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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No.20 of 2007

Akbari Continental Pvt. Ltd. .... ***Petitioner***
Mr. Jagabandhu Sahoo, Sr. Advocate

-versus-

State of Odisha .... ***Opp. Party***
Mr. S.S. Padhy, ASC (CT & GST)

CORAM:
THE CHIEF JUSTICE
JUSTICE B.P. ROUTRAY

JUDGMENT
07.09.2021

Dr. S. Muralidhar, CJ.

1. This revision petition arises from an order dated 4th September, 2006 passed by the Full Bench of Orissa Sales Tax Tribunal (Tribunal), Cuttack in S.A. 350 of 1999-2000 and S.A. No.352 of 1999-2000.

2. The aforementioned appeals, one by the Petitioner-Assessee (S.A. No.350 of 1999-2000) and another by the Department (S.A. No.352 of 1999-2000), arose from an order of the Assistant Commissioner of Sales Tax (ACST) dated 30th March, 1999 partly allowing the Sales Tax Appeal No.AA434/CUI W/98-99 filed by the Assessee which in turn challenged the assessment order dated 29th August, 1998 passed by the Sales Tax Officer (STO), Cuttack I West Circle, Cuttack under Section 12 (4) of the Orissa Sales Tax Act, 1947 (OST Act) for the assessment year (AY) 1995-96.

3. While admitting the present revision petition, this Court by an order dated 13th February, 2007 framed the following two questions for consideration:

> (i) Whether in the fact and circumstances of the case, the petitioner namely M/s. Akbari Continental Pvt. Ltd. is a "Hotel" or comes under "Guest House and Restaurants" under Clause-27 of the ineligibility list so as not be entitled to sales tax exemption under Entry 30-FFFF vide Finance Department Notification dated 16.08.1990?
>
> (ii) Whether in the facts and circumstances of the case, disallowance of the case, disallowance of claim of first point sale of cold-drinks and IMFL U/s. 5(2) (A) (a) read with Section 8 of the Act is sustainable in law?"

4. It must be was mentioned here that on 28th January, 2010 this Court stayed the re-assessment pursuant to the notice dated 12th January, 2010 issued to the Petitioner by the STO asking that books of account for the period of 1995-1996 be produced pursuant to the impugned order of the Tribunal.

5. The background facts are that the Petitioner is a hotelier carrying on the business of providing lodging accommodation and manufacture and sale of food, drinks etc. The Petitioner is a registered dealer under the OST Act. The Petitioner it also registered as a small-scale Industry (SSI) by the District Industries Centre, (DIC) Cuttack. It claims to be eligible for sales tax exemption under the Industrial Policy Resolution, 1989 (IPR-1989). The Industry Department issued a Registration Certificate dated 19th April, 1988 in its favour

showing the date of commencement of production as 19th February, 1988.

6. It is stated that in terms of a Notification dated 16th August, 1990 of the Finance Department (FD), Government of Odisha, finished products would be allowed exemption taking into account the installed capacity. After the commencement of the IPR 1989, the General Manager, DIC, Cuttack issued a certificate dated 19th September, 1992 exempting the Petitioner from payment of sales tax. In the said certificate it was noted that the Petitioner's unit had started fixed capital investment in terms of IPR 1980 and had gone into commercial production on 10th February, 1988. further certified that since the Petitioner's SSI unit was a continuing unit under the 1980 Policy, it was eligible for sales tax exemption on the sale of its finished products for a period of seven years from the effective date as per IPR-1989.

7. In the assessment order dated 29th August, 1998 passed by the STO, Cuttack for AY 1995-96, the claim for exemption from payment of sales tax was disallowed on the ground that there is no evidence that the Petitioner's unit had been set up after 1st August, 1980 prior to 1st April, 1986 in terms of the 1980 Policy. The STO therefore did not accept the Petitioner's unit one to be one continuing under the 1980 policy. It was noted that under Clause-7.3.2 of the IPR, 1989 read with Rule 21 of the OST Rules, the Petitioner was not eligible to get sales tax incentives on its finished products as a continuing unit of

the 1980 policy. It was noted that the hotel was eligible for sales tax loan as per IPR 1980 but the Petitioner did not avail of that loan. Therefore, the Petitioner had not satisfied the condition laid down in clause 7.3.2 of paragraph-III of the IPR 1989. It was further observed that IPR 1989 did not provide for sales tax incentives to hotels making a fixed capital investment prior to the operational period of IPR 1989.

8. Aggrieved by the above assessment order, the Petitioner went in appeal before the ACST with AA 435 CU-I W/1998-99. By order dated 30th March, 1999 the ACST noted that the Petitioner was entitled to exemption under Sl. NO. 30-FFFF of the Tax-Free Schedule as a continuing unit of IPR-1980. It was noted that the General Manager, DIC, Cuttack by a letter dated 24th December, 1996 drew the attention of the STO to the fact that as per the recommendation dated 20th January, 1995 of the State Level Empowered Committee, the Petitioner was held to be entitled to sales tax exemption. However, the 7th State Level Empowered Committee at a meeting held on 30th April, 1996 reversed its earlier decision. This decision was communicated by the Director, DIC to the STO on 25th January, 1997. The ACST held that the Petitioner was thus entitled to exemption at least till 30th April, 1996. As regards purchase or sale of soft drinks, IMFL and cigarettes, which were not manufactured or processed by the Petitioner, it was held that the Petitioner was entitled to sales tax incentive. Thus, only such deductions as were usually available in respect of such goods as first point tax paid goods were allowed. As a result, the amount payable under

the assessment order was reduced to Rs.37,860/-. The excess tax paid was asked to be refunded.

9. Aggrieved to the extent of its other claims relating to sale of IMFL and cold drinks, the Petitioner filed S.A. No.350 of 1999-2000 in the Tribunal. Aggrieved to the extent that the tax payable was reduced to Rs.39,600/- the Department filed S.A. No.352 of 1999-2000.

10. Both the appeals were disposed of by a common order of the Full Bench of the Tribunal. It is held that soft drinks were purchased from unregistered dealers and there could be no presumption that the goods had suffered tax at the first point of sale. Therefore, the Tribunal concluded that the ACST had wrongly allowed deduction of sales turnover of soft drinks by treating the same as first point tax paid goods.

11. As regards the claim for tax exemption under Entry No.30-FFFF of the IPR 1989, it was held that the Petitioner was not eligible for the said tax exemption since it had failed to produce any certificate to show that it was a SSI unit set up after 1st August 1980 and before 1st April, 1986 and that it had gone into commercial production after 1st April 1986. Further, the Tribunal held that the assessment in respect of sale of IMFL as well as soft drinks was found to be not in accordance with the provisions laid down under the OST Act. It was held that with the Petitioner having purchased IMFL worth Rs. 7,28, 517.66 during the year under assessment, the ACST could not have

allowed deduction of the entire sales turnover of Rs. 16, 38,814.35. Further, the Petitioner Assessee had not bifurcated the purchase and sale turnover in IMFL for the period from 1st April, 1995 to 13th July, 1995 and 14th July, 1995 to 31st March, 1996. It was held that this required further enquiry.

12. It was sought to be contended by the Department that in the list of industries excluded from the exemption provision under Entry No.30-FFFF was "Guest House and Restaurant". The Department contended that the activities in the restaurant run by the Petitioner was distinct from that of the hotel and therefore the dealer's business related to the restaurant was not eligible for tax concession. This explanation was accepted by the Tribunal. The matter was accordingly remanded to the STO for a fresh assessment. The re-assessment notice has already been stayed by this Court.

13. This Court has heard the submissions of Mr. Jagabandhu Sahoo, learned Senior counsel for the Petitioner and Mr.S.S. Padhy, learned ASC for CT & GST.

14. As regards the first issue, Mr. Sahoo states that that the DIC Certificate referred to above was indeed produced before the Tribunal and had also been referred to in a brief written note submitted by the Petitioner. That the Petitioner continued to be a 'hotel' and that it was not a restaurant in terms of Sl. No. 27 of the 'ineligible list' was apparent from the deposition made by the General Manager, DIC before the STO on 14th

November, 1996 pursuant to a summons issued to him under Section 21 of the OST Act. Mr. Sahoo relied on the decision in ***Vadilal Chemicals Ltd. v. State of Andhra Pradesh (2005) 5 RC 295*** in the Supreme Court disapproved of the sales tax authorities disregarding the exemption certificate issued by a DIC.

15. On the second issue, Mr. Sahoo points out that the Petitioner purchased IMFL in bottles and sold it in the Hotel's Bar by way of pegs in loose quantity for consumption. There was obviously a wide gap between the purchase value and the sales price. The purchase of IMFL having been subjected to sales tax in the State of Orissa and there being no dispute that it had suffered sales tax, the subsequent sale of IMFL at a higher price cannot be subject to further levy of tax under the OST Act. Likewise for the sale of cold drinks, there was no controversy that the Petitioner was not their first seller and that they had already suffered sales tax. The purchase bills in this regard had been produced before the STO. Therefore, these too were not exigible to sales tax under Section 8 of the OST Act. He placed reliance on the orders p[assed by the Tribunal in the Petitioner's own case for the AYs 1993-94, 1994-95 and 1996-97.

16. Mr. Padhy, learned ASC sought too defend the impugned order of the Tribunal by submitting that the activity of the Petitioner in selling IMFL and cold drinks in its Bar and restaurant was distinct from the service offered by it in the

hotel and therefore those sales in its 'restaurant' would be covered in the 'ineligible list'. Further, there was indeed no clear demarcation of the IMFL stocks for the two distinct periods and this required further enquiry. Therefore, the remand to the STO was justified.

Issue (i)

17. The above submissions have been considered. In the first place, it requires to be noted that it was not the case of the Department before the STO or the ACST that the Petitioner was not a unit under the 1980 Policy or a unit continuing as such under the 1989 IPR or that it had not been issued a certificate by the DIC. The point of controversy was whether by selling IMFL, cold drinks in its hotel it was part of the list of units excluded from exemption under Sl. No. 27 of IPR 1989?

18. In this context Clause 2.18 of the IPR-89 is relevant:

> "Continuing units of 1980 Policy" means any industrial Unit, where fixed capital investment commenced on or after the 1st August, 1980 and prior to the 1st April, 1986 and the unit has gone or goes into commercial production (on or) after the 1st April, 1986."

19. The wording of Clause 3 of the certificate dated 18th April, 1995 issued by the DIC, Cuttack reads as under:

> "The unit being a small-scale continuing unit of 1980 policy and having surrendered the Sales Tax loan availed by it within the prescribed time limit (as per clearance certificate issued by the General Manager, DIC, Cuttack in his letter No.8665, dt.18.9.98) is eligible for exemption from payment

of Sales Tax on sale of its finished products for a period of 7 years from the effective date of IPR 89 and subject to such restrictions and conditions as laid down in Finance Deptt. Notification No.789/90 dt.15.8.90 as amended from time to time."

20. The above certificate therefore should have dispelled any doubt as regards the Petitioner's eligibility for sales tax exemption. In fact, the same certificate has been relied upon by the Petitioner and accepted by the Tribunal in its orders dated 7th January 2008, 21st November 2007 and 21st May 2007 for the AYs 1993-94, 1994-95 and 1996-1997 respectively. In each of the aforementioned orders, passed after the impugned order was passed by the Tribunal on 4th September 2006 for AY 1995-96, the Tribunal has noted that in terms of the above exemption certificate, the Petitioner was exempt from paying sales tax on its finished products i.e. cooked food and beverages for a period of seven years from 1st December 1989 till 30th November, 1996. The AY 1995-96, with which the present revision petition is concerned is covered in this period.

21. In each of the orders for the aforementioned three AYs, the Tribunal has accepted the finding of the ACST that "hotel is different from guest house and restaurant" and that the eligibility certificate issued by the DIC cannot be nullified by the Department and cannot be withdrawn on the basis of subsequent resolution of the State Level Empowered

Committee dated 30th April 1996. The Tribunal has consistently held that "cooked food served in the restaurant of the dealer who is a hotelier is entitled for tax exemption under Serial No.30-FFFF of tax exemption schedule."

22. When the Department sought to refer to the impugned order [for AY 1995-96], the Tribunal distinguished it by observing that the finding therein had been rendered only because of the failure of the Petitioner to produce the exemption certificate. However, the fact that the DIC had indeed issued the aforementioned eligibility certificate on 18th April, 1995 was never in dispute.

23. In any event as explained by the Supreme Court in ***Vadilal Chemicals Ltd. v. State of Andhra Pradesh*** (*supra*), the Department

> "certainly could not assume the exemption was wrongly granted nor did he have the jurisdiction under Section 20 of the State Act to go behind the eligibility certificate and embark upon a fresh enquiry with regard to the appellant's eligibility for the grant of the benefits. The counter affidavit filed by the respondents-sales tax authorities is telling. It is said that the Sales Tax Department had decided to cancel the eligibility certificates for sales tax incentives. As we have said the eligibility certificates were issued by the Department of Industries and Commerce and could not be cancelled by the Sales Tax Authorities, (See in this connection *Apollo Tyres Ltd. v. CIT (2002) 9 SCC."*

24. The Tribunal has for the aforementioned three AYs 1993-94, 1994-95 and 1996-1997 rejected the plea of the Department

that the Petitioner's unit is to be categorized as a 'restaurant' and denied the exemption in terms of Entry 30-FFFF. This Court finds no reason why only for AY 1995-96 the Department's case ought to be accepted by the Tribunal particularly since the eligibility certificate issued by the DIC is the same for all these AYs.

25. Consequently question (i) is answered in favour of the Petitioner and against the Department by holding that the Petitioner is a hotel and does not fall under Clause 27 of the ineligibility list of IPR-1989 and is entitled to sales tax exemption under Entry 30-FFFF in terms of the Finance Department Notification dated 16th August, 1990.

Issue (ii)

26. There are two components of sales in question here. One is regarding the tax payable on sale of cold drinks and the other on the sales of IMFL. As regards the sale of cold drinks, it is not in dispute that the Petitioner is not the first seller in respect of cold drinks. It has produced the invoices to show from whom it has purchased the soft drinks. The Tribunal appears to have rejected these invoices only because the seller was not a registered dealer. But the Tribunal has for the AYs 1993-94 and 1996-97accepted that the cold drinks have suffered tax at the first point of sale and that irrespective of the sellers of such cold drinks not being registered dealers themselves, the cold drinks cannot be made exigible again to sales tax. This appears

position also flows from a reading of Section 8 read with Explanation (1) to Section 5 (2) (A) (a) of the OST Act.

27. In this context Mr. Sahoo is right in placing reliance on ***Govindan and Company v. State of Tamil Nadu, (1975) 35 STC 50***, where the Madras High Court held that to claim benefit of tax on the ground that the sales effected by the Assessees were second sales, they need not show that their sellers had in fact paid the tax at the first point. It was enough for them to show that the earlier sales were taxable sales and the tax was really payable by their sellers. This decision of the Madras High Court has been affirmed by the Supreme Court in ***State of Tamil Nadu v. Raman & Company (1974) 33 STC 1***. Likewise in ***State of Tamil Nadu v. Chamundeswari, (1983) 52 STC 124***, it was held as under:

> "The learned counsel for the revenue contends before us that the assessee must, for getting exemption in relation to his sale, not only show that his sale was not the first sale but also prove that the first sale has suffered tax in the State. We are not inclined to accept this proposition of law as correct. If the sale effected by the assessee is not the first sale, then under the provisions of the Act that sale cannot be brought within the net of taxation and it is for the revenue to search the first seller and levy tax on the first sale. It is not for the assessee, who is the subsequent seller, to show that the first sale has been taxed. Once it is found that the assessee's sale is a subsequent sale and there has been a first sale in respect of the same goods earlier in the State, then it is for the authorities to proceed to levy that transaction of first sale, and the onus cannot be thrown on the assessee to show that the first sale has suffered tax. The onus on the subsequent seller is

> only to point out that there has been a first sale and the onus is not on him to show that the first sale has, in fact, suffered tax. This is the view this Court has taken in two earlier decisions reported in *Govindan & Company v. State of Tamil Nadu* (1975) 35 STC 50 and *Deputy Commissioner (C.T.) v. Vijayalakshmi Mills Ltd.* (1977) 40 STC 463."

28. This was reiterated by the Madras High Court in ***State of Tamil Nadu v. A.R. Duraisamy Chettiar and Brothers 61 STC 360 (Madras)***.

29. However, as regards sales of IMFL this Court is of the view that the Tribunal is right in pointing out that IMFL became first point tax paid goods only with effect from 14th July 1995 and therefore, there had to be a bifurcation of the purchase and sale turnover in IMFL for the period from 1st April, 1995 to 13th July, 1995 and 14th July, 1995 to 31st March, 1996. Since these figures were not readily available, the observation of the Tribunal that this requires a further inquiry appears justified.

30. Question (ii) is accordingly answered partly in favour of the Petitioner by holding that the disallowance of claim of first point sale of cold drinks under Section 5(2) (A) (a) read with Section 8 thereof was not sustainable in law. However, the observation of the Tribunal in regard to the issue of sale of IMFL requiring further enquiry is upheld and the issue of sale of IMFL by the Petitioner for the AY 1995-96 is therefore remanded to the Assessing Authority for a fresh determination.

31. The revision petition is disposed of in the above terms and the order dated 4th September, 2006 of the Tribunal stands modified accordingly.

32. The records of the Tribunal, if requisitioned be returned forthwith. A certified copy of this order be sent by Special Messenger to the Assessing Authority concerned for further enquiry as held in para 31 above.

33. An urgent certified copy of this order be issued as per rules.

(Dr. S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

K.C Bisoi