

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2019

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.NOS.33005 TO 33007 OF 2005
AND WMP.NOS.35958, 35954, 35956, 35955 & 35957 OF 2005

Modern Bakers (Madras) Pvt. Ltd.,
represented by its Director
Subramaniam, No.347, MRH Road,
Madhavaram, Chennai - 600 060.

... Petitioner in all WPs

Vs.

1. The Commercial Tax Officer,
Manali Assessment Circle,
Kuralagam Annex, 1st Floor,
Chennai - 600 108.
2. The Assistant Commissioner (CT),
Zone VIII,
PAPJM Buildings, IV-Floor,
Greams Road, Chennai - 600 006.
3. The Branch Manager,
Tamilnadu Mercantile Bank Ltd.,
Old Washermenpet Branch,
Chennai - 600 021.
4. The Finance Manager,
Parle Products Private Ltd.,
Nirlon House,
254-B, Dr.Annee Besant Road,
Worli, Mumbai - 400 025.

... Respondents in all WPs

Prayer in WP.No.33005 of 2009:-

Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, to quash the proceedings of the Second Respondent herein in Rc.8955/2005/A3 dated 22.9.2005.

Prayer in WP.Nos.33006 & 33007 of 2009:-

Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, to

quash the proceedings of the First Respondent herein in Rc.3334/2004/A3 dated 30.9.2005.

For Petitioner
in the above W.Ps : Mr.N.Prasad

For Respondents
in the above W.Ps : Mr.Mohammed Shafiq,
Spl.G.P.-R1 and R2
No appearance - R3 & R4

C O M M O N O R D E R

The petitioner challenges an order dated 22.09.2005 in W.P.No.33005 of 2009 which cancels the benefit extended to the petitioner under an Agreement of deferral of sales tax liability dated 15.04.2002.

2.The facts in brief are as follows:

The petitioner had set up a unit for the manufacture of biscuits and availed of deferral benefit offered by the Government of Tamil Nadu in G.O.Ms.No.500, Industries (MIG-II) Department, dated 14.05.1990. An Eligibility Certificate was obtained from the General Manager of the District Industries Centre on 20.12.2001. Thereafter, an Agreement was entered into with the Assistant Commissioner, Commercial Taxes Department on 15.04.2002 in line with which proceedings under Section 17(A) of even date were issued by the Assessing Officer. The period of deferral and of repayment are as follows:

Deferral Period		Finanacial year of Repayment	
From	To	From	To
01.10.2001	31.03.2002	01.10.2006	31.03.2007
01.04.2002	31.03.2003	01.04.2007	31.03.2008
01.04.2003	31.03.2004	01.04.2008	31.03.2009
01.04.2004	31.03.2005	01.04.2009	31.03.2010
01.04.2005	31.03.2006	01.04.2010	31.03.2011
01.04.2006	30.09.2006	01.04.2011	30.09.2011

3.The petitioner is a new unit and had commenced commercial production on 01.10.2001. During the period 01.10.2001 to November 2003, the installed capacity of the factory was utilised by the petitioner for its own manufacturing purposes. However and thereafter, the petitioner found that the business was not successful and the unit had not been able to achieve even fifteen percent installed capacity by the end of financial year 2003, accumulating losses. It thus became necessary for the petitioner to devise means and methods to save its investment,

safeguard the interests of the workers and to enable it to repay financial institutions and creditors.

4.The petitioner thus entered into an agreement with Parle Products Private Limited (in short 'Parle'), in terms of which Parle was to supply the raw material for production of biscuits and the petitioner would engage in the activity of manufacture for Parle on job work/contract basis.

5.According to the petitioner, this arrangement with Parle did not impact adversely its entitlement to the deferral in so far as it had engaged in independent commercial production for its own purposes between 01.10.2001 and November 2003 and had entered into the new arrangement only for reasons beyond its control. In any event, neither the terms of the Eligibility Certificate nor the Agreement entered into with the Commercial taxes Department militated against such an arrangement.

6.However, the Department was of the view that the shift from commercial production for its own purposes to job work for a third party, constituted a breach of the terms of the deferral. Notice dated 29.07.2005 thus came to be issued to the petitioner calling upon it to pay the entire taxes for the period when it was engaged in commercial production/manufacture i.e., 01.10.2001 to November 2003 of deferral, for its own purposes, as a lumpsum.

7.Despite the petitioners' objections to the notice issued and its confirmation that would remit the taxes for the period as per deferral scheme, which it incidentally has, admittedly done, the respondent passed the impugned order dated 22.09.2005, rejecting all its contentions and cancelling the Scheme. According to the respondent, the Eligibility Certificate and the Agreement had been drawn on the basis of turnover from first sale of biscuits, the specific condition being that the dealer enjoying the deferral should itself be the tax payer engaging in the activity generating the turnover in question. No shift in mode of operation was contemplated. Thus, the assessee/petitioner was not entitled to change the original obligations as such shift would go to the root of the matter and obviate the grant of the benefit. Coercive action for recovery of the demand was proposed by way of attachment of its bank accounts. It is as against the order of cancellation of deferral dated 22.09.2005 and consequent recovery action that the petitioner is now before the Court.

8.Heard Mr.Prasad, learned counsel for the petitioner and Mr.Haribabu, learned Additional Government Pleader (Tax) for the respondent.

9. The spirit and object behind Sales tax deferral for Industries has been captured in G.O.Ms.No.500 Industries (MIG-II) Department dated 14.05.1990 and relevant portions of the same are extracted below:

G.O.Ms.No.500

Dated: 14.5.1990

The Government in the order second read above declared 105 taluks of this state as industrially backward for the purposes of grant of interest free sales tax loan, interest free sales tax deferral, state capital subsidy etc.

2. With a view to correct regional imbalances in the industrialisation in the state by giving further incentives to more backward areas, the Government direct that 30 taluks, from among the 105 industrially backward taluk be declared as industrially most backward taluks. The name of 30 taluks are annexed to this order.

3.....

4. With a view to encourage more industries in Tamilnadu, the Government direct that the following concessions also be made available to the industries:

(a) For the industries to be started in the 75 backward taluks i.e. Other than the 30 most backward taluks, from among the 105 backward taluks, and in the industrial estates developed by any of the Government agencies including Madras Export Processing Zone, Madras Metropolitan Development Authority, the scheme of interest free sales tax loan / deferral ordered in the Government order first, third and fourth read above is modified as follows:

(i) For the existing units undertaking expansion or diversification, deferral of sales tax will be given for nine years and the total amount thus given shall not exceed 80% of the additional investment made in fixed assets.

(ii) For the new units, the total amount of deferral of sales tax will be given for nine years to the full extent of the total investment made in fixed assets.

(b) The interest free sales tax deferral scheme is extended to the expansion (Part-I) as well as to the starting of new industries (Part-II) in the other areas also, where this scheme was not in vogue hitherto. The deferral of sales tax for the industries in these area will be for five years subject to a maximum of 60% of the total investment made in fixed assets in the case of new industries and 50% of the

additional investment in fixed assets made in the case of expansion/diversification, of the existing industries.

(c) As a gesture to the industries to be set up in any part of Tamilnadu with an investment in fixed assets of more than Rs.50 crores, a special incentive of deferral of sales tax for a period of 9 years to the extent of total investment made in fixed assets will be given. This deferral concession will also be available to the existing industries going in for expansion/diversification with an additional investment in fixed assets for more than Rs.50 crores.

5. The Sales tax deferral/waiver of expansion / diversification ordered in paras 3-4 above is subject to the sales tax payable on products manufactured by the capacity created by expansion / diversification units only.

6. The industries in the Most Backward taluks and in the SIPCOT Complexes at Cuddalore, Manamadurai and Pudukottai can opt either for the full waiver of sales tax for a period of five years ordered in para 3 above or for the deferral of sales tax for nine years as applicable to the industries in the backward taluks ordered in para 4(a) above. The option should be exercised along with the application to be submitted to the authority for issuing eligibility certificate. The option once exercised and accepted will be final and cannot be changed.

10. In the present case the petitioner has been granted sales tax deferral thus confirming the position that it has satisfied all requirements as stated in the above Circular. Clearly the intention is to encourage industries in Tamil Nadu specifically, in the most backward taluks.

11. In Assessing Authority-cum-Excise and Taxation Officer, Gurgaon, and another vs. East India Cotton Mfg. Co. Ltd., (48 STC 239), a Full Bench of the Supreme Court dealt with the interpretation of Section 8(3)(iii) of the Central Sales Tax Act, 1956. The aforesaid provision, which deals with transactions of interstate trade, provides for a concessional rate of tax in respect of transactions where prescribed Declaration forms are filed by the assessee. The provision is extracted below:

'Section 8.....

(3) The goods referred to in clause (b) of subsection(1) -

(a)

(b) are goods of the class or classes specified in the Certificate of Registration of the registered dealer purchasing the goods as being intended for re-sale by him or subject to any Rules made by the Central Government in this behalf, for use by him in the manufacture or processing of goods for sale or [in the telecommunications network or] in mining or in generation or distribution of electricity or any other form of power'

12.The question that arose therein related to the scope and meaning of the expression 'for use by him in the manufacture or processing of goods for sale'. The specific issue related to whether this phrase limited/restricted the application of the provision to those goods manufactured and sold by the registered dealer using goods purchased against his certificate of registration or whether it also included those goods manufactured by the dealer using materials supplied by a third party under job work, where the goods finally manufactured were sold by such 3rd party. This question was answered by the Bench in favour of the assessee stating that a plain reading of the provision supported the case of the assessee to the effect that the benefit of concessional rate of tax would be available both in cases of production by itself for sale by it and production by it for sale by others. In the absence of any language in the provision to support the conclusion that the sale must be by the particular dealer itself, the Full Bench held that words to that effect could not be interpolated/read into the provision, as a result, restricting the relief extended.

13.Noticing and applying the above judgment of the Supreme Court, a learned Single Judge of the Rajasthan High Court at Jodhpur in Commercial Taxes Officer, Jodhpur vs. Vishnu Metals (120 STC 433) had interpreted the relevant provisions in the 'Sales Tax New Incentive Scheme for Industries 1989' issued in terms of the Rajasthan Sales Tax Act, 1954 holding that the exemption granted to industries/units from payment of tax on sale of goods would relate to both goods manufactured by that assessee as well as job works for third parties where the final products were sold by the third party. This decision was confirmed by the Division Bench and travelled in appeal to the Supreme Court, decided by a Full Bench in Commercial Tax Officer, Jodhpur vs. Vishnu Metals and another, (148 STC 634).

14.The Notification under interpretation in that case, is as under:

'Notification No.F.4(35)FD/Gr. IV/87-38 dated the July 6, 1989

In exercise of the powers conferred by sub-section (2) of section 4 of the Rajasthan Sales Tax Act, 1954 (Rajasthan Act 29 of 1954), the State Government, being satisfied that it is expedient in the public interest so to do hereby notifies the "Sales Tax New Incentive Scheme for Industries, 1989 (hereinafter referred to as the 'New Incentive Scheme') and exempt the industrial units from payment of tax on the sales of the goods including by-products and waste items manufactured by them within the State and in case of packing material used therewith the benefit will be available only if it is linked with fixed capital investment, in the manner and to the extent and for the period as covered by this notification.'

15. The above Notification allowed for an exemption to industrial units from payment of tax on sale of the goods including by-products and waste items manufactured by them within the State. The contention of the revenue was to state that such exemption would be available only if the goods were manufactured by the very assessee that had sought benefit under Notification. According to the revenue the entire manufacturing capacity of the industrial units seeking the incentive should be utilised only by the assessee which contention was negated by the learned single Judge, who concluded that the benefit was well available even in those cases where the installed capacity was utilised to produce material for sale by third party manufacturers.

16. While confirming this conclusion in principal, the Supreme Court however observed that both the Single as well as Division Benches had proceeded on the assumption that the job work performed by the assessee resulted in final products that were similar to its own manufactured goods. That this position was not confirmed in fact, was found fault with since, the Supreme Court stated, the incentive granted was inextricably related to the goods manufactured. It was thus incumbent on the Courts, the Bench found, to have examined the position as to whether the goods manufactured on job work were identical to the goods manufactured by the assessee for own sale. For this purpose, the Revenue appeal was allowed, specifically on the factual aspect that the assessee in that case had not been able to specify the nature of the job work undertaken by it. That is not the case in the matter before me as there is no dispute in fact on identity of the product manufactured by it for sale by

itself, or the manufacture of biscuits on contract basis, using the raw material supplied by Parle.

17. Clause 5 of G.O.Ms.No.500 dated 14.05.1990 states that the benefit is available subject to sales tax payable on products manufactured by the capacity created by expansion/diversification. It is not set out as a condition that such manufacture should be by the assessee that has been granted the deferral and the condition imposed is qua utilization of production capacity only. The Revenue, however, argues that the production/exploitation of installed capacity should be for the sake of the assessee only and cannot be for third parties. If the interpretation of the revenue were to be accepted, it would tantamount to stating that such manufacture would have to be only by the assessee who had availed the deferral. The agreement entered into between the parties also does not contain such a stipulation. The relevant clauses of the agreement are Clause 1 and 9, both of which are extracted below:

1. The Sales Tax due on the sale of the products manufactured by them in their premises shall be deemed to have been paid to the assessing authority and an identical amount shall be treated as Government loan.

2...

3...

4...

5...

6...

7...

8...

9. The party of the second part shall keep the normal production during the period of IFST as stipulated in the Eligibility certificate. If the unit availing the loan stopped normal production for a period exceeding six continuous months except in the condition of force-Mejure the entire outstanding loan will become recoverable in one lumpsum. The concerned assessing office shall be permitted to keep close watch over the performance of the industry and foreclose the scheme and enforce the recovery of the tax assessed for all the years covered by the scheme, if the monthly return of check of accounts during the assessment or otherwise show that the industry has stopped production in excess of permitted period."

18. The Revenue argues that the use of the word 'normal' in relation to production means that such production has to be only

by the assessee availing the deferral. I do not agree. The term 'normal production' has to be read qua the 'production capacity' and not qua 'the entity'. Thus, a proper understanding of Clause 9, in my view, is that production qua installed capacity in the factory should not stand interrupted for a period exceeding six months failing which, the entire tax deferred would become recoverable in one lump sum. Admittedly, in this case production has not stopped at all, but has continued consistently over the tenure of the deferral.

19. Moreover this is a case where the benefit of deferral has itself been availed by the petitioner only for the period till production for Parle commenced. Thereafter there is no question of deferral, since there is no sale by the assessee and thus no liability to tax. The only consequence of the job work undertaken in the present case is that the tenure of deferral has been reduced from six to two years.

20. A Division Bench of this Court in *Bhoomi Bottling Gas Company Private Limited Vs. Assistant Commissioner, Commercial Taxes (Ct), Zone-IV, Chennai* and another [(2009) 19 VST 131] considered the case of an assessee that had carried on production for its own purposes from 2000 to 2002. Thereafter it stopped its business of purchasing LPG and refueling it in cylinders but continued the same activity on contract basis with Hindustan Petroleum Corporation Ltd. The scheme of deferral was thus cancelled on various grounds including that normal production was stopped for a continuous period of six months, such cancellation being upheld by the Division Bench.

21. The Bench considered the judgments of the Taxation Special Tribunal in *Ghouseiya Gram Flour Mills Vs. Deputy Commercial Tax Officer, Krishnagiri* [(1996) 101 STC 149] and that of the Supreme Court in *Vishnu Metals* (supra) distinguishing the same from the facts involved in that case. However the judgment of the Supreme Court in the case of *East India Cotton Mfg. Co. Ltd.* (supra) does not appear to have been cited or brought to the notice of the Division Bench and the Bench thus had no occasion to consider the same.

22. Applying the ratio of the judgments of the Supreme Court in *East India Cotton Mfg. Co. Ltd.* (supra) and *Vishnu Metals* (supra), I am of the view that the facts and legal position that arise in this case are analogous to the aforesaid matters. I am thus inclined to take a view in favour of the assessee, drawing support from the aforesaid judgments.

23. Thus, respectfully applying the ratio of the judgements of the Full Bench of the Supreme Court in *East India Cotton Mfg. Co. Ltd.* (supra), Division Bench in *Vishnu Metals* (supra) as

well as the Circular issued by the State setting out the spirit and intendment of the Sales tax deferral Scheme in context, and in the light of the detailed discussion above, these writ petitions are allowed and orders dated 22.09.2005 and 30.09.2005, set aside. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vs

To

1. The Commercial Tax Officer, Manali Assessment Circle,
Kuralagam Annex, 1st Floor,
Chennai - 600 108.
2. The Assistant Commissioner (CT),
Zone VIII, PAPJM Buildings, IV-Floor,
Greens Road, Chennai - 600 006.
3. The Branch Manager, Tamilnadu Mercantile Bank Ltd.,
Old Washermenpet Branch,
Chennai - 600 021.

+1cc to Mr.N.Inbarajan, Advocate, S.R.No.79903

+1cc to the Special Government Pleader(T), S.R.No.79849 & 80800

W.P.Nos.33005 to 33007 of 2005
and WMP.Nos.35958, 35954, 35956,
35955 & 35957 of 2005

PPA(CO)
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