

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 1230 of 2023

**INOX Air Products Private Limited
Vs.
Director of Industries, Directorate of Industries,
Government of West Bengal and others**

For the petitioner	:	Mr. J. P. Khaitan, Sr. Adv. Ms. Dipali Sheth, Adv. Mr. Indranil Banerjee, Adv. Ms. Subham Mehta, Adv. Mr. Subrata Mukherjee, Adv.
For the respondents	:	Mr. Somnath Ganguli, A.G.P. Mr. Vivek Basu, Adv. Mr. Paritosh Sinha, Adv.
For the WBIDCL	:	Mr. Suddhadev Adak, Adv.
For the DVC	:	Mr. Prasun Mukherjee, Adv. Mr. Deepak Agarwal, Adv.
Hearing concluded on	:	12.07.2023
Judgment on	:	27.07.2023

The Court:-

1. The petitioner is a private company engaged in the business of manufacture and supply of industrial gases and medical oxygen and is a consumer of the respondent no.4, the Damodar Valley Corporation (DVC). In the area within West Bengal where the

petitioner consumes electricity for running its industry, there is no other power distributor except the DVC, as per the petitioner.

2. The present dispute arises with regard to the entitlement of the petitioner to get the benefit of waiver under a subsidy scheme floated by the Government of West Bengal, namely, the West Bengal State Support for Industries Scheme, 2013 (as amended up to 12.09.2014)(hereinafter referred to as, “the 2013 Scheme”).
3. Clause 9.4 of the 2013 Scheme provides that, along with other units, Power Intensive Units (PIUs) “as defined in WBIPS 2005” will be entitled to receive waiver of electricity duty with any ceiling under the 2013 Scheme, and also for percentage of waiver in terms of the sub-paragraph 7.2 of 2013 Scheme. Sub-paragraph 7.2 deals with waiver of electricity duty.
4. The petitioner applied for the benefits under the 2013 Scheme. After initial reluctance on the issue and several applications being filed in that regard by the petitioner, the Government of West Bengal, Directorate of Industries, communicated to the petitioner-Company that the petitioner’s appeal to consider its above unit as PIU cannot be granted, as it will violate Clause 6.1 of Part B of the Notification of WBIPS 2005.
5. Learned senior counsel appearing for the petitioner contends that the said ground of refusal is *de hors* the law as well as both the Schemes. It is argued that in terms of Clause 9.4, PIUs as defined in WBIPS 2005 (the 2005 Scheme) would be entitled to the waiver under the 2013 Scheme. Such expression, it is argued, refers only to the

definition of the PIUs under the 2005 Scheme, and not the applicability clause thereunder.

6. Clause 6.1, which has been cited by the respondent-Authorities, provides that the 2005 Scheme shall be applicable to all large scale units and also for expansion of existing units on or after July 16, 2004 *drawing power from West Bengal State Electricity Board (WBSEB)*. The applicability of the 2005 Scheme has, thus, been restricted to companies/undertakings that draw power from the WBSEB.
7. Learned senior counsel argues that such interpretation of the respondent-Authorities, which is that the 2005 Scheme would apply in its entirety even to the 2013 Scheme, is absurd and is negated by the 2013 Scheme itself.
8. In Clause 15 of the 2013 Scheme, pertaining to repeal and saving, it is clearly enumerated that the WBSSIS 2008 (as amended up to 01.01.2013), shall be repealed and stand substituted by the 2013 Scheme from the date of commencement of the 2013 Scheme.
9. As to the contention of the State that the Scheme is only applicable to units drawing power from the WBSEB, which is owned by the State, as the contemplation of the subsidy is to reimburse the beneficiary, is also *de hors* the law, it is argued.
10. Learned senior counsel places reliance on the difference in the specific language of the 2013 and the 2005 Schemes. Whereas the subsidy sought by the petitioner under the 2013 Scheme, as stipulated in Clause 9.4 thereof, comprises of *waiver of electricity duty*, the 2005 Scheme, with regard to similar units, is comprised of incentive in the

form of *reimbursement* from the State Government. It is argued that the concept of reimbursement obviously connotes that the payment is being made by the State Authorities, for which the payment is to be made by the State in the first place. However, in case of the 2013 Scheme, a waiver of electricity duty can be given by any distributor from which the unit gets supply, subject to mutual arrangement between the State and the distributor.

11. Learned senior counsel further places reliance on the Bengal Electricity Duty Act, 1935 (for short, “the 1935 Act”). It is argued that in terms of the definition in Section 2(a) thereof, “energy charge” means the amount charged by a licensee for the supply of energy before deduction of rebate, if any, allowed by the Licensee for payment on or before such date as may be specified by the Licensee.
12. Clause (3a) of Section 2 defines “net charge” as the amount of gross charge that remains after deduction therefrom of any rebate referred to in Clause (2a) or refund of fuel surcharge, if any.
13. Clause 3 envisages an independent charge to be levied and paid to the State Government as duty, on the net charge for energy consumed.
14. Hence, a distinction has been drawn in the said Act, between a duty and the net charge, the former of which is to be levied on the latter, thereby distinguishing the two.
15. Learned counsel appearing for the State submits that the 2013 Scheme is merely an extension of and in addition to the 2005 Scheme. The range of subsidies offered has only been extended by the 2013 Scheme, whereas the other components of the 2005 Scheme remain

intact. It is argued that the expression “Power Intensive Unit” has not been defined in either of the Schemes. It is submitted that since the 2013 Scheme refers back to the 2005 Scheme for the purpose of defining PIUs, the definition of such units, as provided in the 2005 Scheme, should be taken as a whole.

- 16.** It is argued that Part B of the 2005 Scheme deals with the incentive and the same clearly stipulates that the Scheme shall be applicable to all large scale new units drawing power from the WBSEB. Clause 7.1, on which the petitioner relies, also refers to incentives in the form of reimbursement from the State Government. It is argued that such incentive, by way of adjustment with the payment, which can be the only mode for subsidies relating to “reimbursement”, cannot be given unless the power is drawn from State Authorities, here the WBSEB. Hence, it is argued that Part B, Clause 6.0 and 7.0 of the 2005 Scheme, should be taken as a whole for the purpose of construing the definition of PIUs.
- 17.** It is further argued that the distinction sought to be drawn by the petitioner between duty and net charge is not relevant in the present case, in view of the clear language of the Schemes themselves.
- 18.** Learned counsel for the State further argues that even the 2005 Scheme deals specifically with PIUs. There is no change on such aspect, insofar as the 2013 Scheme is concerned. Hence, the concept of PIUs under the 2005 Scheme has to be taken as a whole to construe the definition of PIUs for the purpose of the 2013 Scheme.

- 19.** It is argued that the 2013 Scheme contemplates subsidies in a different field than the 2005 Scheme. However, insofar as the PIUs are concerned, the definition under the 2005 Scheme has been borrowed by the 2013 Scheme, which clearly indicates that the definition given in the 2005 Scheme has to be taken as a whole.
- 20.** Heard learned counsel for the parties. The dispute raised in the present writ petition boils down to “much ado about nothing”. There is no ambiguity in the language of either of the Schemes. The 2013 Scheme, as amended *vide* Notification dated September 12, 2014, clearly lays down that the same has been brought into effect for further clarifications and for extending certain financial support, including more industrial units with a view to promoting large scale industries and industrial atmosphere in the State. Hence, the 2014 notification itself indicates the scope of operation of the 2013 Scheme, which stood amended by the 2014 notification.
- 21.** The 2013 Scheme is an entirely independent Scheme as does not, anywhere, contemplate as an eligibility clause that power has to be drawn from the State Authorities, in particular the WBSEB.
- 22.** The repeal and saving clause, that is, Clause 15 of the 2013 Scheme, as rightly pointed out by learned senior counsel for the petitioner, provides that the WBSSIS 2008 (as amended up to 01.01.2013) shall be repealed and stand substituted by the 2013 Scheme from the commencement of the latter. Thus, the 2013 Scheme is independent of the earlier Schemes.

23. Clause 3.8 of the 2013 Scheme defines “eligible unit”, which does not relate the drawing of power of the units, in any manner, to the WBSEB. The only thin line joining the two Schemes is Clause 9.4 of the 2013 Scheme, which provides, *inter alia*, that PIUs “as defined in WBIPS 2005” would be entitled to waiver of electricity duty under the 2013 Scheme, in terms of the sub-para 7.2 thereof.
24. Clause 7.2 of the 2013 Scheme minces no words in defining the subsidy to be provided to such units as “waiver of electricity duty”, as opposed to the “reimbursement”-mode subsidy given under the 2005 Scheme. Shifting here to the 2005 Scheme, the very Preamble of the Notification dated May 19, 2005, by which the said Scheme was floated, clearly links the same inextricably with the WBSEB.
25. The very first paragraph of the Preamble of the 2005 Scheme states that concessional power tariff was intended for certain industrial consumers of Durgapur Project Limited (DPL) and WBSEB.
26. The second paragraph also clarifies that the West Bengal Electricity Regulatory Commission (WBERC), *vide* its order dated December 7, 2001, fixed the applicable tariff-related conditions for different categories and consumers “of WBSEB” for the years as enumerated therein.
27. The third paragraph speaks about concessional tariff for consumers of DPL.
28. The fourth paragraph of the Preamble of the 2005 Scheme suggests that earlier concessions, which had been provided specifically to the

DPL and WBSEB, would not be provided to the industries as per previous orders of DPL and WBSEB.

- 29.** It is also stipulated in the Preamble that “reimbursement equivalent to same concessions as already provided” would continue to be provided to eligible consumers of DPL and WBSEB.
- 30.** Again, it has been reiterated that the State Government has decided to provide incentives to Power Intensive Industries and to new and expanding industries in certain designated areas by way of “reimbursement” of part of the “net energy charges” for certain period by the State Government as per details formulated in Part B of the Scheme.
- 31.** The definition clause, that is, Clause 3.0, sub-clause (e), of the 2005 Scheme defines “designated power utility” as the DPL, WBSEB and such other authority as may be notified by the State Government.
- 32.** The applicability of Part B of the 2005 Scheme has also to be seen in the light of the Preamble thereof, which stipulates that the incentives given to power intensive industries thereunder, is limited to reimbursement of part of the net energy charges.
- 33.** However, in Clause 9.4, read with Clause 7.2, of the 2013 Scheme, there is no concept of ‘reimbursement’ of part of ‘net energy charges’. What is contemplated in the 2013 Scheme is ‘waiver’ of ‘electricity duty’, which is an entirely different concept. The distinction sought to be brought about by learned senior counsel for the petitioner acquires relevance in such context. As argued by the petitioner, the Bengal Electricity Duty Act, 1935 (for short, “the 1935 Act”) stipulates that

electricity duty shall be a duty levied “on the net charge” for energy consumed. Hence, duty and net charges of electricity are distinguished as two different notions. Such distinction is essential within the contemplation of the Electricity Duty Act, since the component of duty is to be levied and calculated *on* the net charge for energy. Unless the said two terms connote different concepts, the very basis of charging of electricity duty would vanish into thin air.

- 34.** The “reimbursement of part of net energy charges” as envisaged in the 2005 Scheme is entirely different from the “waiver of electricity duty” as contemplated under the 2013 Scheme. Hence, the argument of the State, that the subsidy in every case should be relatable to an adjustment with the payment, which can only happen if the eligible units drawn power from the WBSEB, is clearly demolished.
- 35.** The waiver of electricity duty, as contemplated under the 2013 Scheme, is entirely different and distinct from reimbursement sought to be given by the 2005 Scheme, the latter necessitating a link of drawal of power with the WBSEB or a State Unit for the purpose of payment, with which the reimbursement has to be adjusted.
- 36.** Seen in such context, the “Applicability” contemplated in Clause 6.1 of Part B of the 2005 Scheme, which relates power drawal to the WBSEB, is not relevant for the purpose of defining PIUs at all.
- 37.** In fact, any “large scale unit”, as defined in Clause 6.1 of the 2005 Scheme, cannot, by definition, fall under the expression “Power Intensive Unit”.

- 38.** Hence, we are to fall back upon Clause 7.1 of the 2005 Scheme, which pertains to entitlement for incentives. The only relevant part in Clause 7.1, in the context of PUIs, for bringing a unit under the expression “Power Intensive Units”, is as follows:

“units,...drawing power through HT (33 KV) and EHT (above 33 KV) connection having actual monthly maximum demand of 1500 KVA and above...”

- 39.** As the petitioner undisputedly falls within such definition, the petitioner is entitled to waiver under Clause 9.4, read with Clause 7.2, of the 2013 Scheme.
- 40.** As such, the respondent-Authorities acted *de hors* the 2013 Scheme and the principle of Article 14 of the Constitution of India, whereby similarly placed other units will get the benefit of waiver, in refusing the petitioners the benefit of waiver of electricity duty under the 2013 Scheme.
- 41.** Thus, WPO No.1230 of 2023 is allowed on contest, thereby setting aside the refusal by the Government of West Bengal, Directorate of Industries, *vide* communication dated June 27, 2017 (being Annexure P-4 at page 134 of the present writ petition), and directing the respondent-Authorities to immediately start giving the benefits of the waiver as contemplated in Clause 9.4, read with Clause 7.2 of the said Scheme, as amended till 2014, from the next billing cycle for drawal of power by the petitioner-Company from the DVC.
- 42.** Insofar as the benefits which have already accrued to the petitioner, but have been withheld by the DVC from the petitioner, from October

1, 2013, that is, the date of notification of the WBSSIS, 2013, till the current billing cycle, the DVC shall disburse the entire amount due on such score to the petitioner, by adjustment with the monthly bill to be payable by the petitioner, up to the extent of the entire amount payable for each such monthly bill, till the entire dues on such count are cleared off by the DVC. Such adjustment shall also be given from the next billing cycle. Needless to say, however, the DVC shall be entitled to recover such amount from the State Authorities by any appropriate mode, subject to mutual arrangement between the State and the DVC.

- 43.** Insofar as the adjustments to be given from the next billing cycle on the count of waiver of electricity duty under the 2013 Scheme, the DVC shall be at liberty to work out an arrangement in that regard with the State respondents to enable the DVC to grant such waiver to the petitioner. The State authorities shall actively co-operate with the DVC to ensure that the DVC is compensated adequately for such waiver, preferably by adjustment with the current electricity duty to be deposited by the DVC to the State and refund or adjustment by any other mode, of the amount already accrued as dues.
- 44.** There will be no order as to costs.
- 45.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

Later

A prayer for stay is made at this juncture after the judgment is passed. There being an arguable issue involved, such stay of operation of the judgment and order passed today is granted for a period of three (03) weeks from date.

(Sabyasachi Bhattacharyya, J.)