

SUPREME COURT OF INDIA

M/S BOC India Ltd

Vs.

State Of Jharkhand

C.A.NO. 1538 OF 2009

(S.B. Sinha and Cyriac Joseph J.J)

05.03.2009

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. These two appeals arising out of a judgment and order dated 2.11.2007 rendered by the High Court of Jharkhand at Ranchi in Writ Petition (T) No. 4693 of 2005 were taken up for hearing together and are being disposed of by this common judgment.

3. The factual matrix involved is not in dispute. M/s Tata Iron & Steel Company Limited (TISCO) produces steel. For the said purpose, it purchases oxygen gas from M/s B.O.C. India Ltd. (BOC), the producer and supplier, for industrial and medical use. BOC began supply of oxygen gas to TISCO from the year 1993. Indisputably, TISCO applied for and was granted a registration

certificate in terms of the provisions of Section 13(1)(b) of the Bihar Finance Act, 1981 (hereinafter called and referred to as, "the Act"). The said certificate originally was granted on 16.3.1983. Indisputably, it was renewed from time to time; it covered the period in question, namely, 2001- 02, having been renewed till 31.5.2004. Indisputably, in terms of the provisions of the Act and the rules framed thereunder, a dealer is required to show the list of goods which were taxable at 1% as also the list of those goods which were taxable at 3%. Oxygen was shown in the list of goods taxable at 3% as specified in Annexure 'B' appended to the registration certificate.

4. We may at this stage notice the relevant statutory provisions, namely, Sections 13(1)(b), 14 (2) and 54 of the Act, which read as under: "

13. Special rate of tax on certain sales or purchases.- (1) Notwithstanding anything contained in this part but subject to such conditions and restrictions as may be prescribed. (a) ... (b) Sales to or purchases by a registered dealer of goods required by him directly for use in the manufacture or processing of any goods for sale.

14. Registration of dealers. (1) ... (2) Every dealer required by sub-section (1) to be in possession of a registration certificate shall apply for the same in the prescribed manner to the prescribed authority, and the said authority shall, on being satisfied that the application is in order, register the applicant and grant him a registration certificate within prescribed time in the prescribed manner and in the prescribed form specifying therein the goods or class or description of goods which the dealer sells or purchase and such other particulars as may be prescribed. Provided that no application referred to in this sub-section shall be considered and be deemed valid, unless the applicant furnishes correctly all the prescribed particulars and, such other particulars as may be required by the prescribed authority in this behalf; Provided further that where a dealer required by sub-section (1) to be in possession of a registration certificate applies for such a certificate within the prescribed time-limit and in the prescribed manner and the application is otherwise valid in accordance with the first proviso of this sub-section, he shall be deemed to be in possession of a valid registration certificate from the date he so applied for the purposes of exercising all the rights and performing all the duties and bearing all the liabilities under this part and the rules made thereunder: Provided also that where a dealer carries on any business of sale or purchase of goods, in violation of the express and specific provisions of any law of the State or the Union, then notwithstanding anything to the contrary contained in this part and without prejudice to his liability to pay tax, the prescribed authority shall refuse to grant him a registration certificate.

54. Furnishing of information by dealers.- If any dealer liable to pay tax under this part- (a) disposes of his business or any part of his business, whether by sale or otherwise, or (b) acquires any business or part of any business, whether by purchase or otherwise, or (c) effects any other change in the ownership or constitution of the business, or (d) discontinues his business or shifts his place of business, or (e) changes the name, style or nature of his business or effects any change in the class or description of goods which he sells, or (f) starts a new business or joins another business either

singly or jointly with other persons, or (g) effects any change in the particulars furnished in an application made under Section 14 or declaration furnished under Section 15, He shall, within seven days of the occurring of any of the events aforesaid inform the prescribed authority accordingly, and, if any such dealer dies without doing so, his executor, administrator, successor-in-interest or legal representative, as the case may be, shall within fifteen days of the dealer's death, inform the said authority accordingly."

5. The State in exercise of its rule making power made rules known as Bihar Sales Tax Rules, 1983. Rules 3(9), 6(1)(b), 6(4) thereof read as under: "3(9) (a) Every dealer to whom the provisions of section 54 apply shall inform, in writing, the appropriate authority prescribed in sub-rule (3) about the complete details necessitating action under Section 54. (b) Where the information furnished by a dealer under section 54 or otherwise received by the authority prescribed under sub-rule (3) necessitates amendment of the registration certificate of the dealer the said authority shall, where the dealer has not submitted the certificate for amendment, direct him to produce the certificate and he shall comply with such direction. On receipt of the certificate the said authority shall, after such verification as may be necessary, amend the certificate suitably. (c) Where the information furnished by a dealer under Section 54 or otherwise received by the authority prescribed in sub-rule (3) necessitates amendment in a declaration furnished under Section 15 the dealer shall furnish to the said authority a revised declaration until such revised declaration is furnished to the said authority the original declaration shall continue to be deemed valid and binding.

6. Certificate under section 13.- (1) An application for certificate under sub-section (1) of Section 13 shall be made-- (a) (b) In Form III, where the certificate is required for making purchases covered by clause (b) or (c) of the said sub-section, such application shall be made separately in respect of every place of business; (2) (3) (4) (a) On receipt of an application in Form II or III if the appropriate authority prescribed in clause (a) or (b) of sub-rule (3), as the case may be, after verification of the particulars furnished by the applicant or after making or causing to be made such enquiry as it may deem necessary, is satisfied that the application is in order, it shall grant a certificate in Form VIA or VIB, as the case may be. (b) On receipt of an application in Form IV, if the Joint Commissioner of the Division, after verification of the particulars furnished by the applicant, or after making or causing to be made such enquiry as he may deem necessary, is satisfied that the application is in order he shall, subject to the provisions of clause (a) of sub-rule (6), grant to the applicant a certificate in Form VIC. A copy of the certificate so granted shall also be sent forthwith to the Commercial Taxes Officer in-charge of the sub-circle, if the business is intended to be established within the local limits of a sub-circle, and to the Deputy Commissioner or Assistant Commissioner or Commercial Taxes officer in charge of the Circle in other cases." 6. In terms of the said rules, application for grant of certificate is to be filed in Form III wherein inter alia particulars of the goods which the dealer may be permitted to purchase at special rate of tax in terms of clause (b) or (c) of sub-Section (1) of Section 13 of the Act are required to be shown. A registration certificate is granted in terms of Form VIB. Clause (3) whereof reads as under: "(3) Particulars of the goods which the holder of the certificate is permitted to purchase at special rate of tax, under clause (b) or (c) of sub-section (1) of section 13.

Description	of	goods.	Particular	purpose	for	which	Required
							1
							2
							"

7. Indisputably, the State from time to time issued several notifications, one of such notification being dated 15.12.1976 in terms whereof tax at the rate of three per centum was prescribed in respect of the goods required directly for use in manufacture. However, by reason of S.O. No. 604 dated 12.4.1982, the rate of sales tax on Industrial raw materials (inputs) payable under Section 13(1)(b) of the Act was fixed at one per centum. By a Notification being S.O. 1096 dated 9.9.1983, it was provided: "S.O. 1096 the 9th September, 1983- In exercise of the powers conferred by sub-section (1) of Section 13 of the Bihar Finance Act, 1981 Part 1 (Bihar Act No. 5, 1981) and in supersession of Finance (Commercial Taxes) Department notification No. S.O. 604, dated the 12th April, 1982, the Governor of Bihar is pleased to direct that the rate of sales tax payable under clause (b) of sub-section (1) of Section 13 of the said Act on the raw materials required directly for use in the manufacture or processing of goods for sale in the State or in course of inter-state trade or commerce, excluding such raw materials which have already undergone any manufacturing or production process and which are required for further assembly therewith shall be at the rate of two per centum."

8. Yet again, by reason of S.O. 154 dated 3.2.1986 sales tax on sale of the raw materials required directly for use in the manufacture or processing of goods for sale excluding such raw materials which have already undergone any manufacturing or production process and which are required for further assembly therewith shall be at the rate of two per centum.

9. Concededly, TISCO never applied for amendment or modification of the Registration Certificate. Oxygen gas continued to be allowed to remain in Annexure 'B' of the Registration Certificate wherefor sales tax was payable at the rate of three per centum. Indisputably again, till the Assessment Year 2002-2003 for supply of oxygen gas to TISCO, BOC also used to charge sales tax at the rate of three per centum. However, the said purported mistake was sought to be rectified by BOC in terms of the said Notification dated 3.2.1986 charging two per centum sales tax on the supplies of oxygen gas made to TISCO. TISCO issued a declaration in terms of Form IX of the Rules. BOC also deposited tax at the rate of two per cent on the sale of industrial gases to TISCO.

10. The Deputy Commissioner of Commercial Tax issued a notice to BOC on or about 20.4.2005, stating: "It is informed that you have deposited tax @ 2% on the sale of industrial gases to M/s TISCO Ltd. Because the Hon'ble Supreme Court has dismissed the SLP) No. 15419/2004, filed on your behalf, vide order dated 30.3.2005. Hence, you are directed to produce the evidence before the undersigned of deposit of the balance admitted tax of Rs.1,02,45,572/- by 20.5.2005, otherwise the proceedings for imposition of penalty will be initiated against you u/s 16(9) of Bihar Finance Act, 1981 as adopted by Jharkhand" Another notice dated 29.6.2005 was also issued, stating: "In spite of informing you by this office's letter No. 188 dated 20.4.2005 the balance amount of Rs.1,02,45,572/- being admitted tax has not been deposited by you till date. Again, you are directed to produce the evidence before the undersigned of deposit of the balance admitted tax of Rs.1,02,45,572/- by 15.7.2005, otherwise the proceedings for imposition of penalty will be initiated against you u/s 16 (9) of Bihar Finance Act, 1981 as adopted by Jharkhand."

11. BOC in its letter dated dated 15.7.2005, addressed to the Deputy Commissioner, Commercial Taxes, Jamshedpur Circule, Jamshedpur, stated: "After receiving the said letter/notice dated 29.06.05, we had taken up the matter with Tata Steel i.e. our purchaser who is the registered dealer for purchasing of the said Industrial Gases including Oxygen. It has been informed by Tata Steel that the Tata Steel is using those industrial gases including oxygen as their raw material for manufacturing of steel products and is covered under Notification S.O. No.1096 dated 09.09.83, hence the concessional rate of sales tax @ 2% is applicable. This has already been informed earlier by them vide their letter No. ACCTS/ST/990/115/05 dated 31.05.05 (copy enclosed) explaining the matter in this context. For paying the concessional rate of sales tax against supply/sale of Industrial Gases including Oxygen to Tata Steel, Tata Steel has submitted Form IX for availing the concessional rate of sales tax against supply of such industrial gases including oxygen, a copy of which is enclosed herewith. In view of the above, we request you to withdraw your letter No. 2137 dated 29.06.05 demanding differential rate of tax @ 1% totaling to Rs.1,02,45,572/- and drop the case accordingly." The demand was again raised on BOC by the Deputy Commissioner of Commercial Taxes, Jamshedpur Circle, Jamshedpur by its letter dated 22.7.2005 opining that TISCO was liable to pay concessional purchase tax at the rate of three per cent on Oxygen gas. BOC was, therefore, directed to produce the evidence of deposit of the balance differential amount of Rs.1,02,45,572/- by 18.8.2005 failing which other modes of recovery would be adopted.

12. Questioning the validity and/or legality of the said notice, a Writ Petition was filed before the High Court of Jharkhad at Ranchi, which by reason of the impugned judgment has been dismissed, holding that BOC has no locus standi to file writ petition as admittedly tax was payable by TISCO; being authorized to purchase at the concessional rate of three per cent and not at the rate of two per cent and, thus, the demand made by the respondent was unassailable, the selling dealer being bound by the certificate granted to it under Section 13(1)(b) of the Act. It was also held that whether oxygen gas is a raw material or not cannot be decided/determined in writ application filed by BOC as TISCO alone is competent to explain to the prescribed authority as to how, which had all along treated and mentioned as goods as per Annexure 'B', could be treated as raw material. In view of the order of this Court in the case of Tata Iron & Steel Co. Ltd. vs. State of Jharkhand & ors. [(2005) 4 SCC 272], the writ petition was also held to be not maintainable as TISCO cannot take a different stand to the effect that oxygen gas was used by it as a raw material. It was furthermore held: "As per the registration certificate issued under Section 13(1)(b) of the Act, Oxygen Gas was treated as goods as mentioned in Annexure - B. Endorsing the same, the purchasing dealer has been paying the tax at the concessional rate of 3% for a long number of years treating Oxygen Gas as goods. The selling dealer is bound by the said certificate. Accordingly, he has been collecting sales tax @ 3% from the beginning till 2000 and thereafter he started collecting sales tax @ 2% treating the same as raw material. Neither the purchasing dealer, nor the selling dealer can decide the nature of the goods on their own, unless the certificate is modified by the prescribed authority to that effect, treating Oxygen Gas as raw material, on being approached by purchasing dealer. The purchasing dealer has to pay sales tax @ 3% treating Oxygen Gas as goods mentioned in Annexure - B and the selling dealer has to merely collect and deposit the same as per the certificate with the Government. Unless it is established before the prescribed authority, which, in turn, will decide the nature of the goods, the purchasing dealer cannot claim payment of sales tax at the concessional rate of 2% treating Oxygen Gas as raw material under the garb of the two notifications dated 9.9.1983 and 3.2.1986. Therefore, demand notices are perfectly justified."

13. Mr. S. Ganesh, learned Senior Counsel appearing on behalf of BOC and Mr. Shyam Divan, learned Senior Counsel appearing on behalf of TISCO would contend: i. As oxygen gas is injected to the furnace through lance directly as would appear from diagram mentioned in Encyclopaedia Britannica, there cannot be any doubt whatsoever that it is used as a raw material for the purpose of manufacture of steel. ii. Basic Oxygen Steelmaking (BOS) being a method of steelmaking in which carbon-rich molten iron is made into steel as by blowing oxygen through molten pig iron, the carbon content of the alloy is lowered and changes the material into low-carbon steel as would appear from the Wikipedia, the impugned judgment cannot be sustained. iii. For the purpose of arriving at a finding as to whether a material used for a finished product would be a raw material or not, it is not necessary that the item should continue to remain a part of the finished product as even in a case where it has been burnt down in the chemical process required for manufacturing the end product, the same would continue to be a raw material. iv. Section 13(1)(b) of the Act read with the notification providing only for the conditions that the assessee must sell raw material to a registered dealer; and it must be used for processing/manufacturing of goods meant for sale; BOC, being the assessee, is not concerned as to whether in the registration certificate issued to TISCO, oxygen gas has been shown in Annexure `A' or Annexure `B' v. BOC being an assessee having been made liable to pay tax had the requisite locus standi to maintain the writ application. vi. Special Leave Petition filed by TISCO questioning the applicability of industrial policy, the decision of this Court in Tata Iron & Steel Co. Ltd. vs. State of Jharkhand & ors. [supra] cannot have any application in the instant case as payment of tax being governed by notification, the principles of res judicata and/or estoppel would not apply.

14. Mr. B.B. Singh, learned counsel appearing on behalf of the respondents, on the other hand, would contend: i. The procedure for claiming special rate of tax on all materials and/or on raw materials having been provided for in the Act and/or Rules framed thereunder, the same were required to be complied with by the assessee for claiming the benefit thereof. ii. TISCO which is a consumer of oxygen gas having never raised any contention that the rate of tax in respect of oxygen would be two per cent and not three per cent, BOC cannot be said to have any locus standi to plead the case of TISCO as ultimately the liability would be that of latter. iii. The procedure laid down in the Act as also the rules framed thereunder being mandatory in nature, it was obligatory on the part of the TISCO to comply with requirements of the provisions thereof scrupulously. iv. TISCO having not challenged the demand made by the authorities by way of a writ petition, the Special Leave Petition filed by it is not maintainable.

15. We may, at the outset, place on record that since Mr. B.B. Singh conceded that the decision of this Court in Tata Iron & Steel Co. Ltd. vs. State of Jharkhand & ors. [supra] has no application to the issues involved herein, we are not called upon to deal therewith.

16. BOC admittedly is the manufacturer of oxygen gas. It is a dealer within the meaning of the provisions of the Act being a supplier of its product. It, thus, comes within the purview of `dealer' as contained in Section 2(e) of the Act as it carries on the business of buying, selling, supplying or

distributing goods for cash or for deferred payment or for commission, remuneration or other valuable consideration. It is an assessee. It even as an agent of the State is bound to collect taxes on its behalf and deposit the same in accordance with law. Non-compliance thereof would lead to penal actions. Even in the demand made by the Deputy Commissioner, Commercial Taxes, Jamshedpur Circle, Jamshedpur dated 22.7.2005 it was threatened with proceedings for recovery of the differential amount unless it produced the evidence of deposit thereof.

17. Thus, a demand has been made on BOC. Hence, the opinion of the High Court that it did not have any locus standi to maintain the writ application cannot be accepted. It may be true that the consumer of oxygen gas is TISCO. It was also entitled to purchase the said goods at a concessional rate. If the material is used for manufacture, the rate of tax is three per cent whereas if the material is used as raw material for processing and/or manufacturing of the end product, indisputably, the rate of tax would be two per cent. Ultimately, BOC may be entitled to recover the differential amount of tax from TISCO, but, the same by itself would not mean that it is a busybody. Not only the penal proceedings but also other proceedings could be initiated against it for non-deposit of the aggregate amount of tax within the prescribed period. If an order of assessment is passed against the assessee, the only remedy before it is to prefer an appeal/revision in terms of the provisions of the Act. Thus, in our opinion, it was a person aggrieved to maintain a writ application.

18. In the matter of *The Trade Mark No. 70,078 of Wright, Crossley, and Co. (1898) 15 RPC 131*, it was stated: "I think, notwithstanding what was said in that case, and has been said in other cases dealing with Trade Marks, that an applicant in order to show that he is a person aggrieved, must show that in some possible way he may be damaged or injured if the Trade Mark is allowed to stand; and by 'possible' I mean possible in a practical sense, and not merely in a fantastic view. [See *Kabushiki Kaisha Toshiba vs. TOSIBA Appliances Co. and Ors. [2008 (8) SCALE 354]*]

19. If it is to be held that the assessee is a person aggrieved to question the validity of the demand raised on it, it will have the locus standi to maintain a writ petition.

20. The expression "raw material" is not defined. It has to be given its meaning as is understood in the common parlance of those who deal with the matter. Oxygen gas when used would admittedly be burnt up. Would it mean that it ceases to be a raw material is the question? In *Collector of Central Excise, New Delhi vs. M/s Ballarpur Industries Ltd. [(1989) 4 SCC 566]* on which reliance has been placed upon, Venkatachaliah, J. (as His Lordship then was) speaking for a bench was considering a case where the input of sodium sulphate in the manufacture of paper was held to continue to be a "raw material" by reason of the fact that in the course of the chemical reactions this ingredient is consumed and burnt up, holding:

"14. The ingredients, used in the chemical technology of manufacture of any end-product might comprise, amongst others, of those which may retain their dominant individual identity and

character throughout the process and also in the end-product; those which, as a result of interaction with other chemicals or ingredients, might themselves undergo chemical or qualitative changes and in such altered form find themselves in the end-product; those which, like catalytic agents, while influencing and accelerating the chemical reactions, however, may themselves remain uninfluenced and unaltered and remain independent of and outside the end-products and those, as here, which might be burnt-up or consumed in the chemical reactions. The question in the present case is whether the ingredients of the last mentioned class qualify themselves as and are eligible to be called "Raw-Material" for the end-product. One of the valid tests, in our opinion, could be that the ingredient should be so essential for the chemical processes culminating in the emergence of the desired end-product, that having regard to its importance in and indispensability for the process, it could be said that its very consumption or burning-up is its quality and value as raw-materials. In such a case, the relevant test is not its absence in the end-product, but the dependence of the end-product for its essential presence at the delivery end of the process. The ingredient goes into the making of the end-product in the sense that without its presence the end-product, as such, is rendered impossible. This quality should coalesce with the requirement that its utilisation is in the manufacturing process as distinct from the manufacturing apparatus."

21. Yet again, in the case of *Tata Engineering & Locomotive Company Limited vs. State of Bihar & Anr.* [(1994) 6 SCC 479], this Court while interpreting the provisions of Section 13(1)(b) of the Act itself, held that batteries, tyres and tubes which are by themselves finished products would be raw-material when they are fitted in a vehicle, stating: "What requires consideration, therefore, is whether items such as tyres, tubes, batteries etc. purchased by the appellant for use in the manufacture of vehicles which are otherwise finished products could avail of concessional rate of tax at 1%. That would depend on the construction and understanding of the expression 'industrial raw-material (inputs)' used in the Notification. The word 'raw-material' has not been defined in the Act. It has, therefore, to be understood in the ordinary and well accepted connotation of it in the common parlance of the persons who deal with it. According to dictionary, it means 'something which is used for manufacturing or producing the good'. The ordinary common sense understanding of it is that it is something from which another new or distinct commodity can be produced."

22. Mr. B.B. Singh, however, rightly pointed out that the question as to whether the oxygen gas is a raw material or not had not been raised before the Assessing Authority. For the first time, before this Court, a question of fact has been raised. We cannot, for arriving at such a finding as to whether the same is correct or not, rely on Wikipedia alone, on which reliance has been placed. {See *Commissioner of Customs, Bangalore vs. ACER India (P) Ltd.* [(2008) 1 SCC 382] and *Ponds India Limited vs. Commissioner of Trade Tax, Lucknow* [(2008) 8 SCC 369]}

23. We do not know what are the manufacturing processes involved and what role oxygen gas has to play in the matter of manufacturing of steel. It is also not possible for us to base our decision solely on the basis of a diagram contained in *Encyclopaedia Britannica*. Whether oxygen gas can be considered to be a raw material is essentially a question of fact. Evidence is required to be adduced. Such evidence although may be in possession of TISCO. In the event, such a question is raised by the assessee, namely, BOC, the Assessing Authority must go therein. For the purpose of claiming

exemption from payment of tax and/or special rate of tax applicable to a particular gas or commodity or goods, the assessee itself must bring on record sufficient materials to show that it comes within the purview of the notification. Both in M/s Ballarpur Industries Ltd (supra) and Tata Engineering & Locomotive Company Limited [supra], the question as to whether sodium sulphate and/or batteries, tyres, tubes were raw materials or not could be determined by this Court as such a question had been raised by the Assessing Authority.

24. We may, however, must place on record that we do not agree with Mr. B.B. Singh that the principle that as a procedure has been prescribed in the statute, the same must be followed or no benefit would be available to the assessee as is said to have been held by this Court in *Narbada Prasad vs. Chhagan Lal & Ors.* [(1969) 1 SCR 499] and in *Kunwar Pal Singh (dead) by L.Rs. etc. etc. vs. State of U.P. & ors.* [(2007) 5 SCC 85]. The said decisions cannot have any application in the facts of the present case. In *Narbada Prasad vs. Chhagan Lal & Ors* [supra], this Court was dealing with a matter concerning Representation of the People Act in regard to filing of an election petition as in the election petition essential facts as specified therein was required to be pleaded in the manner laid down therein. In *Kunwar Pal Singh (dead) by L.Rs. etc. etc. vs. State of U.P. & ors.* [(2007) 5 SCC 85], this Court was dealing with the provisions of the Land Acquisition Act. Keeping in view the fact that the same was barred by limitation, this Court held: "The principle is well settled that where any statutory provision provides a particular manner for doing a particular act, then, that thing or act must be done in accordance with the manner prescribed therefor in the Act."

25. For the self same reasons, we are of the opinion, that it is not necessary to go into the question as to whether a person even if he proves that he inadvertently did not claim the benefit of a notification would depend upon the facts and circumstances of each case as no such rule in absolute terms can be laid down therefor.

26. We may, however, notice that this Court in *Share Medical Care vs. Union of India & ors.* [(2007) 4 SCC 573] has opined as under: "

15. From the above decisions, it is clear that even if an applicant does not claim benefit under a particular notification at the initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage."

27. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeals are allowed. The demand made on the appellant is also set aside. The question, as to whether the oxygen gas is a raw material for the manufacture of steel or not may be determined by the Assessing Authority on the basis of the material(s), which may be brought on record by the parties. All contentions raised by the parties on the said question shall remain open. The Assessing Authority is hereby directed to give an opportunity to the parties to adduce evidence

in this behalf. All other consequential proceedings may follow on the basis of the determination on the said question. In the facts and circumstances of the case, there shall be no order as to costs.