

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on: 01.11.2022
Pronounced on :09 .11.2022

OWP No.1520/2013
IA No.2091/2013

M/s Chenab Textile Mills ...Petitioner(s)
Through:- Mr. C.S.Azad, Advocate

V/s

State of J&K and others ...Respondent(s)

Through:- Mr. K.D.S.Kotwal, Dy. AG

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE
HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

Sanjeev Kumar-J

1. The petitioner is an industrial unit registered with the Department of Industries and Commerce. In the year 2005, the Director, Industries and Commerce, J&K, Jammu vide order No.85-Accts of 2005 dated 16th May, 2005 declared the petitioner-Unit as “prestigious unit” for availing all the benefits envisaged in the Industrial Policy issued by the Government in the year 2004. The petitioner-Unit was established and permanently registered in the year 1966. Ever since its establishment, the petitioner-Unit has gone for substantial expansion from time to time. The petitioner obtained the requisite permission and approval of the competent authority for expansion of its existing spinning mill from 102992 spindles

to 128336 spindles by making an investment of Rs.108.00 Crores in the year 2006.

2. As is claimed, the petitioner undertook substantial expansion of the existing spinning mill and, therefore, became eligible for exemption from payment of additional toll under the New Industrial Policy, 2004 and package of incentives for development of industries in Jammu & Kashmir issued by respondent No.1 vide Government Order No.21-Ind of 2004 dated 27.01.2004 read with SRO 22 of 2004 dated 31.01.2004 issued by the Government in exercise of the powers conferred by Section 5 of the Jammu and Kashmir Levy of Tolls Act, Samvat 1995 [“the Act”]. When the claim of the petitioner for exemption from payment of additional toll on the plant and machinery imported by it for undertaking substantial expansion of the mill was not accepted, the petitioner filed OWP No.161/2007 in this Court claiming, *inter alia*, a direction to the respondents to allow the toll tax exemption to the petitioner-Mill for its 9th expansion programme in terms of SRO 22 of 2004 read with Government Order No.432-I&D of 1998 dated 02.12.1998. The writ petition was disposed of by this Court vide order and judgment dated 12.02.2013 and a direction was issued to the respondents to examine the case of the petitioner in light of the request already made by the petitioner and make a decision while keeping in view order dated 5th March, 2007. On review petition moved by the petitioner, the order aforesaid was reviewed to the extent of substituting order dated 5th March, 2007 by order dated 15th

May, 2010, which was passed at the motion hearing stage by the Court in OWP No.161/2007.

3. In compliance to the judgment passed by this Court in OWP No.161/2007 (supra), Deputy Excise Commissioner, Toll Post Lakhanpur considered the entire matter and vide order No.1719/A/LKP dated 03.04.2013 rejected the claim of the petitioner for exemption of toll tax payable on the components, plant and machinery, building material and other equipments procured from outside the State in connection with substantial expansion programme undertaken by the petitioner. The Deputy Excise Commissioner Toll Post Lakhanpur did not find the petitioner entitled to the tax exemption in view of the provisions of SRO 22 of 2004 dated 31.01.2004. It is this consideration order, which is primarily in question in this petition.

3. The impugned order has been assailed by the petitioner primarily on the following grounds:-

- i) That the order impugned is in violation of the interim order passed by this Court on 15th May, 2010 in OWP No.161/2007 and is contrary to the provisions of SRO 22 of 2004 dated 31.01.2004.
- ii) That the impugned order of consideration is non-speaking and clearly an outcome of total non-application of mind by the authority. It is submitted that while considering the provisions of SRO 22 of 2004 dated 31.01.2004, the Deputy Excise

Commissioner ignored to take note of the New Industrial Policy, 2004.

- iii) That the Deputy Excise Commissioner also did not appreciate that the petitioner-Unit was declared as prestigious unit by the competent authority and, therefore, was entitled to toll exemption on the items like plant and machinery, construction material etc imported from outside the State for undertaking substantial expansion of the petitioner-Unit.

4. The writ petition is vehemently contested by the respondents. In the reply affidavit, the respondents have taken a categorical stand that in terms of SRO 22 of 2004 dated 31.01.2004 which was issued by the Government in exercise of powers conferred by Section 5 of the Act, the petitioner-Unit, which was registered in the year 1966 with the Department of Industries, is not entitled to any exemption from payment of additional toll on the material like plant and machinery, components and construction material imported from outside the State for undertaking its 9th substantial expansion programme. It is further submitted that it was only in the year 2008, SRO 22 dated 31.01.2004 was amended vide SRO 85 of 2008 dated 24.03.2008 and for the first time exemption from payment of additional toll chargeable on capital goods to be imported by the existing industrial units for substantial capacity expansion for a period of one year w.e.f. 01.04.2008 to 31.03.2009 was provided. It is further submitted by the respondents that issuance of SRO 85 of 2008 giving benefit of exemption only for a period of one year i.e. financial year 2008-

09 makes it abundantly clear that prior to 24th March, 2008 i.e. the date of issuance of SRO 85 of 2008, such benefit was not envisaged or provided under SRO 22 of 2004 dated 31.01.2004. It is, thus, submitted that the Deputy Excise Commissioner rightly considered the matter in proper perspective and rejected the claim of the petitioner giving cogent reasons in support of its decision. The impugned order of consideration, therefore, is perfectly valid and does not call for any interference by this Court.

5. Having heard learned counsel for the parties and perused the material on record, we are of the view that the petitioner is not entitled to the benefit of exemption of additional toll on components, plants and machinery, building material and other equipments procured from outside the State for undertaking substantial expansion of the Unit either under the Industrial Policy, 2004 promulgated vide Government Order No.21-Ind of 2004 dated 27.01.2004 or under SRO 22 of 2004 dated 31.01.2004. This we say for the reasons given hereinafter.

6. With a view to boost industrialization and provide concessions and incentives to the entrepreneurs, the Government of Jammu & Kashmir came up with package of incentives in the form of New Industrial Policy, 2004, which was promulgated vide Government Order No.21-Ind of 2004 dated 27.01.2004. As per the Industrial Policy, 2004, apart from other incentives that were given to the existing and future industrial units, there was exemption from additional toll. Clause 3.11 of the Government Order No.21-Ind of 2004 dated 27.01.2004, which deals with Toll Taxes exemption reads thus:-

“3.11 Toll Taxes

- i) There will be no additional toll tax on the raw materials, fuel and consumables, procured from outside the state by the existing or new SSI units till 31-01-2015 except for items brought on the negative list from time to time.
- ii) There will be no additional toll tax on finished goods manufactured by the existing or new SSI, Medium and Large units and sent outside the state upto 31-03-2015 except for items brought on the negative list from time to time.
- iii) There will be no additional toll tax on the Raw materials, fuels, consumables brought from the existing new medium and large units upto 31-03-2015 except in case of items brought on the Negative list from time to time.
- iv) There will be no additional toll tax on components, machinery, plant and other equipments procured from outside the state for building the factory, for a period of five years from the date of registration of the unit in SSI, Medium or large sector.
- v) There will be no additional toll tax on 100% export oriented units on the goods exported under proper export documents from the state to any foreign country.
- vi) There will be no additional toll tax on empty containers brought into the state which are used for stuffing products of industry for export out of the state.”

7. From a reading of Clause 3.11, it is clearly evident that the Industrial Policy envisages grant of exemption from payment of additional toll on components, plant and machinery and other equipments procured from outstate the State for building factory for a period of five years from the date of registration of the Unit as SSI, Medium or Large.

Indisputably, the petitioner-Unit was registered with the Department of Industries in the year 1966 and, therefore, Clause-3.11 reproduced herein above was not in any way applicable. At this juncture, it is necessary to make a reference to SRO 22 of 2004 dated 31.01.2004. Needless to say that the Government while promulgating Industrial Policy may declare and pronounce a package of incentives, which may include exemption from payment of various taxes including toll. However, with a view to give effect to these promises and declarations made in the Industrial Policy, necessary statutory notifications are required to be issued by the Government under the relevant legislation. In this way and with a view to give effect to the promise of grant of exemption from payment of additional toll, the Government in the exercise of powers conferred by Section 5 of the Act issued SRO 22 of 2004 dated 31.01.2004. Clause 3 of SRO 22 of 2004 dated 31.01.2004 is relevant for the discussion on hand and the same is, therefore, reproduced hereunder:-

“3. There shall be no additional toll on components, plant and machinery, building material and other equipments procured from outside the State for construction of factory for a period of five years from the date of registration of the units in Small, Medium or Large Scale Sector (including prestigious units)”

8. From a reading of Clause-3 reproduced above, it is abundantly clear that additional toll on components, plant and machinery, building material and other equipments imported from outside the State for construction of factory is exempted for a period of five years from the date of registration of the Units in Small, Medium or Large scale sector

(including prestigious units). The ambiguity, if any, in the Industrial Policy, 2004 is completely removed and Clause 3, which is part of a statutory notification issued under Section 5 of the Act clearly provides that benefit of exemption from payment of additional toll on components, plant and machinery etc shall be available to industrial units, small, medium and large scale and prestigious units only for a period of five years from the date of registration of the unit(s). Obviously, the petitioner is not covered by Clause-3. As is rightly pointed out by the Deputy Excise Commissioner in its impugned order that the petitioner-unit was registered with the Department of Industries and Commerce in the year 1966 and, therefore, the benefit of Clause-3 of SRO 22 of 2004 dated 31.01.2004 is not available to it.

9. Strong reliance is placed by Mr. C.S.Azad, learned counsel appearing for the petitioner, on Clause 3.14 of Industrial Policy, 2004, which deals exclusively with special provision for prestigious Units and the same reads thus:-

“3.14 Special Provision for Prestigious Units

Prestigious units shall avail of full exemption from payment of GST (Till VAT is implemented)/CST and additional toll tax until 31-3-2015 or until such amount of exemption reaches the levels of 150% of capital investment in the project whichever occurs earlier. It may be clarified that negative lists issued for various tax related incentives for medium and large industries shall also be applicable mutatis mutandis to prestigious units.”

10. From a plain reading of Clause 3.14, it comes out that prestigious units like the petitioner-Unit have been held entitled to full exemption from payment of GST and additional toll tax until 31.03.2015 or until such amount of exemption reaches the level of 150% of capital investment in the project whichever occurs earlier.

11. There is no denying the fact that as per the Industrial Policy, 2004, particularly Clause 3.14, the petitioner is entitled to toll tax exemption but Clause 3.14 is required to be read subject to SRO 22 of 2004. Levy of toll is regulated by the Act of legislation known as the Jammu and Kashmir Levy of Tolls Act, Samvat 1995. Section 3 of the Act is a charging Section and provides that levy of toll on various items brought in or taken out of the established check posts under the Act. Section 5 of the Act confers upon the Government power to grant exemption from payment of toll levied under the Act. In the exercise of this power, the Government of Jammu & Kashmir has been coming up with requisite notifications exempting toll levied under the Act. As is stated above, with a view to give effect to the promises held out to the existing and prospective entrepreneurs in the Industrial Policy, 2004, the Government, *inter alia*, came up with a notification in exercise of the powers conferred by Section 5 of the Act as well. This was done by the Government in terms of SRO 22 of 2004.

12. At the cost of repetition, we may say that SRO 22 of 2004 is statutory in nature and, therefore, would govern the exemption from payment of additional toll to the exclusion of any other policy decision of

the Government. From a plain reading of SRO 22 of 2004, in particular Clause 3 reproduced above, we could not persuade ourselves to agree with the learned counsel for the petitioner that the petitioner-Unit is entitled to toll exemption on the import of components, plant and machinery, building material and other items for undertaking substantial expansion.

13. The stand of the respondents that the petitioner was not entitled to such exemption is supported by the fact that the Government in the year 2008 for the first time decided to give benefit of exemption of additional toll chargeable on capital goods to be imported by the existing industrial units for undertaking substantial expansion. This benefit was given only to the units undertaking substantial expansion in the financial year 2008-2009. SRO 85 of 2008 dated 24.03.2008, which so provides, is also reproduced hereunder:-

“Provided that there shall be no additional toll chargeable on capital goods to be imported by the existing industrial units (directly linked to the manufacturing process) for substantial capacity expansion, for a period of one year with effect from 1.04.2008 to 31.03.2009. Provided further that such exemption shall available only on import of capital goods, which are not available locally and is certified as such by the concerned authority at the Toll Post.”

14. In view of the aforesaid discussion, we are absolutely convinced that the impugned order of consideration is fully in consonance with law and the petitioner was rightly held not entitled to the benefit of exemption from payment of additional toll chargeable on capital goods imported by it for undertaking substantial expansion of its unit in the year 2006. Such

exemption came to be provided only with the issuance of SRO 85 of 2008 and was to remain in operation w.e.f. 01.04.2008 to 31.03.2009.

15. The communications relied upon by the petitioner, particularly those made by the Department of Industries in favour of the petitioner are interdepartmental communications incapable of conferring any right on the petitioner to claim exemption from payment of additional toll under the Act and SRO 22 of 2004 issued thereunder. In terms of Article 265 of the Constitution of India, no taxes can be imposed, levied or collected save by authority of law. The authority of law shall mean Act of legislature or delegated legislation. No Government order or executive instructions can be a substitute for the Act of legislature or delegated legislation. Taxes and levies can be imposed or collected only by authority of law and exemption, if any envisaged therein, too, can be by authority of law.

16. For the foregoing reasons, we find no merit in this petition. The same is, accordingly, dismissed.

(Rajesh Sekhri)
Judge

(Sanjeev Kumar)
Judge

JAMMU
09.11.2022
Vinod, PS

Whether the order is speaking : Yes
Whether the order is reportable: Yes