

**State of A.P. Vs. Jindal Strips Limited**

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**Court :** Andhra Pradesh

**Decided On :** Jun-09-2006

**Reported in :** (2007)10VST777(AP)

**Judge :** J. Chelameswar and; M. Venkateswara Reddy, JJ.

**Acts :** [Companies Act, 1956](#); [Central Sales Tax Act, 1956](#) - Sections 9, 9(2) and 33BB; Income Tax Act; Town and County Planning Act, 1947; Andhra Pradesh General Sales Tax Act, 1957 - Sections 33, 33BB and 33C

**Appeal No. :** Tax Revision Case No. 44 of 2003 and Writ Petition Nos. 20861 of 2002, 1056 of 2003 and 1031 of 2006

**Appellant :** State of A.P.;jindal Stainless Limited

**Respondent :** Jindal Strips Limited;commercial Tax Officer and ors.

**Advocate for Def. :** E. Manohar, Sr. Adv. and; S. Krishna Murthy, Adv. for the Assessees

**Advocate for Pet/Ap. :** The Special Government Pleader for Taxes

**Judgement :**

ORDER

**J. Chelameswar, J.**

1. These matters are interconnected. The parties are the same in all these matters. The respondent in T.R.C. No. 44 of 2003 is a public limited company. Prior to April 1, 1995, another company by name Jindal Ferro Alloys was in existence, registered under the Companies Act with the Registrar of Companies in the State of Andhra Pradesh. It is an admitted case of the parties that the said company during its existence was a subsidiary of the respondent-company.

2. The abovementioned subsidiary company admittedly got amalgamated with the holding company, i.e., the respondent-company hereinafter following the appropriate procedure of law prescribed under the Companies Act with effect from April 1, 1995. The said date is the effective date agreed upon by both the companies under the scheme of amalgamation, which was approved by two High Courts having jurisdiction over the holding company and the subsidiary company. Though the actual orders approving the scheme of amalgamation came to be passed much later, i.e., on September 19, 1996 by the High Court of Andhra Pradesh insofar as the subsidiary company is concerned and on October 3, 1996 insofar as the holding company is concerned by the High Court of Punjab and Haryana. As a matter of fact, appropriate intimations to the Registrars of the Companies concerned were made obviously later to October 3, 1996 the details of which may not be necessary for the purpose of the present case.

3. The relevant facts which resulted in the litigation in these batch of cases as narrated by the assessee in his affidavit in W. P. No. 1031 of 2006 are as follows:

The transferor company M/s. Jindal Ferro Alloys Limited prior to its dissolution effected inter-State sales of high carbon ferro chrome amounting to Rs. 39,56,89,503 during the assessment year 1995-96 and Rs. 31,80,19,916 during the assessment year 1996-97 up to the date of dissolution and paid Central sales tax at four per cent. In view of the decision of the honourable Supreme Court in the case of Marshall Sons and Co. (India) Ltd. v. Income-tax Officer : [1997]223ITR809(SC) wherein their Lordships held that where the court does not prescribe any specific date but merely sanctions the scheme presented to it, it shall follow the date of amalgamation/transfer is the date specified in the scheme as 'the transfer date'. Based on the above decision the petitioner claimed

exemption of the said transactions at the time of final assessment under the Central Sales Tax Act for the year 1995-96. The first respondent rejected the claim. Thereupon, the petitioner filed appeal before the Appellate Deputy Commissioner (CT), Visakhapatnam, who by his order dated November 21, 2001 following the decision of the Supreme Court allowed the appeal. Thereupon, the first respondent passed consequential orders dated October 16, 2002, which resulted in an excess tax of Rs. 1,58,27,580 and the same was ordered to be adjusted in the assessment for the year 1996-97. As the same was not adjusted, the petitioner filed Writ Petition No. 20861 of 2002 seeking refund of the said excess tax of Rs. 1,58,27,580. Meanwhile the second respondent issued a revision show cause notice dated December 16, 2002 to set aside the consequential order and the refund order dated October 16, 2002 on the ground that the said order was at tangent with the provisions of Section 33BB. Challenging the said notice the petitioner filed Writ Petition No. 1056 of 2003 seeking quashing of the notice issued by the second respondent. Thereupon, the third respondent issued another notice dated February 1, 2005 proposing to revise the appeal order passed by the Appellate Deputy Commissioner (CT), Visakhapatnam dated November 21, 2001. The petitioner thereupon filed reply dated February 21, 2005. The said respondent by his proceedings dated November 5, 2005 passed deferment orders keeping the proceedings in abeyance till the disposal of T.R.C. No. 44 of 2003 by this honourable High Court.

In respect of the assessment year 1996-97 the first respondent based on the appeal order of the Appellate Deputy Commissioner (CT) by his proceedings dated March 16, 2000 allowed exemption on a turnover of Rs. 31,80,19,916 representing sales effected by M/s. Jindal Ferro Alloys Limited to M/s. Jindal Strips Limited, Hissar. The second respondent by his proceedings dated August 13, 2001 revised the said order and subjected the transactions to tax. The petitioner, thereupon, filed appeal before the Sales Tax Appellate Tribunal, Hyderabad. The Sales Tax Appellate Tribunal in T.A. No. 1458 of 2001 dated October 1, 2002 had set aside the revision and allowed the appeal.

The first respondent by his proceedings dated August 20, 2005 passed consequential orders giving effect to the orders of the Sales Tax Appellate

Tribunal, Hyderabad, which resulted in an excess payment of tax of Rs. 3,11,48,014. The petitioner thereupon claimed refund of the said tax by its petition dated October 7, 2005. The first respondent sought permission from the second respondent for refund of the said amount. The second respondent by the impugned proceedings dated October 22, 2005 ordered withholding of the refund of Rs. 3,11,48,014 under Section 33C.

4. Aggrieved by the orders dated October 1, 2002 of the Sales Tax Appellate Tribunal in T.A. No. 1458 of 2001, the State preferred the T.R.C. No. 44 of 2003.

5. The various writ petitions are filed by the assessee.

6. Writ petition No. 20861 of 2002 is filed seeking a writ of mandamus directing the Commercial Tax Officer, Vizianagaram, to refund an amount of Rs. 1,53,20,424 (rupees one crore fifty three lakhs twenty thousand and four hundred and twenty four only) pursuant to the orders of the Appellate Deputy Commissioner, Visakhapatnam, dated November 21, 2001 representing the excess tax paid by the petitioner under the [Central Sales Tax Act, 1956](#) for the year 1995-96.

7. Writ Petition No. 1056 of 2003 is filed praying that the order of the Deputy Commissioner of Commercial Taxes, Vizianagaram, dated December 16, 2002 be quashed. The said order dated December 16, 2002 is a show cause notice intimating the petitioner that the decision of the Commercial Tax Officer dated March 16, 2002 that the writ petitioner is entitled for refund of an amount of Rs. 1,58,27,520 representing the excess tax for the year 1995-96 under the Central Sales Tax Act is irregular and inconsistent with Section 33BB read with Section 9 of the Central Sales Tax Act and therefore the Deputy Commissioner seeks to set aside the same. It further called upon the petitioner to state his objections, if any, for the proposed course of action of the Deputy Commissioner of Commercial Taxes.

8. Writ Petition No. 1031 of 2006 is filed praying that the proceedings of the Deputy Commissioner of Commercial Taxes, Vizianagaram, dated October 22, 2005 be quashed. This writ petition pertains to the assessment year 1996-97. In view of the decision reached by the Appellate Deputy Commissioner in the case of

the petitioner for the assessment year 1995-96, the Commercial Tax Officer treated the sale of goods during the said assessment year between the writ petitioner and its erstwhile subsidiary as stock transfer and not liable to tax under the Central Sales Tax Act. However, the Deputy Commissioner, Vizianagaram, revised the said decision of the assessing authority by his proceedings dated August 13, 2001 and reached the conclusion that the transaction is taxable. Thereupon, the petitioner carried the matter to the Appellate Tribunal. The appeal of the petitioner was allowed confirming the decision of the assessing authority. The petitioner thereupon claimed refund of the excess tax paid to the tune of Rs. 3,11,38,014. The Deputy Commissioner by his proceedings dated October 22, 2005, ordered withholding of the refund under Section 33C. Hence the writ petition.

9. The main issue that is required to be examined in these cases is the issue raised in T.R.C., i.e., whether the decision of the Tribunal in coming to the conclusion that after the merger of the two companies referred to above, with effect from April 1, 1995, there could not have been a sale of any goods between the abovementioned two companies (during the assessment years 1995-96 and 1996-97), is sustainable in law.

10. The Tribunal came to such a conclusion relying on a decision of the Supreme Court reported in *Marshall Sons and Co. (India) Ltd. v. Income-tax Officer* : [1997]223ITR809(SC) dealing with a case where the liability under the Income-tax Act of a subsidiary company, which came to be amalgamated with the holding company. The Supreme Court in that case held as follows:

Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place.... It is true that while sanctioning the scheme, it is open to the court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the court does not prescribe any specific date but merely sanctions the scheme presented to it--it should follow that the date of amalgamation/date of transfer is the date specified in

the scheme as 'the transfer date'. It cannot be otherwise.

Where the court did not prescribe any specific date or modified the date from which the amalgamation of the companies was to take place as prescribed by the scheme of amalgamation but simply sanctioned the scheme of amalgamation as presented before it, the date of amalgamation would be the date specified in the scheme as transfer date and not the date on which the scheme was approved by the court and where the scheme also provided that after the date of transfer, the subsidiary company would be deemed to be carrying over the business, on behalf of the holding company.

11. In the case of an amalgamation of two corporate bodies, both the corporate bodies agree that their assets and liabilities be pooled together and one of the two bodies goes out of existence in the eye of law and its rights and obligations devolve upon the other corporate body. Since such an arrangement alters the interest, rights and obligations of various persons like the shareholders of the two corporate bodies, their respective creditors, the employees of such bodies and also that such a decision to amalgamate might have implications affecting the general public interest, an elaborate procedure under the Companies Act is prescribed for such an amalgamation. Such decisions of amalgamation are required to be scrutinised and approved by the High Court. If the bodies getting amalgamated are located in different jurisdictions, by all the concerned High Courts.

12. Before the devolution of the rights and obligations of one corporate body (transferor) on another (transferee) consequent upon a merger the transferor would have entered into legal relationship with various other persons either by way of a contract or otherwise thereby creating legal rights and obligations. Under the law of contract, such altered rights or obligations cannot take place without the consent of the parties with whom the contractual relationship subsists. But by the sanction of law a fiction is created that once an amalgamation in accordance with law takes place the rights and obligations of the transferor stand modified, as if, all such rights and obligations acquired or incurred against third parties were rights and obligations of the transferee.

13. Taking into consideration the various possibilities and the possible effect of amalgamation on the rights or obligations of any one of those bodies getting amalgamated, the High Court approving the scheme of amalgamation is authorised by law either to approve the amalgamation with effect from such date as agreed upon by the parties or fix such other date from which the amalgamation takes effect.

14. It is in this background the Supreme Court held in the case cited supra that where the High Court does not fix any specific date as the effective date of the amalgamation, it is the date agreed upon by the parties that would be the effective date of the amalgamation. As a logical corollary fictionally with effect from the date agreed between the parties, one corporate entity ceases to exist and gets amalgamated with another corporate body.

15. It is the settled position of law that a fiction created under law must normally be carried to its logical extent unless expressly curtailed by the law. See *State of Bombay v. Pandurang Vinayak* : 1953 CriLJ1049 wherein the Supreme Court quoted with approval: In *East End Dwellings Co. Ltd. v. Finsbury Borough Council* [1952] AC 109, Lord Asquith while dealing with the provisions of the Town and County Planning Act, 1947, made reference to the same principle and observed as follows:

If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it.... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

16. In the instant case the subsidiary company got merged/amalgamated with the holding company with effect from April 1, 1995, though, as a matter of fact, it continued to exist for sometime more. Therefore, whatever sale of goods that took place between the subsidiary company and the holding company in the interregnum between the sanctioned date of amalgamation and the factual date of

amalgamation by virtue of the fiction created under the law of amalgamation, as rightly pointed out both by the assessing authority and by the Tribunal, is only a transfer of stock of one branch of the holding company to another branch.

17. Even in the case before the Supreme Court, the amalgamation was between a holding and subsidiary companies. The learned Counsel for the petitioners, however, argued that it is the existence of a positive agreement between both the amalgamating companies to the effect that in the interregnum between the actual date of amalgamation and the fictional date of amalgamation the subsidiary company carries on the business on behalf of the holding company which made the Supreme Court to come to the conclusion that the business carried on by the subsidiary company before the actual date of merger shall be deemed to be business carried on on behalf of the holding company.

18. The learned Counsel therefore argued that as the respondent failed to establish the existence of a similar agreement between the companies before us, the principle laid down in the abovementioned decision of the Supreme Court cannot be invoked in the present case.

19. We reject the submissions of the learned Counsel for the petitioners for two reasons. It was neither the submission of the petitioners before the Tribunal nor such a ground is raised in the grounds of revision before us. Even, otherwise, the submission is required to be rejected for the reason as we have already noticed that the legal effect of a merger from a specified date agreed upon by the parties or fixed by the court is to obliterate the distinction between the two corporate bodies and treat them as one entity. All consequential legal effects must necessarily follow unless otherwise specified by the Legislature. If the law did not recognise such legal consequences, the parties by an agreement cannot decide so because it is one of the settled principles of law that altering the rights and obligations with an anterior date (retrospectively) is only possible by an act of sovereign, but not by an agreement of non-sovereign bodies. When retrospective alteration of the rights and obligations of the parties to amalgamation proceedings is sanctioned by the court, the court, in fact, is certifying the sovereign's sanction of such retrospective alteration of the rights and obligations of the parties.

20. The declaration of the law made by the Supreme Court in the judgment referred to above, that in the absence of any specific stipulation of the effective date by the court sanctioning the scheme of amalgamation, the scheme would be effective from such date as agreed between the parties, is not based on the agreement between the parties but based on the sovereign approval of the alteration of the rights and obligations with a retrospective date. The reference made by the Supreme Court to the existence of certain clauses in the scheme of amalgamation in our view is only incidental.

21. We, therefore, do not see any reason to interfere with the order under revision. The T.R.C. is therefore dismissed.

22. In view of the decision reached by us in T.R.C. No. 44 of 2003, it may not be really necessary to go into the factual details of these various writ petitions as all the transactions between the petitioner-company and its erstwhile subsidiary are only transactions of transfer of stock from one branch of the petitioner to the other branch during the assessment years 1995-96 and 1996-97. Therefore, there could not have been any levy of tax under the Central Sales Tax Act. The ultimate question in these three writ petitions is that whether such conclusion reached by this Court would automatically entitle the petitioner to claim refund of the tax collected by the respondents without the authority of law.

23. Learned Counsel for the Revenue Sri Krishna Koundinya argued that in view of the fact that the assessing authority came to the conclusion that there was an excess payment of tax by the assessee, that does not automatically entitle the assessee to claim refund. Learned Counsel submitted so in view of the provisions contained in Section 33BB of the Andhra Pradesh General Sales Tax Act, 1957 read with Section 9(2) of the [Central Sales Tax Act, 1956](#).

24. Section 33BB of the APGST Act reads as follows:

33BB. Non-refund of tax in certain cases.--Where a levy and collection of tax is held invalid by any judgment or order of a court or Tribunal, it shall not be necessary to refund any such tax to the dealer unless it is proved by the dealer to the satisfaction of the assessing authority that the tax has not been collected from

the purchaser.

25. In substance, Section 33BB says that refund of tax which is found by a judicial authority to have been illegally collected is not an automatic consequence of such judicial finding. The Legislature mandated that the dealer who paid the tax is required to establish to the satisfaction of the assessing authority that he did not pass on such tax liability to the purchaser of goods before he can successfully claim a refund. Though such restriction is imposed by the State Legislature in the context of the refund of taxes purportedly collected under the authority of the APGST Act, the Parliament under Section 9(2) of the CST Act declared that the provisions of the sales tax law of the concerned State shall apply in the context of the Central sales tax also. Section 9(2) of the CST Act reads as follows:

9. Levy and collection of tax and penalties.--(1).

(2) Subject to the other provisions of this Act and the authorities for the time being empowered to assess, reassess, collect and enforce payment of any tax under the general sales tax law of the appropriate State, shall, on behalf of the Government of India, assess, reassess, collect and enforce payment of tax, including any interest or penalty, payable by a dealer under this Act as if the tax or interest or penalty payable by such a dealer under this Act is a tax or interest or penalty payable under the general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, rebates, penalties charging or payment of interest, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly:

Provided that if in any State or part thereof there is no general sales tax law in force, the Central Government may, by Rules made in this behalf make necessary

provision for all or any of the matter specified in this sub-section.

26. Broadly speaking the Central Sales Tax Act contains only provisions of levy of tax. The collection part of it is entrusted to the authorities functioning in each State under the local sales tax laws. The Parliament by adoption of the tax collecting machinery under the local sales tax laws of each of the State authorised the officer functioning under the provisions of the State laws to deal with all aspects of collection of the Central sales tax also; the various aspects of such collection are enumerated in Section 9, Sub-section (2).

27. Therefore, that clause in Sub-section (2).the provisions of such law, including provisions relating to...refunds...shall apply accordingly.

clearly indicates that the restrictions imposed under the APGST Act insofar as they pertain to refund of taxes already paid by the petitioner are also applicable to the petitioner even in the matter of refund of tax collected under the Central Sales Tax Act. Therefore, Section 33BB is relevant in the context of the claim of refund of tax of the petitioner. The legislative mandate under Section 33BB in this regard is that such a refund is not automatic on the finding recorded by a judicial body that tax was illegally collected from the assessee, but the assessee is required to establish that he had not already passed on the liability to some other person (purchaser). In substance, the provision is based on a well-established legal principle in the realm of indirect taxes that an assessee shall not unduly enrich himself by taking advantage of an illegality committed by the offices of the State. See *Mafatlal Industries Ltd. v. Union of India* : 1997(89)ELT247(SC) .

28. Therefore we are of the opinion that the petitioner is not entitled for any mandamus as prayed for in the writ petitions for a refund of tax already collected from him. However, it is open to the petitioner to make an appropriate application for refund of the tax which no doubt was collected from him without any authority of law and prove to the satisfaction of the assessing authority that the petitioner had not already passed on the tax burden to the purchaser. The respondents shall consider such an application as and when made by the petitioner in accordance with law and take an appropriate decision.

29. One more issue which was argued before us is that the decision of the Deputy Commissioner of Commercial Taxes passing an order withholding the refund in view of the pendency of T.R.C. No. 44 of 2003 in this court. The Deputy Commissioner invoked Section 33C of the APGST Act for passing such an order. Section 33C reads as follows:

33C. Power to withhold refund in certain cases.--Where an order giving rise to a refund to an assessee or licensee is the subject-matter of an appeal or further proceeding, or where any other proceeding under this Act is pending, and the assessing or the licensing authority is of the opinion that the grant of the refund is likely to adversely affect the revenue, the assessing or the licensing authority may, with the previous approval of the Deputy Commissioner, withhold the refund till such time as the Deputy Commissioner may determine.

30. The learned Senior Counsel Sri E. Manohar appearing for the writ petitioner argued that the decision of the Deputy Commissioner is illegal in view of the scheme of Section 33 which stipulates that such a decision under Section 33C is primarily required to be taken by the assessing authority with the previous approval of the Deputy Commissioner and as the proposal in the instant case did not emanate from the assessing authority, the decision of the Deputy Commissioner is contrary to the express language of Section 33C of the Act.

31. There is no doubt that there is violation of the letter of the law in the instant case, but we are not able to agree that the submission of the learned Counsel for the petitioner for the reason that when Section 33C calls upon the assessing authority to take a decision to withhold the refund, it mandates that he should take such a decision with the previous approval of the Deputy Commissioner who is a higher authority than the assessing authority. Obviously, the Legislature thought that such a serious decision must be taken after an appropriate application of mind by the superior officers entrusted with the responsibility of collecting the tax. The proposal of the assessing authority may in a given case receive the approval or not receive the approval of the superior authority having regard to the facts and circumstances of the case. Therefore, the decision in fact is always taken by the Deputy Commissioner--superior authority. Hence, we do not find any legal flaw

with the decision that the decision to withhold the refund of tax originates from the Deputy Commissioner even without a proposal from the assessing authority. Though the issue is academic in the instant case, in view of the conclusions already reached by us, we thought it fit to examine the issue as such questions are likely to arise repeatedly. Accepting the submission of the learned Counsel for the petitioner, on a strict interpretation of Section 33C, in our view, would not promote any 'public good'. Rule of law, no doubt, is a great principle, but the purpose of the rule of law is to promote 'public good'. The profound caution made by an eminent scholar Joseph Raz is worthwhile recalling in this context. See [1977] 93 LQR 195.

Since the rule of law is just one of the virtues the law should possess, it is to be expected that it possesses no more than prima facie force. It has always to be balanced against competing claims of other values. Hence Hayek's arguments to the extent that they show no more than that some other goals inevitably conflict with the rule of law are not the sort of arguments which could, in principle, show that pursuit of such goals by means of law is inappropriate. Conflict between the rule of law and other values is just what is to be expected. Conformity to the rule of law is a matter of degree, and though other things being equal, the greater the conformity the better--other things are rarely equal. A lesser degree of conformity is often to be preferred precisely because it helps realisation of other goals.

In considering the relation between the rule of law and other values the law should serve, it is of particular importance to remember that the rule of law is essentially a negative value. It is merely designed to minimise the harm to freedom and dignity which the law may cause in its pursuit of its goals however laudable these may be. Finally regarding the rule of law as the inherent excellence of the law, it means that it fulfils essentially a subservient role. Conformity to it makes the law a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal. This subservient role of the doctrine shows both its power and its limitations. On the other hand, if the pursuit of certain goals is entirely incompatible with the rule of law then these goals should not be pursued by legal means. But on the other hand, one should be wary of disqualifying the legal pursuit of major social goals in the name of the rule of law. After all the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that

it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty.

32. The writ petitions are accordingly disposed of. In the result, the tax revision case is dismissed and the writ petitions are disposed of.

**J. Chelameswar and M. Venkateswara Reddy, JJ.**

33. After the pronouncement of the judgment, learned Senior Counsel for the petitioner Sri E. Manohar submitted that in view of the conclusion reached by the court, the petitioner is entitled to make a representation seeking a refund of the excess amount of tax collected from the petitioner and some reasonable time be granted to the petitioner to make such a representation, otherwise objections regarding limitation would be raised by the respondents.

34. Heard the learned Counsel for the respondents.

35. In the circumstances, we deem it appropriate to direct that the petitioner is at liberty to make a representation indicated earlier in the judgment within a period of four weeks from today and on receipt of the said representation, the respondents shall consider the same in accordance with law and pass an appropriate order within a period of eight weeks thereafter.

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