

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Pronounced on: April 10, 2017

+ LPA 837/2015 & C.M.No.27443/2015

UNION OF INDIA & ANR

..... Appellants

Through: Mr.Sanjay Jain, ASG with
Mr.Jasmeet Singh, Mr.Srivats Kaushal &
Ms.Aastha Jain, Advs.

Versus

INDOSOLAR LTD

..... Respondent

Through: Dr.Ashwani Kumar, Sr.Adv. with
Mr.Ashish Kumar, Mr.Aayush Chandra, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

: **Ms.G. ROHINI, Chief Justice**

1. This appeal is preferred against the order of the learned Single Judge dated 03.07.2015 in W.P.(C) No.3625/2013.
2. The respondent Nos.1 and 2 in the writ petition i.e., the Union of India, Ministry of Communication & Information Technology and the Appraisal Committee set up by Department of Information & Technology are the appellants before us whereas the writ petitioner is the sole respondent.
3. For the sake of convenience, the parties to this appeal shall hereinafter be referred to as they were arrayed in the writ petition.
4. The writ petitioner is a company carrying on the business of manufacturing of solar photo voltaic cells (PV cells) and solar modules. By its application dated 30.03.2008, the petitioner sought capital subsidy of Rs.300 crores under "Special Incentive Package Scheme" notified by the

Government of India, Ministry of Communications & Information Technology vide Notification dated 21.03.2007.

5. The said request was not considered on the ground that the Net Present Value (NPV) of eligible capital expenditure of the petitioner falls short of threshold NPV of investment of Rs.1000 crores prescribed under the scheme. Aggrieved by the same, the petitioner filed W.P.(C)No.3625/2013 with the following prayer:

"(i) Issue a writ of mandamus or any other appropriate writ directing the Respondent No.1 and 2 to release in favour of the Petitioner the subsidy of Rs. 253.2 Crores in respect of the total NPV of Rs. 1012.87 Crores achieved by the Petitioner under the 'Special Incentive Package Scheme'; and/or

(ii) Direct the Respondent No. 1 and 2 to refrain from calculating the NPV under Clause 2.4 of the Special Incentive Package Scheme by discounting from the base year itself in contravention of the clauses of the Special Incentive Package Scheme; and/or

(iii) Any other appropriate writ, order or direction which this Hon'ble Court may deem fit and suitable in the facts and circumstances of the case."

6. The said writ petition was disposed of by the learned Single Judge by the order under appeal dated 03.07.2015 holding that the eligible capital expenditure incurred in the base year shall not be discounted to arrive at the threshold limit and accordingly directing the respondents to re-calculate the threshold limit under the scheme. The learned Single Judge also directed that in case the petitioner meets all other parameters, the respondents will release the incentives to which the petitioner is eligible under the scheme in terms of the provisions set out therein.

7. Challenging the said order, the Government of India filed the present appeal.
8. We have heard Sh. Sanjay Jain, learned ASG appearing for the appellants and Dr. Ashwani Kumar, the learned Senior Counsel appearing for the respondent/writ petitioner.
9. Before advertng to the contentions advanced by the parties, the Notification dated 21.03.2007 under which the "Special Incentive Package Scheme" (SIPS) (hereinafter referred to as 'the Scheme in question') has been made by the Government of India may be reproduced hereunder for ready reference:

**"MINISTRY OF COMMUNICATIONS AND INFORMATION
TECHNOLOGY
(Department of Information Technology)
NOTIFICATION
New Delhi, the 21st March, 2007**

Special Incentive Package Scheme to encourage Investments for setting up Semiconductor Fabrication and other micro and nano technology manufacture industries in India.

No.3(1)/2007-IPHW(SIPS). - The semiconductor industry and other high tech industries are characterized by specific constraints that challenge their viability. These are highly capital intensive and have to deal with constantly changing technology. It, therefore, becomes imperative on part of the Government to create a conducive environment for manufacturing and offer a package of incentives comparable with other countries to attract global investments into the manufacturing sector as well as help bridge the viability gap due to lack of adequate infrastructure and eco-system. While this will involve an initial cost incurred by the Government to seed the manufacturing industry in the country, the return on investments by way of contributing to GDP will succinctly justify the incentives planed as a part of the Special Incentive

Package for semi-conductor manufacturing and other high tech industries in the country.

2. Special Incentive Package

The Special Incentive Package is as under:

2.1 The investment will be for the manufacture of all semi-conductor and eco-system units, namely displays including Liquid Crystal Displays (LCD), Organic Light Emitting diodes (OLED), Plasma Display Panels (PDP), any other emerging displays; storage devices; solar cells; Photovoltaics; other advanced micro and nano technology products; assembly and test of all the above products.

2.2 The Special Incentive Package shall be for state of the art technology.

2.3 In the case of semi-conductor manufacturing (Fab units) products, the threshold Net Present Value (NPV) of investment will be Rs.2,500 crores and above. The threshold NPV of investment in manufacture of other eco-system products will be Rs.1,000 crore and above. This threshold value shall be taken as the Net Present Value (NPV) of investments made during the first 10 years of the project life and the discount rate will be @9%.

3.1 The Central Government or any of its agencies shall provide incentive of 20% of the capital expenditure (as defined in sub-paragraph 3.3) during the first 10 years for the units in SEZ and 25% of the capital expenditure for non-SEZ units. Non-SEZ units shall be exempt from CVD. The incentives, if any, offered by the State Government or, any of its agencies or local bodies shall be over and above this amount.

3.2 The period of ten years shall be the first ten years of the project life from the start of the project and not with regard to the start of any subsequent phase of the project.

3.3 The capital expenditure will be the total of capital expenditure in land, building, plant and machinery and technology including R&D. The cost of land exceeding 2% of

the capital expenditure shall not be considered for calculation in this regard.

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5.1 Those investors who choose equity as part of their incentive packages shall be given such equity after the financial closure for the project and equity shall be released on a proportionate basis as equity is brought in by the promoters.

5.2 All other incentives shall be released after the end of the financial year in which the NPV of the total investment exceeds the threshold value.

5.3 Thereafter, the incentives shall be provided on an annual basis on the value of investments made during the year and be restricted to the first 10 years of the project life.

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7.1 An Appraisal Committee shall be set up by the Department of Information Technology and headed by the Additional Secretary, Department of Information Technology. The Appraisal Committee will receive expression of interest from investors and submit its recommendations to the Government. The Government shall consider such recommendations and grant approvals.

7.2 For the effective functioning of the Appraisal Committee (A.C.), a set of guidelines shall be drawn up by DIT and issued separately.

M. Madhavan Nambiar
Addl. Secy."

10. In terms of para 7.2 of the Scheme, Guidelines dated 14.09.2007 have been framed by the Department of Information & Technology issued Guidelines dated 14.09.2007 for operation of the Scheme. Clause 2.4 of the said Guidelines provides for the calculation of Net Present Value as under:

"2.4 Net Present Value (NPV)

The Net Present Value (NPV) shall be calculated in the following manner:

$$NPV = \sum_{i=1}^{10} \frac{C}{(1+r)^i}$$

where:

C = Net Cash Flow

i = Number of completed years *from* base year

r = Discount rate (9% in this case)

The discount rate as per SIPS will be @ 9%"

(emphasis supplied)

11. Clause 2.7 which deals with threshold limit reads as under:

“2.7 Threshold limit

- (a) the threshold limit shall be the minimum amount of the investment calculated in NPV terms for eligibility of the benefits under the SIPS.
- (b) the minimum amount of such investment shall be Rs.2,500 crore in case of Fab units, and Rs.1,000 crore in case of eco-system units, made during the period of first ten years of the project *following* the base year.
- (c) the base year for the calculation of the threshold limit will be the financial year (FY) in which application is made. For this purpose, the FY will be the year beginning on the 1st April and ending on the 31st March of the succeeding year.”

(emphasis supplied)

12. Clause 3.7 and Clause 3.8 of the Guidelines which are also relevant for proper appreciation of the controversy involved may be reproduced hereunder:

“3.7 The applicant while submitting the application for seeking release of all incentives other than equity contribution must ensure that such request be duly accompanied by the report of the annual audited accounts as adopted by the Board of Directors and a certificate from the auditors of the company with regard to date-wise expenditure on items eligible under the scheme. Such request shall be made and entertained subject to

approval of the Government after the end of FY in which the NPV (as calculated as at the base year) exceeds the threshold value of the total eligible investment. The veracity of all claims submitted by applicants will be duly verified.

3.8 Investments made before the date of the receipt of application and investment in land made more than six months before the date of receipt of application shall not be considered for calculation of capital expenditure under the SIPS.”

13. It is not disputed before us that the petitioner falls under the category of "other eco system products" provided under para 2.3 of the Notification dated 21.03.2007. The threshold NPV for the said products has been prescribed as Rs.1000 crores and above. The petitioner claims that its NPV is Rs.1183 crores and therefore it is entitled for the subsidy of Rs.300 crores. However, according to the respondent No.1, the NPV of eligible capital expenditure of the petitioner has been worked out to be Rs.923 crores which falls short of threshold NPV of Rs.1000 crores.

14. As per para 2.3 of the Scheme in question, the threshold value shall be taken as the Net Present Value (NPV) of investments made during the first ten years of the project life and the discount rate will be @ 9%. As per para 3.1, incentive of 25% of the capital expenditure of the applicant is to be provided by the Central Government or any of its agency. As per para 5.3, such incentive shall be provided on annual basis on the value of investments made during the year. However, the same is restricted to the first ten years of the project life.

15. Clause 2.7(c) of the Guidelines provides that the base year for the calculation of the threshold limit will be the Financial Year in which the application is made. In the present case, the petitioner's application dated

30.03.2008 was received by the respondent No.1 on 09.04.2008 and therefore it is not in dispute that the base year for the calculation of the threshold limit shall be the Financial Year 2008-09.

16. However, the discrepancy in the calculation of NPV was on account of the claim of the respondent No.1 that the discount on the investment shall be applied to the base year, i.e. 2008-09 also. In other words, the contention is that the base year cannot be excluded for the purpose of calculating the investments made during first ten years of project life. Thus, it is claimed by the respondent No.1 that the first ten years of the project life shall be reckoned from 2008-09 itself after giving the discount.

17. On the other hand, the petitioner claims that in calculating the NPV, investments made in the years following the base year alone are to be discounted in terms of Clause 2.4 and 2.7 of the Guidelines.

18. The learned Single Judge accepted the contention of the petitioner and held:

“16.2 For the effective functioning of the Appraisal Committee, the DIT was required to draw up guidelines to which reference has been made above. Therefore, what is pertinent, and therefore, requires to be noticed, is that, the operability of the scheme was dependent on the formulation of the necessary guidelines by the DIT. The 2007 notification, by itself, had neither set out the definitions nor the formulae for calculation of the NPV. As indicated in paragraph 15.3 above, the guidelines in fact added conditions to the 2007 notification.

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16.4 A plain reading of the definition of the symbol "i" in the formulae, provided in clause 2.4, along with clause 2.7(a), (b) & (c) of the guidelines, would establish the following: First, the base year is that FY, in which application is made. Second, the threshold limit is the minimum amount of investments

calculated in NPV terms for claiming benefits under the scheme. Third, for “eco-system units”, the minimum amount of threshold limit, which an applicant had to achieve, was Rs. 1000 crores, which was to be made “during the period of first 10 years of the project following the base year”.

16.5 Consequently, the base year in the instant case would necessarily be the FY 2008-2009, as the application for the purposes of grant of subsidy was made only on 09.04.2008. Therefore, in calculating the NPV, of the investments/ eligible capital expenditure, made during the first ten (10) years of the project, would commence from the date following the base year.

16.6 The purpose it appears is that the base year is fixed as per clause 2.7 (c) of the guidelines, which in turn is dependent on the FY, in which, the application is made. The FY commences from 1st April and ends on 31st March of the succeeding year. The object appears to be, to exclude, for the purposes of discounting, every eligible capital expenditure which is made in the base year.

16.7 As a matter of fact, a perusal of clause 3.8 of the guidelines, to which I have made a reference, would show that there is intrinsic evidence available, which is demonstrative of the fact that, all investments made before the date of the application and investment in land more than six (6) months prior to the date of the application are not to be considered as eligible expenditure under the scheme.

17. It appears to be, therefore, the intent of the scheme to, not to discount the eligible capital expenditure made in the base year. NPV is usually defined to represent the present value of stream of net cash flows resulting from a project which are discounted at a person's or entity's cost of capital minus the project's net investment. It is ordinarily used to evaluate, rank and select from various investments proposals available to a person or an entity. (See : Black's Law Dictionary, 6th Edition, p. 1041; Also see : Oxford Dictionary of Accounting, New Edition, p. 244).

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19. Accordingly, while allowing the writ petition, the learned Single Judge issued the following directions for re-calculation of the threshold limit under the Scheme:

"21. Having regard to the above, I am inclined to accept the argument that the base year, which is FY 2008-2009, in the instant case, will have to be excluded in arriving at the threshold limit of NPV of the capital investment made by the petitioner as prescribed under clause 2.3 of the scheme. In other words, eligible capital expenditure incurred in the base year will not be discounted to arrive at the threshold limit.

22. Accordingly, the respondents no. 1 and 2 are directed to re-calculate the threshold limit, under the scheme, in terms of the findings returned above. The respondents will complete the said exercise within four weeks from today, and in case, the petitioner, were to meet the all other parameters, they would release the incentives, to which, it is eligible, under the scheme, in terms of the provisions set out therein."

20. Assailing the said order, it is contended by Shri Sanjay Jain, the learned ASG appearing for the appellants that the interpretation given by the learned Single Judge is bad in law inasmuch as it militates against the express language of the Scheme in question as also the Guidelines and makes the provisions of the Guidelines override the Scheme in question which is impermissible under law. It is also contended that in the light of para 2.3 of the Scheme which provides that the threshold value shall be taken as the NPV of investments made "during the first ten years of the project life and the discount rate will be @ 9%", it is clear that discounting @ 9% shall be done during the said period of ten years. It is further contended that since the Guidelines dated 14.09.2007 framed by the respondent No.1 can only supplement/provide what was not already provided in the Scheme, the said Guidelines have to be read in consonance

with the Scheme and even in case of any conflict, the provisions of Guidelines which are repugnant to the Scheme need to be read/struck down.

21. It is sought to be explained by the learned ASG that the expression "following the base year" in clause 2.7(b) of the Guidelines cannot be given effect to since the interpretation on the basis of the said expression would run against the express provisions and intent of the Scheme in question. The learned ASG would submit that if discounting is not given in the base year relying upon the expression "following" in clause 2.7(b) of the Guidelines, it would create an anomaly since the same would make the value of "i" in the formula as "zero" in the base year.

22. Placing reliance upon *Shin Satellite Public Co. Ltd. v. Jain Studios; (2006) 2 SCC 628*, the learned ASG would therefore submit that clause 2.7(b) of the Guidelines has to be read down or struck down for being contrary to the provisions of the Scheme in question. The learned ASG has also placed reliance upon the decisions of this Court in *Ojas Industries P. Ltd. v. UOI; 2006 (86) DRJ 593(DB)* and *Fed. Association of Maharashtra v. UOI; 2005 1 AD (DEL) 345* to substantiate his submission that in economic regulatory measures, literal rule should be provided since such measures are made by experts.

23. In support of his submission that the Guidelines can only supplement the Scheme in question but not supplant, the learned ASG relied upon *Dr. S.K. Kacker v. AIIMS & Ors.; (1996) 10 SCC 734*.

24. Per contra, it is contended by Dr.Ashwani Kumar, the learned Senior Counsel appearing for the respondent/writ petitioner that the order under appeal which is supported by unexceptionable reasoning warrants no interference in an intra-court appeal. While submitting that where two

views are plausible and the court below has taken one of the plausible views, the appellate court would not intervene to reverse the decision of the court below, the learned Senior Counsel relied upon *Umabai v. Nilkanth Dhonibai Chavan*; (2005) 6 SCC 243 and *Indian Oil Corporation Ltd. v. Sanjeev Kumar*; 2015 SCC Online Del 6503.

25. It is also contended that the Government of India being the author of the policy under the Scheme in question cannot escape its consequences. In support of the said submission, the learned Senior Counsel relied upon *J.K. Industries Ltd. v. Union of India*; (2007) 13 SCC 673, *P. Kasilingam & Ors. v. P.S.G. College of Technology & Ors.*; (1995) Supp. (2) SCC 348, *K.P. Varghese v. ITO, Ernakulam*; (1981) 4 SCC 73, *Sant Ram Sharma v. State of Rajasthan*; (1968) 1 SCR 111 and *Desh Bandhu Gupta & Company v. Delhi Stock Exchange*; (1979) 4 SCC 565.

26. We have given our thoughtful consideration to the rival submissions made on behalf of the parties.

27. Admittedly, the base year for calculation of NPV would be the Financial Year 2008-09. Clause 2.4 of the Guidelines has set out the formulae for calculating NPV. According to the petitioner, the value of the investment made in the base year should be taken as it is, i.e. without being discounted. Thus, it is claimed that the investments made till the end of Financial Year 2008-09, i.e., 31.03.2009 could not be discounted. If the said interpretation of the petitioner is accepted, it would meet the threshold NPV of Rs.1000 crore prescribed under Para 2.3 of the Scheme and the petitioner would be eligible to seek grant of incentive of 25% of the capital expenditure in terms of Para 3.1 of the Scheme.

28. On the other hand, the specific case of the respondents is that the period of first 10 years shall be reckoned from the start of the project as provided by Para 3.2 of the Scheme and therefore the base year shall also be included for calculation of threshold value and the investment made during the base year shall also be discounted.

29. Having regard to the said submissions, the learned Single Judge in the order under appeal framed a question as to whether or not the capital expenditure incurred by the respondent/writ petitioner in the base year is to be discounted or not.

30. After examining the provisions of the Scheme and the calculation of the NPV as set out in the Guidelines, the learned Single Judge was of the view that since the Scheme by itself had neither set out the definitions nor the formulae for calculation of the NPV and the operability of the Scheme was dependent on the Guidelines, the Guidelines in fact added to the conditions stipulated in the Scheme.

31. The learned Single Judge was also of the view that issue involved is not to be examined only from the point of view as to how NPV is ordinarily calculated but it is to be contextualized in the setting of the Scheme. The learned Single Judge further explained:-

"17.3 Having said so, the position, however, is not to be examined only from the point of view as to how NPV is ordinarily calculated, but is to be contextualized in the setting of the scheme. The scheme intends to exclude investments/ capital expenditure made in the base year, perhaps, on the assumption that its present value is not likely to be altered dramatically as against those which are made in the subsequent years. Besides, the scheme as configured, seeks to incentivise in various forms, capital

investment, of the kind prescribed, which reaches or crosses a particular threshold limit. The scheme envisages that the threshold limit is to be quantified in present value terms, for which, a discount rate of 9% is fixed. However, in the calculation of the threshold limit, the scheme seeks to apply the discount rate to only those investments made in the years "*following*" the base year. If that be the intent, the approach adopted by the petitioner seems to accord with the provisions of the scheme.

18. Therefore, while one cannot quibble with the proposition advanced on behalf of the respondents that the guidelines cannot supplant the scheme, what cannot be lost sight of, is that, the guidelines make the scheme operable. The mechanics of the scheme are provided in the guidelines. For instance, the formulae for calculating the NPV and the manner in which the threshold limit is to be ascertained, is provided in the guidelines. The guidelines, to my mind, are thus an elaboration of what the scheme envisages.

19. One cannot also find fault with the proposition that the intention of the maker of the document is to be ascertained from the language used in the document, and if, the language is clear and unambiguous, no interpretative rules can be brought into play. If, as indicated above, the guidelines are considered as an extension of the scheme, then the use of the expression "*from*" in the definition of the symbol "i" and also the use of the word "*following*" in clause 2.7 (b), prior to the expression "base year", would persuade me to conclude that the investments made in the base year are not to be discounted."

32. We entirely agree with the reasoning of the learned Single Judge.

33. On a reading of the provisions of the Scheme as well as the Guidelines we are of the view that the Guidelines have merely supplemented the Scheme and there is no conflict as such between the Scheme and the

Guidelines. Hence, the question of Guidelines overriding the Scheme dated 21.03.2007 does not arise at all. Having regard to the fact that the definition of "i" in the formula in Clause 2.4 of the Guidelines indicates "number of completed years from base year", we are also of the view that the learned Single Judge was right in holding that discounting of the value of capital expenditure is to take place from the year subsequent to the base year. This is made further clear from the language of Clause 2.7(b) of the Guidelines.

34. Hence, the learned Single Judge was fully justified in concluding that in the light of Clause 2.4 and Clause 2.7 of the Guidelines, the investments made in the base year are not to be discounted. The said interpretation given by the learned Single Judge, in our considered opinion, does not suffer from any legal infirmity warranting interference in an intra court appeal.

35. Accordingly, the order under appeal is upheld and the appeal is dismissed.

CHIEF JUSTICE

SANGITA DHINGRA SEHGAL, J

APRIL 10, 2017

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