IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.09.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition No.15708 of 2008

M/s.India Gypsum Limited,
Represented by its Finance Manager,
Mr.LK.Segar, Plot No.3631,
Door No.13, J Block,
III Avenue, Anna Nagar,
Chennai 600 102. ...Petitioner

Vs

1.The Assistant Commissioner,
Commercial Taxes, Zone VIII,
Greams Road, Chennai 600 006.

2.State Industries Promotion Corporation
of Tamil Nadu Limited, Zone VIII,
Represented by its Managing Director,
No.19A, Rukmani Lakshmipathy Road,
Egmore, Chennai 600 008. ... Respondents

Prayer: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari calling for the records in the impugned order in RC.134/2008/A3 dated 09.06.2008 on the file of the first respondent and quash the same.

For Petitioner :Mr.N.Venkataraman, Senior Counsel
assisted by Ms.P.Jayalakshmi,
for Mr.R.Karthikeyan

For Respondents:Mr.Haribabu, AGP - R1
Ms.Narmada Sampath, AAG
assisted by Mr.Ramesh Venkatachalapathy
for R2

ORDER

The petitioner before me is India Gypsum Limited, a Company incorporated in terms of the provisions of the Companies Act, 1956. It is engaged in the manufacture and sale of Gypsum boards and calcined plasters, and an assesseee on the files of the first respondent/ Assistant Commissioner, Commercial Taxes (R1).

2. The petitioner availed of an Interest Free Deferral Scheme with the Commercial Taxes Department and the State Industries Promotion Corporation of Tamil Nadu Limited (SIPCOT) on 26.09.2000, which provides for deferral of sales tax upto an amount of Rs.1501.40 lakhs, spread over a period of nine years from the month in which the petitioner commences commercial production, i.e., from 01.12.1999 to 30.11.2008. In terms of the deferral eligibility certificate, the period of deferral along with financial year of repayment, are set out below:

'DEFERRAL PERIOD	FINANCIAL YEAR OF REPAYMENT
01.12.1999-31.3.2000	1.12.2008- 31.3.2009
1.4.2000 -31.3.2001	1.4.2009 - 31.3.2010
1.4.2001 -31.3.2002	1.4.2010 - 31.3.2011
1.4.2002 -31.3.2003	1.4.2011 - 31.3.2012
1.4.2003 -31.3.2004	1.4.2012 - 31.3.2013
1.4.2004 -31.3.2005	1.4.2013 - 31.3.2014
1.4.2005 -31.3.2006	1.4.2014 - 31.3.2015
1.4.2006 -31.3.2007	1.4.2015 - 31.3.2016
1.4.2007 -31.3.2008	1.4.2016 - 31.3.2017
1.4.2008 -31.3.2008	1.4.2017 - 31.3.2017'

3. Simultaneous therewith, the petitioner entered into a Deed of Agreement for 'deemed payment of deferred sales tax deemed to be loaning and recovery of loan' with the Commercial Taxes Department on 20th November, 2000. The salient features of the agreement are that the petitioner, a new unit, became entitled to full tax deferral subject to a ceiling of Rs.1501.40 lakhs. The repayment shall be as per the eligibility certificate and the petitioner shall not alienate/disperse/encumber/lease out various fixed assets until the Government loan was fully repaid without express permission from the Government. Various other conditions have been set out which may not be very material to the lis that arises in this writ petition.

4. Suffice it to say that in the course of the deferral there appears to have been, according to the Department, a change in constitution of the petitioner unit, as a result that clause 10(b) of the agreement stood breached. The clause provides that in the event that the promoter - partner or director of the company had grossly and habitually defaulted in payment of tax or attempted to prevent the tax recovery proceedings by changing the constitution of the concern or the firm or company or by transferring the fixed assets to another while engaging in business, also attempting to prevent tax recovery proceedings, the Department would proceed to cancel the deferral as well as the agreement and the entire amount of tax would become payable in one lumpsum by the assessee.

5. Clause 11 provides that in the event of default of any of the conditions referred to in the agreement including the condition at 10 (b), the deferral granted shall stand cancelled for the entire period. In the event of such default, as per clause 12, the Government loan, the tax and the interest due thereupon shall be recoverable in the manner specified under the Revenue Recovery Act, 1864.

6. R1 issued a show cause notice dated 11.01.2008 putting the petitioner to notice that various provisions of the Companies Act, 1956 stood violated in its case. According to R1, who had noticed the statement in the Directors' report for the year 2005-06 to the effect that British Plaster Board PLC ('BPB') had been acquired by Saint Gobain, a change had been occasioned in the constitution of the petitioner. This change, according to R1, resulted in the breach of agreement conditions as well as of Sections 108, 108A, 108B, 108C and 394 of the Companies Act. Section 108 deals with transfer not to be registered except on production of instrument of transfer, section 108A placed a restriction on the acquisition of certain shares, section 108B placed a restriction on the transfer of shares, 108C placed a restriction on the transfer of shares of foreign companies and section 394 facilitated re-construction and amalgamation of companies.

7. On an application of the aforesaid provisions, R1 was of the view that there had been change in the ownership/constitution of the petitioner, which rendered the petitioner ineligible to avail the deferral benefit. He thus proposed to cancel the eligibility certificate and the agreement entered into inter se the Department and the petitioner and the petitioner was called upon to remit the entire quantum of taxes deferred, amounting to Rs.1501.40 lakhs in one lumpsum with interest from the date of accrual of liability.

8. The petitioner was given an opportunity to file its objections to the proposal within 15 days. On 05.02.2008, the

petitioner objected to the show cause notice pointing out that there had been no change whatsoever in the constitution or ownership of the petitioner firm, no acquisition or transfer of shares and consequently, no breach of the deferral agreement. It also pointed out that the delisting of shares that had taken place on 12.01.2005 was strictly in compliance with the procedure set out in the Securities Exchange Board of India (Delisting of Securities) Guidelines 2003 and in any event, the delisting had nothing whatsoever to do with the acquisition of shares inter se BPB Plc and Saint Gobain outside the Country.

9. The case of R.Anandhi V. Commercial Tax Officer ((1999) 115 STC 514) relied upon by the Officer was objected to and distinguished on facts pointing out that that case referred to a proprietary organisation that had transferred its entire business, lock, stock and barrel.

10. Subsequent exchange of communications on 28.04.2008 and 13.05.2008 between the petitioner and R1, reiterate the contents of the show cause notice as well as the objections noted above.

11. On 09.06.2008, R1 proceeded to pass the impugned order along the lines of the show cause notice cancelling the deferral agreement and calling upon the petitioner to pay the deferred tax in one lumpsum along with interest from the date from which it had become due. The petitioner was called upon to pay the same within 30 days under threat of coercive measures.

12. Heard the submissions of Mr.N.Venkataraman, learned senior counsel for Ms.Jayalakshmi, learned counsel for the petitioner, Mr.V.Haribabu, learned Additional Government Pleader for Commercial Taxes/R1 and Ms.Narmada Sampath, learned Additional Advocate General assisted by Mr.Ramesh Venkatachalapathy, learned counsel for SIPCOT/R2.

13. India Gypsum Limited is a company incorporated under the provisions of the Companies Act, 1956 on 05.02.1985, and is an independent assessable entity. The agreement entered into by the petitioner with the Commercial Taxes Department contains the following clause which is said to have been breached by it.

> 'Deed of agreement for Deemed Payment of Deferred Sales Tax Deemed to be loaning and recovery of loan
>
> 10...............
>
> a) i) Party of the second part certify that promoters-partners or Directors have not made any defaults to commercial tax Department.
>
> (ii) that they have not wound up any firm or company for which they have availed sales tax concessions in the part and

(iii) that they have not transferred the fixed assets of any concern or firm or company for which they have availed sales tax concessions previously, to any other person.

b) In the case of any specific proof to the effect that the promoter-partner or director of the firm or company has grossly habitually defaulted payment of tax or attempted to prevent the tax recovery proceedings by changing the constitutions of the concern or the firm or company or by transferring of fixed assets to another etc., while doing business now or earlier in any other names. Commercial taxes Department has full rights to cancel the proceedings and agreement that has been entered under IFST deferral or waiver schemes and to recall the sales tax already deferred in one lumpsum from the party of the second part.

11. In case of default of any of the conditions mentioned in para 3,4,5,6,7,8,9 and 10 above the deferral thus granted shall be cancelled for the entire period for which the same was granted.

12. In default of repayment of Government loan or cancellation of the deferral facility for violation of any of the conditions as mentioned in paras 3,4,5,6,7,8,9 and 10 such Government loan, tax and interest due thereon shall be recoverable in such manner as specified under Revenue Recovery Act, 1864 (Tamil Nadu Act II of 1864) for the loan under sub-section (2) of Section 24 of the TNGST Act 1959 (Tamil Nadu Act I of 1959) for the tax and the amount is also liable for 24% interest per annum'

14. Clause 10 (b) stipulates that if the partner/promoter or director of the firm or company has grossly or habitually defaulted in payment of tax or attempted to prevent tax recovery proceedings by changing the constitution of the company or transferring fixed assets to a third party, then the deferral agreement would be liable to be cancelled.

15. It has however, never been the case of the respondents, commencing from the time of issuance of show cause notice, that there has been an attempt on the part of the petitioner to either default in payment of tax or to thwart tax recovery proceedings. In fact, there has been no demand of tax prior to issuance of show cause notice. Thus, and simply on this score,

the invocation of clause 10(b) is not justified in the present case.

16. Be that as it may, detailed submissions have been made by both parties on the circumstances when clause 10(b) would, in fact, stand attracted. According to the petitioner, there is absolutely no change in the constitution of the company. The petitioner has placed on record the shareholding pattern to state that all the companies in the group prior to 2008 were held by British Plaster Board Plc, United Kingdom. Thereafter, the flow chart reveals companies situated in England, Luxembourg, Netherlands and India. As far as India Gypsum Limited is concerned, it is, though a stand alone independent legal entity, a subsidiary of two independent entities by the name of BPB Plc India Limited and BPB Holdings India Private Limited, both subsidiaries of BPB Plc, United Kingdom.

17. In 2008, substantive shareholding in BPB Plc UK was acquired by Saint Gobain, France. This is an admitted fact. This, does not, in any way however, affect the constitution or independent status of India Gypsum Limited, In fact, the shareholding pattern of India Gypsum Limited remains unaffected by the acquisition of shares of BPB Plc UK by Saint Gobain, France. The annual reports for the period ending 31.12.2006 and 30.09.2008 reveals substantially similar shareholding in the petitioner company.

18. The stand of SIPCOT in its counter is to the effect that the Writ Petition is not maintainable seeing as the petitioner has breached the conditions of the eligibility certificate and as such rendered itself ineligible to the benefit of deferral scheme.

19. Before me, the submissions of SIPCOT are quite different from what have been stated in the counter. SIPCOT avers that there is an additional agreement that has been entered into vis-a-vis itself and the petitioner that imposes a different set of conditions upon the petitioner. According to SIPCOT, it is the owner of the land upon which petitioners' unit stands and there are various terms and conditions that have been set out in that agreement which stood breached by the petitioner. SIPCOT thus avers that the identity of the assessee that had entered into the deferral agreement and that of the petitioner before Court is rendered different by virtue of the change in shareholding, and the present petitioner is alien to and completely unconnected with it.

20. This allegation is not borne out by anything stated in the counter. No such agreement has been produced before me and I have no hesitation in rejecting this submission as being bereft of any merit whatsoever.

21. Pending Writ Petition, there appears to have been a Scheme floated by the Commercial Taxes Department providing for discounted payments of sales tax deferral. Thus, as against the demand of Rs.1501.40 lakhs, an offer was made to the petitioner on 15.09.2009 by the Joint Commissioner of G.O.Ms.No.60 dated 28.02.2007, announcing premature payment of deferred taxes under a Net Present Value Scheme ('NPVS') at a deep discount of 8%. The Scheme was promoted as being one that was favourable to the assessees, offering concession/discounts ranging from 30 to 50%. The petitioner was requested to avail the opportunity and settle the payment. The petitioner, by communication dated 11.11.2009 put the respondent to notice of the pendency of the present Writ Petition, parallelly indicating its interest in availing the scheme offered. On 10.03.2010, the petitioner availed the scheme enclosing a cheque for settlement of the entire amount at a sum of Rs.11,04,01,412/-. On 22.03.2010, the Joint Commissioner (CT) acknowledges receipt of the letter and cheque for a sum of Rs.10,93,23,630/- in pursuance of the scheme. Be that as it may, the mere fact that the amount has been paid by the petitioner and received by the Department would not, in my view, stand in the way of the matter being contested on merits.

22. In support of his case regarding change in constitution of firm, learned AGP relies on a communication inter se the Department and the petitioner for availment of the NPVS Scheme. Though the Department addresses its offer to Tvl. India Gypsum Ltd., the reply was addressed in the letter head of Saint-Gobain Gyproc India Limited. Thus, according to the respondents, the change in constitution is apparent. The respondents explain this stating that though the agreement entered into by the Commercial Taxes Department is with India Gypsum Limited, pursuant to a change of name sometime between 2008 and 2009, the name of the assessee is now Saint-Gobain Gyproc India Limited.

23. I am not in a position to accept the arguments of the revenue on this ground as the detail of shareholdings in the Annual Report do not bear testimony to a change in constitution. Though the respondent is certainly entitled to pierce the corporate veil and ascertain the truth in regard to the companys' constitution, no such enquiry has been done in the present case.

24. Moreover, a mere change in constitution would not amount to breach of the agreement, since clause 10(b) envisages that such change in constitution must be 'in order to enable the petitioner/assessee to avoid payment of tax or to circumvent the meeting of its liabilities'. It has never been the case of the Department that the petitioner has circumvented or avoided any

tax liability. The fact that the petitioner has remitted the entire amount of deferred taxes at discounted rate even prior to commencement of repayment schedule would show that it is not a company which either intended or did not have the resources to meet its liabilities.

25. Though I could allow this Writ Petition at this stage, since the argument relating to constitution of the company have been heard in detail, I may also refer to few decisions cited at the bar in this regard.

26. The Supreme Court in the case of Balwant Rai Saluja and another V. AIR India Ltd. and others ((2014) 9 SCC 407) rendered in the context of a labour enactment states as follows:

> '67.The Companies Act in India and all over the world have statutorily recognized subsidiary company as a separate legal entity. Section 2(47) of the Companies Act, 1956 (for short "the Act, 1956") defines 'subsidiary company' or 'subsidiary', to mean a subsidiary company within the meaning of Section 4 of the 1956 Act. For the purpose of the 1956 Act, a company shall be, subject to the provisions of sub-section (3) of Section 4, of the 1956 Act, deemed to be subsidiary of another. Sub-section (1) of Section 4 of the 1956 Act further imposes certain preconditions for a company to be a subsidiary of another. The other such company must exercise control over the composition of the Board of Directors of the subsidiary company, and have a controlling interest of over 50% of the equity shares and voting rights of the given subsidiary company. '

27. Thereafter, the Madras High Court in the case of Spencer & Co. Ltd., Madras V. The Commissioner of Wealth Tax Madras (AIR 1969 Mad 359) while considering the liability of the company under the Wealth Tax Act, 1957 reiterated this position at paragraph 7 as follows:

> '7. It is well settled that an incorporated company is a legal person and it cannot be equated to its share-holders. The position continues to be the same even if the number of the share-holders is reduced to one by accident or otherwise. The act of the company cannot, therefore, be regarded as that of any of the share-holder and vice versa. It is true that occasionally the corporate veil of a company is pierced through in order to find out the substance but that is only where it is permitted by a statute or in exceptional cases of fraud. '

28. Then again, the Supreme Court, in Electronics Corporation of India & Others V. Secretary Revenue Department, Govt. of A.P. And others ((1999) 4 SCC 458) was dealing with an issue under the Andhra Pradesh Non-Agricultural Lands Assessment Act, 1963 and states at paragraph 15, that a clear distinction must be drawn between a company and its shareholder even though the shareholder may be only one, and that, the Central or a State Government. Thus, irrespective of the same, a company registered under the Companies Act is a distinct legal entity, other than the legal entity or entities that hold its shares.

29. De hors the above settled legal proposition, even on the facts of the present case, I have held that the change of constitution at the level of the United Kingdom/France has not resulted in any material change in the constitution of the petitioner company.

30. In the light of the discussion as above, the impugned order is set aside and the Writ Petition allowed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Assistant Commissioner,
Commercial Taxes, Zone VIII,
Greams Road, Chennai 600 006.

2.State Industries Promotion Corporation
of Tamil Nadu Limited, Zone VIII,
Represented by its Managing Director,
No.19A, Rukmani Lakshmipathy Road,
Egmore, Chennai 600 008.

+1cc to M/s.R.Karthikeyan, Advocate SR.82888
+1cc to M/s.Ramesh Venkatachalapathy, Advocate SR.82653
+1cc to Spl Government Pleader (Taxes) SR.83243

Writ Petition No.15708 of 2008

BP(CO)
CB(07/02/2020)