

A M/S VIVIDH MARBLES PVT. LTD.  
v.  
COMMERCIAL TAX OFFICER

FEBRUARY 23, 2007

B [S.B. SINHA AND MARKANDEY KATJU, JJ.]

C *Taxation—Sales tax—Exemption—Pursuant to Industrial Policy—Two schemes exempting payment of sales tax—Option to the entrepreneur to opt for any one scheme—Assessee opting for later scheme getting 75% exemption—Assessing Authority by mistake granted exemption under former Scheme granting 100% exemption—On realization of mistake, demand made for recovery of 25% tax—Challenged in Writ Petition—Dismissal thereof—On appeal, held: Assessee having opted for one Scheme, is estopped from opting for another Scheme,—Assessee cannot be permitted to derive benefit of the mistake of Assessing Authority—Statutory Authorities are entitled to rectify their mistake.*

E State Government, pursuant to its industrial policy, formulated two Schemes exempting payment of Sales tax, one in the year 1987 (granting 100% exemption) and another in 1989 (granting 75% exemption) . Both the Schemes provided for different nature of incentives 1989 Scheme not given retrospective effect and entrepreneurs were given a choice to opt for either of the two Schemes. Appellant herein opted for 1989 Scheme. Eligibility Certificate was granted in terms whereof 1989 Scheme was applied. In order of assessment exemptions were stated to have been granted in terms of 1987 Scheme. When the mistake of the Assessing Authority was discovered, a show cause notice was issued to the appellant for payment of balance sales tax. Appellant filed a Writ Petition thereagainst on the grounds that it being eligible for grant of exemption under both the Schemes, it preferred to avail of 100% exemption under 1987 Scheme; that notices seeking recovery of the balance tax was contrary to assessment order; and that respondent having granted exemption under 1987 Scheme, could not be permitted to change its opinion to allow exemption under 1989 Scheme. The Writ Petition was dismissed by High Court. Hence the present appeal.

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**Dismissing the appeal, the Court**

**HELD: 1.1.** 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. Having opted for the 1989 Scheme, 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. [Para 10] [145-G-H; 146-A]

*Indian Cement and Ors. v. State of Andhra Pradesh and Ors.*, [1988] 1 SCC 743; *West Bengal Hosiery Association and Ors. v. State of Bihar and Anr.*, [1988] 4 SCC 134 and *British Physical Lab India Ltd. v. State of Karnataka and Anr.*, [1999] 1 SCC 170, distinguished.

*Maharashtra State Seeds Corporation Ltd. v. Hariprasad Drupadrao Jhadao and Anr.*, [2006] 3 SCC 690, referred to.

**1.2.** 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. [Para 13] [146-E, F]

**2.** In a case of this nature, a direction to the effect that the appellant is not liable to pay any interest or any penalty, cannot be issued. 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. [Para 19] [147-D, E]

*Shree Cement Ltd. and Anr. v. State of Rajasthan and Ors.*, [2000] 1 SCC 765; *Indian Cement and Shree Digvijay Cement Co. Ltd. and Ors. v. State of Rajasthan and Ors.*, [2000] 1 SCC 688 and *State of Rajasthan and Anr. v. J.K. Udiapur Udyog Ltd. and Anr.*, [2004] 7 SCC 673, distinguished.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 926 of 2007.

From the Final Common Judgment and Order dated 6.2.2006 of the High

A Court of Judicature for Rajasthan at Jodhpur in SB STCRP No. 49/2004.

M.L. Verma and P.K. Manohar for the Appellant.

Sushil Kumar Jain, Puneet Jain, Christe Jain and Abhishek Gupta for the Respondent.

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The Judgment of the Court was delivered by

**S.B. SINHA, J.** 1. Leave granted.

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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'). 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 :

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(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."

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

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"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.

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... ..

(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-

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(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 A
- (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. B

(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. C

4. 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 where to exemption from tax liability was limited to 75%. D

5. 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 : E

"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. F

A 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 :-

B	a.	Cost of land	:	
	b.	Cost of new building	:	9.49
	c.	Cost of new plant and machinery or imported second land machinery	:	57.00
C	d.	Installation expenditure capitalized for P & M	:	_____
	e.	Capitalized interest during construction not exceeding 5% of the total fixed capital investment	:	_____
D	f.	Technical know-how fees or drawin fees paid Laboratories recognized by the State Govt. or the Central Government	:	_____
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		Total	:	66.49

A copy of eligibility certificate issued by you may also please be sent to this office.”

F 6. 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 :

G “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.

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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." A

7. 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% of its turnover. A writ petition filed thereagainst by the appellant has been dismissed by reason of the impugned judgment. B

8. 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. C D

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

10. 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 thereof. 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 E F G H

A 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.

B 11. 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.

D 12. 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.

E 13. 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 Jhadao & Anr.*, [2006] 3 SCC 690]

G 14. 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.

H 15. Reliance has been placed by *Mr. Verma on Indian Cement and Ors.*

v. *State of Andhra Pradesh and Ors.*, [1988] 1 SCC 743, *West Bengal Hosiery Association and Ors. v. State of Bihar and Anr.*, [1988] 4 SCC 134 and *British Physical Lab India Ltd. v. State of Karnataka and Anr.*, [1999] 1 SCC 170. A

16. 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. B

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

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

19. 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. 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. D E

20. 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 Anr. v. State of Rajasthan and Ors.*, [2000] 1 SCC 765 is misplaced. Therein, again dicta in *Indian Cement* (supra) and *Shree Digvijay Cement Co. Ltd. and Ors. v. State of Rajasthan and Ors.*, [2000] 1 SCC 688 was followed. In this case, there is no direction to the respondent-State to recover the difference in tax. F

21. In *State of Rajasthan and Anr. v. J.K. Udiapur Udyog Ltd. and Anr.*, [2004] 7 SCC 673, 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 G H

A 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.

B 22. 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).

K.K.T.

Appeal dismissed.