

**SUPREME COURT OF INDIA**

Vividh Marbles Pvt. Ltd

Vs.

Commercial Tax Officer

SLP (Civil) 17056 of 2006

(S.B.Sinha and Markandey Katju, JJ.,)

23.02.2007

**JUDGMENT**

**S.B.Sinha, J.,**

1. Leave granted.

2. The State of Rajasthan pursuant to its industrial policy formulated 'Sales Tax Incentive Scheme, 1987' (for short, '1987 Scheme') and 'Sales Tax New Incentive Scheme for Industries, 1989' (for short, '1989 Scheme').

3. In terms of 1987 Scheme exemption from payment of sales tax of 100%; was provided. 1989 Scheme which was notified in the Official Gazette on or about 06.07.1989 was given retrospective operation with effect from 05.03.1987. It was to remain in force upto 31.03.1998. Sub-clause (b) of Clause (1) of 1989 Scheme reads as under :

(b) An industrial Unit, other than the new industrial unit covered by 1985 Dispensation, being covered by the Sales Tax Incentive Scheme for Industries, 1987 (hereinafter referred to as the Old Incentive Scheme) shall have an alternative option to seek the benefits under the New Incentive Scheme."

4. Clause 4 of the said Scheme which is relevant for our purpose, reads as under :

" 4. Exemption from tax on sales (a) An industrial unit, which is granted eligibility certificate under this notification shall be exempted from payment of tax on sales made within the State of the goods manufactured by it in accordance with the parameters incorporated in Annexure "C" to this notification.

(b) for the purpose of arriving at the limit of tax exemption as provided in Annexure "C" the aggregate of the following shall be considered (i) Aggregate amount of tax which would have been leviable under the provisions of the RST Act 1954;

(ii) Aggregate amount of tax on inter-State sales which would have been leviable under the provisions of the CST Act, 1956; and (iii) Aggregate amount of tax, as and when levied, on consignments.

(d) When the limit of tax exemption prescribed in Annexure "C" is exhausted, all sales thereafter shall be subject to tax under the Act by the assessing authority concerned.

(e) The Incentive available under this Scheme shall be subject to the condition that the beneficiary industrial unit after having availed of any benefit under this Scheme shall not make sales outside the State including branch transfers of the goods manufactured by it exceeding 60% in case of SSI, Medium and Large units and 80% in case of Pioneering and Prestigious units and 90% in case of Very Prestigious Units of its total production."

5. Appellant herein was eligible to obtain the benefits of the said Industrial Policy both under 1987 and 1989 Schemes. It, however, opted for 1989 Scheme, wherefor an application for grant of sanction of eligibility certificate was filed before the Manager, District Industries Centre, Rajsamand on 01.04.1995. Indisputably, the eligibility certificate was to be granted by the Industries Department of the State. The said certificate was granted on 07.12.1996, pursuant whereunto exemption from tax liability was limited to 75%;

6. Contending, however, that it had altered its position on a representation made by the State that 1987 Scheme would be applicable in its case, the appellant alleged that it had not realized sales-tax from its customers. In support of the said contention, it inter-alia relied upon an order of sanction of eligibility for grant of exemption/deferment issued by the Member Secretary of the Department to the Commercial Taxes Officer, Rajsamand, which is in the following terms :

"The application has been prima-facie found eligible for the benefit of exemption from tax/deferment of tax on the basis of 'A Industrial Unit/' a New Unit covered by 1985 dispensation/a sick Industrial Unit/ Expansion/ Diversification / under sales tax Incentive/ Deferment Scheme 1987/1989 under PST and / or C.S.T. Act' on the sale of Marble Slabs.

Hence a formal eligibility certificate as per law be granted to the said applicant. The application filled by the unit was completed in all respect on 6.5.95.

The eligible fixed capital Investment as determined by the committee which is subject to verification as per law is as follows :- a. Cost of land :

b. Cost of new building : 9.49 c. Cost of new plant and machinery or imported second : 57.00 land machinery d. Installation expenditure capitalized for P & M :

e. Capitalized interest during construction not exceeding 5% of the total fixed capital investment :

f. Technical know-how fees or drawing fees paid Laboratories recognized by the State Govt. or the Central Government :

Total : 66.49 A copy of eligibility certificate issued by you may also please be sent to this office. "

11. Reliance has also been placed on the order of assessment passed by the Assessing Authority of the Commercial Taxes Department, wherein also exemption had been stated to have been granted in terms of 1987 Scheme, a sample copy whereof reads as under :

"5. Sale under Incentive Scheme From 6.5.95 to 5.5.2003 under the Incentive Scheme, 1987 the assessee has already been allowed a heavy tax exemption of Rs. 3,11,250.00. Eligibility Certificate No. 1/354 has been issued to the Assessee. Under the Incentive Scheme, 1987 the assessee has made a sale of marbles slab of Rs. 5,42,063. On this sales tax @ 16 percent of Rs. 86,730 is being imposed and being deducted from eligible amounts received under the Incentive Scheme."

12. The mistake of the Assessing Authority, however, having been discovered, the appellant was issued with a notice to show cause as to why it should not pay the balance sales-tax on 25&percent; of its turnover. A writ petition filed thereagainst by the appellant has been dismissed by reason of the impugned judgment.

13. Mr. M.L. Verma, the learned Senior Counsel appearing on behalf of the appellant, would submit that in view of the representation made by the respondent, pursuant whereto or in furtherance whereof the appellant had not collected any tax from the customers, the impugned order cannot be sustained. In any event, it was urged that no penalty or interest should be levied on the said amount.

14. The learned counsel appearing on behalf of the respondent, however, supported the impugned judgment.

15. It is not in dispute that the State formulated two Schemes; one in the year 1987 and another in 1989. The said Schemes provided for different nature of incentives. Although 1989 Scheme was framed during pendency of 1987 Scheme, as noticed hereinbefore, the same was given a retrospective operation in terms whereof the entrepreneurs were given a choice to opt either for 1987 Scheme or 1989 Scheme. Appellant was aware thereabout.

16. It opted for 1989 Scheme. The sanction of eligibility provided that a formal eligibility certificate as per law would be granted to the appellant. The investment for capital, however, was determined at Rs.66.49 lacs. The said sanction did not amount to a grant of a certificate. The eligibility certificate, as indicated hereinbefore, was granted only on 07.12.1996, in terms whereof clearly 1989 Scheme was applied. It was so explicitly stated in the eligibility certificate also. It may be true that the Assessing Authority committed a mistake in referring to the 1987 Scheme in its order of assessment, but thereby the appellant cannot be permitted to derive any benefit to which it was not entitled under the law. Appellant indisputably was

eligible for grant of exemption in terms of both the Schemes. It had opted for the latter Scheme. While doing so, it must have taken into consideration the benefits under both the Schemes separately. Having opted for the 1989 Scheme, in our opinion, now the appellant cannot be permitted to turn round and contend that it should have been granted the benefit of 1987 Scheme, only because at a later stage it found the same to be more beneficial.

17. A contention was raised that the eligibility certificate dated 07.12.1996 was communicated on 02.07.2003. No. such contention was raised before the High Court. Before the High Court, the principal contentions raised on behalf of the appellant were : (i) It being eligible for grant of exemption under both the Schemes, it preferred to avail of 100% exemption under 1987 Scheme; (ii) Notices seeking recovery of 25% tax liability was contrary to the order of assessment; and (iii) Respondent cannot now be permitted to change its opinion to allow only 75% exemption under 1989 Scheme, because for all practical purposes it had availed and had been granted exemption under 1987 Scheme.

18. There had been no representation whatsoever on behalf of the respondent that the appellant would be entitled to exemption under 1987 Scheme. The eligibility certificate was to be granted and in fact granted by the Industries Department. The Sales Tax Authorities, therefore, were merely to pass an order of assessment on the basis thereof.

19. The order of sanction being in a printed proforma referred to both the 1987 and 1989 Schemes. It was issued only for the purpose of determination of the fixed capital investment. It had nothing to do with the grant of eligibility certificate. If the Assessing Authority committed a mistake in referring to 1987 Scheme and allowed 100% exemption in terms thereof, the State cannot suffer thereby. The statutory authorities are entitled to rectify their mistake. When such mistakes are apparent on the face of the records even no opportunity of hearing is necessary., [See *Maharashtra State Seeds Corporation Ltd. v. Hariprasad Drupadrao Jhadoo & Another*<sup>1</sup> Appellant having opted for grant exemption under 1989 Scheme, the respondent was bound to accept the same and, thus, it had not committed any illegality in doing so. In that view of the matter, in our considered view, the appellant who is estopped and precluded from raising a contention contrary to or inconsistent with its assertion for grant of exemption.

20. Reliance has been placed by *Mr. Verma on Indian Cement and Others v. State of Andhra Pradesh and Others*<sup>2</sup> *West Bengal Hosiery Association and Others v. State of Bihar and Another*<sup>3</sup> and *British Physical Lab India Ltd. v. State of Karnataka and Another*<sup>4</sup> In *West Bengal Hosiery Association* (supra), the question which arose for consideration was as to whether the levy of sales-tax on goods imported into one State from another may affect the free flow of trade and commerce and, thus, attract Article 301 of the Constitution of India. Such a question does not arise herein.

21. In *Indian Cement* (supra) preference to local manufacturers was held to be ultra vires Part XIII of the Constitution of India.

22. In *British Physical Lab India Ltd. (supra)*, it was opined that it was just and equitable not to permit the State to collect the differential amount.

23. The said decision again has no application in the instant case.

24. Mr. Verma then submitted that at least a direction should be issued that the appellant is not liable to pay any interest or any penalty. We do not see as to how in a case of this nature such a direction can be issued.

25. Appellant herein knew the actual state of affairs. It at all material times was aware of the extent of its entitlement thereto, which was confined to the benefits under the 1989 Scheme. However, despite such knowledge if it had not recovered any tax, it must thank itself therefor.

26. Furthermore, the question as to whether the appellant did show it bona fide or not is a question of fact. Such a contention can be raised only in an appropriate proceeding and not before us for the first time. Reliance placed on *Shree Cement Ltd. and Another v. State of Rajasthan and Others*<sup>5</sup> is misplaced. Therein, again dicta in *Indian Cement (supra)* and *Shree Digvijay Cement Co. Ltd. and Others v. State of Rajasthan and Others*<sup>6</sup> was followed. In this case, there is no direction to the respondent-State to recover the difference in tax.

27. In *State of Rajasthan and Another v. J.K. Udiapur Udyog Ltd. and Another*<sup>7</sup> whereupon again strong reliance has been placed, the Court held that no penalty or interest should be charged, as the said proceeding had been remained pending. Such a direction was issued by this Court in exercise of its jurisdiction under Article 142 of the Constitution of India, having regard to the fact that the lis was finally determined by this Court. The fact of the present case, in our opinion, is completely different, as applicability of the Schemes in question depended upon the volition of the appellant, wherewith the respondent had nothing to do. For the reasons aforementioned, there is no merit in this appeal, which is dismissed accordingly, with costs. Counsel's fee is assessed at Rs.10,000/- (Rupees ten thousand only).

Judgment Referred.

<sup>1</sup>(2006) 3 SCC 0690

<sup>2</sup>(1988) 1 SCC 0743

<sup>3</sup>(1988) 4 SCC 0134

<sup>4</sup>(1999) 1 SCC 0170

<sup>5</sup>(2000) 1 SCC 0765

<sup>6</sup>(2000) 1 SCC 0688

<sup>7</sup>(2004) 7 SCC 0673