REPORTABLE

RAJASTHAN TAX BOARD, AJMER

Appeal No. 1177 /2010/Sirohi
Appeal No. 1178 /2010/Sirohi
Appeal No. 1179 /2010/Sirohi
Appeal No. 1180 /2010/Sirohi
Appeal No. 1181 /2010/Sirohi
Appeal No. 1182 /2010/Sirohi

Assistant Commercial Taxes Officer,
Abu Road, Sirohi ..... Appellant

Versus
M/s Unilink Cement Private Limited,
Abu Road, Sirohi . ..... Respondent

D.B.
Sunil Sharma, Member
Amar Singh, Member

Present :-
Shri N.S.Rathor,
Advocate for the Appellant

Shri Alkesh Sharma,
Advocate for the Respondent

Date of Judgement: 24-06-2014

JUDGMENT

1. These six appeals have been filed before the Rajasthan Tax Board (for short, " the Board ") by the Assistant Commercial Taxes Officer,Abu Road, Sirohi (for short,"the Assessing Authority") against the orders dated 31.12.09 of the Deputy Commissioner, Appeals(for short,"the Appellate Authority"), whereby the orders passed under the Rajasthan Sales Act (for short " the Act") by the Assessing Authority were set aside, the details of which are as follows:

Assesment year	RST/CST	Disputed Tax	Interest
92-93	RST	377115/-	512876
92-93	CST	95306/-	-
93-94	RST	310123/-	347337/-
93-94	CST	68073/-	-
94-95	RST	201510	177328/-
94-95	CST	365273	-

2. These six appeals are disposed of by a common order and a copy thereof be kept on each file. The brief facts of the case are that the respondent assessee was in business of manufacturing and selling cement from its mini cement plant at nil rate of tax under 100% exemption from tax granted under the Rajasthan Sales Tax New Incentive Scheme, 1987 (for short," Incentive Scheme, 1987). Consequent upon certain amendments having been brought about in the provisions of the Incentive Scheme, 1987, this cent percent exemption from tax allowable to mini cement plants was later reduced to fifty per cent for certain category of mini cement plants; which caused the Assessing Authority to levy 50% additional tax and impose interest thereon in the impugned rectification orders dated 01.05.1998 under section 37 of the Rajasthan Sales Tax Act,1994 (for short, "the Act") read with section 9 of the Central Sales Tax Act,1953 (for short, " the CST Act").

3. Aggrieved with the decision of the Assessing Authority, the respondent assessee filed appeals before the Appellate Authority which were allowed by orders dated 16.12.1999.Thereafter Revenue appealed against these orders before the Board which were rejected by orders dated 11-02-2008. Now, appellant department filed revision before Hon'ble Rajasthan High Court against the aforesaid orders which were decided on 10.05.2007 and the cases were remanded back to the Appellate Authority to be disposed of with certain directions laid down therein.

4. The Appellate Authority held that when the Assessing Authority had issued notices dated 05.12.1997 under section 30 of the Act and under section 9 of the CST Act read with section 30 of the Act, he could not have passed rectification orders dated 01.05.1998 under section 37 of the Act on their strength, without issuing notices afresh under section 30 of the Act. He, therefore, decided that the aforesaid rectification orders were not tenable in the eyes of law.

5. The Appellate Authority accepted the contention that the respondent company's original eligibility certificate for 100% exemption from tax issued on 07.07.1989 with effect from 08.07.1988 under Incentive Scheme, 1987 was not amended afterwards, as such tax exemption granted to the tune of 100% could not have been slashed to 50% retrospectively. As a result, the assessee respondent relying upon the legality of the exemption certificate never charged any tax from buyers of its goods, which otherwise would have been an act against law,either. Thus, additional levy of tax to the tune of balance 50% of tax against the respondent assessee was not in keeping with law.

6. The Appellate Authority held that proviso to the clause 4(a) inserted in the construct of incentive scheme,1987 with retrospective effect from **06.08.1988** did not adversely or otherwise affect the respondent company's eligibility for 100% exemption from tax from **08.07.1988** : it was a date falling prior to the date of retrospective effect of the aforesaid notifications causing downsizing of the percentage of tax exemption from 100% to 50% in instant cases.

7. The Appellate Authority, in compliance of the Hon'ble Rajasthan High Court's directive in the instant cases, *" to permit the assessee to plead and place on record the factual foundation for his claim of applicability of the doctrine of promissory estoppel and to allow the revenue to meet with the plea of doctrine of promissory estoppel set up by the assessee",* heard both the parties to the issue and going through the record placed before him, *concluded that the assessee respondent, on the grounds of promissory estoppel, had made investments in the plant and machinery and started production. Therefore, the action of the Assessing Authority in reducing tax exemption from 100% to 50% from retrospective effect was unjustifiable and against law.*

8. At the outset, the learned counsel to the Revenue, Shri NS Rathor argued that the assessee respondent was not entitled to 100% tax exemption for its mini cement plant under the incentive

scheme 1987 because, by virtue of notification dated January 11, 1990, the government had amended incentive scheme, 1987 with effect from August 6, 1988 substituting item no.10 of annexure B and inserting a proviso to sub clause (a) of clause 4 in the aforesaid scheme, which fixed tax liability at 50% for certain categories of mini cement plants retrospectively from August 6, 1988. Pleading forcefully that the Hon'ble Supreme Court had expounded the postulate in several cases that doctrine of promissory estoppel should be properly pleaded and established before the Authority concerned gave verdict on this count, he averred that the exercise was not scrupulously followed in present case. To stress the point further, he quoted case of State of Rajasthan and Others Vs M/s Bhatanagar Cements, reported in 115 STC 290; the relevant excerpt of which is as follows:

"However, for the period subsequent to February 22, 1990, the Tribunal proceeded only upon the basis of promissory estoppel. Promissory estoppel has to be pleaded and established. We find nothing in the application made by the respondent to the Tribunal which can be said to be a plea of promissory estoppel supported by the necessary factual particulars. It is only if these factual particulars are pleaded that the other side has an opportunity to answer the same. We think also that before applying the doctrine of promissory estoppel, as it did, the Tribunal should have reached a finding as to whether or not the respondent's plant qualified as a small-scale industry or as a mini cement plant within the meaning of the amended scheme. This was the respondent's only case before it. If the particulars in this behalf were not, as it stated, before the Tribunal, the Tribunal should have called for the same or sought a finding on this aspect from the tax authorities".

9. He was vociferous that the Assessing Authority was right in rectifying orders under section 37 of the Act so as to charge 50% of the remaining tax as yet unpaid. The learned Deputy Government Advocate of the Revenue further contended that it

was immaterial to raise the bogey of charging wrong section of the Act to decide the issue in circumstances when the assessee had earlier been issued a notice also under section 30 of the Act. He wanted that the issue be decided on merits, and argued that respondent was beating about the bush taking shelter under umbrella of promissory estoppel, without having to prove it convincingly. He contested that respondent assessee seeking relief under promissory estoppel had no locus standi for stopping the Assessing Authority from levying remaining 50% of tax, since bandying out the unproven facts to claim 100% exemption from tax did not serve any purpose; and, therefore impugned orders of the Appellate Authority be rejected and those of the Assessing Authority be revoked.

10. Beginning the arguments, Shri Alkesh Sharma the learned counsel to the assessee respondent said that, in much as the eligibility and resultant quantum of exemption from tax to the impugned unit were concerned, the imbroglio which would otherwise have arisen in this situation over the small sector units Versus mini cement plants debate, could never see the light of the day by mischief of amendment brought about in clause 2(K) of the incentive scheme vide notification no. F4(39) FD/Tax/94-163 dated 21.02.1998 with insertion of following expression in the existing "NOTE,-(1)" thereof:

"a mini cement plant, where the investment in its plant and machinery does not exceed the limits prescribed for small scale units shall mean a small scale unit".

11. He further contended that above construct intended confering retrospective applicability to it ,from May 23,1987: it being date of the aforesaid 1987 incentive scheme coming into operation in case of such units as were covered under the aforesaid 1987 dispensation for twofold reasons: first, it was designed in form of an Explanation of clause 2 (K); secondly, the incentive scheme itself was operative till 31.03.1997; and, if, at all, the above expression had nothing to do with the aforesaid

incentive scheme, 1987 no purpose was served issuing this notification from 21.02.1998.

12. Further elaborating his stand , the learned counsel to the assessee respondent, Shri Alkesh Sharma argued that the investment made in plant and machinery of mini cement unit under consideration did not exceed limits prescribed for small scale units rendering unit eligible to seek 100% exemption from tax from July 08,1988 because annexure "C" of the incentive scheme declared that the quantum of sales tax exemption would be hundred per cent of fixed capital investment and the period of eligibility seven years for the aforesaid unit in question, since it was a new unit in the small sector.

13. The learned counsel to the assessee respondent, Shri Alkesh Sharma asserted that it was never in dispute that on September 11,1989, the only category of cement plants ineligible as per item 10 of Annexure "B" of the incentive scheme was large scale cement units except new units in the tribal sub plan areas; and, mini cement plants had not as yet been categorized for purposes of restriction in tax exemption limits. By notification January 11, 1990, the government amended incentive scheme, 1987 with effect from August 6, 1988 to substitute item no.10 of annexure B and insert a proviso to sub clause (a) of clause 4 in the scheme postulating tax liability at 50% for mini cement plants of certain capacity ,and provisions were made to give them effect from 06.08.1988. In similar vein, the Government issued another notification dated 22.02.1990 fixing a ceiling of 50% tax exemption for mini cement plants with riders of capacity parameters and types of kiln used. However, the decision given by the Hon'ble Rajasthan Taxation Tribunal in case of M/s Bhatnagar Cements Vs State of Rajasthan, reported in 103 STC 146, clearly expostulated that such a proviso as brought about by notification dated 11.01.1990 was not applicable in cases where certificates of exemption from tax had been issued prior to date of issue of notification provided that the foundation of promissory estoppel had been fulfilled with necessary ingredients in place. Since the certificate of exemption from tax was issued with effect from

08.07.1988, the instant cases are squarely covered by decision of the Hon'ble Supreme Court in case of State of Rajasthan and Others Vs M/s Bhatanagar Cements, reported in 115 STC 290.

14. The learned counsel to the assessee respondent, Shri Alkesh Sharma brought point home that the appellant company was granted eligibility certificate for 100 % exemption from tax under the aforesaid incentive scheme with effect from 08.07.1988, therefore aforesaid notifications dated 11.01.1990 and dated 22.02.1990 could not divest the respondent company of continuance of its already granted 100% exemption from tax, since these notifications were applicable to the industrial units set up on or after the dates of issuance of aforesaid notifications.

15. Before analysing case on hand, We need to have a look at the changes made in Item no. 10 of Annexure "B" which thereafter read :

"All cement plants (including white cement plants) except,-

(a) Those in the small-scale sector;

(b) Mini-cement plants of the capacity limited to 200 tonnes per day or 66,000 tonnes per annum ; and

(c) New industrial units in the tribal sub-plan area."

The proviso added to sub-clause (a) of clause 4 read:

"Provided that mini cement plants (using vertical shaft kiln with a licensed capacity not exceeding 200 tonnes per day or 66,000 tonnes per annum may, or mini cement plants using retary kiln with a lincesed capacity not exceeding 300 tonnes per day or 99,000 tonnes per annum) may be entitled to claim exemption from tax to the extent of 50 percent of its tax liability under the Act with all restrictions applicable to an industrial unit as provided in annexure "C".

16. Chronologically, by another notification dated February 2, 1990 sub-item (b) of item No. 10 of annexure "B" and the proviso to sub-clause (a) of clause 4 of the 1987 Incentive Schemes inserted by the amendment of January 11, 1990 were further amended again with effect from August 6, 1988. As a consequence of these amendments the first proviso (the second

proviso added later is not relevant for our present purposes) to sub-clause (a) of clause 4 read:

"Provided that mini cement (using vertical shaft kiln with a licensed capacity not exceeding 200 tonnes per day or 66,000 tonnes per not exceeding 300 tonnes per day or 99,000 tonnes per annum) may be entitled to claim exemption from tax to the extent or 50 percent of its tax liability under the Act with all restrictions applicable to an industrial unit as provided in annexure "C"."

17. Similarly these amendments item 10 of annexure "B" now read :

"10. All cement plants including white cement plants, except"

(a) Those in the small-scale sector:

Mini cement plants using vertical shaft kiln with a licensed capacity not exceeding 200 tonnes per day or 66,000 tonnes per annum, or mini cement plants using rotary kiln with a licensed capacity not exceeding 300 tonnes per day, or 99,000 tonnes per annum ; and

(b) New industrial units in the tribal sub-plan area."

18. At the back drop of above, we see that upshot of these amendments was to restrict, inter alia, the claim for exemption under the 1987 Incentive Scheme to 50 percent of tax liability for mini cement plants of the type and quantum of production specified, whereas for cement plants in the small-scale sector the exemption was available to the full extent provided for in annexure "C".

19. It is evident that grant of an exemption and the withdrawal of an exemption cannot be viewed as the same process in reverse. It is not a two-way street and the fact that sub section (2) of section 4 of the Act authorises the grant of exemptions with retrospective effect cannot be said to authorise their withdrawal with retrospective effect. Neither the RST Act nor the CST Act, in terms, provide for retrospective withdrawal of exemptions.

20. Admittedly, the applicant established his cement plant attracted by the incentives promised under these Schemes among others. At the time when the cement plant was found eligible for benefits under these Schemes, i.e. on September 11, 1989, it was entitled to 100 percent exemption of tax liability for a period of seven years or 100 percent of fixed capital investment whichever was earlier. By the amendment of January 11, 1990 and February 22, 1990 this benefit in the case of mini cement plants of a certain category was sought to be restricted with effect from August 6, 1988 to 50 percent exemption of tax liability for a period of seven years or 100 percent of fixed capital investment whichever was earlier.

21. At the backdrop of the foregoing account, the crux of the matter is whether the Appellate Authority made compliance of the directive of the Hon'ble Rajasthan High Court given in the cases of the same unit in STR Nos.156/ 2005, 161/ 2005, 166/ 2005, 167/2005,205/2005and222/2005, by a common judgment dated May,10,2007 in matter of CTO, Sirohi Vs M/s Unilink Cement Pvt Ltd, which asked him:

" to permit the assessee to plead and place on record the factual foundation for his claim of applicability of the doctrine of promissory estoppel and to allow the revenue to meet with the plea of doctrine of promissory estoppel set up by the assessee"

22. We find that in compliance of the Hon'ble Rajasthan High Court's directions to the Appellate Authority, he heard both the parties to the issue and going through the record placed before him, ***concluded,*** **on the basis of arguments presented and record available on file,** ***that the assessee respondent, on the grounds of promissory estoppel, had made investments in the plant and machinery and started production. Therefore, the action of the***

Assessing Authority in reducing tax exemption from 100% to 50% from retrospective effect was not justifiable and against law.

23. It is also a fact that the Assessing Authority passed impugned orders on 01.05.1998 on the basis of amendments made by notification dated 11.01.1990 conferring thereon retrospective effect from 06.08.1988 and thereby reducing 100% tax exemption to 50% only in cases of mini cement plants ;and it is worth pondering that before the proceedings could have been initiated by the Assessing Authority in present all matters, the aforesaid relevant provision under the Scheme of 1987 was amended by issuing another notification dated 10.12.1996, whereby the aforesaid provision for reduction in tax benefit itself was deleted. However, while scrapping the impugned proviso ,no safeguard of a saving clause was put on the statute. Therefore, when Assessing Authority passed impugned orders dated 01. 05. 1998 , the proviso 1 did not exist in the incentive scheme.Therefore the assessment orders were *ab initio null & void.* The Hon'ble Rajasthan High Court in the case of Ms Moomal Marbles Ltd Vs State of Rajasthan & Others, reported in 130 STC 160, similarty held that:

"A reading of the notifications dated November 20, 1991 and March 27, 1995 extracted as above clearly shows that the Explanation inserted with effect from November 20, 1991 was deleted vide notification dated March 27, 1995. The notification dated November 20, 1991 has not been saved by any saving clause. Thus, on the date reassessment, i.e., February 28, 1998 the notification dated November 20, 1991 was not in existence. No action under a provision can be taken after the provision has been deleted unle ss the said provision has been saved by a specific provision to that effect. The apex Court in Kolhapur Canesugar Works Ltd. v. Union of India reported in JT 2000 (1) SC 453 held that where there is no saving, then proceedings initiated

under the old rule becomes non est. The decision of apex Court is based on a decision in Rayala Corporation (P) Ltd. v. Director of Enforcement, New Delhi reported in AIR 1970 SC 494. "

"In the instant case, the explanation inserted by notification dated November 20, 1991 has been deleted vide notification dated March 27, 1995 without any specific saving clause. Thus, when the assessing authority passed the reassessment order dated February 28, 1998 the Explanation inserted vide notification dated November 20, 1991 was not in existence being rubbed off or in other words in view of notification dated March 27, 1995 it became non est. Thus, the entire proceedings of re-assessment which includes the notice dated October 15, 1997 and the order of reassessment dated February 28, 1998 are wholly without jurisdiction without authority of law."

24. In the light of the analysis of facts and law discussed in the foregoing account and cases gone through, this bench does not seem it appropriate to trifle with findings of the Appellate Authority arrived at in the impugned appeals. In the result, the impugned appeals of the Revenue are rejected and the aforesaid appeal orders of the Appellate Authority are upheld.

25. Order pronounced.

24-6-14

(AMAR SINGH)
MEMBER

(SUNIL SHARMA)
MEMBER