IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.08.2022

CORAM

**THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

**W.P. No.9807 of 2013**
**and M.P. Nos.1 and 2 of 2013**

Malco Energy Limited,
Rep. by its Director,
M/s.A.Sumathi …Petitioner

Vs.

1.The State of Tamil Nadu,
Rep. by the Secretary to the Government,
Energy (B1) Department,
Secretariat, Chennai-600 009.

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

3.The Chief Electrical Inspector to Government,
Thiru Vi Ka Industrial Estate,
Guindy, Chennai-600 032.

4.Tamil Nadu Generation and Distribution
Corporation Limited,
Rep. by its Chairman and Managing Director,
144, Anna Salai, Chennai-600 002. …Respondents

*(Petitioner cause title amended vide order dated 23.08.2022 made in W.M.P.No.21168 of 2022 in W.P.No.9807 of 2013 by MSQJ)*

**PRAYER:** Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus calling for the records comprised in the impugned order of the 1st Respondent in Letter (Ms.) No.29 dated 20.03.2013 and quash the same as being arbitrary, illegal and contrary to the provisions of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 and the Tamil Nadu (Taxation on Consumption) of Sale of Electricity Act, 2003 and consequently direct the 1st Respondent to grant exemption from payment of electricity tax to the petitioner for the period from May 1999 to June 2003.

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|---|---|
| For Petitioner | : Mr.Rahul Balaji |
| For Respondents 1 to 3 | : Mr.V.Ravi<br>Special Govt. Pleader |
| For Respondent 4 | : Mr.Abul Kalam<br>Standing Counsel |

**O R D E R**

The writ petition is filed challenging the rejection of the petitioner's claim for exemption under Section 13 of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 (hereinafter referred to as the "1962 Act").

2. This is the second round of litigation. In the first round of litigation there was a direction by this Court in W.P. No.14696 of 2001 dated 09.02.2011 wherein the request of the petitioner for grant of exemption was rejected and the same came to be challenged. This Court on considering the

submissions of either side issued the following directions:

> *"18. The order under challenge, also shows total application of mind. The order does gives no reason as to why the claim of the petitioner was not found eligible for exemption from payment of electricity tax on the energy generator, and as to why the contention raised in representation were not acceptable.*
>
> *19. Consequently, this writ petition is allowed, the impugned order is set aside, the case is remitted back to the State of Tamil Nadu, to take a decision afresh on the representation made by the petitioner for grant of tax exemption on consumption of electricity.*
>
> *20. The needful be done within a period of three months of receipt of certified copy of this order. The respondents are directed to pass a detailed speaking order giving reasons for acceptance or non-acceptance of the request by the petitioner. No costs."*

3. Pursuant to the above directions, the petitioner had filed a representation dated 08.04.2011 wherein after setting out the background of the petition, the petitioner had set out the rationale for claiming exemption inter alia submitting the following:

a. The Government in exercise of its power conferred under Section

13(1) of the 1962 Act had granted exemption to Paper, Textile, Chemical and Sugar Industries from payment of Electricity Tax on self-generated electrical energy. The rationale/ logic for such exemption was that these Industries are highly energy intensive and any generation of electricity by private producers will relieve the grid to the said extent of its obligation.

b. The expression "energy intensive industry" has been defined under Section 2(3) of the 1962 Act, which reads as under:

> *"2(3) "Energy intensive industries" means industries in which the price of energy used in the process of manufacturing or producing the principle product of the industry concerned exceeds 15 per centum of the total cost of the manufacture or production of that product and includes the industries manufacturing or producing the following, namely:-*
>
> *i) Aluminium;*
> *ii) Bleaching powder;*
> *iii) Calcium carbide;*
> *iv) Caustic soda;*
> *v) Synthetic gem."*

c. Aluminium being energy intensive Industry and when the intention behind the grant of exemption was to cover industries which are energy intensive nature, there is no reason why the Aluminium Industry should be left out while every other Industry enumerated under Section 2(3) of the 1962 Act has been granted the benefit of exemption.

d. If the reason for not extending the benefit to Aluminium Industries was the fact that no representation was made on behalf of Aluminium Industries unlike the other Industries, however, even that reason may not survive inasmuch as the petitioner after setting up the captive power plant in the year 1999 submitted a representation as early as on 05.11.1999 seeking exemption for payment of Electricity Tax by including Aluminium Industry in the list of industries exempted from payment of tax by placing reliance on Government Letter No.4522/B1/99-3 - Energy Secretary, Tamil Nadu dated 22.09.1999. Despite repeated instructions, as there was inaction on the part of the Government, the petition in W.P.No.14696 of 2001 was disposed of finally as stated above with the directions extracted supra.

e. Though, the petitioner was having liquidity constraints, the petitioner had set up a captive power plant investing Rs.275 crores to insulate itself from poor power quality and frequent power interruptions which in turn has relieved the Board of its obligation to supply the required energy to the petitioner Company to the extent of energy captively generated.

Importantly, the petitioner Company was one of the few Companies at that point in time which employed captive power plants which was promoted by the Government.

f. The Government while exercising its power under Section 13 of the 1962 Act to grant exemption ought to exercise that power which is in compliance with principles of fairness and ensure that it does not suffer from any arbitrariness and also ensure that it does not suffer from the vice of being discriminatory.

4.1. The learned counsel for the petitioner had also sought for a personal hearing before passing any order in the matter. Importantly, the petitioner has also stated in its representation that if the Respondents require any additional information in support of the application, the same would be provided by the petitioner.

4.2. The Respondents passed the impugned order dated 23.02.2013 rejecting the petitioner's representation pursuant to the orders of this Court for grant of exemption under Section 31 of the Act which is challenged in the present writ petition on the premise that it suffers from gross non-application of mind and has failed to take into account the relevant and has taken into account factors which may not be relevant and thus needs to be set-aside.

5. To the contrary, it is the submission by the learned counsel for the Respondents that the impugned order has dealt with the representation filed by the petitioner and has also set out the reasons for rejection of the petitioner's request/ claim for exemption and thus the representation does not have any merit.

6. Heard both sides, perused the materials available on record.

7. This Court intends to clarify that there can be no doubt about the fact that there is no right to a concession or an exemption. However, once an exemption / concession has been extended, the same is open to be tested on the ground of non-compliance with the Constitutional/ statutory mandate/ requirements. Furthermore, in the present case, the impugned order has been passed pursuant to the orders of this Court wherein it has been expressly directed that the earlier order of rejection did not give any reasons nor did it deal with the contentions raised in the representation and indicate as to how it is not applicable in that context. The Respondents were directed to pass a

detailed order giving reasons for the acceptance or otherwise of the petitioner's claim for exemption. While it is true that the impugned order itself contained reasons but I am afraid that the reasons that has been set out suffers from being perverse and also indicative of gross non-application of mind as could be seen from the following:

a. At para 4(a) one of the reasons for rejection set-out in the impugned order was that exemption was extended depending on the nature of the fuel used in generation of electricity i.e., Low Sulphur Heavy Stock (LSHS) which is a derivative of imported petrol and the cost of the same was also under constant escalation, whereas the petitioner was using furnace oil.

The above reason suffers from the following two fallacies:

i) The petitioner was using imported coal and not furnace oil and therefore the impugned order suffers from the above factual error.

ii) Secondly, assuming that it was furnace oil that was being used, the reasons which are set out for extending benefit to Diesel, LSHS viz., those were derivatives of imported petroleum would equally/ perforce apply to furnace oil, as it is also a derivative of imported petroleum and the cost was also under constant escalation.

b. At para 4(b) of the impugned order after setting out the reasons for extending the benefit of exemption to Paper, Chemical, Textile and Sugar Industries. It proceeds to state that this must be compared with Cement Industry thereby indicating that the Respondents were under the impression that the petitioner was a Cement Industry whereas the petitioner was an Aluminium manufacturing Industry - This is again indicative of non-application of mind.

c. Thirdly, reference is made to Section 14(2) of the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003, that in fact, the petitioner had claimed exemption under Section 13 of 1962 Act - Again indication of non-application of mind.

d. Fourthly, the impugned order looks to the rate charged on Industries manufacturing Aluminium and states that it is only 10 % and therefore, it was stated that the rate of 10% which was being charged by itself would constitute concession. The above submission overlooks the fact that "energy intensive industries" enumerated in Section 2(3) of the 1962 Act includes various categories of Chemical Industries while including the Aluminium Industry and are liable to tax at 10 %. While the Chemical Industries are granted exemption, the Aluminium Industry has been denied the benefit of exemption. Thus, the rate of tax at 10% or otherwise which has been suggested as the reason in the impugned order, is wholly irrelevant. In this regard, it may be relevant to note that Section 13 of the 1962 Act, which confers the Government to grant exemption while setting out various criteria to be looked into while exercising such power and granting exemption, it does not provide for considering the rate of tax. Thus, it appears that the impugned order has looked at the aspects which may not be relevant.

8. It is submitted by the learned counsel for the petitioner that they were neither granted a personal hearing nor were furnished materials which has been referred to in the impugned order which prompted/ was relied upon by the Respondents to arrive at the conclusion. It was further submitted by the learned counsel for the petitioner that in the present case, had personal hearing been granted and information sought for by the petitioner, they would have furnished the materials relied upon, and the Respondents would have been in a position to make a well-informed decision.

9. Grant of exemption is normally a piece of sub-ordinate/ delegated legislation or quasi-legislative in character depending on the context and the nature of power exercised. In the previous round of litigation before this

Court in W.P. No.14696 of 2001, the case was remitted back to the 1st Respondent with a direction to take decision afresh on the representation made by the petitioner for grant of exemption with a futher direction to pass a detailed speaking order giving reasons for acceptance (or) non-acceptance of the request by the petitioner. The above direction clearly indicates that the orders must be made in compliance with principles of natural justice, the same not having been challenged, has attained finality. While principles of natural justice would not apply to delegated/ sub-ordinate legislation normally, however there are exceptions to the above Rule. This Court is not inclined to examine the above issue as the impugned order is made on the basis of imprimatur/ command of the Respondents.

10. In the circumstances, this Court is of the view that the impugned order is liable to be set-aside, and the petitioner is permitted to submit their representation containing the response to the various reasons set out in the impugned order. The Respondents are directed to furnish copies of any material which they intend to rely upon. The petitioner shall submit a representation within a period of 3 weeks from the date of receipt of a copy of this order and the Respondents shall dispose of the representation

submitted by the petitioner within a period of 8 weeks thereon.

11. With the above directions, the writ petition stands disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

**23.08.2022**

Speaking (or) Non Speaking Order
Index : Yes/ No
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To:

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**MOHAMMED SHAFFIQ, J.**

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