SUPREME COURT OF INDIA

Secretary To Government and Others

Vs

Messrs Peekay Re-Rolling Mills Private Limited

Appeal (Civil) 8031 of 2004

(S. H. Kapadia and P. K. Balasubramanyan, JJ)

03.04.2007

JUDGMENT

S. H. KAPADIA, J.

Civil Appeal Nos. 8031/04 and 8032-8033/04

Being aggrieved by the common judgment dated 22.8.2003 delivered by the Division Bench of the Kerala High Court in W.A. Nos. 991 and 1316 of 2003, the State has come to this Court by way of the present civil appeals. Facts giving rise to these civil appeals are as follows.

Peekay Re-Rolling Mills (P) Ltd., respondent herein, was registered as an industrial unit on 6.9.1991. They claim to have set up an industrial unit in the State on account of tax exemption given to industrial units from payment of sales tax for the fixed period commencing from the date of commercial production. Tax exemption was in fact granted under Section 10 of the Kerala General Sales Tax Act, 1963 ("1963 Act") vide notification dated 4.11.1993. Under that notification, tax exemption was admissible to medium scale units for seven years from the commencement of commercial production. In the present case, the respondent commenced the said production on 31.3.1995. In between, on account of acute power shortage in the State, the Government issued an Order inter alia stating that certain industries included in the negative list would not be eligible for State Investment Subsidy and certain other assistance. One of the items in the negative list, being

item no. 7, was "power intensive units", whose total power requirement exceeded 2500 KVA and where the cost of power exceeded 25% of the cost of production. By clauses 2 and 4 of the said G.O., all units in the negative list provisionally registered on or after 31.12.1993 were denied State Investment Subsidy. By clause 3 of the said G.O., expansion/ modernization/ diversification of existing units in the negative list was also disqualified from tax exemption from the Government except in cases where an application was made by the unit on or before 31.12.1993.

Subsequent to the commencement of commercial production on 31.3.1995 and prior to March, 1996, additional investment was made by the respondent for the construction of building, installation of plant and machinery, electrification etc. This expansion was undertaken for the purpose of downline integration to enable the respondent to manufacture steel ingots, an input in the manufacture of iron rods and bars. After starting commercial production, the respondent made an application for tax exemption on 20.6.1997. The Director of Industries issued eligibility certificate and based on the said certificate, the Commissioner of Taxes granted exemption on 19.12.1997 on the initial investment to the respondent to the tune of Rs. 2.66 crores (approx.) for seven years from 31.3.1995 to 30.3.2002. During the pendency of the exemption application before the Director of Industries, additional capital investment of Rs. 5 crores (approx.) was made. This led to the increase in the contract load and, therefore, an application was made on 24.9.1997 by the respondent claiming tax exemption on the basis of additional capital investment. This application dated 24.9.1997 was rejected by the competent authority on the ground that the respondent was a power intensive unit having a load factor of more than 2500 KVA. Reliance was placed on G.O. dated 26/27.11.1993 in that regard. This order led to litigation. Without going into unnecessary details, suffice it so state that both, the Government and the Director of Industries, proceeded to reject the claim for tax exemption by placing reliance on the above G.O. dated 26/27.11.1993. This led to the filing of O.P. Nos. 32947 and 32807 of 2000 by the respondent herein in the High Court. To complete the chronology of events, on 19.4.1994 the Government issued a clarification to the G.O. dated 26/27.11.1993. By the said G.O., it was clarified that tax exemption would continue to be available to all industries which were provisionally registered before 31.12.1993 and only those industries in the negative list which stood registered on or after 31.12.1993 alone would be ineligible for financial assistance/ tax exemption from the Government. Therefore, in the said O.P. Nos. 32947 and 32807 of 2000 one of the grounds taken by the respondent was that the Government as well as the Director of Industries had erred in denying tax exemption to the respondent without considering the clarificatory G.O. dated 19.4.1994. In the said writ petitions, the order passed by the Director of Industries dated 21.10.2000 holding that the respondent was not entitled to tax exemption in respect of the additional capital investments was questioned. This order was passed by the Director of Industries based on an inter departmental letter dated 5.7.2000 addressed by the Principal Secretary to the Director of Industries, which the Department has termed as "clarification". Before the High Court, it was also contended by the respondent that eligibility for tax exemption had to be decided only with reference to statutory notification under Section 10(1) of the said 1963 Act and not with reference to the general executive orders which do not have statutory flavour and that by the said G.O. dated 26/27.11.1993 it was not open to the State Government to withdraw the benefit of tax exemption granted vide notification dated 4.11.1993.

By judgment dated 10.4.2003, the learned Single Judge held that G.O. dated 26/27.11.1993 was a comprehensive Notification dealing with various subjects. It was further held that even under Section 10(3) of the said 1963 Act, specific power was given to the Government to cancel or modify any notification under Section 10(1) of that Act and, therefore, the effect of the said G.O. dated

26/27.11.1993 was to modify/ amend Notification dated 4.11.1993. The learned Single Judge further held that when the Government had statutory power to issue such a notification, any G.O. issued without reference to the provisions of the statute should be deemed to be issued in exercise of such power. In the circumstances, the contention advanced on behalf of the respondent to the effect, that G.O. dated 26/27.11.1993 cannot cause an amendment/ modification to the statutory notification dated 4.11.1993 under Section 10(1) of the said 1963 Act, stood rejected. In the petition, one of the contentions raised by the respondent was that the respondent's unit was not a Power Intensive Unit because its expenses on account of the cost of power was less than 25% of the cost of its total production. In this connection, respondent placed reliance on clause 7 of G.O. dated 26/27.11.1993. This argument was rejected by the learned Single Judge holding that the issue can be decided on interpretation of clause 7 with reference to the connected load and not with reference to the cost of production attributable to power charges. The learned Single Judge interpreted the word 'and' in clause 7 and read it as disjunctively. On that basis, the learned Single Judge held that though the word 'and' was used in clause 7, the two conditions, namely, the contract load above 2500 KVA and the cost of power at more than 25% of the cost of production, cannot be read conjunctively and that they have to be read disjunctively. In other words, the learned Single Judge has read the word 'and' as 'or'. The learned Single Judge also rejected the contention raised by the respondent that the respondent was entitled to exemption since its unit stood registered before 31.12.1993. This argument was rejected on the ground that under clause 3 of G.O. dated 26/27.11.1993, expansion of existing unit in the areas included in the negative list was not entitled to tax exemption unless application was made on or before 31.12.1993. According to the learned Single Judge, the respondent was granted tax exemption on initial investments for the full period of seven years from 31.3.1995 to 30.3.2002. This, according to the learned Single Judge, was in view of the clarificatory G.O. dated 19.4.1994. According to the learned Single Judge, the respondent's unit was not in the negative list on 26.11.1993. It came under the negative list only by virtue of additional investments made by the respondent after 1.7.1995 and, therefore, it was not a case of existing industry in the negative list making additional investments and claiming tax exemption thereon. According to the learned Single Judge, it was a case where by making additional investments, the respondent had brought its unit into the negative list. For the aforestated reasons, O. P. Nos. 32807 and 32947 of 2000 were dismissed.

Aggrieved by the said judgment, the respondent herein carried the matter in writ appeals to the Division Bench. By the impugned judgment, it has been held that, G.O. dated 26/27.11.1993 was a general Notification withdrawing grant of subsidy and as against the said G.O., the exemption Notification dated 4.11.1993 was a specific Notification issued under Section 10(1) of the said 1963 Act and, therefore, the specific Notification would override the general G.O./ Notification dated 26/27.11.1993. Accordingly, the writ appeals were allowed, hence, these civil appeals.

We are of the view that the State Government had the authority under Article 162 of the Constitution Of India, 1950 to issue G.O. dated 26/27.11.1993 withdrawing the tax exemption on account of acute power shortage in the State. However, for the reasons mentioned hereinbelow, we are not examining the larger question of principle, namely, applicability of specific Notification under Section 10(1) of the 1963 Act vis-a'-vis comprehensive Notification dated 26/27.11.1993 issued by the Ministry of Industries withdrawing all tax exemptions including those under Section 10(1) of the 1963 Act.

We are proceeding on the basis that the comprehensive G.O. dated 26/27.11.1993 issued by the State Government on account of acute power shortage is applicable to the facts of the present case. It is undisputed that on 4.11.1993 the State Government had issued a statutory Notification under Section 10(1) inter alia granting exemption to medium scale units from payment of sales tax for seven years. Similarly, the State had given concessions under Electricity Act. It had promised subsidies. All these exemptions/ concessions were withdrawn by G.O. dated 26/27.11.1993 by the Ministry of Industries on account of acute power shortage. We do not find any infirmity in the issuance of the said G.O. dated 26/27.11.1993. The question still remains as to the scope of the clarificatory G.O. dated 19.4.1994. This question has not been examined by the Division Bench. According to the appellants, the said clarificatory G.O. was not applicable to units which made additional investments after 26.11.1993. However, this aspect has not been examined by the Division Bench. The Division Bench has also not examined clause 3 of G.O. No. 169/95/ID dated 1.11.1995 , which reads as follows:

"3. Investments in generators shall be eligible for the purpose of Tax Exemption Additional investment for balancing equipment and lines of backward or forward integration shall qualify only as additional investment for the purpose of tax exemption. Additional investment for purposes of determining tax exemption eligibility will mean those investments necessary to the running of the unit which however do not; qualify independently as expansion/diversification/ modernization, units shall consequently be entitled only to increase in the monetary limit for tax exemption already enjoyed without extension in the period. Tax Exemption for additional investments may be given during the period the unit is enjoying its initial Tax Exemption or when the unit is enjoying tax exemption on account of expansion/ diversification/ modernisation."

The Director of Industries, in his order dated 21.10.2000 while rejecting the respondent's claim for tax exemption has relied upon an inter departmental letter dated 5.7.2000. The effect of this letter has also not been considered by the Division Bench, whether the letter is an amendment or a clarification.

Similarly, the Division Bench has failed to consider clause 7 of G.O. dated 26/27.11.1993. We reproduce hereinbelow clause 7:

"7. Power intensive units based on electro thermal/ electro chemical processors or units where total power requirement exceeds 2500 KVA of contract load and where cost of power is more than 25% of cost of production of the items manufactured except where the units generate their power requirements in excess of 2500 KVA of contract load by own captive power." (Emphasis supplied)

As stated above, according to the appellants, the word 'and' in the above quoted clause should be read as 'or' whereas, according to the respondent, clause 7 defines power intensive units to mean units whose total power requirement exceeds 2500 KVA of contract load and where the cost of power is more than 25% of cost of production of the items manufactured by the units. As stated above, the learned Single Judge has accepted the contention advanced on behalf of the appellants herein. However, this is an important aspect. The said clause 7 refers to the Load Factor and to the cost of power as percentage of cost of production. According to the appellants, the Cost Factor has

no nexus with the object sought to be achieved, namely, lowering of consumption. According to the appellants, under clause 7 both the cost and the load factors were required to be taken into account so that in cases where the limit of 2500 KVA is not exceeded, investment is not discouraged. According to the appellants, if both the conditions were to be satisfied for making a unit power intensive unit then, in the present case, the said G.O. dated 26/27.11.1993 would not apply since during the relevant period the respondent's unit did not incur expenses on account of cost of power exceeding 25% of the total cost of production. In the present case, the Division Bench has failed to consider the following aspects in the matter of interpretation of clause 7 of the said G.O. dated 26/27.11.1993. The reason for issuance of the said G.O. was to curb excess electricity consumption and not to curb additional investments. The underlying reason for issuance of the said G.O. was to restrict power consumption and not to restrict expansion of units in terms of additional investments. This is the basic argument advanced on behalf of the respondent in support of their contention that the word 'and' in clause 7 should be read conjunctively. On the other hand, it is argued on behalf of the appellants that the word 'and' in the said clause should be read as 'or' since the reason for issuance of the said G.O. was to curb excess electricity consumption either by way of exceeding the prescribed ceiling of 2500 KVA or by way of additional investments (capital expenditure for additional facility). These aspects have not been considered by the Division Bench though it had been considered in favour of the appellants by the learned Single Judge.

For the above reasons, we hold that the State Government was entitled to issue comprehensive G.O. dated 26/27.11.1993 on account of acute power shortage in the State. We further hold that the comprehensive G.O. applies across the board to all units which became power intensive units. To that extent, we find merit in the civil appeals filed by the State. However, since the Division Bench of the High Court has not examined the points referred to above, to that extent alone, we remit the matter to the Division Bench for its consideration.

Subject to above, the civil appeals filed by the State stand allowed. There is no order as to costs.

Civil Appeal No. 8034/04

[Sales Tax Officer & Ors. v. Premium Ferro Alloys Ltd.]

Although, the dates of events are different, the matter is similar on the question of withdrawal of tax exemption to the case just decided vide Civil Appeal Nos. 8031/04 and 8032- 8033/04 concerning Secretary to Government & Ors. v. M/s Peekay Re-rolling Mills (P) Ltd..

One of the points which arises for determination in the present case is whether Premium Ferro Alloys Ltd. is entitled to claim tax exemption on additional investments made after 24.11.1998. It is urged on behalf of the said company (respondent herein) that G.O. No. 169/98/ID dated 24.11.1998 by which the State Government modified the negative list by including all types of steel re-rolling mills, units manufacturing iron ingots, operated prospectively. In this connection reliance was placed on clause 3 of the said G.O.

We do not find any merit in the above contention. We quote hereinbelow clause 2 and clause 3 of the said G.O. dated 24.11.1998.

"2 The Director of Industries & Commerce has in his letter read above proposed some modifications to the negative list. The Government have examined the proposal of the Director of Industries & Commerce and decided to amend the G.O. read above by including the following industries also in the negative list.

1. Metal Crushers including Granite Manufacturing Units.

2. All types of steel Re-Rolling Mills, Units Manufacturing iron ingots.

3. Ferro Silicon

4. Calcium Carbide

5. Cement Manufacturing

6. Potassium Chlorate

3. This order will be effective from the date of order and will be applicable to all units taking provisional registration or IEM/SIA as the case may be from the date of this order. All the conditions stipulated in the G.O. read above and subsequent amendments/ clarifications issued thereon will be applicable to this order also."

Reading the above two clauses, it is clear that the G.O. dated 26/27.11.1993 got modified by G.O. dated 24.11.1998. Therefore, if the said G.O. dated 26/27.11.1993 is found to be applicable then the G.O. dated 24.11.1998 which is modification of the earlier G.O. dated 26/27.11.1993 would apply as a clarificatory G.O.. We may reiterate that in our judgment in Civil Appeal Nos. 8031/04 and 8032-8033/04 the question of interpretation of clause 7 of G.O. dated 26/27.11.1993 has been remitted to the High Court. However, as far as retrospectivity of G.O. dated 24.11.1998 is concerned, we are of the view that the said G.O. is clarificatory. Therefore, there is no merit in the contention raised on behalf of Premium Ferro Alloys Ltd. that the said G.O. dated 24.11.1998 is prospective and not retrospective.

However, the issues, which we have remitted to the Division Bench in the earlier matters (Civil Appeal Nos. 8031/04 and 8032-8033/04), also arise in the present case.

In the circumstances, we remit this case also to the Division Bench. Accordingly, we request the Division Bench of the High Court to tag W.A. No. 1477 of 2003 with W.A. Nos. 991, 1316 and

1561 of 2003 and decide the appeals accordingly.

Subject to above, the appeal is allowed with no order as to costs.