

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.04.2018	Pronounced on : 02.07.2018
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CORAM:

THE HON'BLE Dr. JUSTICE S.VIMALA
AND
THE HON'BLE MRS. JUSTICE S.RAMATHILAGAM

Writ Appeal No.2553 of 2012
and M.P.No.1 of 2012

M/s.MMS Steel & Power Pvt. Limited,
Rep. by its Senior Manager,
6-3-1109/A/1
3rd Floor, Navabharat Chamber,
Somajiguda, Raj Bhawan Road,
Hyderabad-500.

... Appellant

versus

1.The State of Tamil Nadu
Rep. by its Secretary to the Government,
Industries Department,
Secretariat, Fort St. George,
Chennai-600 009.

2.The Director,
Chief Electrical Inspector to Govt. of Tamil Nadu,
Thiru Vi Ka Industrial Estate,
Guindy, Chennai-32.

3.The Electrical Inspector,
4/7, Kesavan Nagar,
Thirupapuliyur,
Cuddalore - 607 002.

... Respondents

Writ Appeal filed under Clause 15 of the Letters Patent,
against the order, dated 30.07.2012 passed in Writ Petition
No.5140 of 2012.

Prayer in W.P.No.5140 of 2012:

Writ Petition filed under Article 226 of the Constitution of
India praying for the issuance of a Writ of Certiorari Calling
for the records comprised in the impugned order in Lr.No.
638/EI/Cuddalore/ E-Tax/A1/11 dated 21.9.2011 on the file of the
3rd respondent and quash the same as being arbitrary and illegal.

For Appellant : Mr.Rahul Balaji

For R1 : Mrs.Thangavadhana Balakrishnan
Additional Government Pleader

For R2 and R3 : Mrs.Narmada Sampath, AAG

J U D G M E N T

(Judgment of the Court was delivered by S.Vimala, J.,)

The Petitioner Company is involved in the generation of electricity using natural gas. The Power Generation Plant is at Nallur in Thiruvarur District and near Narimanam in Nagapattinam District. The petitioner procures natural gas from ONGC and GAIL and uses the same to power steam, power turbines, which in turn generates electricity. The combined generation capacity of these two plants is about 28 megawatts.

2. A captive power plant called auto-producer or embedded generation is a power generation facility used and managed by an industrial or commercial energy user for their own energy consumption. Captive power plants can operate off-grid or they can be connected to the electric grid to exchange excess generation. The petitioner Company is engaged in power generation using captive power plant. The power generated in these plants is supplied to 8 captive group consumers. There are various industrial units situated in various parts of the State and the power generated by the petitioner is wheeled to captive consumers through the TANGEDCO grid for which the petitioner is paying appropriate wheeling charges.

3. The term "captive generative plant" is defined in Section 2(8) of the Electricity Act, 2003 and the definition reads as under:

"Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such cooperative society or association"

4. The various qualification which are needed to be fulfilled for a generating plant to be treated as a captive generating plant is provided under Rule 3 of the Tamil Nadu Electricity Rules, 2005.

"Requirements of Captive Generating Plant.- (1) No power plant shall qualify as a 'captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless- (a) in case of a power plant - (i) not less than twenty six percent of the ownership is held by the captive user(s), and (ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use: Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society: Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

5. The Tamil Nadu Electricity Board in the letter dated 16.09.2006 has approved the wheeling of power from the petitioner's plant to the 16 captive group companies. The 16 industrial units together hold 26.01% of the ownership stake and they consume majority of the power generated. Thus, the petitioner is a captive generating plant as defined under the provisions of Electricity Act, 2003 and Electricity Rules, 2005.

6. The petitioner had set up captive generating plant only because of the acute power shortage in the State of Tamil Nadu. The Tamil Nadu Electricity Board sought to impose restriction and control measure in the year 2008 in accordance which there were scheduled power cut to HT consumer for a stipulated powers everyday. In addition to the power cut, Tamil Nadu Electricity Board stopped power supply during peak hour period between 6.00 p.m. to 10.00 p.m to HT consumers. Other industries were advised to adopt a scheme known as "Power holiday" wherein they would operate/dis-operate for certain months. These measures were approved by Tamil Nadu Electricity Regulatory Commission.

7. This surge in demand lead to increase in the third party sale of power and also to the establishment of captive generation plant. This model was attractive as it assured power supply to the persons with such plants. As a commercial model a captive generation plant was developed for the use of number of industrial houses jointly.

8. Electricity Tax on captive generation plant was higher than the Tax on normal generators as per Tamil Nadu Tax on Sale or Consumption of Electricity Act, 2003. The State of Tamil Nadu issued Government Order granting exemption from electricity tax for a particular period for captive generating plant by virtue of the powers conferred under of the Tamil Nadu Tax on Sale or Consumption of Electricity Act, 2003, by exercising powers conferred by Sub-Section 2 of Section 14 of the Act, 2003. The exemption in respect of electricity tax payable under the said Act was originally granted and later on it was being extended from time to time.

9. The respondent issued demand notice stating that the petitioner had failed to pay the tax and a specified amount was directed to be paid within a period of 15 days from the date of receipt of notice. The existence of G.O's granting exemption was brought to the notice of the third respondent. The petitioner requested the respondent to provide it with copies of records on the basis of which the amount demanded had been arrived at. But no reply was sent by the third respondent. Challenging the impugned demand notice seeking to collect arrears of electricity tax, the writ petition has been filed.

10. The impugned demand notice is challenged on the following grounds:

(a) The demand issued without a show cause notice and without providing an opportunity of hearing is arbitrary and illegal.

(b) Demand notice is without considering extant government orders which exempts the petitioner from paying the electricity tax.

(c) The demand notice failed to take into consideration that the petitioner is a captive generation plant.

(d) For the period from 04.09.2008 till 31.03.2011 the petitioner is entitled to claim the exemption from the payment of tax granted under various G.O's.

(e) The impugned demand notice did not provide the details of calculation and therefore, it is void.

11. The writ petition filed was dismissed by the learned Single Judge by order dated 30.07.2012 on the ground that none of the consumer of the petitioner had stake of more than 26% and further, the claim that all the consumers jointly hold 26% of the shareholding does not satisfy the legal requirement and therefore, the exemption claimed cannot be granted. Challenging the dismissal of the writ petition, this writ appeal is filed.

12. The memorandum of appeal raises the following grounds of objections:

(i) Section 9 of Tamil Nadu Tax on consumption or Sale of Electricity Act, 2003, which requires the person making the assessment to provide reasonable opportunity of hearing to the assessee before assessing the amount of electricity tax payable.

(ii) The procedure prescribed under Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 has not been followed.

(iii) The writ Court failed to appreciate the shareholding in the generating company with voting rights would constitute ownership (Rule 3(1)(a) r/w.3(1)(c) of Electricity Rules, 2005).

(4) The provisions of Electricity Act and rules which are special in nature would have an overriding effect over the provisions of Companies Act, 1956 in case of conflict.

(5) In the decision reported in the case of Malva Industries Ltd. vs. Punjab State Electricity Regulatory Commission dated 06.12.2007 it has been held that if the shareholders own more than 26% of the shares and consumes more than 51% of the power generated, it would be a captive generating plant, which had not been taken note of by the learned Single Judge. The decision in Malva Industries Ltd has been followed in Chattishkar Power Distribution Company Ltd. vs. Hira Fera Alloys Ltd. dated 18.05.2010.

12. The contention of the learned counsel for the appellant is that the petitioner's power plant is a captive generation plant as defined in Section 2(2) of the Act and it is primarily for the generation of electricity for their own use and therefore, the demand of tax is illegal and the impugned order of the respondent demanding tax is liable to be quashed. It is further contended that only on account of the general shortage of power, the Tamil Nadu Government issued orders granting exemption from the payment of electricity tax (for their own use) and the impugned notice is against the objective of the exemption and hence it is liable to be quashed.

13. The learned counsel for the respondent Electricity Board has relied upon the following decision in support of contention that the demand for electricity tax is legal, valid and it is in accordance with law.

(i) 2015 (13) SCC 220 (B.P.L. Ltd. v. CCE)

"21. We approve the aforesaid reasoning and rational given by the Tribunal in coming to the

conclusion that the goods of the appellant would not qualify the description contained in Notification Nos.8/96 and 4/97. It is trite that strict interpretation is to be given to the exemption notifications and it is upon the assessee to prove that he fulfills all the conditions of eligibility under such Notifications. This is so held by this Court in Rajasthan Spinning and Weaving Mills, Bhilwara, Rajasthan v. Collector of Central Excise, Jaipur, Rajasthan[1], wherein this principle was stated in the following manner:

"16. Lastly, it is for the assessee to establish that the goods manufactured by him come within the ambit of the exemption notification. Since, it is a case of exemption from duty, there is no question of any liberal construction to extent the term and the scope of the exemption notification. Such exemption notification must be strictly construed and the assessee should bring himself squarely within the ambit of the notification. No extended meaning can be given to the exempted item to enlarge the scope of exemption granted by the notification."

22. This principle has been reiterated time and again. It is not necessary to take note of all such cases. We would however like to reproduce the restatement of this member by the Constitutional bench of this Court in Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal & Ors.[2], as follows:

"29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or

substance of the notification granting exemption.

30. In *Novopan India Ltd. (Novopan India Ltd. v. CCE and Customs, 1994 Supp (3) SCC 606)* this Court held that a person, invoking an exception or exemption provisions, to relieve him of tax liability must establish clearly that he is covered by the said provisions and, in case of doubt or ambiguity, the benefit of it must go to the State. A Constitution Bench of this Court in *Hansraj Gordhandas v. CCE and Customs (AIR 1970 SC 755 : (1969) 2 SCR 253)* held that (*Novopan India Ltd. Case, SCC p. 614, para 16*):

"16...such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification i.e. by the plain terms of the exemption."

(ii) 2011 (1) SCC 236 (*CCE v. Hari Chand Shri Gopal*)

"29. The law is well settled that a person who claims exemption or concession has to establish that he is entitled to that exemption or concession. A provision providing for an exemption, concession or exception, as the case may be, has to be construed strictly with certain exceptions depending upon the settings on which the provision has been placed in the Statute and the object and purpose to be achieved. If exemption is available on complying with certain conditions, the conditions have to be complied with. The mandatory requirements of those conditions must be obeyed or fulfilled exactly, though at times, some latitude can be shown, if there is a failure to comply with some requirements which are directory in nature, the non-compliance of which would not affect the essence or substance of the notification granting exemption."

(iii) 2014 (15) SCC 136 (*State of Jharkhand v. LA Opala R.G. Ltd.*)

"17. This Court in *Gammon (I) Ltd. v. Commr. of Customs, (2011) 12 SCC 499* while rejecting the plea of the appellant that the exemption notification should receive a liberal construction to further the object underlying it relied upon the decision of a Three-Judge

Bench of this Court in Novopan India Ltd., which stated the aforesaid principle and the object behind adopting literal interpretation in determining eligibility for claiming exemption or exception from tax as follows:

"32. ... '16. ...The principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee-assuming that the said principle is good and sound-does not apply to the construction of an exception or an exempting provision; they have to be construed strictly. A person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. In case of doubt or ambiguity, benefit of it must go to the State. This is for the reason explained in Mangalore Chemicals and other decisions viz. each such exception/exemption increases the tax burden on other members of the community correspondingly. Once, of course, the provision is found applicable to him, full effect must be given to it. As observed by a Constitution Bench of this Court in Hansraj Gordhandas v. CCE and Customs that such a notification has to be interpreted in the light of the words employed by it and not on any other basis. This was so held in the context of the principle that in a taxing statute, there is no room for any intendment, that regard must be had to the clear meaning of the words and that the matter should be governed wholly by the language of the notification i.e. by the plain terms of the exemption."

18. In CCE v. Mahaan Dairies this Court has observed that:

"8. It is settled law that in order to claim benefit of a notification, a party must strictly comply with the terms of the notification. If on wording of the notification the benefit is not available then by stretching the words of the notification or by adding words to the notification benefit cannot be conferred."

(iv) 2009 (12) SCC 735 (Collector of Customs (Preventive) v. Malwa Industries Ltd.)

"11. An exemption notification should be read literally. A person claiming benefit of an exemption notification must show that he satisfies the eligibility criteria. Once, however, it is found that the exemption notification is applicable to the case

of the assessee, the same should be construed liberally.

14. From the reported decision, it is clear that it is for the assessee to show that he has fulfilled the eligibility criteria for the purpose of claiming exemption from the payment of electricity tax. The assessee is expected to show that the ownership in the plant of the captive unit was 26% and that 51% of the power generated is used for the personal use of the assessee.

15. The learned counsel appearing for the Electricity Board would contend that the exemption by the Government would be applicable only if the power generated is by using gensets and not otherwise.

16. The relevant Government order reads as under:

"In exercise of the power conferred by sub-section 2 of Section 14 of the Tamil Nadu Tax on Sale or Consumption of Electricity Act, 2003, the Governor of Tamil Nadu hereby makes exemption in respect of the Electricity Tax payable under the said Act on consumption of Electricity for own use by the HT consumers using their captive generation plant namely, gensets for the period on and from the 1st March, 2008 to 31st May, 2008.

This period has been extended from time to time and lastly it was extended up to 31.03.2011."

17. The contention of the company is that the government orders did not specifically mention that exemption is not applicable to captive power plant which generate electricity by using machineries other than gensets. The contention of the respondent is that, only those Corporations who generate the electricity using gensets alone are eligible for tax exemption and tax exemption is not applicable to those units which receives the electricity through Tamilnadu Electricity Board grid. The contention of the petitioner is that the Government Order uses the phrase captive generative plant, "namely genset". The term gensets has not been defined in the Electricity Act, 2003. The term genset cannot be restricted to mean production made by using generator alone and it should be applicable to all forms of generators including the type of generators as are used by the petitioner at its plant. The term "namely" "that is to say" is merely used to connote a sense of being illustrative and it cannot be taken to mean that it imposes any specific limitations and it cannot be construed as a synonym to the term "limited to". This interpretation is allegedly supported by the decision of the Supreme Court in Vee Nisson Electronics vs.

Commissioner of Central Excise, Mumbai (2004 (10) SCC 190). Which of the contention is correct is the issue to be decided.

16.3. It is the main contention of the learned counsel for the petitioner that the nature of the enquiry contemplated in terms of the provision granting exemption from payment of electricity tax is quasi judicial in nature and therefore the opportunity of hearing ought to have been given to the petitioner especially when the petitioner demanded details based on which the impugned direction was issued asking the petitioner to pay tax. It is specifically pointed out that after the impugned order was served, the petitioner sent a detailed reply to the third respondent by the letter dated 24.11.2011 explaining that the petitioner is entitled to exemption. The existence of G.O's granting exemption was also brought to the notice of the respondent. Copy of the records were also sought for to find out the basis on which the amount demanded has been arrived at. Under the circumstances the respondent ought to have provided with an opportunity of hearing. Only when an opportunity is given, the burden of proof which is allegedly on the part of the petitioner, as contended by the learned counsel for the respondent can be discharged. Therefore, it is a fit case to set aside the impugned order and remand it back to the respondents with a direction to provide sufficient opportunity of hearing to the petitioner and to decide the issues in accordance with law

17. In the result, the writ appeal is allowed. The order dated 30.07.2012 passed by the learned Single Judge in Writ Petition No.5140 of 2012 is set aside. The matter is remitted back to the respondents to decide the issue in accordance with law, after providing sufficient opportunity to the petitioner Company, within a period of two months from the date of receipt of a copy of this Judgment. No costs. Consequently, connected miscellaneous petition is closed.

सत्यमेव जयते Sd/-

Assistant Registrar(CS II)

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Sub Assistant Registrar

To

1.The Secretary to the Government,
Industries Department,
Secretariat, Fort St. George,
Chennai-600 009.

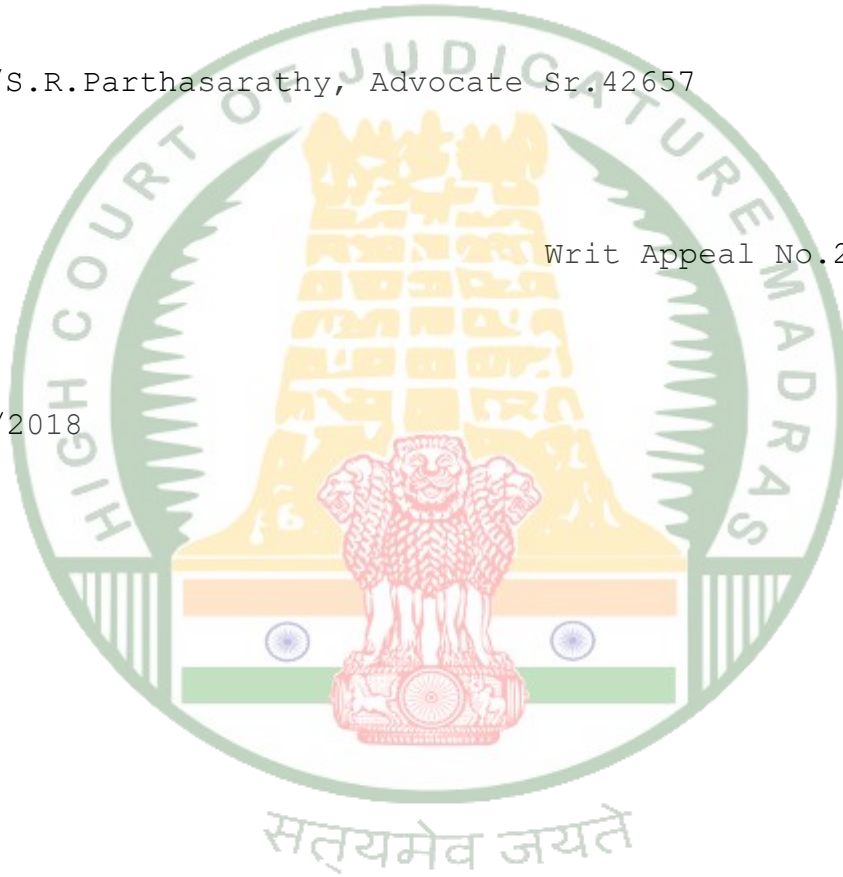
2.The Director,
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3.The Electrical Inspector,
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Thirupapuliyur,
Cuddalore - 607 002.

+1cc to M/S.R.Parthasarathy, Advocate Sr.42657

Writ Appeal No.2553 of 2012

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