

(2003) 08 SHI CK 0011

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 812 of 2001

Associated Cement Cos. Ltd. and Another

APPELLANT

Vs

State of H.P. and Others

RESPONDENT

Date of Decision : 19-08-2003

Acts Referred:

Income Tax Act, 1961 — Section 15C, 15C(6)

Citation : (2003) 3 ShimLC 264

Hon'ble Judges : R.L. Khurana, J

Bench : Single Bench

Advocate : A.N. Haksar, K.D. Sood and U.A. Rana, for the Appellant; M.S. Chande, General, Ashutosh Burathoki, A.A.G. for Respondents No. 1 to 3 and Baldev Singh, Additional Central Government Standing Counsel for Respondent No. 4., for the Respondent

Final Decision : Allowed

Judgement

R.L. Khurana, J.—The Petitioner is a public limited company duly incorporated under the companies Act. It has set up two Industrial Unit, known as Galgal Cement Works (Units No. 1 and 2) at Barmana in District Bilaspur. for the purpose of manufacture of cement the Petitioner gets raw material from outside the State and the finished product, that is, cement is transported outside the State.

2. The first unit, that is, unit No. 1 was established and commissioned in the year 1984 while the second unit, that is, Unit No. 2 was established and commissioned with effect from 15.9.1994. This second Unit came to be registered in the year 1995 with effect from 15.9.1994.

3. Respondent No. 4 has framed a scheme known as "Transport Subsidy Scheme, 1971 (for short the Scheme). This scheme came into effect in the State of Himachal Pradesh with effect from 24.8.1971. It was to remain in operation till March, 1979. However, the operation of the Scheme came to be extended from time to time. It was last extended till 31.3.2007 vide notification dated

25.5.2000.

4. The Scheme provides for disbursement of a subsidy on transport of raw material(s) as well as finished goods. The Scheme is applicable to both new industrial Units as also the existing Industrial Units in the selected area. The Industrial Units of the Petitioner are registered under the Scheme and as such eligible for the Transport Subsidy. The Petitioner has been granted transport subsidy in full in respect of its Unit No. 2 for the period 15.9.1994 till 30.6.1997 and part subsidy for the period 1.7.1997 to 30.9.1997. No subsidy has been granted after 30.9.1997. Not only that disbursement of transport subsidy was stopped, Respondent No. 4 has started steps for the recovery of the subsidy amount paid to the Petitioner for the period 15.9.1994 to 30.9.1997 by issuing a notice dated 4.2.2003 (Annexure P-49).

5. It appears that the Comptroller and Auditor General (for short : CAG) in its report for the year ending March, 2000 (copy Annexure R-4/ IV) raised an objection as to the disbursement of subsidy in favour of the Petitioner in respect of its Unit No. 2 by treating it as a separate and new Unit. CAG was of the opinion that Unit No. 2 was not a new and separate Unit. Rather it was a case of substantial expansion of Unit No. 1 for the following reasons:

(i) Unit Nos. 1 and 2 are located at the same place and use the same infrastructure and office facilities. It is not possible to identify or segregate the raw material being brought in and the finished goods exported;

(ii) Unit No. 2 belongs to the same company and was doing exactly the same business of Unit No. 1 and functioning from the same premises;

(iii) The ownership of both the Units is the same and only one consolidated balance sheet is prepared taking capital of the two Units together;

(iv) The sale tax registration and Pollution Control Certificate issued by the State Authorities do not distinguish between the two units;

(v) In January, 1993, the Petitioner Company had filed an Industrial Entrepreneur Memorandum (IEM) for effecting substantial expansion of the Unit at Gagal from 7.60 lakh tons per annum (LTPA) to 10 LTPA. Though Unit No. 2 is claimed as a new Unit, the date from which commercial production was to start remained the same, viz., 31.10.1993. It appears that the Petitioner company was seeking to take advantage of the Transport Subsidy Scheme for an extended period, as a proposal to restrict the subsidy to a maximum period of five years was under consideration of the Ministry at that time;

(vi) The minimum gestation period for a new cement plant to commence production normally is not less than two to three years. It is not clear how Unit No. 2, which is being claimed as a new Unit, could commence production within a period of 18 months. This can be achieved only when it is a case of substantial expansion;

(vii) In the meeting convened on 26.6.2000 by the Department of Industrial Policy and Promotion (DIPP) to consider whether Unit No. 2 was to be treated as a separate unit or a case of substantial expansion, officials of the State Government and representatives of the Petitioner company also took part. The issue relating to payment of Transport Subsidy was to be sorted out between DIPP and the State Government. In such circumstances, the propriety of the Petitioner-Company participating in the meeting was questionable; and

(viii) The Transport Subsidy Scheme seeks to promote the development of industry in remote and inaccessible areas. The intention of the Scheme is to grant subsidy for a period of five years whereafter the Unit becomes selfsufficient to meet its transportation costs in full. Units cannot undertake substantial expansion and claim to be new Units for the purpose of Transport Subsidy.

6. Having to observed CAG in its report held that payment of Rs. 30.22 crores made to the Petitioner company was incorrect and that the amount was required to be recovered immediately.

7. It further appears that Respondent No. 4 referred the matter to the Attorney General for opinion on the question-whether Unit No. 2 of the Petitioner Company would qualify to be treated as a new Industrial Unit under the Scheme?

8. The Attorney General vide his opinion dated 23.12.2002 (Annexure R-4/IV) after reproducing the factual features detailed by CAG in its report, opined:

In my opinion the cumulative effect of the above factual features, even after excluding the aspect of consolidated balance sheet, inevitably leads to the conclusion that Gagal II unit is not a new Industrial Unit. It is a case of substantial expansion of existing Gagal-I Unit. Apparently ACC was seeking to take advantage of the Transport Subsidy Scheme for an extended period, because a proposal to restrict the subsidy to a maximum period of five years was under consideration of the Ministry at that time.

In my opinion, Gagal-II Unit of ACC cannot be regarded as a new Unit. Consequently Gagal-II Unit is not entitled to Transport subsidy and payment Transport Subsidy on the basis that Gagal-II is a new Unit was erroneous and unwarranted in law.

9. It is in pursuance of the report of CAG and the opinion of the Attorney General that notice dated 4.2.2003 (Annexure P-49) came to be issued by Respondent No. 2 calling upon the Petitioner to refund the amount of Transport Subsidy received by it earlier.

10. Aggrieved by the stoppage of Transport Subsidy and the notice dated 4.2.2003, the Petitioner is before this Court by way of the present writ petition seeking the issuance of appropriate writ, order or directions to the Respondents :

(a) to implement the scheme and grant Transport Subsidy to the Petitioner for the period 1.7.1997 to 14.9.1999;

(b) to restrain the Respondents from effecting recoveries, in any manner, of the amount of subsidy already paid to the Petitioner; and

(c) to quash and set aside the demand notice dated 4.2.2003 (Annexure P-49).

11. The sole question arising for determination is whether Unit No. 2 of the Petitioner is a separate and new Unit within the meaning of the Scheme and entitled to Transport Subsidy?

12. It may not be out of place to quote here para 6(xv) of the Scheme:

Directorate of Industries of the State and Union Territories concerned will lay down a system of preregistration of Industrial Units which are eligible for Transport Subsidy. At the time of registration, the Directors of Industries will fix and indicate the capacity of such Units. They will also lay down procedure to ensure regular inflow of information regarding the movement of raw material and finished goods to and from the Industrial Units. The Directorate of Industries of the States and Union Territories should also lay down that statistics of production and utilisation of raw materials should be maintained and kept open for inspection on request by Directorate of Industries.

13. Respondent No. 4 in its reply affidavit has admitted that Unit No. 2 of the Petitioner came to be treated and registered by the State Government as a new Unit and sanctioned/disbursed Transport Subsidy on the following grounds/reasons:

(a) It had separate Central Excise Registration Number;

(b) A separate Sales Tax Certificate was issued by the H.P. Sales Tax Authority on 13.3.1995 with effect from 15.9.1994;

(c) It was considered as a separate factory by the State Labour Department;

(d) Separate power load was sanctioned and separate power meter(s) were installed by the State Electricity Board for Unit No. 2 to regulate the power supply to the said unit;

(e) The unit was exempted from electricity duty for a period of nine years with effect from 15.9.1994 by the Chief Electrical Inspector under the State Incentive Rules, 1991;

(f) Clearance was granted by the State Pollution Control Board for setting up Unit No. 2;

(g) The Petitioner is maintaining separate RG-I and other registers in respect of Unit No. 2, under the Excise Rules for raw materials, production and finished goods, which records are being verified by the Directorate of Industries from time to time;

(h) The plan layout of unit No. 2 has been approved by the Central Excise Department; and

(i) Unit No. 2 has been exempted from both Central Sales Tax (CST) and General Sales Tax (GST) for a period of nine years from the date of commencement of commercial production.

14. Respondent No. 4 has further admitted that subsidy was being disbursed by DIPP periodically and the last disbursement of Rs. 10,02,046 was made on 29.9.1999. Total disbursement of subsidy in respect of Unit No. 2 till date has been to the tune of Rs. 30,31,68,301.

15. It is also evident from the reply affidavit of Respondent No. 4 that it took the stand before the CAG that Unit No. 2 of the Petitioner was a separate and new unit and as such was entitled to subsidy under the Scheme. However CAG did not accept the stand taken by the Respondent.

16. The stand taken by Respondents No. 1 to 3 in their reply affidavit is that the scheme proceeding for transport subsidy is a centrally sponsored scheme being implemented by the concerned State Government. The Respondents No. 1 to 3 are only acting as implementing agency for and on behalf of Respondent No. 4. Whatever amount was received from Respondent No. 4 for disbursement as transport subsidy stood disbursed and that further disbursement would be made only on the receipt of amount of subsidy from the Respondent No. 4. It was pleaded that deand notice dated 4.2.2003 (Annexure P-49) was issued on the direction of Respondent No. 4 vide letter dated 9.1.2003 on the basis of the report of CAG and the opinion tendered by the Attorney General of India.

Para 6(xvii) of the Scheme (Annexure P2) provides:

Notwithstanding the provisions of the Scheme, Government of India and/or the Government of the State/Union territories have full discretion to refuse to entertain or reject any claim for transport subsidy.

Relying upon the said powers, it was vehemently argued by the learned Counsel for Respondent No. 4 that the Government under the said provision has vast discretion to reject the claim for subsidy. Therefore, no fault can be found if the claim of the Petitioner for subsidy in respect of unit No. 2 has been rejected.

17. Dealing with the said provision in *The Associated Cement Companies Ltd. Vs. Union of India (UOI) and Others*, a Division Bench of this Court has held that when an authority is vested with the discretionary powers, such discretion is not to be exercised in an arbitrary manner. It has to be exercised in a judicious manner and reasons are required to be recorded therefor.

18. In the present case, it is significant to note, that the claim of the Petitioner for transport subsidy under the Scheme has never been rejected by the competent Authority acting under para 6(xvii) of the Scheme (Annexure P2). There is no order of the competent Authority rejecting the claim of the Petitioner with regard to grant of subsidy under the Scheme and/ or to recover the amount of subsidy already paid/dispursed to the Petitioner under the scheme in respect of Unit No. 2. The Respondents appear to have acted by stopping the subsidy

and initiating the steps for recovery of the amount of subsidy already paid/ disbursed merely on the basis of the report of CAG and the opinion of the Attorney General. Neither CAG nor the Attorney General is the authority to act under para 6(xvii) of the Scheme. Therefore, neither the report of CAG nor the opinion of the Attorney General can be said to be an order passed under para 6(xii) of the scheme.

19. It is further significant to note that even before CAG while meeting its objections, the stand taken by Respondent No. 4 was that Unit No. 2 of the Petitioner was treated, registered and recognised as a separate and new unit and thus eligible for the grant of subsidy. It has been averred by Respondent No. 4 in their reply affidavit while replying to paras 3 to 8 of the Petitioner as under:

In October, 2000, office of the principal Director of Audit, New Delhi has observed that the Unit (Gagal-II) cannot be treated as a new unit and that it should be considered as an expansion of the existing unit and, therefore, the sum of Rs. 30.22 crore reimbursed by the DIPP to the Government of Himachal Pradesh as transport subsidy in respect of the claim of ACC for Gagal Unit-II treating it as a separate and new unit, for the period 1.4.1995 to 1997, was irregular and requires recovery. Copy of letter of office of Principal Director of Audit dated 24.10.2000 is placed as Annexure R-4/II.

The Department of IPP in its reply dated 28.11.2000 informed the Principal Director of Audit that it has been established that Gagal-II unit of ACC is a separate unit, having distinct entity from Gagal-I unit and is eligible for transport subsidy.

20. It was further averred that reply of DIPP was not accepted by CAG and the matter came to figure in the report of CAG.

21. Thus, once Respondent No. 4 itself has recognised and treated Unit No. 2 of the Petitioner as a separate and new unit, it is not open to it to contend that Unit No. 2 is not a separate and new Unit and that the same is only a substantial extension of Unit No. 1, unless the recognition/registration of Unit No. 2 as a separate and new Unit was rescinded/ revoked/cancelled by the competent Authority acting under para 6(xvii) of the Scheme.

22. Para 4(a) of the Scheme defines "Industrial Unit" as meaning an industrial Unit where a manufacturing programme is carried on.

23. "New Industrial Unit" has been defined under para 4(b) of the Scheme as meaning an industrial unit which has been set up manufacturing capacity and comes into production on or after the date of commencement of the scheme.

24. In *Textiles Machinery Corporation Ltd., Calcutta v. Commissioner of Income Tax, West Bengal* 1997 (2) SCR 762, a case under the Income Tax Act, the Petitioners therein sought exemption u/s 15C of the Act on the ground that it was a newly established industrial undertaking whereas the case of the Income Tax authorities was that it was a case of expansion of an existing Industrial Unit,

it was held:

The Assessee continues to be the same for the purpose of assessment. It has its existing business already liable to tax. It produced in the two concerned undertakings commodities different from those which he has been manufacturing or producing in its existing business. Manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit is the heart of the matter, to earn benefit from the exemption of tax liability u/s 15-C. Sub-section (6) of the section also points to the same effect, namely, production of articles. The answer, in every particular case depends upon the peculiar facts and conditions of the new industrial undertaking on, account of which the Assessee claims exemption u/s 15-C. No hard and fast rule can be laid down. Trade and industry do not run in earmarked channels and particularly so in view of manifold scientific and technological developments. There is great scope for expansion of trade and industry. The fact that an Assessee by establishment of a new industrial undertaking expands his existing business, which he certainly does, would not, on that score, deprive him of the benefit u/s 15-C. Every new creation in business is some kind of expansion and advancement. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the Assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business. No particular decision in one case can lay down an inexorable test to determine whether a given case comes u/s 15-C or not. In order that the new undertaking can be said to be not formed out of the already existing business there must be a new emergence of a physically separate industrial unit which may exist on its own as a viable unit. An undertaking is formed out of the existing business if the physical identity with the old unit is preserved. This has not happened here in the case of the two undertakings which are separate and distinct.

(Emphasis supplied)

25. The above ratio was reiterated in *The State of Gujarat and Others Vs. Saurashtra Cement and Chemical Industries Ltd.*,

26. Applying the test laid down in *Textile Machinery Corporation's* case (supra), it may be noticed that Unit No. 2 is a self contained and an independently viable unit. It is not dependent on any item of Unit No. 1. It is assessed to Central Excise and Sales Tax as an independent Unit. Thus, the only inevitable conclusion is that Unit No. 2 is a separate and independent unit and as such entitled to transport subsidy under the scheme.

27. As a result, the present petition is allowed and the Respondents are directed to pay the outstanding amount of transport subsidy as is admissible to the Petitioner under the Scheme within three months from today. The demand notice dated 4.2.2003 (Annexure P-49) is quashed and set aside. The Respondents are restrained from effecting recovery from the Petitioner in pursuance of the said

notice.

28. No interest is being awarded on the outstanding amount as claimed by the Petitioner since neither there is any provision for payment of such interest in the scheme nor the learned Counsel for the Petitioner has been able to bring to the notice of this Court any provision entitling the Petitioner to such an interest.

Parties are left to bear their own costs.