

(2003) 10 KAR CK 0050

In the Karnataka High Court

Case No : Writ Petition No. 42831 of 2002

Associated Cement Companies Ltd. and Another

APPELLANT

Vs

State of Karnataka and Others

RESPONDENT

Date of Decision : 22-10-2003

Acts Referred:

Citation : (2003) ILR (Kar) 5048 : (2004) 1 KCCR 82 SN : (2004) 136 STC 442

Hon'ble Judges : R. Gururajan, J

Bench : Single Bench

Advocate : Andhyarujana, for Udaya Holla, Holla, for the Appellant; Anand, HCGA for R-2 and 3, for the Respondent

Final Decision : Allowed

Judgement

R. Gururajan, J.

IA. dated 21.8.2003 filed by the petitioner for amendment is allowed. Petitioner is to amend the petition.

Petitioner/company aggrieved by an order dated 24-9-2002, (Annexure-S) issued by the Commissioner for Industrial Development & Director of Industries and Commerce, the decision taken at the 74th State Level Committee Meeting held on 2-8-2002 (Annexure-T), and the demand notice dated 12.11.2002 (Annexure-V), is before me seeking for a writ of certiorari in this petition. A writ of mandamus is sought for by the petitioner to respondents thereby directing the respondents to continue to grant the benefit in terms of the original certificate issued to the petitioner/ company. The facts in brief are as under;

1.1. Petitioner is a cement industry and is engaged in the manufacture and sale of cement at its factory at Wadi, situated in Karnataka State. Petitioner has a capacity of producing only 4 lakh MT of cement. There was acute power shortage in Karnataka leading to frequent stalling of production. With the object to accelerate industrial development in Karnataka and take the State to a prominent position in the industrial map of this country, a new industrial policy

was introduced and it offered a package of incentives and concessions including exemption from payment of sales tax or deferment of the same according to eligibility and entitlement of the applicant. A State Level Committee was constituted to determine the eligibility of each applicant. The Industrial Policy is filed at Annexure-A.

1.2. Annexure-B was issued by the respondent give effect to the industrial policy by the Government. On 11-10-1995 Annexure-B was modified granting sales tax exemption to an industrial unit undertaking investment in expansion/modernization thereby limiting it to the additional capacity created by it and of such investment subject to specified ceilings.

1.3. Petitioner according to petition averments, attracted by the concession granted by the State Government decided to augment and increase the captive power plant capacity for the purpose of better utilisation of the installed capacity. They made an investment of Rs. 48 Crores and set up a captive generation plant in their works at Wadi. An application was filed for sales tax incentives and investment subsidy in terms of the Policy.

1.4. Petitioner provided all necessary details in the application and it is at Annexure-D. A revised application was filed in terms of Annexure-E. On 8-8-1995, General Manager, District Industries Centre, Department of Industries and Commerce, Government of Karnataka, Gulbarga, recommended to the Commissioner for Industrial Development and Director of Industries and Commerce that the petitioner be awarded the eligibility certificate in terms of the new Industrial Policy. The General Manager stated that petitioner plant has not been able to run to its 100% capacity due to acute shortage of power and that consequently, captive power plant had been set up for this purpose so as to increase production. Copy of the recommendation is at Annexure-F. Department of Industries issued thereafter an eligibility certificate in favour of the petitioner plant. The certificate did not state that the exemption was limited to the additional capacity created by the investment. Annexure-G is the certificate. Petitioner thereafter from February 1996 to April 1996 claimed sales tax exemption on the sale of cement on the basis of the eligibility certificate. Sales Tax Returns were filed before the Deputy Commissioner of Commercial Taxes. The Deputy Commissioner on 19-4-1996 stated that the petitioner could not claim sales tax exemption. He relied on Clause-II of the new industrial policy. According him, petitioner's claim was not in accordance with the notification. Annexure-J is the letter. A detailed reply was submitted by the petitioner in this regard. Petitioner strongly relied on the original certificate and also the policy to contend that the benefits could not be denied to the petitioner. Annexure-K is the reply. The department, thereafter, notwithstanding the objection, according to petition averments issued provisional assessment orders thereby rejecting the claim of the petitioner for grant of exemption. Aggrieved by the assessment orders, petitioner filed Writ Petitions in this Court in WP Nos. 29825-829/1996. Learned Single Judge dismissed the petitions. Writ Appeals were filed in

WAs.No.108-112/97 against the order passed by the learned Single Judge. Petitioner states in the body of the petition that there were similarly placed companies who had been issued with eligibility certificates but were being denied sales tax exemption. Those companies also filed Writ Petitions in this Court. The matter was thereafter taken by way of appeal by those petitioners in those cases. A Division Bench of this Court in a judgment reported in 2000 (117) STC 414 (Wipro's case) ruled that the Sales Tax Authorities have no competence either to question the correctness of the eligibility certificate issued by the Director of Industries and Commerce or Authorised Nominee nor it is permissible to take a view contrary to the one taken by the certifying authorities in respect of the factual aspects. Following the said judgment, a Division Bench of this Court in WA No. 108-112/1997 filed by the petitioner set aside the order of the learned Single Judge in Writ Petition Nos. 29825-829/1996 filed by the petitioner with certain directions. Thereafter the Commissioner referred the original certificate to the State Level Committee for its decision. This was wholly outside the mandate of this Court's order. The State Level Committee to "avoid confusion" amended the certificate by inserting para 4(a) in the eligibility certificate. A show cause notice was issued to the petitioner with regard to the said amendment. A detailed reply was submitted by the petitioner in terms of Annexure-P filed to this petition.

1.5. Petitioner thereafter appeared before the State Level Committee through their counsel. They made elaborate oral submissions and pointed out that the proposed amendment is totally outside the ambit of the judgment dtd. 2-9-1998 of this Court. No orders were passed by the State Level Committee. Thereafter, a notice was issued fixing the date for further hearing as 31-5-2001. The matter was heard. Written submissions were filed. The committee rejected the contention of the petitioner and amended the eligibility certificate in terms of the proceedings of the 74th SLC meeting held on 2-8-2002. Amended certificate is at Annexure-S. Original proceedings of the 74th SLC meeting is at Annexure-T. Petitioner in this petition is challenging Annexure-S and T and the consequential demand in terms of Annexure-V.

2. Notice was issued and the respondents entered appearance. They have filed a detailed counter statement objecting to every one of the contentions urged by the petitioner. According to them, the amendment was necessitated in the light of the policy of the Government. The original certificate issued to the petitioner is by virtue of a mistake having been committed by the Department of Industry and Commerce. It does not take away the alleged benefit conferred by the Industrial Policy. They also refer to the policy to contend that the petitioner is not entitled for any exemption. They further say the condition of additional capacity is essential for additional sales tax exemption. According to them, if there is no additional capacity, no concession can be granted in terms of the policy. Their further contention is that the non-collection of tax by the petitioner cannot be a ground to set at naught the original certificate. They justify their action. They have also filed Annexure-R1 in support of their contention. During the pendency

of the proceedings, the respondents have chosen to further amend the certificate on 24-I -2003. The said certificate is also filed at Annexure-A. An application was filed seeking permission of the Court to amend the prayers. The same is allowed.

3. Petitioner is represented by Sri. T. Andhyarujana, learned Sr., Counsel. He elaborately argued before me to contend that injustice is meted out to his client. Learned Counsel took me through the factual position to contend that certificate issued on an earlier occasion has become final and binding on the department. He refers to me the operative portion of the Division Bench judgment in the petitioner's case to contend that liberty was reserved only to rectify the certificate in case of any factual error. According to learned Counsel, there are no factual errors available on record and that therefore according to him the amended certificate runs counter to the direction issued by this Court. Petitioner also complains that the decision with regard to capacity is contrary to the policy of the State Government itself. Their further submission is that the amended certificate has been issued without referring to the certificate issued by the District Industries Centre to contend that investment was made to meet the power requirement and that therefore the question of additional capacity would not arise on the facts of this case. Limiting the concession on additional production is unsustainable according to petitioners. They further say that a further amendment has been carried out contrary to the direction of this Court. He complains that the corrigendum of the Joint Director dated 24-7-2002 is also in violation of the Division Bench order. According to petitioner, the exemption for investment in captive power is referable if there is additional capacity created out of investment. Captive Power plant has been installed to meet the power shortage and that cannot create any additional capacity. The General Manager on 8-8-1995 has stated that the petitioner is suffering from want of power. Therefore the Industrial Policy particularly, the condition (e) in Annexure-C of the Industrial Policy and Explanation II (iii) is not applicable.

4. Per contra, learned Government Advocate invites my attention to the material facts to contend that the Policy of the Government is to provide benefits "not to all but to a few" to meet the conditions in terms of the policy. He states that the grant of concession granted earlier runs counter to the conditions and that therefore they are obliged to issue an amended certificate. He supports the amendment in the light of the policy of the Government. Learned Government Advocate says that the Courts have very little say with regard to the policy of the Government. He wants the petition to be dismissed.

5. It is an admitted fact before me that the petitioner is a Company manufacturing Cement in Gulbarga District. The State Government with an object to accelerate industrial development offered concession in terms of the earlier policy dated 12.7.2003. In the policy it is stated that the power generation shall be given top priority. Towards the same, concessions were offered to private sector units who undertook for captive power generation. It provided for incentives for installation of equipment towards captive power

generation. Clause 3.1 of the Policy reads as under:

3.1 Captive Power units shall be taken up as a part of original. cost, eligible for sales tax concessions. This is applicable to all units in Zone-II and III and specified categories in Zone-I, Sales tax and other incentives for existing units setting up captive generation sets would be limited to investment made on such generation set. In terms of GO No. DE 97: PPC 92 dated 8.6.1992 package of incentives to provide entrepreneurs who set up new industrial units in the State shall also be extended to the private entrepreneurs who set up power projected, treating them as new industrial unit for the purpose of extension of these incentives."

Clause (II) of the Order of the Government provides for sanction of the incentive and concession subject to certain conditions. Clause II (a) provides for creation of maximum possible additional employment opportunities and provide minimum 80% of employment to local people. The incentives and concessions according to the order is applicable only to all new and additional investments made on or before issue of this Government Order. It further says that these incentives and concessions shall also be available for investments made for expansion, diversification and modernisation, but limited to the extent of additional capacity created out of such investment. Petitioner submitted an application on 10-2-1995 with regard to incentives and concessions for new industrial investment in Karnataka along with an application. Petitioner produced the annexures in terms of the requirement. Petitioner submitted a revised application. A Chartered Accountant's and an Engineer's certificate were enclosed. Thereafter on 8-8-1995, the General Manager, District Industries Centre, noticing the application of the petitioner recommended to the Commissioner for Industrial Development that the petitioner be awarded the eligibility certificate in terms of the Policy. Thereafter the Government of Karnataka issued a certificate dated 16-1-1995 in the matter of exemption. Petitioner in terms of the exemption availed sales tax concession on 19-4-1996 and endorsement in terms of Annexure-J was issued by the respondent. It is stated therein that the petitioner/ company had not created any additional capacity and that therefore petitioner is not eligible for tax exemption on sale of cement. Petitioner filed his return and also submitted a reply to the Deputy Commissioner explaining their stand in the matter. They have stated in para 4 and 5 of their reply as to how incentive is available on the existing capacity of the unit. A very detailed reply was submitted by the petitioner. Thereafter respondent passed a provisional assessment orders for various months. In the light of the provisional assessment order and the consequential demand, petitioner filed Writ Petitions in this Court in WP Nos. 29825-829/1996. A learned Single Judge of this Court by a detailed order ruled that the sales tax authorities have the necessary power and jurisdiction to reject the certificate granted by the SLC. It may not be out of place to mention here, that the petitioner strongly relied on the certificate issued to them in the matter of concession. Aggrieved by the order of the learned Single Judge, dismissing the petitions, petitioner filed Writ Appeal No. 108-112/1997. In the meanwhile, a

Division Bench of this Court in somewhat similar circumstances in WIPRO INFOTECH LTD. v. ADDL., DY COMMRO OF COMMERCIAL TAXES 2000 (117 STC 244) ruled that the certificate is binding on the department and the department can only correct the factual error on the face of the record after notice and hearing. In the light of this order, Division Bench of this Court in WA No. 108-112/1997 filed by the petitioners set aside the order of the learned Single Judge and the assessment orders and consequential demands and in the order liberty was reserved to the respondent to correct any factual either on the face of the record or otherwise, after notice and after hearing the petitioner.

5.2. After Division Bench judgment, a notice dated 11/18-2-1999 was issued to the petitioner seeking insertion in the original certificate. They wanted to amend the certificate by inserting Clause 4 (a) readings as under;

"4(a). The Tax exemption (both under, KST Act 1957 and CST Act 1956) shall be limited to quantum of tax payable on additional production created by the unit for a period of five years from 10-4-1995."

The exemption was referable to additional production created i.e., the capacity. The amended certificate made substantial changes, the initial Clause 4 was deleted and Clause 4(a) was introduced. Thereby the tax exemption was limited to quantum of tax payable on additional production created by the unit for a period of 5 years from 10-4-1995. Petitioner submitted a detailed reply in the light of the Division Bench judgment. Written submissions were also filed by the petitioner. Thereafter, the SLC in its proceedings on 74th meeting issued the show cause notice and thereafter amended the certificate. Demand notice has been issued. Petitioner aggrieved by the same filed the present Writ Petition seeking for various prayers as referred to above in earlier paragraphs. Notice was issued and respondents as mentioned earlier entered appearance and opposed the petitioner, During the pendency of the petition the certificate was further amended reading as under;

"The tax exemption (both under KST Act 1957 and CST Act 1956) shall be limited to quantum of tax payable on additional production over and above the average of three years production immediately prior to installation of DG Sets resulting due to. Additional investment by the unit for the period of five years from 10-4-1995."

5.3. An amendment application is filed seeking for quashing of the same. Amendment is allowed.

5.4. Let me see as to whether this amendment of the certificate after the order of the Division Bench in writ appeals filed by the petitioner can be accepted on the facts of this case.

6. Learned single Judge of this Court in WP No. 29825-829/96 filed by the petitioner by a detailed order ruled that the respondents are right in not accepting the exemption certificate issued to the petitioner. Learned Judge

dismissed the writ petitions. Writ Appeals were filed by the petitioner in W.A.Nos. 108-112/1997. The Division Bench while considering the petitioner's case noticed the observations made by the Division Bench in Wipro's case in similar circumstances, reading as under;

"20. Keeping in view the statutory provisions, the legislative intendment and the stand taken by the contesting parties, we hold that the assessing authority under the Act, for the purposes of determining the eligibility and the entitlement, is legally bound to accept the factual aspects which are to be covered by a certificate required to be issued and produced before him as per the procedure laid down under the notification including the amount of investment which is certified to be eligible for the said purpose.

22. It is also necessary to be clarified that if the assessing officer discovers any factual error either apparent on the face of the record or even otherwise, then, he can request the concerned officers of the industry department to rectify the certificate after hearing the industrial unit concerned. We also find it advisable to observe that if the concerned officer does not take prompt or desired action in the matter, then the Commissioner of Commercial Taxes, at his level, can refer the matter to the State Level Committee whose decision has been given a finality under Clause (k) of the Government Order reproduced above."

and thereafter has passed the following order.

"10. Appeal is accepted and the order of the Single Judge is set aside. Writ Petition is allowed. It is held that the Sales Tax Officer is bound by the certificate issued by the Industries Department under the new industrial policy. The assessment framed by the Assessing Authority to the extent that it includes sales tax on the exempted items is set aside. The demand notices issued for payment of exempted sales tax are also quashed. However, we reserve liberty to the Sales Tax Officer in terms of paragraph-22, of the Division Bench judgment extracted above to approach the concerned officer of the Industries Department if he is of the opinion that any factual error either on the face of the record or otherwise has crept in while issuing the certificate. If the Sales Tax Officer files such representation with the concerned officers of the Industries Department then the officers of the Industries Department on prima facie satisfaction of the objections raised by the Sales Tax Officer, may issue notice to the appellant to show cause as to why the certificate issued earlier be not recalled/amended. Appellant shall be given sufficient opportunity to counter the show cause notice. Thereafter it shall be open to the concerned officers of the Industries Department to either reaffirm its earlier certificate or to withdraw/modify the same in accordance with law. Till the order is withdrawn or modified, the Sales Tax Officer remains bound to accept the certificate."

(underlining is mine).

7.2 After the Division Bench order, notice, has been issued by the respondent and in the notice it was stated that they would like to issue an amended

certificate and that therefore the petitioner is to submit an explanation. It may be necessary to notice at this stage, that the Division Bench while passing the order had reserved liberty to the Sales Tax Officer in terms of Paragraph 22 of the Wipro's case, to approach the concerned officer of the Industries Department if he is of the opinion that any factual error or otherwise has crept in while issuing the certificate. The material on record would show that there is no such finding in terms of para 22 of the Wipro's case by the Sales Tax Officer. On the other hand, a notice has been issued by the Commissioner for Industrial Development without there being an opinion by the Sales Tax Officer when this show cause notice was issued a very detailed objection has been filed by the petitioner contending inter alia that the said amendment runs counter to the Division Bench judgment. Personal hearing was given and thereafter the impugned endorsement has been issued. It is very necessary to quote the original certificate issued by the authorities.

"4. The unit is located at Zone-11 as per Government Order No. CI 140 SPC 93, Bangalore dated 12-7-1993 and eligible for 80% Sales Tax Exemption i.e., both KST and CST on Sale of finished goods for a period of 5 years from 10-4-1995 under Expansion Programme i.e., the date of commencement of Commercial production as evidenced by the unit letter dated 12-6-1993, and limited to Rs. 30.40 Crores (rupees thirty Crores and forty lakhs only) being 80% of the accepted investment of Rs. 38.00 Crores made on fixed assets under expansion programme."

Instead of the above paragraph 4, the following new paragraph 4 and 4(a) was added.

"4. (I) The unit located at Zone II as per Government order No. CI 140 SPC 93 Bangalore dated 12-7-1993;

(II) The unit is eligible for exemption of KST and CST to the extent of Rs. 30.40 Crores (80% of the investment of Rs. 38.00 Crores made on fixed assets in installing the power generation set) on the sale of finished goods for a period of 5 years from 10-4-1995;

The amended paragraph reads as under;

"The tax exemption (both under KST Act 1957 and CST Act 1956) shall be limited to quantum of tax payable on additional production over and above the average of three years production immediately prior to installation of DG Sets resulting due to additional investment by the unit for the period of five years from 10-4-1995."

6.3 The amendment on the facts of this case as rightly pointed out by the learned counsel for the petitioner cannot be termed as a factual error warranting any amendment. It virtually alters the picture of the certificate itself. Certain rights in terms of the earlier Certificate (paragraphs No. 4) are taken away and a new condition of additional capacity is introduced by the respondent. This cannot

be treated as a factual error as ruled by the Division Bench in the petitioner's case "Factual error" cannot be a virtual "rechange" order withdrawing the benefits as has been done in the case on hand.

Let me see as to why this amendment is introduced in Annexure-T, the 74th SLC proceedings. An argument was advanced as a matter of fact that the earlier committee heard the matter but a subsequent committee passed the order without hearing the petitioner. Learned Senior Counsel further states that they are not keen on any further hearing that they would be satisfied if Annexure-T is considered in the light of the Division Bench judgment of this Court in WIPRO case.

8. Let me see as whether Clause 4(a) as has been introduced in the case on hand, is sustainable in law.

9. It is seen from the proceedings at Annexure-T that Subject No. 3 deals with the petitioner's case. The facts have been noticed at pages 301 to 304. The authorities have considered the petitioner's case at page 305 as under;

"The contentions are met as below:

The main aspect of the argument is that the department is authorised (by the Hon'ble High Court of Karnataka in order in Writ Appeal 108-112/1997) only to effect modification of "factual error" and this would not authorised withdrawal of the certificate. This is not well founded since "factual error" would encompass all aspects permitted by the Industrial Policy 1993-98. The certificate dated 16-1-1996 issued by the Industries Department did not make proper appraisal of the applicability of the sales tax exemption only to the extent of the additional capacity obtained from the investment made in establishing the captive power plant. The said investment would amount to expansion of the unit and therefore the omission of mention of this aspect in the certificate dated 16-1-1996 is only a mistake of fact and is not beyond rectification. Thus the proposed notice dated 11/18-2-1999 is well within the powers authorised to be exercised by the authority concerned as it amounts to only rectification of mistakes.

The three different situations made out of Clause 3.1 of Annexure-B to the Industrial Policy 1993-98 are not correct since the clause has to be read in totality and not in piecemeal. The scheme envisaged in the said clause 3.1 is that the investment in captive generation set (for entitlement of the sales tax exemption) should be either as a part of the investment of the new industry or that of expansion since the words employed in the said clause are "and considered as part of original cost". Only upon this criteria being fulfilled, then the extent of the availability of the sales tax and other concessions is set out in the second part of the above clause in cases where investment is made towards setting up of the captive power generation sets by the existing industries. This benefit is envisaged to be limited to the extent of the investment made and limited only to the extent of additional capacity created out of such investment. This view is valid for the reason that Clause (e) of part II of Annexure-C of the

GO envisaging the restrictions and conditions is of general application to all the incentives and concessions envisaged in the GO and it cannot be understood to be applicable for one situation and as not applicable to another situation as is sought to be made out by disjointly reading the contents of Clause 3.1. Further the contention that Clause 3.1 provides for incentives for investments in captive generation sets is a stand alone provision and the same is not governed by the condition set out in Clause (e) of part II of Annexure-C is incorrect, since Clause (e) of part II of Annexure-B of the GO has to be read conjointly with Clause 3.1 of the GO and not in isolation. Thus read, it is clear that the sales tax exemption and other incentives are available even to the existing units taking up expansion/modernization programme by making investments for setting up of captive power generating sets, but limits to the extent of additional capacity created out of such investment made for installing captive generation set.

The use of the expression "also" is required to be understood as a term providing for extension of the benefit of incentives and concessions for expansion/diversification and modernisation but limited to the additional capacity created out of such investments and the contention that this expression "also" has applicability independent of situation (2) made out (as noted earlier) of Clause 3.1 of the GO is not applicable. In this view of the matter, this contention is not acceptable.

The contention that in South India Paper Mills Ltd.'s case the 56th State Level Committee meeting has approved that the entire investment made in captive power generation sets is eligible for grant of incentives and concessions and now the SLC cannot take a different stand appears misunderstood for the following reasons; Firstly, this piece of information is extraneous to the company's case and cannot be taken up since the facts and circumstances of that case are not brought out. Further considering for a moment the facts in that case are similar to that of the present case, it is open to the authorities concerned to cause rectification of the mistaken stand. This being so, the support sought to be drawn by the company in this regard is of no avail.

The argument that the company cannot be made to pay the demand with retrospective effect with the proposed action of the withdrawal off the certificate, as it had not collected tax is of no avail. This is for the reason that the company was not made aware about the liability quite in time by the sales tax authorities in their proposal of provisional assessments during the relevant period. The sales tax authorities had issued notice holding that the certificate issued by the Director of Industries is not in conformity with the industrial policy GO dated 12-7-1993 and the consequential FD notification to this GO hearing No. FD171 CSL 93 (I) dated 28-8-1993 and ED I CSL 95(1) dated 11-10-1995.

The challenge made in WP No. 29825-829/1996 of this action of the sales tax authorities did not find favour with the Hon'ble Single Judge who in order dated 29-11-1996 upheld the action of the sales tax authorities of the provisional assessment for the months of April, May, June and July 1996. The Hon'ble Judge

held that the sales tax officer need not blindly accept the incomplete certificate and also held that the company was entitled for the benefit of the incentive to the extent of the. creation of Additional production capacity on the quantum of the investment made in setting up captive power generating set."

10.1 The authorities have noticed the entire policy and they have thought it fit to amend the certificate in the proceedings. A reading of this amendment would show that it is nothing but a re-decision and not factual error in terms of the Division Bench judgment. Re-decision on errors on facts is different from re-decision by way of fresh adjudication. The latter decision on adjudication changes the entire picture and colour of the certificate. Even this re-decision is based on the findings at page No. 307 to 309. The committee has noticed the order of the learned Single Judge in the Writ Petitions filed by the petitioner at page 307. It noticed the findings of the learned Judge at para 20 for the purpose of amending the certificate in the guise of correcting the factual error in terms of the Division Bench judgment. The committee notices the finding of the learned Single Judge that the exemption is to be on the basis of additional production capacity. The committee noticed that the learned Single Judge's order was challenged in Division Bench. While noticing the Division Bench judgment the Committee observed as under in page 307;

"This order of the Hon"ble Single Judge was taken up in WA and in the judgment dated 2-9-1998 in WA No. 108-112/1997 the only aspect considered was about the acceptance of the certificate issued by the Director of Industries. In this judgment, the Court relying on the judgment of the Division Bench in WA No. 3791/97 dated 17-3-1998 which is much later to the Single Judge order dated 29-11-1996 in this case is- Writ Petition No. 29825-829/96 in the case of Wipro Infotech Ltd., held that the dispute about the certificate issued by the Director of Industries could only be sorted out by approaching the said authority and it is not open to the Sales Tax Authority to reject the certificate. In this judgment it is held that,

"Thereafter it shall be open to the concerned officers of the Industries Department to either reaffirm its earlier certificate or to withdraw/modify the same in accordance with law. Till the order is withdrawn or modified, the Sales Tax Officer remains bound to accept the certificate."

The finding given by the Hon"ble Single Judge in the order dated 29-11-1996 as to the extent of applicability envisaged in the GO dated 12-7-1993 in that the sales tax exemption is available only to the additional capacity created out of the investment expansion/diversification/modernisation made by the unit establishing the captive generation set is found not set aside in the judgment dated 2-9-1998 of the Division Bench in the Writ Appeal No. 108-112/1997.

In view of this, the finding of the Hon"ble Single Judge is of utmost bearing on the issue and therefore the proposal to withdraw the certificate is in accordance and within the scope of the GO dated 12-7-1993 and therefore it cannot be said

that the company would be fastened with a retrospective liability."

10.2 A reading of this finding would show that this subsequent development after remand by Division Bench is factually unsustainable in law. It is factually incorrect to say that Division Bench of this Court in the Writ Appeal filed by the petitioner was only considering the acceptance of the certificate. As a matter of fact, the Division Bench in its order has set aside the order of the learned Single Judge in its order. When the Division Bench judgment in the very petitioner's case has set aside the order of the learned Single Judge, the committee could not have and ought not to have taken into consideration the judgment of the learned Single Judge as has been done in the case on hand. Once an order is set aside, that order has no legality or enforceability in law. In terms of the Division Bench judgment it would mean that the finding of the learned Single Judge in the case of the petitioner cease to be available for anybody. The Division Bench judgment has become final. Hence the respondents are bound to follow the Division Bench judgment and they cannot dilute it in any manner. In my view, the committee has proceeded to consider the judgment of the learned Single Judge which has been set aside after remand in a manner unknown to law and has proceeded in a wrong direction in relying on the decision of the learned Single Judge which has been set aside by the Division Bench judgment thereby arrived at wrong conclusions because of a wrong path adopted by it.

10.3 It is also to be seen that when a judgment of the Supreme Court has been cited by the petitioner, the same has not even been properly considered except saying that the said case is distinguishable on facts. In fact at pages 308 and 309, the committee has not followed the dictum of the Supreme Court in the case of Birla Jute and Inds. Ltd. Vs. State of M.P. and Another, on the ground that the petitioner is agitating before this Court in one forum or the other. This is not a correct approach expected of a high powered committee consisting of highly placed officials. The committee has failed to notice that the petitioner was successful in the appeal in this Court, Availing a legal remedy cannot be found fault with by the committee, and that therefore the finding on the question of litigation is unsustainable in law.

10.4 It is also interesting to notice that the committee has relied on the judgment of this Court in WP. No. 7112/98. In the said judgment, this Court has noticed that if the investment has already been made, prior to coming into force of the notification dated 11-10-1995, in terms of the notification dated 28-8-1993, the benefit of exemption cannot be denied giving effect to the notification dated 11.10.1995 retrospectively. In the case on hand, admittedly, investment has been made by the petitioner prior to 11-10-1995. After noticing the same, the respondents deny the benefits following the notification dated 11-10-1995. This again is a legal error committed by the respondent. On this ground also this Court has no option but to set aside the amended certificate. The amendment certificate in my view is factually and legally unsustainable in the light of Division Bench judgment on the facts of this case. There are no

factual errors shown to me in terms of the Division Bench judgment. Looking from any angle, I am of the view that, this Court has to come to the aid of the petitioner in the light of the Division Bench judgment. In these circumstances, I have no hesitation in setting aside the impugned amended certificates issued by the Department.

10.5. During the pendency of the proceedings, the respondents notwithstanding stay of further proceedings have chosen to further amend the certificate thereby further restricting the concession. The subsequent amendment, which is again challenged in this petition, provides for exemption limiting the quantum of tax payable on additional production over and above the average of three years production. When the matter is seized by this court-and when stay has been granted by this Court, it is un-understandable to me as to how a corrigendum to the amended certificate can be issued in respect of amendment that is challenged in this Writ Petition. I express my displeasure in the matter and it is hoped that the respondents do not repeat such acts and Rule of Law prohibits such acts in maintaining its dignity for orderly society.

11. At this stage, I must notice that concessions and incentives are granted for better growth of industries in the State. These are all incentive measures for the betterment of economic growth of the State. Parties act on promise and abide by it. After several long years, if those assessments are again reopened, it may not be possible for them to retrace the steps taken by them (industry). I do not mean that concessions cannot be withdrawn in a given certificate but it should be on sound principles and in exceptional cases such as factual errors as pointed out by the Division Bench in Wipro's case. As otherwise, sanctity of a certificate of high powered committee would lose its respect and credibility. In this regard it is necessary to notice the judgment of the Supreme Court in the case of Birla Jute and Inds. Ltd. Vs. State of M.P. and Another, . The Supreme Court in para 8 has ruled as under.

"There was, in our view, no jurisdiction for reviewing the said certificate long after the term thereof had expired and, there fore, long after its benefit had been availed by the appellant or (sic not) at all. The view taken by the High Court in the judgment to which we have referred to is correct, and is borne out by the decisions of this Court aforementioned."

The committee without even noticing the law on the subject has chosen not to consider the same. There is no justification in the case on hand, to review an amended certificate after several long years This judgment supports the petitioner.

12. I have also gone through the original file made available to me. I do not find any factual errors in terms of the Division Bench judgment not warranting my interference.

13. In the result, this petition is allowed. The impugned orders are set aside. Any payment made by the petitioner is ordered to be refunded to the petitioner by

the State in accordance with law.

14. I would have imposed costs but for the factum of drought situation faced by the State. No costs.