @ 4%. It is an admitted case of the parties that the "Bulk Premix" so manufactured at Rourkela is not sold as such because it is an intermediary product which is used for manufacture of "Bulk Explosive". This "Bulk Explosive" is not manufactured in the Rourkela plant of the appellant. So the "Bulk Premix" is sent to its other branches at Angul (Talcher) and Belpahar in the State of Orissa, for which the appellant has obtained Sales Tax Registration, wherein the raw material has been mentioned as "Bulk Premix", while the finished product is mentioned as "Bulk Explosive". Apart from sending the "Bulk Premix" to its different branches in the State of Orissa, the appellant also transfers/sells the goods outside the State.

3. For manufacture of "Bulk Explosive", the "Bulk Premix" is carried in special tankers dedicated for such purpose to the actual blasting site from the onsite support plants where the ingredient i.e. "Bulk Premix" and other chemicals are mixed in proportion commensurate with the character of the rock and/or other substances to be blasted. Such mixing in right proportion takes places at the site of blasting and the resultant manufacture being explosive is discharged into the bore holes at the mine bench. It is at this stage that the "Bulk Premix" when mixed with the other chemicals and discharged into bore holes becomes explosives and at that stage the sale of explosives takes place and the sales tax and excise duty are paid on such sale of "Bulk Explosive".

4. In the assessment order for the year 1998-99, the assessing officer did not find any violation of the declaration given by the appellant while purchasing "Ammonium Nitrate", though the "Bulk Premix" has been transferred from Rourkela plant to Talcher and Belpahar, i.e., inside the State of Orissa, and did not make any addition for the same. But, for goods sent outside the State of Orissa, the assessing officer was of the view that the appellant had contravened the provisions of the 5th proviso to Section 5(1) of the Act by furnishing wrong declaration as the goods manufactured were not sold. For the year 1997-98, however, all transfers of "Bulk Premix", whether inside or outside the State of Orissa, were disallowed and it was held that the appellant has contravened the declaration given in Form IV while purchasing the raw material. This order was confirmed by the Assistant Commissioner of Sales Tax.

5. Considering the rival stands taken before it, the High Court noted that the only question that arose for consideration was whether the appellant who purchased raw materials for manufacture/processing of "Bulk Premix" for sale on the strength of declaration can be said to have violated the declaration when the "Bulk Premix" was transferred to its different branches for manufacture of "Bulk Explosive". The High Court held that the Sales Tax Authorities were justified in demanding differential tax as provided in the 5th Proviso to Section 5(1) of the Act on the raw material (Ammonium Nitrate) purchased by furnishing declaration in Form IV by paying concessional tax at the rate of 4%. The writ applications were accordingly dismissed.

6. In support of the appeals it is stated by Dr. D.P. Pal, learned Senior Advocate that the only question that arises for consideration is whether the raw material i.e. "Ammonium Nitrate Liquor" was used for the purpose of manufacturing

"Bulk Premix" in the Rourkela factory? Such "Bulk Premix" is undisputedly the raw material for manufacturing used in the manufacture of "Bulk explosive". Such products were for sale and were actually sold. Even if the "Bulk Premix" gets transferred outside the State of Orissa for being further used in the manufacture of a final product i.e. "Bulk Explosive", there is no contravention of the 5th proviso to Section 5(1) of the Act. Raw materials purchased at concessional rate of tax would be liable to tax at the full rate prevailing on the following conditions satisfied :

- (1) The dealer must be a registered dealer.
- (2) The goods or class of goods must be specified in its certificate of registration as being intended for use within the State of Orissa by him in the manufacture/processing of goods for sale.
- (3) The goods so manufactured must be sold.
- (4) The purchasing dealer must furnish a declaration in Form IV.

In case the goods so purchased are used for any other purpose or utilized outside the State of Orissa, the dealer shall pay the differential tax on the goods.

7. It was pointed out that there is no dispute or controversy that the raw material i.e. "Ammonium Nitrate Liquor" has been used within the State of Orissa by the appellant in the manufacture of goods namely "Bulk Premix". But the "Bulk Premix" so manufactured gets further processed for the manufacture of the final product i.e. "Bulk Explosives" which undisputedly was for sale and is actually sold. It is submitted that law does not require that the final products which are for sale should to be sold within the State of Orissa. Reliance is placed on Paragraphs 11 and 18 of M/s. Polestar Electronic (Pvt.) Ltd. v. Additional Commissioner, Sales Tax and Another (1978(1) SCC 636) to support the argument. Reference is also made to J.K. Cotton Spinning & Weaving Mills Co. Ltd. v. S.T.O., Kanpur, and another (1965 (16) STC 563) which related to meaning of expression "in manufacture of goods" appearing in Section 8(3) (b) of the Central Sales Tax Act, 1956 (in short the 'Central Act') which, according to appellant is in pari materia with the 5th proviso to Section 5 (1) of the Act. Reference is also made to decision of the Orissa High Court in Indian Aluminium Co. Ltd. v. S.T.O. (1993) 90 STC 410) for this purpose. It is, therefore, submitted that so long as the goods, that is, the intermediary products are manufactured within the State of Orissa but are used in the manufacture of final product either in the State of Orissa or outside, the raw materials have been used for manufacture of goods for sale, and there is no contravention of the 5th proviso to Section 5 (1) of the Act.

8. Per contra, learned counsel for the respondent-State and its functionaries submitted that the factual position as noticed by the Authorities and the High Court clearly shows that the 5th proviso to Section 5(1) is clearly attracted. The said provision pertains to tax concession. When the claim concessions are under consideration, these provisions have to be construed strictly. The appellant is in the business of manufacture and sale of "Bulk Explosive", which has several uses in Orissa. "Bulk Premix" is used as raw material for manufacture and sale of "Bulk Explosive" as per the Certificate of Registration. However, so far as the Rourkela unit is concerned, the company has different Certificate of Registration and it is admitted that the appellant

manufactures only "Bulk Premix" in this unit. In the Certificate of Registration it is mentioned that raw materials purchased would be used in the manufacture of "Bulk Premix". Though certificate also mentioned about "machineries for explosives" before the High Court it was conceded that it is a mistake and assessee does not manufacture "Bulk Explosives" in the Rourkela Unit. Thus the appellant purchases raw materials mainly from SAIL in Orissa and other raw materials in Bihar and had manufactured "Bulk Premix" in their Rourkela Unit. Undisputedly, appellant gave declaration in Form IV for concessional rate of tax i.e. 4%. Admittedly, the appellant did not sell "Bulk Premix" manufactured by it and the same is used after stock transfer for manufacture of "Bulk Explosive" in other units in Orissa and places outside the State.

9. It is submitted by the revenue that the stress is on use of the goods purchased in the manufacture/process of "goods for sale". By not selling "Bulk Premix" and instead effecting stock transfer for manufacturing of "Bulk Explosives" for sale, there is clear violation of the first limb of the 5th proviso to Section 5(1) and therefore second limb of the proviso is attracted making the assessee liable to pay the differential tax on goods.

10. The First proviso to Section 5(1) is conceptually different from Section 8(3) of the Central Act. While the Act used the expression "within the State of Orissa" the Central Act does not have any such restriction. This is inevitable because in respect of the Central Act, the sale has to be outside the State. The use of the expression "within the State of Orissa" in 5th proviso makes the position clear that the raw materials purchased must be used for manufacture of goods in the State of Orissa for sale.

11. Entry serial No. 48 of List \026C, is quoted below :-

"Goods of the class or classes specified in the certificates of registration of the registered dealer purchasing the goods as being intended for use by him in the manufacture or processing or packing of goods for sale or in mining or in the generation or distribution of electricity or any other form of power subject to the production of true declaration by the purchasing registered dealer or his authorized agent in Form IV."

12. The 5th proviso to section 5(1) of the Act reads as under :-

"5. Rate of tax \026 (1) The tax payable by a dealer under this Act shall be levied on his taxable turnover at such rate, not exceeding twenty five percent, and subject to such conditions as the State Government may, from time to time, by notification specify:

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Provided further that where a registered dealer purchases goods of the class or classes specified in his Certificate of Registration as being intended for use within the State of Orissa by him in the manufacture or processing of goods for sale or in mining or in generation or distribution of electricity or any other form of power at concessional rate of tax

or free of tax after furnishing a declaration in the prescribed form, but utilizes the same for any other purpose or outside the State of Orissa, he shall pay the difference in tax or the tax, as the case may be, payable had he not furnished the declaration."

13. Form IV, which is appended to the list of taxable goods, is in the following language :-

"I/we\005\005\005\005hereby declare that the goods purchased by me/us in ash Memo/Bill No\005\005\005dated the \005\005\005from\005\005\005shall be used in the manufacture/processing or packing of goods for sale in mining/generation or distribution of electricity or any other form of power.

Dealer/Authorised Agent."

14. The 5th proviso to Section 5(1) indicates the purpose for which the goods are intended to be used i.e. for manufacture/processing of goods for sale. In the instant case the raw material purchased for manufacture of "Bulk Premix", has not been used for any other purpose. But the manufactured product i.e. "Bulk Premix" has not been sold but has been transferred to other branches of the appellant situated inside as well as outside the State of Orissa.

15. As noted above the Certificate of Registration indicates that the raw materials purchased would be utilized in the manufacture of "Bulk Premix". There is also a mention about "machinery for explosive". Though it was contended by the appellant that the same is the mistake of fact and the only thing which is intended to be produced at Rourkela is "Bulk Premix", it is conceded that the "Bulk Premix" manufactured had not been sold but has been sent to different places for manufacture of other goods i.e. "Bulk Explosive". The position is factually different from that under consideration in Indian Aluminum's case (supra) as the appellants instead of selling the manufactured goods transferred it to other places for further manufacture of "Bulk Explosive". The transfer clearly falls within the expression "any other purpose" mentioned in the 5th proviso to Section 5(1) of the Act. As the goods manufactured have not been sold but have been transferred, there is a violation of the terms of the declaration and the assessee has been rightly held to be liable for payment of the differential tax payable on the raw materials purchased at concessional rate of tax by 4% paid by furnishing Form IV. High Court's impugned judgment, therefore, does not warrant any interference. It may be noted that the High Court made some observation about what would have been the consequence had there been mention of final product in the Certificate of Registration of the appellant.

16. Learned counsel for the respondent-State submitted that the observations of High Court are erroneous. Though learned counsel for the appellants also referred to the observation to support their stand, we make it clear, that we have not expressed any opinion about the correctness of the said view as that does not really fall for determination in the present case.

17. The appeals fail and are accordingly dismissed.