(2002) 03 MAD CK 0006

Madras High Court

Case No: Writ Petition No''s. 12463 to 12466 of 1998

Southern Agrifurane Industries Ltd.		APPELLANT
	Vs	
Commercial Tax Officer and Others		RESPONDENT

Date of Decision: March 19, 2002

Acts Referred:

- Sick Industrial Companies (Special Provisions) Act, 1985 - Section 18, 3, 3(1)
- Tamil Nadu General Clauses Act, 1891 - Section 15
- Tamil Nadu General Sales Tax Act, 1959 - Section 17, 17(3), 17A

Citation: (2002) 126 STC 550

Hon'ble Judges: V.S. Sirpurkar, J; K. Raviraja Pandian, J

Bench: Division Bench

Advocate: N. Sriprakash, for the Appellant; T. Ayyasamy, Special Govt. Pleader (Taxes), for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V.S. Sirpurkar, J.
This judgment shall dispose of four writ petitions, they being W.P. Nos. 12463 of 1998, 12464 of 1998, 12465 of

1998 and 12466 of 1998. All the writ petitions more or the less pertained to a common controversy involved.

2. Four original petitions, viz., O.P. Nos. 1326 and 1327 of 1997, 1727 of 1997, 3999 of 1997 and 868 of 1998 came to be disposed of by the

Tamil Nadu Taxation Special Tribunal by a common order. The present writ petitions pertained to that common order. These original petitions

pertained to the various orders passed under the provisions of the Tamil Nadu General Sales Tax Act, 1959 (in short ""the Act"") as also the

Government Orders passed. W.P. No. 12463 of 1998 is against the order passed in O.P. No. 868 of 1998 challenging the communications dated

November 11, 1996 and February 13, 1997. W.P. No. 12464 of 1998 pertains to the order passed in O.P. No. 1327 of 1997 which was

against the proceedings dated March 27, 1997 rejecting the request of the petitioner for waiver of interest. W.P. No. 12465 of 1998 pertains to

the order passed in O.P. No. 1727 of 1997 wherein a declaration was claimed that G.O. Ms. No. 18 dated January 18, 1995 and G.O. Ms. No.

31 dated February 3, 1995 were bad in law and as such ineffective. Lastly, W.P. No. 12466 of 1998 pertains to O.P. No. 3999 of 1997 and

seeks to quash the order dated July 31, 1998 in that original petition and further seeks the relief of confirmation of G.O. Ms. No. 417 dated

October 7, 1997.

3. Following facts which emerged during the debate before us would be essential to comprehend the controversy involved in these matters :

3.1. The petitioner, Southern Agrifurane Industries Limited (hereinafter referred to as ""the petitioner-company"") is a registered company under the

Companies Act, 1957. It became a sick industrial undertaking due to heavy losses in terms of Section 3(o) of the Sick Industrial Companies

(Special Provisions) Act, 1985 (in short ""the SICA"").

3.2. The petitioner-company was referred to the Board of Industrial and Financial Reconstruction (briefly ""the BIFR""). A case (Case No. 110 of

1998) was, therefore, registered before the BIFR. Number of meetings and hearings were held whereafter a scheme came to be formulated on

July 28, 1993, The following parties were heard, they being :

(a) Southern Agrifurane Ltd. (petitioner)

(b) Bank of Madura

(c) Syndicate Bank

(d) Industrial Development Bank of India (IDBI)

(e) Industrial Finance Corporation of India (IFCI)

(f) Tamil Nadu Industrial Investment Corporation Limited (TIIC)

(g) Southern Petrochemical Industries Corporation Limited (SPIC)

(h) State Industrial Promotion Corporation of Tamil Nadu Limited (SIPCOT)

(i) South India Sugars Limited

3.3. In a scheme that was formulated for the rehabilitation of the sick industrial undertakings and to inject life into them, a number of measures were

ordered wherein it was estimated that the petitioner-company would require a total sum of Rs. 1,491 lakhs which were to be provided as under :

Interest-free unsecured loans : Rs. 568.00

Promoters rights issue of equity capital : Rs. 300.00

Deferment of sales tax by the Government of Tamil Nadu : Rs. 623.00

Rs. 1,491.00

3.4. As regards the last item, that is ""deferment of sales tax by the Government of Tamil Nadu, which was solely depended upon the decision

taken by the Government of Tamil Nadu, second respondent herein, it was mentioned in the scheme :

To grant interest-free deferment of sales tax payable to Tamil Nadu Government on sales of furfural and IMFS during the six months period from

January 1993 to June 1993 (Rs. 623 lakhs approx.). The deferred amount of sales tax as above shall be repayable during the three years period

from July 1, 1994 to June 30, 1997.

Thus, the sales tax liability of the petitioner-company was to be deferred for the aforementioned period of six months and instead the petitioner-

company could repay the deferred sales tax within three years period as indicated. Of course, in the same scheme, it was clearly mentioned at para

3(E)(v) that the Central Government, the State Government and the banks/institutions shall reserve the right of recompense for the sacrifices

undertaken by them under the scheme as also the right to accelerate the repayment schedule, if the cash flow projections and other conditions of

the company so warrant. It is also mentioned therein that such rights would be exercised with the prior approval of BIFR. There is nothing on

record that the State Government was directly heard but there is enough evidence on record that it had agreed for the deferral mentioned above.

3.5. However, even before this order could be implemented, the period of deferral between January 1, 1993 and June 30, 1993 had already

expired and it is the claim of the petitioner-company that it had already paid the taxes for that period. It seems that thereafter it was felt that the

scope of the capital expenditure had widened on account of the additional outlay of Rs. 468 lakhs which had arisen on account of the necessity to

comply with the excise regulations for handling and distillation of molasses/spirit in the petitioner-company''s distillery and IMFS division and

bonded warehouse for IMFS and improvement of furfural quality for export purpose. There was a liability of past excise duty on account of sale of

furfural of Rs. 155 lakhs pertaining to the period from September, 1991 to December, 1992 had to be met and, therefore, the petitioner-company

had proposed that in order to meet the additional capital expenditure the Government of Tamil Nadu may grant deferment of interest-free sales tax

of furfural/IMFS payable during twelve months period (as against six months agreed to by the State Government and has held in the scheme) from

October, 1993 to September, 1994, i.e., between October 1, 1993 and September 30, 1994 and the deferred sales tax should be repayable not

within three years as agreed to earlier but during the period from October 1, 1995 to September 30, 2000, i.e., for five years, A communication to

that effect seems to have been sent by the IDBI which was to act as the ""operating agency"" as per the orders of the BIFR to the Principal

Secretary to the Government, vide letter dated August 19, 1993. Unfortunately, the letter containing the proposal from the petitioner-company is

not available and it was reported before us that it was not traceable either in the Government files or the petitioner-company''s records.

3.6. It seems that in pursuance of this letter, a letter came to be sent by the Special Secretary to the Government to the Registrar of BIFR on

September 23, 1993. In this letter, a reference was made to the earlier order passed by the BIFR as also to the fact of deferment of sales tax

amounting to Rs. 623 lakhs approximately for six months between January, 1993 to June, 1993. A reference was then made in paragraph 2 to a

request made by the company for sanctioning of deferral of sales tax for one year from October 1, 1993 to September 30, 1994 and for

repayment of the deferral sales tax in five years after a moratorium period of one year. A reference was also made to the aforementioned letter

dated August 19, 1993 sent by the operating agency, viz., IDBI, It was then stated in paragraph 3 that the Government had considered the above

request made by the petitioner-company and had proposed to sanction the deferral of sales tax for one year from October 1, 1993 to September

30, 1994 and to permit the repayment thereof in five years period after a moratorium period of one year. Unfortunately even this letter is not

available either in the court records or in the records of the petitioner-company. A further request was made that the proposal of the company

should be placed before the BIFR for its consideration and conveying its approval earlier. It was obvious that the petitioner-company having

already paid its dues of sales tax between January 1, 1993 and June 30, 1993 and being dissatisfied by the ceiling fixed by the BIFR to the extent

of Rs. 623 lakhs had wanted to take the advantage of extended period of one year instead of six months as also had sought the extension to five

years from three years of the repayment schedule.

3.7. It seems that in pursuance of this letter, BIFR amended the scheme on December 8, 1993, The amendment is as follows :

On page 4 at para B(i) of the abovementioned sanctioned scheme, sales tax deferment during the six months'' period from January, 1993 to June,

1993 (Rs. 623 lakhs approximately) has been mentioned to be repayable during the three years period from July 1, 1994 to June 30, 1997. It is

now amended as deferment for one year from October 1, 1993 to September 30, 1994 to be repayable during the period from October 1, 1993

to September 30, 2000.

Unfortunately for us the amended minutes of the meeting dated December 8, 1993 are not made available by the petitioner-company or the State

Government.

3.8. After this amendment dated December 8, 1993, the State Government proceeded to pass a Government Order (G.O. Ms. No, 5 dated

January 7, 1994). We shall advert to this Government Order later on. However, at this juncture, it may only be stated that after referring to the

aforementioned letter of IDBI and after taking the resume of the facts till then and also noting the changes in the cost of rehabilitation/means of

financing and other changes due to elapse of time between operating agency''s report and the actual sanction granted by the BIFR dated

December 8, 1993 as aforementioned of extending the deferment as well as repayment of taxes and after noting the fact that the company had

already paid the sales tax for the earlier period from January 1, 1993 to June 30, 1993, it was directed that the petitioner-company should be

granted the sales tax deferral for a period of one year from October 1, 1993 to September 30, 1994 and the repayment of this deferred tax should

be over a period of five years starting from October 1, 1995 to September 30, 2000. Paragraph 5 (which should be ordinarily para 4) is extremely

important and it reads as under :

The Commercial Taxes and Religious Endowments Department is requested to issue necessary notification with reference to para 3 above. (It

should be ''para 4'' of the letter as that paragraph has been wrongly numbered as para 4)"" In pursuance of this, even a notification seems to have

been published vide G.O. Ms. No. 62 dated March 4, 1994 in the Official Gazette u/s 17A of the Tamil Nadu General Sales Tax Act, 1959.

3.9. The BIFR then held fresh meeting on August 18, 1994 and again heard all the eight parties mentioned earlier. The minutes of that meeting have

been placed before the court by the State Government. The minutes suggest that in the earlier framed scheme dated July 28, 1993 u/s 18(4) of

SICA was referred. It was then stated that on that date of hearing, i.e., on August 18, 1994 the implementation of the said scheme was reviewed.

The minutes further mentioned that a case was put up by the representative of the monitoring agency that after the sanction of the scheme the

company had to incur additional capital expenditure of Rs. 468 lakhs and paid the statutory dues of Rs. 155 lakhs on account of Central excise

duty for the year 1991-92. The additional capital expenditure of Rs. 468 lakhs which was not known earlier at the time of sanction of the scheme

had to be incurred mainly to comply with the requirements of State Excise Regulations for handling and distillation of molasses/spirit and storage of

IMPS, etc. It was also represented by the said representative that some tasks like setting up of effluent treatment plant (ETP) and erection of FBC

boilers were progressing as per schedule while a new tank had already been completed and the ETP was expected to be commissioned by

September, 1994. The said representative then pleaded that the total cost of rehabilitation would now be about Rs. 2,114 lakhs as against Rs.

1,491 lakhs under the scheme sanctioned on July 28, 1993. When a query was put to the representative of the company it seems to have been

submitted by him that the additional expenditure of Rs. 623 lakhs (difference between Rs. 2,114 lakhs and Rs. 1,491 lakhs)--explanatory bracket

added by us--would be met out of the deferment of sales tax agreed to by the State Government. The representative of the company had also

added that the State of Tamil Nadu had already sanctioned deferment of the sales tax vide G.O. Ms. No. 5 dated January 7, 1994. The Board

then ultimately passed the following order :

After hearing the parties, the Bench sanctioned the enhanced cost of rehabilitation of Rs. 2,114 lakhs. The additional cost of Rs. 623 lakhs would

be financed out of sales tax deferral of Rs. 623 lakhs and additional promoters'' contribution of Rs. 10 lakhs. The Bench rejected the contentions

of the company seeking deletion of the clauses pertaining to the right of recompense of the banks and the institutions as this right could be

exercised only with the approval of the BIFR and directed SIPCOT to reconcile the accounts within a period of two months.

3.10. It seems that thereafter the Government came out with G.O. Ms. No. 18 dated January 18, 1995. A reference was made to the earlier

passed G.O. Ms. No. 5 as also to the letter sent by the Special Commissioner and Commissioner of Commercial Taxes Department dated April

20, 1994 wherein the Commissioner had requested the Government to restrict the sales tax deferral granted to the petitioner to the book value of

fixed assets of the company. A reference was also further made to a letter dated July 7, 1994 being a Government D.O. letter addressed to the

Special Commissioner and Commissioner of Commercial Taxes that the aggregated deferral amount was not likely to exceed the amount of Rs.

1,246 lakhs which was the expected cash inflow as per the BIFR package. A reference was also made to the letter written from the petitioner-

company dated August 4, 1994 where a request was made to the Government to permit the petitioner to avail the deferral of sales tax for one year

from October 1, 1993 to September 30, 1994 as approved by the BIFR and the Government. A further reference was made to the sanctioned

scheme and the amendment made thereto vide order dated December 8, 1993. A statement then came to be made :

The total amount of deferral envisaged in the BIFR scheme dated July 28, 1993 for a period of six months was Rs. 623 lakhs. Consequent on the

extension of deferral to one year the total anticipated amount of deferral works out to Rs. 1,246 lakhs. Accordingly, the Government direct that

total amount of sales tax deferral granted to Southern Agrifurane Industries Limited be fixed at Rs. 1,246 lakhs. This amount should be repaid over

a period of five years after a moratorium of one year, i.e., from October 1, 1995 to September 30, 2000 as already ordered in the Government

order first read above.

3.11. It seems that in this letter dated August 4, 1994, the petitioner-company had made a request in terms of the order passed by BIFR. The said

letter has been placed on record by the petitioner-company. From that letter it seems that the petitioner-company had received a notice dated July

29, 1994 from Deputy Commercial Tax Officer, Villupuram, asking the petitioner-company to pay a sum of Rs. 374 lakhs. In the notice it was

found that the deferral of sales tax on the sale of IMFS and furfural had thus been restricted to Rs. 1,216 lakhs only and since the company had

already availed the deferral of sales tax of Rs. 1,590 lakhs up to June, 1994, the excess amount of Rs. 374 lakhs should be refunded to the

department immediately. The petitioner-company in this letter then pleaded that as per the revised order dated December 8, 1993 while revising

the period for deferral from six months to one year the BIFR had not fixed any monetary ceiling on the deferral of sales tax. It was further pleaded

that even in the order dated September 23, 1993, the petitioner-company was allowed to have the deferral for a period of one year and that the

funds made available by the deferral were fully utilised for the revival of the company as approved by the Bench. A request was then made that

since it was the policy of the Government of Tamil Nadu to come to the rescue of the sick industries and to revive them, it was with the support of

the Government that the petitioner-company was surging ahead with its scheme of revival as approved by the BIFR and that fruitful results were

just started on this exercise. It was also pointed out that on the present level of production the petitioner-company was paying about Rs. 50 crores

by way of taxes. In that view, it was requested that the Special Commissioner and Commissioner of Commercial Taxes should permit the

petitioner-company to avail the deferral of sales tax for one full year, with effect from October 1, 1993 to October 30, 1994 as approved by the

BIFR and the Government of Tamil Nadu, The latent request was that the deferral amount should not be restricted to Rs. 1,216 lakhs as was

stated in the notice received by it.

3.12. Perhaps realising that there was no clear reference to the ceiling limit of deferred sales tax in G.O. Ms. No. 5 or as the case may be, G.O.

Ms. No. 62 and the petitioner-company was taking undue advantage of the same even contrary to the scheme the aforementioned G.O. Ms. No.

18 came to be issued clearly ordering the ceiling at Rs. 1,246 lakhs (and not Rs. 1,216 lakhs as appeared in the notice of the company). In

pursuance of this Government Order a subsequent notification came to be published vide G.O. Ms. No. 31 on February 3, 1995 in the Official

Gazette under the provisions of Section 17-A of the Tamil Nadu General Sales Tax Act. These last two Government Orders, i.e., G.O. Ms. Nos.

18 and 31 are the principal objects of attack in these petitions.

4. Before we advert to the contentions raised by the learned counsel for the petitioner, few facts because of which the matters came before the

sales tax authorities are also necessary.

5. It seems that after sending the aforementioned letter dated August 4, 1994, the petitioner-company thought that the G.O. Ms. No. 18 dated

January 18, 1995 had restricted their liability to Rs. 1,246 lakhs and even G.O. Ms. No, 31 which was the statutory notification had confirmed the

action taken in G.O. Ms. No. 18. It seems that the petitioner-company kept quiet. The liability of the petitioner-company for the taxes which was

to the tune of Rs. 374 lakhs, as showed in the Government letter dated July 29, 1994, had thereafter swollen for which the notices were sent on

July 31, 1996, August 21, 1996 and September 10, 1996. It seems, the petitioner-company ignored those notices. Therefore, a notice dated

November 11, 1996 came to be issued clearly making a reference to the earlier said notices and further making a demand of the excess tax to the

tune of Rs. 5,51,91,688 along with the interest u/s 24(3) of the Tamil Nadu General Sales Tax Act to the tune of Rs. 4,36,48,594, totalling to Rs.

9,88,40,282. It was clearly suggested in the notice that if the above arrears is not paid, coercive steps will be taken as provided under the Tamil

Nadu General Sales Tax Act. There is no clear history available as to what the petitioner-company had done as regards G.O. Ms. No. 18. It only

seems from the papers that the petitioner-company wrote two letters dated February 21, 1995 and another letter dated March 27, 1995 pleading

their old ease. The third letter appears to have been sent only in July 18, 1996 and all the while it seems that the Government was only sending

notices or had kept quiet.

6. A letter seems to have been sent on October 3, 1996 with regard to the letter of the petitioner-company dated July 31, 1996 pointing out that

the arrears had mounted to the staggering amount of Rs. 9,76,99,654. It seems that it is only in respect of this letter that ultimately a notice

threatening to take coercive action dated November 11, 1996 came to be issued. This time probably the Government meant business and started

taking coercive action by writing to the various banks. It seems that in response to the earlier notice dated November 11, 1996, the petitioner-

company requested by letter dated November 15, 1996 to the Principal Secretary, Industries Department, firstly to waive the interest amount of

Rs. 4.37 crores on the ground that the deferral of sales tax was interest-free one and the entire sales tax amount was used only to revive the sick

unit. It is secondly claimed that the two instalments awarded to it for making the balance amount of taxes of Rs. 5.52 crores. These requests seem

to have been considered by the Government in its G.O. Ms. No. 539 dated December 31, 1996 wherein the Government refused to grant the

waiver of interest and merely granted two instalments--first being in December 1996 and the second being 15th March, 1997, meaning thereby

that the earlier amount of about Rs. 9,88,40,282 was to be paid in two instalments. There were also five conditions one of which was that a default

of any condition would result in the entire balance being recovered in one lumpsum. It appears that even here the company did not pay anything in

December, 1996 but paid the first instalment on January 10, 1997 of approximately Rs. 4.94 crores. It then paid the remaining instalment of

approximately Rs. 5.89 lakhs on March 14, 1997 but, before that it wrote a letter on January 18, 1997 wherein it was suggested that without

prolonging the matter, the petitioner-company was going to settle the amount of Rs. 5.52 crores immediately rather than making the payments in

two instalments. The amount was requested to be accepted. It was pointed out that they already paid the amount of Rs. 4,94,20,141 before this

date. They claimed that the balance of Rs. 57,71,547 would be settled on the acceptance of the Government. The request of waiver of interest of

Rs. 4.37 crores was again reiterated. It seems that on the even date, i.e., January 18, 1997, the petitioner-company wrote to the Government that

they had effected the payment of Rs. 4,94,20,141 towards the first instalment in compliance with the conditions of the G.O. Ms. No. 539 dated

December 31, 1996. Thus, on January 18, 1997 whereas by one stance the petitioner-company was complying with the order dated December

31, 1996 and had paid the first instalment out of the two instalments granted, it still wrote another letter in which it showed its readiness to pay the

balance of the deferred taxes amounting to approximately Rs. 5.52 crores in lumpsum and it has also made an offer to pay the remaining amount of

Rs. 57,71,547. These two letters were clearly inconsistent with each other but that aspect would be considered later on.

7. On March 11, 1997, the petitioner-company wrote another letter pointing out that it had agreed to pay Rs. 5.52 crores in two instalments and

again requested to waive the interest of Rs. 4.37 crores. A reference to G.O. Ms. No. 539 was again made and the earlier inconsistent offer made

on January 18, 1997 of paying the entire amount of Rs. 5.52 crores was repeated. On March 14, 1997, however, the company paid the remaining

instalment of Rs. 5,89,000 approximately which was nothing but the second instalment from out of the total amount of Rs. 9,88,40,282 but not

before the writing of the letter dated March 11, 1997, Strangely enough, the Government, by its letter dated March 17, 1997, directed the

company to pay Rs. 57,71,547. In fact, this amount was not at all due as the petitioner-company had already paid the two instalments as per the

directions of the Government in G.O. Ms. No. 539 which was perhaps ignored or was made to be ignored because of the contradictory two

letters on January 18, 1997. Using this very stance of the Government asking the petitioner-company to deposit Rs. 57,71,547, the petitioner-

company immediately changed its stand and then treated the amount paid on March 14, 1997 as the tax for February which had not fallen due or

which was not demanded in the earlier demand at all.

8. The petitioner-company merely tried to show that the second payment was not in pursuance of the order made in G.O. Ms. No. 539 dated

December 31, 1996 but was because of the Government''s order directing the company to pay Rs. 57,71,547. It tried to show as if the

Government had agreed merely to accept the deferred tax amount of Rs. 5.52 crores out of which it had already paid Rs. 4,94,20,141 since the

Government later on directed the company to pay Rs. 57,71,547 which was the remaining amount out of Rs. 5.52 crores which was the tax

amount. In this, the petitioner-company seems to have ingenuously skirted the issue of payment of interest u/s 24(3) which in fact it had already

paid. The petitioner-company, it seems, took the stance that the amount which was paid on March 14, 1997 was for the month of February which

amount was neither demanded by the earlier notice nor was even contemplated earlier. Be that as it may, the petitioner-company is now pursuing

the same stand and thereby wants to avoid the payment of interest which had fallen due because of the earlier default on its part to pay Rs. 5.52

crores by way of tax.

9. Finding that the Government was not relenting to its request the petitioner-company promptly filed four original petitions before the Special

Tribunal, the details of which have already been given in the earlier part of the order. The Special Appellate Tribunal did not accept the case

pleaded by the petitioner and it seems all the four petitions more particularly in respect of G.O. Ms. Nos. 18 and 31 which according to the

petitioner-company could not have been issued as under those Government Orders the Government had put a ceiling to the tax deferral of one

year which ceiling was not there earlier. The Special Tribunal took the view that in fact the Government had not gone back on its promise nor had

it in fact put a ceiling as the Government had in fact agreed to give the benefit of the tax deferral only to the tune of Rs. 623 lakhs. The Tribunal

took the view that in spite of this if the Government then granted the tax deferral of Rs. 1,246 lakhs it could not be said that the Government had

gone back on their promise or had no power to do so. We have to now see whether the said G.O. Ms. Nos. 18 and 31 were within the powers of

the Government or they are vitiated because of the illegality attached to it.

10. Learned counsel for the petitioner Sriprakash came out with the following submissions :

10.1. Learned counsel firstly submits that the basis for G.O. Ms. No. 5 and the resultant G.O. Ms. No. 62 which is a notification issued u/s 17A of

the Tamil Nadu General Sales Tax Act is the order of BIFR dated December 8, 1993 by which the BIFR amended the scheme. We have already

in the earlier part of this order quoted that order. According to the learned counsel though in the earlier order dated July 28, 1993, the BIFR had

fixed the ceiling of the deferral of taxes at Rs. 623 lakhs, no such ceiling was to be found in the aforementioned order dated December 8, 1993.

According to him, G.O. Ms. Nos. 5 and 62, which emanated from this BIFR''s order, also did not fix any ceiling and, therefore, the Government

could not subsequently pass G.O. Ms. No. 18 and the resultant G.O. Ms. No. 31 to provide the ceiling to the tax deferral of Rs. 1,246 lakhs.

According to the learned counsel, the order dated December 8, 1993 by the BIFR was binding on the Government particularly u/s 19(3) and

Section 32 of SICA. The learned counsel further pointed out that the Government at no point of time moved u/s 18(5) of SICA for correction or

explanation of the order dated December 8, 1993 and, therefore, the subsequent G.O. Ms. Nos. 18 and 31 being contrary to the BIFR scheme

have to be held illegal and vitiated on that ground.

10.2. The argument is clearly erroneous both on facts as well as on law. Firstly, it has to be borne in mind that after the passing the first scheme

and restricting the tax deferral at Rs. 623 lakhs since the order itself came to be passed on July 28, 1993 and since the concerned period of

January 1, 1993 to June 30, 1993 had already elapsed by then, there was no necessity felt on the part of the Government to take out any

Government order or to issue a notification u/s 17A of the TNGST Act. The petitioner-company also did not insist on the same because it had

already paid off that tax by then as it was required to pay the taxes monthly. It is at that stage that it was realised that apart from this Rs. 623 lakhs,

which was the part of the package scheme for revival of the petitioner-company, there was an additional expenditure involved. It will be seen that

the additional liability was to the tune of Rs. 623 lakhs. Again as the petitioner-company had to spend Rs. 468 lakhs on account of the necessity to

comply with the excise regulation for handling and distillation of molasses/spirit in the petitioner-company''s distillery and IMPS division and

bonded warehouses for IMPS and improvement of furfural quality for export purposes. Besides this liability, there was the further liability of Rs.

155 lakhs pertaining to the period from September, 1991 to December, 1992 on account of the past excise duty. It is obvious that the petitioner-

company had approached IDBI which was the operating agency and it was only on account of the petitioner-company''s approach and pointing

out that its liability had increased that IDBI had written to the Principal Secretary by its letter dated August 19, 1993. Now IDBI could never have

come to know about the extra liabilities unless the petitioner-company had represented the same to it.

10.3. We perused the original files of the Government wherein, there is a letter dated September 6, 1993 written by IDBI to the BIFR, the copy of

which has been given to the Principal Secretary of the Government. In the supplementary report, which accompanies that letter, there is a clear

reference as under:

Subsequent to the operation of O.A. Report, circulation of draft scheme by BIFR, certain facts had come to the company''s notice which were

conveyed to BIFR/O.A. vide letters dated July 9, 1993 and August 21, 1993.

From this it is clear that the petitioner-company had made the representations only about the aforementioned additional liability of Rs. 623 lakhs. It

is strange that these letters should not be found with the petitioner-company though we had specifically desired to seek them during the debate. A

clear reference is to be found in the said supplementary report under paragraph 2.2 that the company itself had made a grievance on its noticing the

additional liability.

10.4. Be that as it may, in that view, the IDBI had recommended for the additional finances being made available to the petitioner-company to the

tune of Rs. 623 lakhs (Rs. 468 lakhs + Rs. 155 lakhs). IDBI also agreed that the petitioner-company''s proposal that the additional Rs. 623 lakhs

should be raised again by increasing the tax deferral from six months to one year and it is for that purpose that ultimately BIFR was approached

and the BIFR seems to have accepted this proposal of the IDBI which was consented to by the State Government also. We have already pointed

out these facts in the earlier part of this order which surfaced during the debate and from the records made available to us from parties from time to

time. Therefore, it was clear that BIFR ultimately passed an order on August 18, 1994, i.e., much before the passing of the G.O. Ms. No. 18 or

G.O. Ms. No. 31 in which these facts have been specifically referred to. It then enhanced the earlier total package of Rs. 1,419 lakhs to Rs. 2,114

lakhs, i.e., exactly granting the additional cost of Rs. 623 lakhs. It also then considered the request by the petitioner-company to increase the

period of one year. All this is to be found in the minutes dated August 18, 1994. There can be no doubt, therefore, that firstly the order dated

December 8, 1993 was undoubtedly amended and the scheme itself was amended for which the BIFR had all the necessary power and sanction

under the provisions of SICA. Therefore, the argument that the order dated December 8, 1993, passed by the BIFR which was the basic order

remained intact and was not challenged is in itself incorrect on facts. Secondly, even in that order there is nothing to find that the BIFR had the

intention to give the tax deferral of one year without any ceiling. In fact, at that stage what was granted to the petitioner-company was only tax

deferral for one year. However, the other part of the earlier order pertaining to the ceiling of Rs. 623 lakhs was left untouched. That will be clear

from the express language of the order dated December 8, 1993, wherein the amendment is only pertaining to the period of deferment and the

period of repayment. The third part of the order has not been amended. Therefore, even there the argument is incorrect. Whatever doubts left

were then clarified in the order dated August 18, 1994 where undoubtedly the petitioner-company was granted additional tax deferral of Rs. 623

lakhs. We are not prepared to accept the Tribunal''s logic that the tax deferral was limited to only Rs. 623 lakhs. When we read the record of the

proceedings held on August 18, 1994, there is no doubt left that besides Rs. 623 lakhs of deferral which was granted to the petitioner-company,

additional Rs. 623 lakhs were granted which was required on account of the liabilities which we have already explained. If on this background the

argument of the learned counsel is to be tested then the scheme would be binding on all the concerned parties under the provisions of Section

19(3) read with Section 32 of the SICA but we do not want to be understood as having accepted the argument of the learned counsel on Section

19(3) and Section 32 of SICA for the simple reason that on facts itself the learned counsel is not correct. It is, therefore, not necessary for us to

consider that argument.

10.5. The position which is obtained is that the BIFR itself had provided Rs. 1,246 lakhs in place of Rs. 623 lakhs by its subsequent order and by

amending the scheme. Once this position on the facts is accepted the subsequent argument that G.O. Ms. Nos. 18 and 31 were contrary or

inconsistent with the scheme has also to fail. There was absolutely nothing inconsistent with those Government Orders. They are perfectly in

keeping with the scheme under which Rs. 623 lakhs of deferral was additionally ordered and the time for the deferral was also extended from six

months to one year as also the period of repayment was extended from 3 years to 5 years with one year moratorium. There can be no doubt that

the petitioner-company never had any ceiling-less tax deferral for one year in its mind because, its representation to IDBI and the subsequent

representation to BIFR on August 18, 1994 are absolutely clear that it had only the additional burden of Rs. 623 lakhs in its mind.

10.6. Though much was argued on the basis of G.O. Ms. No. 5 dated January 7, 1994 and it was tried to be suggested that the said Government

Order provided for no ceiling on the tax deferral for one year. The language itself suggests that the said Government Order did not grant ceiling-

less tax deferral. When we consider the whole language of G.O. Ms. No. 5 in paragraph 2 thereof there is a clear reference made to the

communication of the IDBI and the mention of the additional capital expenditure required by the petitioner-company as per its opinion as also the

requirement of the extended time of one year of deferral and five years time for repayment of the deferred tax. There is a clear reference to the

additional costs of rehabilitation, scheme of financing and the action taken by the BIFR. All this can be seen reflected in the minutes and the order

dated August 18, 1994 passed by the BIFR.

10.7. We have carefully gone through the G.O. Ms. No. 5 and the resultant notification under G.O. Ms. No. 31. In our opinion, G.O. Ms. No. 5

and G.O. Ms. No. 31, if read jointly, which we must do, no doubt is left that there was no intention to grant a complete tax deferral for one year

that too, without any ceiling. What was agreed to and ordered accordingly was certainly not a ceiling-less deferral for one full year. It may be seen

that since IDBI had already made specific representation undoubtedly on the basis of the representation made to it by the petitioner-company the

mention of the amount of Rs. 1,246 lakhs was omitted erroneously and without realising the serious implication thereof. Therefore, it was certain

that the petitioner-company also knew as to what was to be given to it under the package of the scheme and that it was only Rs. 1,246 lakhs of tax

deferral. It is unthinkable that an unlimited tax deferral would be given particularly where the liabilities of the petitioner-company and its viability

were being meticulously tested by the BIFR, the Government and the IDBI. Therefore, it did not lie in the mouth of the petitioner-company to say

by G.O. Ms. No. 5 and the resultant G.O. Ms. No. 62 unlimited tax deferral of one year was ordered. If seeing from this angle, it will be clear that

the subsequent G.O. Ms. Nos. 18 and 31 were nothing but ""clarifying orders"" perhaps because in the earlier Government Orders exact sum of Rs.

1,240 lakhs was not mentioned. Once this factual backdrop is clear, the argument that the Government was cutting down the unlimited tax deferral

earlier granted and that too by retrospective effect must fall down. What was being done by the Government was only ""clarifying"" the earlier

Government Order wherein the ceiling limit of Rs. 1,246 lakhs was omitted either inadvertently or carelessly. However, the Government had full

power to clarify the state of affairs which was obtained by drafting somewhat slacked drafting of G.O. Ms. Nos. 5 and 62.

11. On the impermissibility of issuing a notification of retrospective nature, the learned counsel relied on the celebrated decision of the Supreme

Court reported in Strawboard Manufacturing Co. Ltd. Vs. Gutta Mill Workers'' Union, where section. 14 of the U.P. General Clauses Act, 1904

fell for consideration. The learned counsel pointed out that the said decision was consistently followed. The Supreme Court held that in the absence

of any distinct provision providing the power of amendment and modification, the State could not issue a notification having retrospective effect.

The Supreme Court held that the amending order operates only prospectively, that is only from the date of the order and it could not validate the

award which have been made after the expiry of the time specified in the original order.

11.1 The learned counsel pointed out that a division Bench of the Karnataka High Court has taken a similar view in the decision reported in [1978]

42 STC 356 (Ananda Soap Factory v. State of Karnataka). A view was expressed by the division Bench that there being no provision in the Act

conferring power on the State Government to issue a notification with retrospective effect, withdrawing a benefit already given would not be

permissible by issuing a fresh notification.

11.2 The learned counsel also referred to the decision reported in [1999] 112 STC 161 (State of Tamil Nadu v. Kannapiran Steel Re-rolling

Mills). A division Bench of this Court was dealing with Section 8(5) of the Central Sales Tax Act under which a notification dated March 13,

1982, was issued granting exemptions in respect of the tax payable with regard to the end-products coining under item 4 of the Second Schedule

to the Tamil Nadu General Sales Tax Act manufactured by steel re-rolling mills in Tamil Nadu subject to the condition that the raw materials had

suffered tax under the Tamil Nadu General Sales Tax Act, which was to come into force from April 1, 1982. Subsequently, the Government of

Tamil Nadu issued another notification dated April 25, 1986 cancelling the notification granting exemption and the said cancellation was effected

with effect from March 17, 1986. The question was whether such a cancellation with retrospective effect was possible and permissible. Following

the decision in Ananda Soap Factory Vs. State of Karnataka, , and relying on the other decisions reported in The Cannanore Spinning and

Weaving Mills Ltd. Vs. Collector of Customs and Central Excise Cochin and Others, , The Income Tax Officer, Alleppey Vs. M.C. Ponnoose

and Others, , Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, , AIR 1960 Mys. 326 (India Sugars and Refineries Ltd. v. State of

Mysore), Strawboard Manufacturing Co. Ltd. Vs. Gutta Mill Workers'' Union, , the division Bench held that in the absence of any specific

provision permitting to do so such a retrospective withdrawal of the benefit or the exemption as the case may be was not possible.

11.3. In this behalf, it was further pointed out relying on another decision reported in [1999] 113 STC 26 (Honest Corporation v. State of Tamil

Nadu) that a division Bench of this Court had held that a modification to any notification u/s 17 of the Tamil Nadu General Sales Tax Act can be

made only prospectively and not retrospectively.

11.4. Speaking about the decision in Honest Corporation case [1999] 113 STC 26, it must be said that there the Bench was specifically of the

opinion that though Sub-section (1) of Section 17 permitted the State Government to make exemption prospectively or retrospectively, the

language of Sub-section (3) thereof was very clear which did not permit the Government to cancel or vary or modify any notification

retrospectively. It was on that basis alone that the decision was rendered. The learned counsel points out that under Sub-section (3) of Section 17,

there was at least a power of cancellation or varying the notification and in case of Section 17-A which has fallen for consideration in this case

there is no power like Section 17(3) and, therefore, that could be all the more reason to hold that there was no such power to cancel, vary or

modify the earlier issued notification much less with retrospective effect.

11.5. We must point out at the outset that Section 17 and Section 17-A of the Tamil Nadu General Sales Tax Act operate in completely different

spheres. Therefore, while Section 17 considers the power of exemption of payment of tax or reduction in their rates, Section 17-A speaks only

about the deferral of the payment of taxes without wiping out the tax liability. Section 17-A has limited operation as it is only in case of new

industrial unit, sick unit or sick textile mills. It cannot be forgotten that there is a specific power given under Sub-section (1) of Section 17-A

conferring tax deferral to such units prospectively or even retrospectively. The aforementioned decisions turn solely on the express language of

Section 17(3) which conspicuously did not provide any power to the Government to cancel or vary the notification issued under Sub-section (1)

with retrospective effect. The reason is not far to see. Section 17 of the Tamil Nadu General Sales Tax Act speaks of a total exemption or

reduction in rates of the taxes. Once such exemption or reduction in the rates was already enjoyed by the tax-payer, the Government could not

have retraced its steps back and insisted upon the payment of the exemption or reduced taxes. In case of Section 17, there will be no question of

going to the Tamil Nadu General Clauses Act because obviously there is a specific provision in shape of Section 17(3) regarding the

Government''s power to cancel, vary or modify any notification. Once there is such a provision available, there would be no question to fall back

upon the General Clauses Act. But that is not the case with Section 17-A. Section 17-A deals merely with the deferral. It does not in any manner

wipe out or reduce the tax liability. The only result of the deferral would be that the tax-payer would be spared of the liability to pay the interest for

which under the scheme of the Act there is a different provision in shape of Section 24. Therefore, the decision, which deals essentially with

Section 17 and an entirely different kind of power, could not be made applicable to the facts of the present case. In case of Section 17(3) there is

a specific indication that power u/s 17(3) shall not be used retrospectively, whereas there is no such specific section in case of Section 17-A and

the advantage of Section 15 of the Tamil Nadu General Clauses Act would always be available to the notification issued u/s 17-A. Therefore, the

decision is of no consequence in so far as the present controversy is concerned.

12. The question then remains about the retrospective effect of the notification and the withdrawal of the alleged benefits granted under G.O. Ms.

Nos. 5 and 62 with retrospective effect. In our opinion, considering the language of G.O. Ms. No. 5, it cannot be said that a ceiling-less tax

deferral was granted under that Government Order. Therefore, this would be a case where a certain advantage for tax was conferred on the

taxpayer and is being then withdrawn. The taxpayer, in this case the petitioner-company, knew well what it had sought and what was intended to

give to it and what it actually got by way of tax deferral. Under this factual background if ultimately by issuing G.O. Ms. Nos. 18 and 31 certain

clarifications alone were made, it cannot be said that the earlier notification was being varied or cancelled or modified. It was merely being

explained. What was given by notifications vide G.O. Ms. Nos. 5 and 62 was in no manner lessened by G.O. Ms. Nos. 18 and 31 and that is how

the parties understood the same though, of course, the petitioner-company changed its stand to take the advantage of the omission of the figure in

G.O. Ms. No. 5 or G.O. Ms. No. 62. A complete tax deferral for one year was never a stand or even a demand of the petitioner-company. It

cannot; therefore, be allowed to take advantage of some omission and to inflate its advantage which was meticulously calculated to help it to

revive. Therefore, the decision of the division Bench in Kannapiran, Steel Re-rolling Mills case [1999] 112 STC 161, cannot help the petitioner.

Once this view is taken of the matter, it is not necessary for us to consider the argument that even with the aid of Section 15 of the Tamil Nadu

General Clauses Act, it was not possible for the State Government to vary, amend or cancel the notification issued by it with retrospective effect.

Once the subsequent notification is held not to be having the retrospective effect the whole edifice of the argument has to necessarily fail. The

factual aspect of the development that took place make it abundantly clear that right from the beginning, that is at the stage of G.O. Ms. Nos. 5

and 62 what was given was only the tax deferral of Rs. 1,246 lakhs.

13. It is at this place that we must comment on the bona fide aspect of the petitioner-company. We must say from all the facts which have been

culled out in the judgment that the petitioner-company completely lacks in bona fide at least in so far as these writ petitions are concerned or in so

far as the petitioner-company''s prayer regarding G.O. Ms. Nos. 18 and 31 concerned. Even at the cost of repetition, we may repeat that it was

the petitioner-company who itself made overtures to the IDBI after it found that the first scheme issued by the BIFR was of no consequence on

account of the elapse of time. The petitioner-company who had already paid the taxes which were deferred for the period from January 1, 1993 to

June 30, 1993. The petitioner-company then in no uncertain terms approached the IDBI which was the ""operating agency"" appointed by the BIFR

and highlighted its additional liabilities of Rs. 468 lakhs plus Rs. 155 lakhs on account of the explanation of the petitioner-company''s activities and

the arrears of excise duty respectively. Their representative also went to the BIFR for the change in the language because the petitioner-company

had then felt that the six months deferral would not be enough. The six months deferral was also estimated at Rs. 623 lakhs only which would be

on the basis of the information supplied by the petitioner-company alone. Again on account of the additional outlay of Rs. 623 lakhs, to which we

have made a reference earlier, the petitioner-company sought for one year''s time instead of six months as it thought that one year''s period of time

would be enough during which its tax liabilities could grow to Rs. 1,246 lakhs. What we are at pains to see is that when the first order dated

December 8, 1993 came before the BIFR, though at that time the petitioner-company had committed itself in terms of its additional demands of

Rs. 623 lakhs only and though the BIFR chose to change the order and that too at the instance of the petitioner-company alone, the petitioner-

company took an attitude of a chameleon by changing its colour, taking the advantage of the BIFR not mentioning the exact amount of the total

deferral which it had done in the earlier order, the petitioner-company tried to grab more and more advantage in a most unfair manner. We have

referred to the whole correspondence in great details only to show that right from the beginning it was petitioner-company''s own demand of Rs.

1,246 lakhs and it could not be imagined that the BIFR would grant, them a tax deferral of one year''s time without providing a ceiling therefor. On

this backdrop the petitioner-company had been acting in an unfair manner. At least we could say that there is a complete lack of bona fides in the

stand taken by the petitioner-company that the BIFR order and the subsequent Government Order, G.O. Ms. No. 5 followed by G.O. Ms. No.

62 had provided a ceiling-less tax deferral for one full year.

14. Things did not stop here. Even after the petitioner-company was threatened with the coercive action because of its nonpayment of the taxes

and after the State Government realised that the petitioner-company had taken advantage of more than Rs. 1,246 lakhs and had not paid the taxes

therefor, the petitioner-company started taking calculated steps in order to avoid the ire of the Government or its coercive action the petitioner-

company had clearly agreed to pay the whole arrears in two instalments without, of course committing as to what the quantum of each instalment

would be. The first instalment of Rs. 4,94,20,141 was made by the petitioner-company on January 10, 1997. This was also a belated payment.

The petitioner-company then had to make the payments of the remaining instalment of Rs. 5.89 lakhs on March 14, 1997. Before that, the

petitioner-company wrote a completely misleading letter that it wanted to wipe out the main liability of the loan amounting to Rs. 5.52 lakhs and for

that purpose offered to pay approximately Rs. 57 lakhs to complete the main tax liability. In fact, this letter was completely misleading because the

petitioner-company had already committed and accepted the offer by the petitioner-company to pay the whole arrears, that is the tax arrears and

the interest accrued thereupon in two instalments and it also paid the first instalment and had bought time thereby. It was really strange that this

design on the part of the petitioner-company should not have been realised by the State Government which merely directed the petitioner-company

later on to pay Rs. 57 lakhs. However, fortunately before us the petitioner-company had already paid the second instalment obviously to avoid the

penal or coercive action against it by the State Government. After having made the payment of the second instalment on March 14, 1997, the

petitioner-company again changed its stand and says that the second instalment should be towards the arrears of tax for the month of February. All

this suggests a deal-cut attitude on the part of the petitioner-company to avoid the taxes.

15. It was tried to be argued before us that since the Government had accepted and directed the petitioner-company to pay Rs. 57 lakhs in effect,

the Government had agreed as if to write off the interest amounting to more than Rs. 4 crores. We do not agree. In fact, even the Government had

directed the petitioner-company later on to pay Rs. 57 lakhs of rupees in terms of its offer earlier made on March 11, 1997. It cannot be forgotten

that on March 14, 1997 it had made the payment of next instalment and thereby its past liability of the taxes and the interest was wiped off. It was

too much on the part of the petitioner-company then to turn back and say that the second payment on March 14, 1997 was not towards the

second instalment but towards the tax liability for the month of February which liability was never in question. All this takes us to hold that in this

case the petitioner-company does not have any bona fides. The petitions must fail even on that count.

16. The learned counsel lastly argue that the legislative intention of the taxing statute is irrelevant and what is relevant is the language thereof.

According to the learned counsel, therefore, the formal notification u/s 17-A vide G.O. Ms. No. 62 did not provide any limit and, therefore, it must

be presumed that by that notification, a ceiling less tax deferral for the full year was granted. The learned counsel, therefore, argues that the

subsequent notification u/s 17-A vide G.O. Ms. No. 62 was clearly impermissible. The learned counsel argues this on the basis of the theory that

even if it was understood by the petitioner-company that the tax deferral was limited to Rs. 1,246 lakhs and even if it was intended by the said

notification that intention will be of no consequence and the language of the notifications should alone be relevant. The learned counsel also argues

that the subsequent notification cannot be viewed as clarification as there does not appear anything in G.O. Ms. No 18 suggesting any such

clarification. On the other hand, the learned counsel points out that the rationale of G.O. Ms. No. 18 is that since Rs. 623 lakhs tax deferral was

provided for six months, the tax deferral for one year would be exactly the double the amount, i.e., Rs. 1,246 lakhs.

17. We do not agree. There is a clear-cut reference to the proceedings of BIFR and the amount of Rs. 1,246 lakhs having been worked out.

There is also a reference made in G.O. Ms. No. 18 to a letter written by the petitioner-company requesting the Government to permit the

petitioner-company for availing the deferral of sales tax from October 1, 1993 to September 30, 1994 as approved by the BIFR. The words ""as

approved by the BIFR"" would signify that the petitioner-company itself had sought the tax deferral benefit of Rs. 1,246 lakhs only. In the letter

dated August 4, 1993 by the petitioner-company also there is a reference to the words ""as approved by the BIFR"" in the penultimate portion.

Therefore, all the Government orders would have to be read in the light of the words ""as approved by the BIFR"". Since the notifications u/s 17-A

of the Tamil Nadu General Sales Tax Act like G.O. Ms. Nos. 31 and 62 have emanated only out of the aforementioned Government Orders, i.e.,

G.O. Ms. Nos. 5 and 18, they cannot be read de hors the instruments which have conceived them. Paragraph 3 of the Government order, G.O.

Ms. No. 18, is clear enough for that proposition. Therefore, the criticism that the language of the aforementioned Government order suggests a

ceiling less sales tax deferral for one full year and, therefore, the intendment of such Government order should be ignored cannot be accepted. In

our opinion, since G.O. Ms. No. 62 and G.O. Ms. No. 31 have to be read along with G.O. Ms. Nos. 5 and 18 respectively, such contention has

to be rejected.

18. For all these reasons, the writ petitions have no merits and they are, accordingly, dismissed but without any orders as to the costs. W.M.P.

Nos. 18935 to 18938 of 1998 are closed.