

SUPREME COURT OF INDIA

Commissioner of Commercial Taxes & Ors.

Vs.

Bajaj Auto Ltd. & Anr.

C.A.No.5913-5920 of 2008

(Shiva Kirti Singh and R.K.Agrawal,JJ.,)

28.10.2016

JUDGMENT

R.K.Agrawal,J.,

1. Challenge in the above said appeals is to the legality of the common judgment and order dated 05.01.2007 rendered by a Division Bench of the High Court of Orissa at Cuttack in Writ Petition (C) being No. 233 of 2002 and connected matters wherein the High Court allowed the petitions filed by the respondents herein.

2. Civil Appeal No. 5913 of 2008 is being treated as the leading case, hence, the facts of the said appeal are given below:-

“a) The respondents are engaged in the sale and purchase of Motor Vehicles and are registered dealers under the Orissa Sales Tax Act, 1947 (in short ‘the OST Act’) as well as under the Central Sales Tax Act. The respondents had been paying entry tax on the goods when they were bought into the State of Orissa under Section 3(3) of the Orissa Entry Tax Act, 1999 (in short ‘the OET Act’). However, they were paying surcharge on the balance amount after deduction of the entry tax paid on the motor vehicles.

b) The Finance Department, Government of Orissa, by letter dated 20.11.2001, stated that the surcharge under the OST Act shall be calculated on the payable amount of tax due on the taxable turnover (Section 5 & 5A) instead of on the reduced Sales Tax amount after setting off of entry tax.

c) On 30.03.2002, the Sales Tax Officer, Sambalpur-I Circle, passed an order under Section 12(4) of the OST Act wherein surcharge was levied under Section 5A of the OST Act on the gross sales tax payable by the respondent-Company.

d) Being aggrieved by the demand notice dated 30.03.2002 as well as the letter dated 20.11.2001 issued by the Finance Department of the Government of Orissa, the respondent-Company filed a writ petition being No. 233 of 2002 along with a set of other writ petitions filed by the respondents herein before the High Court of Orissa at Cuttack.

e) The Division Bench of the High Court, vide common judgment and order dated 05.01.2007, allowed the appeals filed by the respondents herein.

(f) Being aggrieved by the judgment and order dated 05.01.2007, the appellants have preferred these appeals before this Court by way of special leave.

3. Learned senior counsel for the appellants have taken the stand that **there** is nothing in the provisions of the OET Act or the Rules made thereunder which would alter the mode of computation prescribed in Section 5A of the OST Act. Section 4 of the OET Act provides for reduction of the liability of a dealer under the Sales Tax Act to the extent of entry tax paid under the OET Act. This provision only appertains to reduction of entry tax. It has nothing to do with the computation of the surcharge under the OST Act. In any event, in terms of Section 4 of the OET Act, reduction of entry tax paid by the dealers is from the liability under the Sales Tax Act. In substance, it means that the total liability under the Sales Tax Act having been determined would then be reduced by the extent of entry tax paid.

4. Learned senior counsel further submitted that the illustration given under Rule 18 of the Odisha Entry Tax Rule, 1999 (in short 'the Rules') neither curtails nor expands the ambit of the provisions of the Act for which he relied upon a decision of this Court in *Shambhu Nath Mehra vs. The State of Ajmer*¹ wherein it was held as under:-

“11. We recognise that an illustration does not exhaust the full content of the section which it illustrates but equally it can neither curtail nor expand its ambit;....”

5. Learned senior counsel further relied upon *Lalit Mohan Pandey vs. Pooran Singh and Others*² wherein this Court has held as under:-

“75. The illustration appended to the Rules does not envisage such a situation. Illustrations although are of relevance and have some value in the construction of the text of the sections but they cannot have the effect of modifying the language of the statute and they cannot either curtail or expand the ambit of the statute.”

6. Learned senior counsel further submitted that the levy of tax includes surcharge for which he relied upon the following judgments of this Court in:-

“(i) In *The Commissioner of Income Tax, Kerala vs. K. Srinivasan*³, this Court has held as under:-

“ 10. The meaning of the word “surcharge” as given in the Webster’s New International Dictionary includes among others “to charge (one) too much or in addition ...” also “additional tax”.”

(ii) In *The Madurai District Central Co-operative Bank Ltd. vs. The Third Income Tax Officer, Madurai*⁴ it was held as under:-

“18. In *CIT Kerala v. K. Srinivasan* on which the appellant relies, this Court has traced the history of the concept of “surcharge” in the tax laws of our country. After considering the report of the Committee on Indian Constitutional Reforms, the provisions of the Government of India Act, 1935, the provisions of Articles 269, 270 and 271 of the Constitution and the various Finance Acts, this Court held, differing from the High Court, that the word “income tax” in Section 2(2) of the Finance Act, 1964 includes surcharges and the additional surcharge.”

(iii) In *M/s Hoechst Pharmaceuticals Ltd. and Others vs. State of Bihar and Others*⁵, it was held as under:-

“28. It cannot be doubted that a surcharge partakes of the nature of sales tax and therefore it was within the competence of the State legislature to enact sub-section (1) of Section 5 of the Act for the purpose of levying surcharge on certain class of dealers in addition to the tax payable by them

79 A surcharge in its true nature and character is nothing but a higher rate of tax to raise revenue for general purposes....”

(iv) In *M/s Ashok Service Centre and Others vs. State of Orissa*⁶ this Court has held as under:-

"17....The Act only levied some extra sales tax in addition to what had been levied by the principal Act. The nature of the taxes levied under the Act and under the principal Act was the same and the legislature expressly made the provisions of the principal Act mutatis mutandis applicable to the levy under the Act ”

(v) In *Sarojini Tea Co. (P) Ltd. vs. Collector of Dibrugarh, Assam and Another*⁷, it was held as under:-

“16. From the aforesaid decisions, it is amply clear that the expression ‘surcharge’ in the context of taxation means an additional imposition which results in enhancement of the tax and the nature of the additional imposition is the same as the tax on which it is imposed as surcharge. A surcharge on land revenue is an enhancement of the land revenue to the extent of the imposition of surcharge. The nature of such imposition is the same viz., land revenue on which it is a surcharge.”

7. On the other hand, learned senior counsel for the respondents submitted that in view of the clarification issued by the office of Commercial Tax through e-mail to one of the dealers in motor vehicles, viz., TELCO, Bhubaneswar, the appellants were stopped from demanding surcharge on the entire amount of tax payable under the OST Act before deducting the amount payable under the OET Act. According to him, the clarification issued by the Commercial Tax Department to TELCO, Bhubaneswar, was in accordance with the illustration appended to Rule 18 of the Rules which did not take into consideration the amount of surcharge payable before deducting the entry tax paid while computing the amount of sales tax payable. He, thus, submitted that the amount of surcharge is to be levied only on the balance amount of sales tax payable on the sale price of the motor vehicle after deducting the entry tax paid. According to him, if two constructions are possible then the one which preserves the workability and efficacy has to be preferred for which he relied upon a decision of this Court in *State of Tamil Nadu vs. M.K. Ka.nd.aswa.mi and Others*⁸, wherein it has been held as under:-

“26. It may be remembered that Section 7-A is at once a charging as well as a remedial provision. Its main object is to plug leakage and prevent evasion of tax. In interpreting such a provision, a construction which would defeat its purpose and, in effect, obliterate it from the statute book, should be eschewed. If more than one construction is possible, that which preserves its workability, and efficacy is to be preferred to the one which would render it otiose or sterile. The view taken by the High Court is repugnant to this cardinal canon of interpretation.”

8. Learned senior counsel also relied upon a decision of this Court in *Associated Cement Companies Ltd. vs. State of Bihar and Others*⁹ wherein this Court has held that a dealer is entitled to reduction in tax to the extent of tax paid under the Bihar Entry Tax Act while working out the tax payable by it under the Bihar Sales Tax Act.

9. Heard learned counsel for the parties and perused the records.

10. The sole question for consideration is whether the ‘Surcharge’ under Section 5A of the OST Act is to be computed on the gross amount of sales tax or on the net amount of sales tax after setting of or deducting the amount of entry tax?

11. Under Section 5 of the OST Act, Sales Tax is payable by a dealer on the taxable turnover at a prescribed rate. Under Section 5A, it is provided inter alia for payment of surcharge. Section 5A of the OST Act (as it stood at the relevant time) reads as under:

“5A Surcharge: (1) Every dealer whose gross turnover during any year exceeds rupees ten lakhs shall, in addition to the tax payable by him under this Act, also pay a surcharge at the rate of ten per centum of the total amount of tax payable by him:
”

12. It would also be relevant to reproduce Section 4 of the OET Act (as it stood at the relevant time) which reads as under:-

“(4) Reduction in Tax Liability:

(1) where an importer of motor vehicle liable to pay tax under sub-section (3) of Section 3 being a Dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicles then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

Explanation: For the purpose of this sub section the chassis and the vehicle with body built on the chassis shall be treated as one and the same goods.

(2) When an importer or manufacturer of goods specified in Part-III of the schedule except motor vehicles pays tax under sub-section (1) of section 3 or section 26 of this Act, being a Dealer under the Sales Tax Act becomes liable to pay tax under the said Act by virtue of Sale of such goods, then his liability under the Sales Tax Act shall be reduced to the extent of tax paid under this Act.

(3) The reduction in tax liability of an importer as provided in sub-section (1) or of an importer or manufacturer as provided in sub-section (2) shall not be allowed, unless the entry tax paid and tax payable under the Sales Tax Act are shown separately in the cash memo or the bill or invoice issued by him for the sale by virtue of which such liability accrues.”

13. Rule 18 of the Odisha Entry Tax Rule, 1999 is reproduced hereunder:

“18. Set off of Entry Tax against Sales Tax: (1) When the importer of a motor vehicle liable to pay tax under sub-section (2) of section 3 of this Act being a dealer in motor vehicles becomes liable to pay tax under the Sales Tax Act by virtue of sale of such motor vehicle, his tax liability under the Sales Tax Act shall be reduced to the extent of the tax paid under these rules.

Illustration: Assuming Entry Tax Rate and Sales Tax Rate to be 10%

1)	Purchase Value of Motor Vehicle	Rs. 2,00,000/-
2)	Entry Tax Payable @ 10%	Rs. 20,000/-
	Total:-	Rs. 2,20,000/-
3)	Sale Price of the Motor Vehicle	Rs. 2,20,000/-
4)	(a) Sales Tax due @ 10%	Rs. 22,000/-
	Deduct Entry Tax paid	Rs. 20,000/-
	Sales Tax payable	Rs. 2,000/-
	Total:-	Rs. 2,22,000/-

Note: If the sales tax payable on such motor vehicle is less than the entry tax paid, then the sales tax payable will be nil.

(2) When an importer of goods specified in Part III of the Schedule to the Act other than motor vehicle, liable to pay tax under this Act is also a dealer liable to pay tax under the Sales Tax Act, then the Sales Tax payable on the sale of goods shall be reduced to the extent of entry tax paid in the same manner as illustrated under the sub-rule(1).”

In view of the statutory provision contained in Rule 18 of the Rules, the tax payable under the said Act was to be determined after deduction therefrom the entry tax paid by a dealer importing vehicle into the State of Orissa.

14. Since the determination of surcharge payable under the OET Act was relatable and/or linked to the tax payable under the OST Act, a clarification was sought for by one of the dealers in motor vehicles, namely, TELCO which is similarly situated as the Respondent No.1-company from the office of Commercial Tax, in view of the provision contained in Rule 18 of the Rules, which is as under:-

“Surcharge is payable on the amount of tax that becomes payable by a dealer after set off of entry tax paid at the time of purchase of such goods.”

15. In accordance with the clarification issued to TELCO, Bhubaneswar, as aforesaid, which was also circulated to other dealers of motor vehicles, including the Respondent No.1-Company, surcharge was calculated and paid which was quantified after deducting therefrom the amount of entry tax paid by the Respondent No.1-Company while importing a motor vehicle into the State of Orissa.

16. On 20.11.2001, the Government of Orissa, in the Finance Department, wrote a letter to the Commissioner of Commercial Taxes, Orissa relating to the computation of tax payable on the motor vehicle for the purpose of levy of surcharge on an interpretation of the provisions of the OET Act, the OST Act and the Rules which is as under:-

“GOVERNMENT OF ORISSA
FINANCE DEPARTMENT

No. CTB-23/2001. 55863/F

From:

Shri K.C. Parija,
Deputy Secretary to Government

To

The Commissioner of Commercial Taxes,
Orissa, Cuttack

Sub: Computation of tax payable on Motor Vehicle for the purpose of levy of surcharge.

Ref: C.C.T.'s letter No. 15264/CT, dt. 12.7.2000
Bhubaneswar, the 19th November, 2001.

Sir,

In inviting a reference to the aforesaid letter, I am directed to say that surcharge under Orissa Sales Tax Act, 1947, shall be calculated on the payable amount of tax due on the taxable turnover (Section 5 & 5A) instead of on the reduced Sales Tax amount after setting off of entry tax. The position may kindly be clarified to the Field Officers and if such faulty procedure of charging surcharge is adopted by any of the Circle Officers, same should be discontinued forthwith and corrective measure as per the provisions of the statute may be taken up to make good the loss.

2. It may further be noted that the illustration in rule -18 of Orissa Entry Tax Rule, 1999 or provision of any other Finance Department notification have limited implication for that purpose only and they have no overriding effect on the statutory provisions of the OST Act.

Yours faithfully

Sd/-
(K.C. Parija)
DEPUTY SECRETARY TO GOVERNMENT

OFFICE OF THE COMMISSIONER OF COMMERCIAL
TAXES: ORISSA: CUTTACK

Dated: 20.11.01

Memo No. 24808/CT
III(I) 207/2000

Copy forwarded to all ACCTs/All CTOs/All Addl. CTOs of Assessment Units for information and necessary action. The CTOs are requested to circulate the above clarification of Finance Deptt. to all the Addl. CTOs of their respective circles.

Dd/-
Addl. Commissioner of Commercial Taxes (Gen) Orissa,
Cuttack

In the said letter, it was inter alia intimated that surcharge shall be calculated on the payable amount of tax due on the taxable turnover (section 5 and 5A) instead of on the reduced sales tax amount after setting off of Entry Tax.

17. On 30.03.2002, the Sales Tax Officer, Sambalpur-I Circle, Sambalpur passed an order under section 12(4) of the OST Act wherein surcharge has been levied under Section 5A of the said Act on the gross sales tax payable, without deducting the entry tax as required under Section 4 of the OET Act. As a result of this, excess surcharge to the tune of Rs. 21,25,117.37/- has been levied by the Sales Tax Officer.

18. It is well settled that an illustration given under the Rules does not exhaust the full content of the section which it illustrates but equally it can neither curtails nor expands its ambit. Further, surcharge is nothing but an additional tax and is payable on the sale of goods in the manner laid down for levy of surcharge. In view of the provisions contained in the OET Act, a dealer is not entitled for reduction of the amount of entry tax from the amount of tax payable before the levy of surcharge under Section 5A of the OST Act.

19. On a plain reading of the provisions of the OST Act as well as the OET Act and the Rules, it can be seen that Section 5A of the OST Act creates a charge and imposes liability on every dealer under the OST Act to pay surcharge @ 10% on the amount of tax payable by him under the OST Act. Section 4(1) of the OET Act, in the same way, prescribes for reduction of the tax amount payable by the dealer to the extent of entry tax already paid for the same article for which sales tax is payable. The Section, does not specifically contemplate anything, which would indicate that the provisions of the OET Act or the Rules have to be taken into consideration while assessing the sales tax or surcharge. In essence, the provisions made in the Rules lay down the modality of 'set off'. It is important to mention here that OST Act was enacted in the year 1947 whereas OET Act was enacted in 1999. The provision of set off has been made in the OET Act and the Rules framed thereunder and not in the OST Act. The heading of Section 4 of the OET Act gives a broad idea regarding the provision of set off by way of "reduction in tax liability". Sub-Sections 1 and 2 of Section 4 of the OET Act provide for reduction of liability under the OST Act.

20. It is well settled that the objective of framing rules is to fill up the gaps in a statutory enactment so as to make the statutory provisions operative. Rules also clarify the provisions of an Act under which the same are framed. Section 4 of the OST Act is a charging Section attracting liability to pay Sales Tax "on sales and purchases effected". Section 5 of the OST Act provides for rate of Sales Tax. Section 5A of the OST Act levies surcharge on the dealer which is nothing but an additional tax. Therefore, on a plain reading of the provisions under the OST Act as well as under the OET Act, a dealer is not entitled for reduction of the amount of entry tax from the amount of tax payable before the levy of surcharge under Section 5A of the OST Act. A harmonious reading of Rule 18 of the Rules as well as Sections 4, 5, 5-A of the OST Act reveals no conflict or inconsistency. The Rules are to be construed to have been made for furtherance of the cause for which the Statute is enacted and not for the purpose of bringing inconsistencies.

21. Section 5A of the OST Act is a self-contained provision and the surcharge, as already seen above, is leviable at the specified per centum of tax payable under the OST Act. Tax payable under the OST Act is independent of the provisions of OET Act. The assessment or

quantification or computation of surcharge shall have to be made in accordance with the provisions of the OST Act.

22. Thus, on a conjoint reading of Section 5 of the OST Act, Section 4 of the OET Act and Rule 18 of the Rules, we are of the considered opinion that the amount of surcharge under Section 5A of the OST Act is to be levied before deducting the amount of entry tax paid by a dealer.

23. In view of the forgoing discussion, the impugned judgment and order dated 05.01.2007 passed by the High Court cannot be sustained and is liable to be set aside. In the result, all the appeals are allowed; however, the parties shall bear their own cost.

Judgment Referred.

¹*AIR 1956 SC 0404*

²*(2004) 6 SCC 0626*

³*(1972) 4 SCC 0526*

⁴*(1975) 2 SCC 0454*

⁵*(1983) 4 SCC 0045*

⁶*(1983) 2 SCC 0082*

⁷*(1992) 2 SCC 0156*

⁸*(1975) 4 SCC 0745*

⁹*(2004) 7 SCC 0642*