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ASSOCIATED CEMENT COMPANIES LTD.

v.

STATE OF BIHAR AND ORS.

SEPTEMBER 29, 2004

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[ARIJIT PASAYAT AND C.K. THAKKER, JJ.]

Bihar Finance Act, 1981—Section 3—Bihar Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993—Section 3—Sales tax—Levy of—By Notification liability to pay tax under Finance Act exempted to the extent tax paid under Entry Tax Act—Demand of tax by Revenue denying adjustment of entry tax on the ground that there was no liability due to exemption—High Court upheld the demand—On appeal, held: Assessee was entitled to reduction to the extent of tax paid under Entry Tax Act in view of the Notification—It was liable to pay tax but for the exemption—Liability to pay tax and actual payment of tax are conceptually different.

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Words and Phrases:

“Exemption”, “Liable”—Meaning of.

E Petitioner-Company was engaged in manufacture of cement. Their factories/units were registered under Bihar Finance Act, 1981. State of Bihar vide its Industrial Policy, 1995 offered Sales tax exemption on incremental production to existing industrial units in the State, which undertook expansion of their capacities. The policy was given effect to by Notification dated 22.12.1995. State granted exemption to the petitioner w.e.f. 1.4.1998 to 31.3.2007 protecting additional production of cement from payment of sales tax. Entry tax paid under Bihar Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993, for transfer of its stock to other districts of the State by the petitioners used to be adjusted towards total liability of Sales Tax on the sale of cement in terms of the Industrial Policy and Section 3(2) of Entry Tax Act.

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H After bifurcation of the State of Bihar into States of Bihar and Jharkhand, the concerned units of the petitioner fell in the State of Jharkhand. Revenue issued demand notices stating therein that entry tax paid on exempted cement could not be adjusted against sales tax

payable on other cement i.e. non-incremental production and demanded tax, for the exempted period. Petitioner filed Writ Petition challenging the demand notices. High Court dismissed the Petition upholding the validity of the demand notices. A

In appeal to this Court, respondent-State contended that when there was no liability because of exemption granted, question of adjustment of tax in respect of goods which have not suffered tax does not arise. B

Allowing the appeal, the Court

HELD: 1. It cannot be said that as tax was not paid on portion of the turnover of the scheduled goods i.e. cement, the assessee-appellant had no liability under Bihar Finance Act, 1981. It was definitely liable to pay tax under the Act, but for the exemption. The assessee-appellant was liable to pay tax under Section 3(3) of Bihar Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993. Therefore, it was entitled to reduction to the extent of tax paid under the Entry Tax Act while working out tax payable by it under the Act. The notices issued by the respondent are without legal sanction and are quashed. [879-C-D-E] C

2. The question of exemption arises only when there is a liability to pay tax. The former depends on charge created by the statute and latter on computation in accordance with the provisions of the statute and rules framed thereunder, if any. Liability to pay tax chargeable under Section 3 of the Act is different from quantification of tax payable on assessment. Liability to pay tax and actual payment of tax are conceptually different. But for the exemption the dealer would be required to pay tax in terms of Section 3. Exemption presupposes a liability. Unless there is liability question of exemption does not arise. Liability arises in term of Section 3 and tax become payable at the rate as provided in Section 12. Section 11 deals with the point of levy and rate and concessional rate. [878-E-F-G] D

3. A bare reading of clause (2) of the Notification makes the position clear that liability of importer of cement under the Act shall be reduced to the extent of tax paid under the Entry Tax Act where such importer become liable to pay tax under the Act by virtue of sale of the scheduled goods. [877-G-H; 878-A-B] E

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A *Zungarrao Bhikaji Nagarkar v. Union of India and Ors.*, [1997] 7 SCC 409 and *Australian Mutual Society v. IRC*, (1962) AC 135 (P.C.), referred to.

Oxford Dictionary and Black's Law Dictionary 6th Edn., referred to.

B 4. Literally "exemption" is freedom from liability, tax or duty. Fiscally it may assume varying shapes, specially, in a growing economy. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification C of inequitable burden of progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly speaking liberal and strict construction of an exemption provision is to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause D then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the Notification then full play should be given to it and it calls for a wider and liberal construction. [877-A-B-C-D]

E *Union of India and Ors. v. Wood Papers Ltd. and Anr.*, [1990] 4 SCC 256 and *Mangalore Chemicals and Fertilisers Ltd. v. Deputy Commissioner of Commercial Taxes and Ors.*, [1992] Supp. 1 SCC 21, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1488 of 2004.

F From the Judgment and Order dated 28.3.2003 of the Patna High Court in C.W.J.C. No. 7821 of 2002.

R.F. Nariman, Ashish Dholakia, U.A. Rana and Arvind Kumar for M/s. Gagrat & Co. for the Appellant.

G B.B. Singh for the Respondents.

The Judgment of the Court was delivered by

H ARIJIT PASAYAT, J. : Challenge in this appeal is to the legality of judgment rendered by a Division Bench of the Patna High Court.

Appellant questioned legality of the notices issued on 30.5.2002 and 24.6.2002 by the Deputy Commissioner, Commercial Taxes, Patna Special Circle, Patna (Respondent No. 3) proposing to levy tax for the assessment years 1998-99, 1999-2000 and 1.4.2000 to 14.11.2000 under the Bihar Finances Act, 1981 (in short the 'Act') before the High Court. Notices were issued on the purported basis that the appellant was not entitled to adjustment of tax paid under the Bihar Tax on Entry of Goods into Local Areas for Consumption, Use or Sale Therein Act, 1993 (hereinafter referred to as the 'Entry Tax Act'). The High Court upheld validity of the notice and action taken by concerned respondents.

Factual position in a nutshell is as follows:

Appellant is a public limited company registered under the Companies Act, 1956 (in short the 'Act') and has two manufacturing units—one at Sindri and another at Jhinkpani. Prior to bifurcation of the erstwhile State of Bihar the units were registered under the Act and as well as under the Entry Tax Act and the consolidated registration was made at Patna Special Circle, under the Act. On 15th November, 2000, the erstwhile State of Bihar was bifurcated into two States, namely, State of Jharkhand and the State of Bihar and the said two manufacturing units of the appellant now have fallen in the State of Jharkhand.

In the year 1995, the State Government has come out with Industrial Policy to give incentives to the new units or the existing units having additional/incremental production with regard to payment of sales tax. In terms of the aforesaid policy, claim of the appellant is that it invested money for additional/incremental production cement in the unit at Sindri and with regard to aforesaid additional/incremental production exemption was granted in terms of the aforesaid industrial policy as well as under the provisions of the Act for the period from 1.4.1998 to 31.3.2007 The appellant also claimed exemption under the provisions of the Act on the basis of the aforesaid Industrial Policy which was denied by the State and then he filed a writ petition before the High Court and the same was dismissed and the matter is pending before this Court.

According to the appellant it was entitled to adjust the entry tax paid under the Entry Tax Act while computing the tax payable under the Act. Appellant questioned correctness of the notices issued by filing writ petition (CWJC No. 7821 of 2002). By the impugned judgment dated 28.3.2003 the

A Division Bench of the High Court dismissed the writ petition holding that there was no scope of such adjustment.

Reference was made to various provisions of the Act i.e. Section 3(1) of the Entry Tax Act and the exemption notification No. SO 37 dated 25th

B February, 1993 issued by the State Government. It was held that "tax" as defined under clause 2(x) of the Act includes additional tax. Clause 2 of the exemption notification issued clearly stipulated that if there was liability under the Act then that shall be reduced to the extent of tax paid under the Ordinance issued in relation to the entry tax. It was further held that as additional tax is also a part of tax as stipulated in clause 2 of the Act, the

C appellant is entitled to benefit under the notification and its liability for payment of additional tax has to be adjusted against payment of tax under the Entry Tax Act.

Learned counsel for the appellant submitted that the High Court has failed to notice the clear language used in the Act and the Entry Tax Act.

D Bifurcation sought to be introduced as regards each goods which have suffered tax and those which were exempted from payment of tax is not legally permissible. According to the respondents it is only that part of the turnover which has suffered tax and it is the tax levied in respect of such turnover which is available to be adjusted in terms of the exemption

E notification and not otherwise. This was stated to be an erroneous reading of the relevant provision.

Learned counsel for the respondent submitted that the exemption notification has to be construed strictly. There cannot be any exemption by implication.

F When there is no liability to tax because of the exemption granted, the question of any adjustment of tax in respect of goods which have not suffered tax does not arise.

It would be appropriate to take note of the relevant provisions of the Entry Tax Act and the Act. Section 2(c) of the Entry Tax Act reads as follows:

G "2(c): "Entry of goods" with all its grammatical variations and cognate expressions means Entry of goods into a local area from any place outside that local area or any place outside the State for consumption use, or sale therein.

H [Provided that in case of such goods which are liable to tax under

Section 12(1), of the Bihar Finance Act, 1981, entry of Goods shall mean entry of goods into local area from any place outside the State for consumption, use or sale therein.]”

Section 3 of the Entry Tax Act is the charging section under the said Act. Same reads as follows:

“3. *Charge of Tax*— (1) There shall be levied and collected a tax on entry of scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding 5 percentum of the import value of such goods as may be specified by the State Government in a notification published in a official gazette subject to such conditions as may be prescribed.

Provided different rates for different scheduled goods and different local areas may be specified by the State Government.

(2) The tax leviable under this Act shall be paid by every dealer liable to pay tax under Bihar Finance Act, 1981 or any other person who brings or causes to be brought into the local areas such scheduled goods whether on his own account or on account of his principal or takes delivery or is entitled to take delivery of such goods on such entry:

Provided no tax shall be leviable in respect of entry of such scheduled goods effected by a person other than the dealer if, the value of such goods does not exceed 25 thousands in a year.

Provided further that where an importer of scheduled goods liable to pay tax under the Act, becomes liable to pay tax under the Bihar Finance Act, 1981 (Bihar Act, 5 1981) by virtue of sale of such scheduled goods, his liability to pay tax under the Bihar Finance Act, 1981 shall stand reduced to the extent of tax paid under the Act.

(3) The liability to pay tax on scheduled goods shall only be at the point of first entry into a local area and any subsequent entry or entries into any other local area or areas of the said scheduled goods shall not be subject to tax provided the subsequent importing dealer produces before the assessing officer the original

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A copy of the cash memo, invoice, bill or challan issued to him by the dealer from whom he purchased or received the said scheduled goods, and files a true and complete declaration in the form and manner prescribed".

B Section 2(d) of the Act defines "Dealer". Section 3(h) defines "Goods" and Section 3(j) defines "Gross Turnover". Section 3 of the Act is the charging section which reads as follows:

"3. *Charge of tax*— (1) Subject to the provisions of this part, the sales tax or the purchase tax as the case may be, shall be paid by every dealer -

C (a) with effect from the date of commencement of the Bihar Finance Act, 1981 if his gross turnover during a period not exceeding twelve months immediately preceding the said date exceeded the specified quantum;

D (b) to whom clause (a) does not apply, with effect from the date immediately following the day on which his gross turnover during a period not exceeding twelve months immediately preceding such date first exceeded the specified quantum.

E *Explanation*— In this section, the expression, 'specified quantum' means-

F (i) in relation to an importer, nil;

(ii) in relation to any dealer, who himself manufactures any goods, nil;

G (iii) in relation to any dealer engaged in the execution of works contract—Where the total value of works contracts taken together exceeds Rs. Twenty-five thousand in a year;

(iv) in relation to any dealer engaged in the delivery or supply of goods as a result of transfer of the right to use any goods for any purpose nil;

H (v) in relation to any other dealer, Rs. 1,00,000.

Provided that the State Government may, by notification published in the Official Gazette and subject to condition of one month's previous notice, increase or reduce the amount of specified quantum.

(2) Such tax shall be payable to a dealer to whom clause (a) of sub-section (1) applies on sales and purchases made inside Bihar on and from the date of commencement of the Bihar Finance Act, 1981 and by a dealer to whom clause (b) of the said sub-section applies on such sales and purchases made on or from the date immediately following the day mentioned in the said clause (b).

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(8) Notwithstanding anything contained in other sub-sections, a dealer registered under the Central Sales Tax Act, 1956 (LXXIV of 1956) shall irrespective of the quantum of his gross turnover, be liable to pay sales tax on his sale, made, inside Bihar, of any goods which he has purchased after furnishing a declaration under sub-section (4) of Section 8 of the said Act or any goods in the manufacture or possessing of which goods, so purchased by him have been used:

Provided that sales tax shall not be payable if the dealer shows to the satisfaction of the prescribed authority that the sale is deductible from his gross turnover under clause (c) of sub-section (1) of Section 21 for purpose of determining his taxable turnover.

(9)

(10) The tax for each year may, with the previous approval of the Commissioner, be estimated and collected in advance during a year

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A in such instalments as may be fixed by the prescribed authority. For the purpose the prescribed authority may require the dealer to furnish an advance estimate of his taxable turnover for that year and may provisionally determine the amount of tax payable by the dealer in respect of the year. Thereupon the dealer shall pay the amount so determined by such date as may be fixed by such authority."

B Section 6 deals with charge of additional tax and Section 7 deals with exemption. Section 7 is a pivotal provision so far as present dispute is concerned. It reads as under:

C "7. *Exemption* — (1) No tax shall be payable under this Part on sales or purchases of goods which have taken place -

- (a) in the course of inter-State trade or commerce;
- (b) outside the State;

D (c) in the course of import of goods into, or export of goods out of the territory of India.

E (2) The provisions of the Central Sales Tax Act, 1956 (LXXIV of 1956) shall apply for determining when sale or purchase of goods shall be deemed to have taken place in any of the ways mentioned in clauses (a), (b) or (c) of sub-section (1).

F (3) The State Government may, by notification and subject to such conditions or restrictions as it may impose, exempt from the sales tax or purchase tax —

- (a) sales of any goods or class or description of goods;
- (b) sales of any goods or class or description of goods to or by any class of dealers;

G (c) purchase of any goods by any class of dealers or any purchase or category or description of purchases of such goods.

H (4) Where exemption from the levy of tax under this Part on any sale or purchase of goods is claimed by a dealer under the provisions

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of this section or Section 21, the burden of proof shall lie on such dealer and the prescribed authority may require the dealer to substantiate the claim in the prescribed manner.”

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Literally “exemption” is freedom from liability, tax or duty. Fiscally it may assume varying shapes, specially, in a growing economy. In fact, an exemption provision is like an exception and on normal principle of construction or interpretation of statutes it is construed strictly either because of legislative intention or on economic justification of inequitable burden of progressive approach of fiscal provisions intended to augment State revenue. But once exception or exemption becomes applicable no rule or principle requires it to be construed strictly. Truly speaking liberal and strict construction of an exemption provision is to be invoked at different stages of interpreting it. When the question is whether a subject falls in the notification or in the exemption clause then it being in nature of exception is to be construed strictly and against the subject but once ambiguity or doubt about applicability is lifted and the subject falls in the notification then full play should be given to it and it calls for a wider and liberal construction. (See *Union of India and Ors. v. Wood Papers Ltd. and Anr.*, [1990] 4 SCC 256), *Mangalore Chemicals and Fertilisers Ltd. v. Deputy Commissioner of Commercial Taxes and Ors.*, [1992] Supp 1 SCC 21) to which reference has been made earlier.

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Notification No. 37 dated 25th February, 1993 is also relevant, more particularly, clause (2) thereof. There is no dispute that in terms of clause (1) cement is one of the scheduled goods. Clause (2) reads as under:

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“Where an Importer of India made foreign liquor, Vegetable and Hydro-generated Oil or Cement is liable to pay tax under sub-section (2) of Section 3 of the Ordinance becomes liable to pay tax under the Bihar Finance Act, 1981 by virtue of sale of such scheduled goods, his liability under the Bihar Finance Act, 1981 shall be reduced to the extent of tax paid under the Ordinance.”

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It is to be noted that reference therein is made to the Ordinance i.e. Bihar Ordinance No. 1/93. The same has been enacted. The notification has been issued in exercise of the powers conferred by sub-section (1) of Section 3 of the Entry Tax Act and proviso to sub-section (1) of Section 12 of the Act.

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A bare reading of clause (2) of the notification makes the position clear that liability of importer of cement under the Act shall be reduced to the

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A extent of tax paid under the Entry Tax Act where such importer become liable to pay tax under the Act by virtue of sale of the scheduled goods.

Stand of the respondents appears to be that since there was no liability in respect of portion of sales because of notification of the State Government

B SO No. 479 dated 22.12.1995 as part of the Industrial Policy 1995 granting exemption from payment of sales tax on production of extended industrial unit which undertakes expansion of their capacity, no question of adjustment arises. To put differently stand of the respondent is that when there was no tax liability on such sales, there was no liability to pay any tax and, therefore, the benefit of adjustment available under clause (2) of the notification SO C No. 37 dated 25.2.1993 does not arise. The interpretation put forward by the respondents found acceptance by the High Court.

Crucial question, therefore, is whether the appellant had any "liability" under the Act. The answer to this lies in Section 3 of the Act which is

D extracted above and is the charging section. In sub-section (1) subject of the provision of the part (i.e. part I) sales tax or purchase tax, as the case may be, shall be paid by every dealer as provided in the section itself. Section 7 speaks of exemption. Sub-section (3) of Section 7 stipulates that State Government may, by notification and subject to such conditions or restrictions as it may impose, exempt from sales tax or purchase tax certain sales or E purchases as the case may be. The question of exemption arises only when there is a liability. Exigibility to tax is not the same as liability to pay tax. The former depends on charge created by the Statute and latter on computation in accordance with the provisions of the Statute and rules framed thereunder if any. It is to be noted that liability to pay tax chargeable under Section 3 F of the Act is different from quantification of tax payable on assessment. Liability to pay tax and actual payment of tax are conceptually different. But for the exemption the dealer would be required to pay tax in terms of Section 3. In other words, exemption presupposes a liability. Unless there is liability question of exemption does not arise. Liability arises in term of Section 3 and tax become payable at the rate as provided in Section 12. Section 11 deals G with the point of levy and rate and concessional rate.

The word "liable" in the Concise Oxford Dictionary means "legally bound, subject to a tax or penalty, under an obligation". In Black's Law Dictionary (6th Edn.) the word "liable" means "bound or obliged in law or

H equity; responsible, chargeable, answerable, compellable to make satisfaction,

compensation, or restitution..... obligated, accountable for or chargeable with". The above position was noted in *Zungarao Bhikaji Nagarkar v. Union of India and Ors.*, [1997] 7 SCC 409.

Tax at the appropriate rate would have become payable but for the exemption. Decision in *Australian Mutual Society v. IRC*, [1962] AC 135 P.C., has stated the position as follows:

“The phrase “exempt from taxation” (Land and Income Tax Act, 1954 (No. 6701) (New Zealand) Section 86(1) does not cover income that is not at all within the reach of the New Zealand tax laws. It refers to income that would, had it not been for the exemption, otherwise have been so taxable”.

Therefore, it cannot be said that as tax was not paid on portion of the turnover of the scheduled goods i.e. cement, the assessee-appellant had no liability under the Act. It was definitely liable to pay tax under the Act, but for the exemption. There is no dispute that the assessee-appellant was liable to pay tax under sub-section (3) of Section 3 of the Entry Tax Act. Therefore, it was entitled to reduction to the extent of tax paid under the Entry Tax Act while working out tax payable by it under the Act.

Above being the position the notices issued by the respondent are without legal sanction and are quashed. The judgment of the High Court is set aside.

The appeal is allowed with no order as to costs.

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Appeal allowed.

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