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IN THE HIGH COURT OF ORISSA AT CUTTACK

STREV No.276 of 2008

M/s. Uphar Udyog, Rourkela, Petitioner
Sundergarh

-versus-

State of Odisha represented by the Opposite Party
Commissioner of Sales Tax, Cuttack

Appeared in this case:

For Petitioner : Mr. Jagabandhu Sahoo,
Senior Advocate

For Opposite Party : Mr. S. S. Padhy,
Additional Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAİK

JUDGMENT
19.05.2022

Dr. S. Muralidhar, C.J.

1. The present revision petition by the Assessee arises out of an order dated 8th June, 2007 of the Orissa Sales Tax Tribunal (Division Bench), Cuttack (Tribunal) in S.A. No.913 of 2002-03 for the year 1998-99.

2. While admitting the present revision petition on 9th May 2008, the following Questions were framed for consideration:

(a) Whether in the fact and circumstances of the case, the learned Tribunal is erred in law by disallowing the tax exemption on sale of finished products manufactured by the industrial unit under the diversification scheme ?

(b) Whether in the facts and circumstances of the case, the order of enhancement of assessment passed by the Ld. Tribunal without compliance of the provisions of Rule-50 (3) of the Orissa Sales Tax Rules is lawful and valid ?

(c) Whether in the fact and circumstances of the case, the learned Tribunal has committed error of jurisdiction or is erred in law while deciding issues which are not before him in the appeal filed by the Petitioner in absence of cross objection filed by the State ?

3. This Court heard the submissions of Mr. Jagabandhu Sahoo, learned Senior Counsel for the Petitioner and Mr. S. S. Padhy, learned Additional Standing Counsel for the Department-Opposite Party.

4. The background facts are that the Petitioner is a registered dealer under the Orissa Sales Tax Act, 1947 (OST Act) as well as the Central Sales Tax Act, 1956 (CST Act). The Petitioner is a registered Small Scale Industrial Unit (SSI Unit) in terms of the Industrial Policy Resolution (IPR), 1986. It was engaged in manufacture of steel almirahs, racks, tables, air coolers, cabinets. For this, it has been granted a permanent registration certificate by the District Industries Centre (DIC), Rourkela.

5. After coming into force of the IPR 1989, the Petitioner undertook expansion and diversification by virtue of a separate project report, which was duly approved by the Competent Authority. The Petitioner started manufacturing new items viz., foundation packing and rings, gaskets, plates and packing exhaust smoke channel, electrical panel board sheet material like karai, G.P. Tray, Grain Storage Tank, Steel door and window.

6. The Project Manager of the DIC, Rourkela, who was the Competent Authority, issued in favour of the Petitioner a certificate of eligibility that the Petitioner was entitled to exemption from payment of sales tax on purchase of raw materials and sale of finished products under IPR-89 for a period of seven years from the date of commencement of commercial production i.e., 9th September, 1998.

7. In terms of the notification issued on 16th August, 1990 by the Finance Department (FD), Government of Orissa, under Entry 30-FFF of the exemption list issued under Section 6 of the OST Act, existing SSI Unit of 1986 IPR, which had undertaken expansion or modernization or diversification after 1st December 1989, on the basis of a separate project report duly approved by the Financial Institution and starting commercial production thereafter within the State, again as certified by the Competent Authority, would be eligible for exemption from payment of sales tax for a period of seven years from the date of commercial

production to the extent of the increased commercial production over and above the existing installed capacity. This exemption would be available only once within the entire effective period.

8. Since the Petitioner was assessed to NIL demand in respect of the products relating to the pre-expansion period, it discontinued production of those products and thereafter only manufactured products under the diversification unit. Thus, the Petitioner claims that it did not manufacture and sell any product from out of the original installed capacity of the industrial unit.

9. While completing the assessment for the period 1998-99, the Sales Tax Officer (STO) by an order dated 21st January 2002 raised a tax demand by estimating the notional value of finished products, which the Petitioner's Industrial Unit could have produced for the period from 1st April 1998 to 9th September, 1998. According to the STO, this would work out to Rs.8,50,465/-. The STO allowed exemption only in the sum of Rs.27,77,530/-. The net tax liability was worked out at Rs.1,50,005/-.

10. Aggrieved by the above assessment order, the Petitioner filed an appeal before the Assistant Commissioner of Sales Tax (ACST), Sundargarh Range, Rourkela, who by an order dated 19th June, 2002 confirmed the assessment order and dismissed the Petitioner's appeal.

11. The Assessee then went in appeal before the Tribunal with S.A. No.913 of 2002-03. According to the Tribunal, the production and sale under the diversification scheme could not be construed to be increased commercial production over and above the installed capacity of the Unit and that the Petitioner had violated the stipulation laid down in the Finance Department Notification vide entry No.26-FF and 30-FFF (ii) of the Tax Free Schedule of the IPR, 1989. It was thus held that the Petitioner was not entitled to enjoy the benefit of exemption of tax on purchase of raw materials and sale of finished products under the diversification scheme.

12. The Tribunal further held that the levy of sales tax on the raw materials and sale of finished products @4% and 12% respectively and surcharge @ 10% on the tax on finished products was leviable. Accordingly, the order of the ACST was set aside and the case was remanded to the ACST to make good the deficiency by issuing appropriate notice to the Appellant/Petitioner as to why the taxes as mentioned above would not be levied.

13. As regards questions (b) and (c) framed for consideration, viz., the correctness of the remand of the case by the Tribunal for levy of enhanced tax on the Assessee, the Court is of the view that the Tribunal exceeded its jurisdiction. In *Shyamsunder Sahoo v. State of Orissa* [1994] 92 STC 28, this Court explained that the

power of the Tribunal under Section 23(3)(c) of the OST Act to enhance the assessment is relatable to appeal or cross objection filed by the Revenue. In the present case, there is no such cross appeal by the Revenue and therefore, there was no occasion for the Tribunal to have remanded the issue of tax on raw materials and finished products including surcharge on finished products to the ACST for a fresh determination. In this context, the following observations in *Shyamsunder Sahoo* (*supra*) are relevant:

"6. At this juncture it is relevant to refer to rule 50 of the Orissa Sales Tax Rules, 1947 (in short, "the Rules"). Sub-rule (3) of rule 50 provides that the appellate authority shall not enhance an assessment or penalty unless the appellant has had a reasonable opportunity of showing cause against such enhancement. The appellate authority is, therefore, obligated to bring to the notice of the appellant before it material on the basis of which enhancement is proposed. On being so indicated, the assessee shall be in a position to show cause against the proposed action. The narration of facts as referred to by the Tribunal go to show that no opportunity was granted to the assessee-petitioner to show cause against the proposed action for enhancement. This is really of no consequence in the case at hand because of our conclusion that the Tribunal has no power to enhance the assessment in the absence of an appeal or cross-objection. Therefore, the Member was not justified in directing restoration of the enhancement made by the assessing officer. That part of the order is nullified."

14. Consequently, Question (b) is answered in the negative and Question (c) is answered in the positive i.e., both Questions are answered in favour of the Assessee and against the Department. That portion of the impugned order of the Tribunal remanding the above issue to the ACST is hereby set aside.

15. As regards question (a), viz., the disallowance of tax exemption on sale of finished products manufactured by the industrial unit under the diversification scheme, the Court notes that a clarification on IPR 1989 was issued by the Director of Industries, Orissa by its letter dated 24th/28th May, 2001 with particularly the reference to the expression "enabling installed capacity", it was clarified as under:

"Existing installed capacity means the capacity recorded in the permanent registration certificate (PMT) at the time of issue of the same and there is no provision to amend the same capacity frequently unless undertaken E/M/D, provided such E/M/D should fulfill the criteria as defined in relevant IPR. Similarly, in no case the original capacity recorded in the PMT can be reduced for the purpose of availing the incentives. In this connection, this office has already clarified that once eligibility certificate for S.T. concession is issued, it cannot be amended with every increase in fixed capital investment, vide this office letter No. 6738 dtd. 23.5.2000 (copy enclosed)."

16. In *Tin Plate Company of India Limited v. State of Bihar* [2004] 135 STC 385, the Jharkhand High Court explained with reference to a similar issue and held as under:

"13. In view of cause (15) of S.O. No. 478 read with S.O. No. 57 dated March 2, 2000, diversification of a unit is quite distinguishable from expansion/modernization of the unit and diversification of the unit cannot be equated with expansion/modernization of the unit. In case of diversification the facility of exemption of sales tax will be available on such raw materials which has been used in the commercial production and which has not been earlier produced by the unit and that the product manufactured is a new one. Therefore, in case of diversification there cannot be any incremental production which proceeds on the basis that the production of the relevant year should not exceed $2/3^{\text{rd}}$ of the production capacity. In case of expansion/modernization the principle of production exceeding $2/3^{\text{rd}}$ of the production capacity is only applicable. It is relevant to mention here that this principle of production exceeding $2/3^{\text{rd}}$ of the production capacity cannot apply in case of diversification of the unit which postulates the production for the first time of the new products as the raw materials are used for the first time in case of diversification. Viewed thus, the principle of incremental production has no application in the case of diversification of the unit. This interpretation stands fortified due to the amendment of S/O. No. 478 by S.O. No. 57 dated 2nd March, 2000 referred to above which is to the effect that "and this facility shall be available to the unit to the extent of the actual production as a result of diversification". There can, however, be no doubt that exemption made with a beneficent object for encouraging

investment in new machinery or plant have to be liberally construed. The provision in S.O. No. 478 read with S.O. No. 57 (supra) is made permitting exemption of tax for the purpose of encouraging an industrial activity. The said provision has to be liberally construed for all intent and purposes. It is the settled principle of law that an exemption provision cannot be denied full effect by a circuitous process of interpretation and the liberal language used in a notification must be given due weight. So if the tax-payer is within the plain terms of the exemption notification, he cannot be denied the benefit calling in aid, any supposed intention, and the language of the notification has to be given effect to. Based upon the facts aforesaid and the interpretation of clause (15.4) of S.O. No. 478 read with clause (Ga) of S.O. No. 57 dated March 2, 2000 the petitioner is entitled to full exemption in respect of the sales tax paid on the purchase of the raw materials i.e., HR coils for the production of the new product, i.e., TMBP which was not earlier produced in the unit of the petitioner for manufacture of ETP."

17. Once it was clear that the Petitioner had stopped manufacturing the products in terms of the original installed capacity and was manufacturing only under the diversification unit, there is no justification in withdrawing the exemption. In this context, again reference may be made to a circular dated 24th June 1999 issued by the Commissioner of Commercial Taxes, Orissa to all the authorities functioning under the OST Act wherein it was observed therein as under:

"xxx xxx xxx

Lately it has come to the notice that some of the assessing officers and first appellate authorities have allowed to such Industrial units undertaking Expansion/ Modernization/ Diversification, exemption of sales tax on entire purchase of raw materials and sales of finished products on the interpretation that the dictionary meaning of the term 'over and above' is 'in addition to' 'or' 'besides'. It seems that such authorities have taken out the term 'over and above' out of the context employed in the provision of the entry and have failed to make a harmonious interpretation of all the words used in it.

In the connected entries the language is very clear. The term 'over and above' qualifies to the volume of finished products only. As the units before their expansion have certain finished products and that volume of finished products continues after the date of commercial production of the unit after expansion, the term 'over and above' has been used to separate the volume of additional finished products from the volume of products produced as per the installed capacity of the unit before going for expansion. The entries do not provide for any benefit of exemption in respect of finished product prior to the date of the expansion for which there is no scope for the term 'over and above' to qualify 'exemption' and therefore it is erroneous to interpret the term 'over and above' benefit of sales tax exemption in addition to the exemption already provided for.

There is, no ambiguity in using the term 'over and above' when particular reference has since been made only to the additional volume of the finished products and the words 'increased commercial production' preceding the words 'over and above' makes the meaning more clear. This exemption has been granted only in respect of the additional volume of finished products and no exemption has

been given for the finished products of the original installed capacity of the unit before Expansion/ Modernization/ Diversification.

The assessing and appellate authorities are advised to keep the above points in mind while deciding the matters of granting exemption of sales tax in case of Expansion/ Modernization/ Diversification provided for in the aforesaid entries."

18. The plain dictionary meaning of expression 'over and above' would mean 'in addition to' or 'as well as'. Here there is no finished product of the original installed capacity and only under the diversification unit and therefore it was erroneous on the part of the Department to reject the claim of the Petitioner for exemption. Consequently, Question No.(a) is answered in the affirmative by holding that the Tribunal erred in law by disallowing the tax exemption on sale of finished products manufactured by the Petitioner's industrial unit under the diversification scheme. The impugned order of the Tribunal to that extent is set aside as are the corresponding orders of the STO and the ACST.

19. The revision petition is disposed of in the above terms.

(S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge

S.K. Guin, Sr. Stenographer