(2007) 01 JH CK 0048

In the Jharkhand High Court

Case No : Writ Petition (T) No. 6163 of 2006

Atibir Hi-Tech Pvt. Ltd. APPELLANT

Vs

State of Jharkhand and Others RESPONDENT

Date of Decision : 11-01-2007

Acts Referred:

- Bihar Electricity Duty Act, 1948 — Section 2
- Bihar Electricity Duty Rules, 1949 — Rule 14(4), 3, 3A, 4
- Bihar Reorganisation Act, 2000 — Section 85
- Constitution of India, 1950 — Article 226, 288
- Damodar Valley Corporation Act, 1948 — Section 58
- Electricity (Supply) Act, 1948 — Section 5
- Electricity Act, 1910 — Section 24, 24(1), 28, 3, 3(1)

Citation : (2007) 1 BLJR 840 : (2007) 1 JCR 598

Hon'ble Judges : M.Y. Eqbal, J;D.K. Sinha, J

Bench : Division Bench

Advocate : M.S. Mittal, A.K. Yadav, N.K. Pasari and J.S. Pasari, for the Appellant; S.B. Gadodia, General, Dilep Jerath and T. Kabiraj, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—In this application under Article 226 of the Constitution of India, the petitioner M/s. Atibir Hi-Tech Pvt. Ltd has prayed for quashing the order dated 3.3.2006 issued by the Deputy Commissioner of Commercial Taxes, Giridih Circle, Giridih, whereby petitioner''s application elated 27.1.2006 for cancellation of registration certificate issued under Rule 4 of the Bihar Electricity Duty Rules, 1949 and for refund of the amount realized by way of electricity duty has been rejected and a direction has been issued to the petitioner to make payment of electricity duty together with surcharge.

2. The petitioner is an industry having Induction Furnace and Rolling Mill at Mohanpur in Giridih said to have been set up in 1998. The petitioner purchases electricity from Damodar Valley Corporation for the purposes of its industry under the agreement executed between the Damodar Valley Corporation being

the licensee and the petitioner company. The petitioner-company started its commercial activities from November, 1998. The petitioner''s case is that under ill-advice, the petitioner applied for registration as an assessee under Rule 3 of the Bihar Electricity Duty Rules, 1949 and on 9.12.1999 the petitioner-company was registered under Rule 4 of the Bihar Electricity Duty Rules, 1949 and a registration certificate was issued on 4.1.2000 making the petitioner-company liable to pay duty for distribution and/or consumption of energy from 7.11.1998. The petitioner''s further case is that since the respondents-Commercial Taxes Department has been wrongly and illegally realizing electricity duty and surcharge from the petitioner-company, it filed an application for cancellation of registration which was rejected by the impugned order. The Deputy Commissioner of Commercial Taxes, Giridih by notice dated 8.4.2006 directed the petitioner to deposit the amount of Rs. 3,47,708/- on account of electricity duty due upto November, 2005 and also directed to file statement of returns of electricity duty payable by the petitioner-company. The petitioner''s case is that it was not obliged to pay duty directly to the State and the Deputy Commissioner of Commercial Taxes illegally rejected the application for cancellation of registration.

3. In the counter affidavit filed by the respondents-Commercial Taxes Department, firstly it was contended that the impugned order passed by the Deputy Commissioner of Commercial Taxes is revisable and the petitioner can file revision before the Joint Commissioner of Commercial Taxes, Hazaribagh under Rule 14(4) of the Bihar Electricity Duty Rules, 1949. The respondents'' case is that the petitioner voluntarily filed application for registration along with copy of agreement dated 28th August, 1998 entered into with DVC for bulk purchase of electricity energy. In terms of the agreement, electricity duty or any other levy imposed by the Government of West Bengal or the Government of Bihar or the Government of India or any other competent authority in respect of energy generated by the Corporation and purchased by the petitioner from DVC shall be paid by the petitioner. It was stated that the petitioner has been regularly filing returns for the bulk purchase of electrical energy horn DVC and paying electricity duty. In any case, the petitioner is liable to pay electricity duty under the Act and the Rules.

4. In the counter affidavit filed by respondent No. 6 DVC, it is stated that the provisions of Electricity Act and the Electricity Duty Act are not applicable so far the present case is concerned. The petitioner and the respondent-DVC are governed by the Damodar Valley Corporation Act, 1947. It was further stated that as per the agreement entered into between the petitioner and the Damodar Valley Corporation, the former is liable to pay the duty and all taxes to the competent authority.

5. Mr. M.S. Mittal, learned Counsel appearing for the petitioner, assailed the impugned order passed by Deputy Commissioner of Commercial Taxes as being illegal and wholly without jurisdiction. Learned Counsel firstly submitted that in

view of definition of a licensee u/s 2(d) of the Bihar Electricity Duty Act, 1948, the petitioner cannot be said to be a licensee. Learned Counsel submitted that in view of Rule 3 of the Bihar Electricity Duty Rules, 1949, only an assessee is liable to be registered for payment of electricity duty. The petitioner, cannot be forced to be an assessee and to pay electricity duty directly to the State Government. Learned Counsel put reliance on the decisions of the Supreme Court in the cases of Damodar Valley Corporation Vs. State of Bihar and Others, , The Tata Iron & Steel Co. Ltd v. The State of Bihar and Ors. 1993 (2) PLJR 59, Bihar Alloy Steels Ltd. v. State of Bihar and Ors. 1996 (1) PLJR 824 and, Steel Authority of India Ltd v. State of Bihar 2002 (2) JCR 72 SC.

6. Mr. S.B. Gadodia, learned Advocate General, referred Rules 3 and 3A of the Electricity Duty Act and submitted that the petitioner is liable to pay electricity duty and also surcharge. According to him, DVC is not a licensee but a bulk-purchaser. Learned Advocate General further submitted that under Rule 4(a), the petitioner is liable to pay electricity duty. Learned Advocate General relied upon a decision of this case of Steel Authority of India Ltd v. State of Bihar 2002 (2) JCR 72 SC.

7. Mr. Dilep Jeratha, learned Counsel appearing for the DVC, on the other hand, submitted that Section 58 of the Damodar Valley Corporation Act overrides the effect of the Electricity Duty Act and the Rules. According to the learned Counsel, as per Clause 16 of the agreement, the petitioner is liable to pay electricity duty.

8. Before appreciating the rival submissions made by the learned Counsels, it would be useful first to refer some of the relevant provisions of the Act relating to payment of electricity duty and surcharge.

9. The Bihar Electricity Duty Act, 1948 was enacted for the purpose of levy of duty on the sales and consumption of Electrical Energy. This Act has been adopted by the State of Jharkhand by Notification dated 22nd December 2000 in exercise of power conferred by Section 85 of the Bihar Re-organization. Act, 2000 Section 2(b) and 2(d) of the Act defines the word "Consumer" and "Licensee" which reads as under:

2(b) ''Consumer'' means any person who is supplied with energy by a licensee, but does not include either a licensee or the ''distributing licensee'' as described in Clause 1(a) of Clause IX of the Schedule to the Indian Electricity Act, 1910 (9 of 1910), or a person who obtained sanction u/s 28 of the said Act;

2(d) ''licensee'' means any person, including a company or a local authority licensed under Part II of the Indian Electricity Act, 1910 (IX of 1910) to supply energy, or any persons including a company or a local authority who has obtained sanction u/s 28 of the Act to engage in the business of supplying energy and includes the Bihar Electricity Board constituted u/s 5 of the Electricity (supply) Act, 1948 (54 of 1948);

10. From plain reading of the word "Consumer" it is clear that consumer means

any person who is supplied with energy by a licensee but does not include either a licensee or distributing licensee. The ''Licensee'' has been defined as any person including a company or a local authority licensed under Part II of the Indian Electricity Act, 1910 to supply energy, or any person including a company or local authority who has obtained sanction u/s 28 of the Act to engage in the business of supplying energy and includes the Electricity Board. Section 28 of the Electricity Act reads as under:

Section 28-No person, other than a licensee, shall engage in the business of supplying energy to the public except with the previous sanction of the State Government and in accordance with such condition as the State Government, may fix, in this behalf, and any agreement to the contrary shall be void.

(IA) The State Govt. shall not give any sanction under Sub-section 1:

(a) except after consulting the State Electricity Board:

and

(b) except with the consent-

(i) in any case where energy is to be supplied in any area for which a local authority is constituted, of that local authority;

(ii) in any case where energy is to be supplied in any area forming part of any Cantonment, Aerodrome, Fortress, Aresenal, Dockyard, or Camp or any building or place in the occupation of the Govt. for defence purposes, of the Central Govt.;

(iii) in any area within the area of the supply of a licensee, or that licensee;

Provided that except in a case failing under sub-clause

(iii), no such consent shall be necessary, if the State Govt. is satisfied that such consent has been unnecessarily withheld.

(2) Where any difference or dispute arises as to whether any person is or is not engaging, or about to engage, in the business of supplying energy to the public within the meaning of Sub-section (1), the matter shall be referred to the State Govt. and the decision of the State Govt., shall be final.

11. Section 3 of the Act deals with the incidence of the duty and provides that a duty shall be levied and paid to the State Government on the unit of energy consumed or sold excluding losses of energy in the transmission and transportation. Section 3 reads as under:

Section-3 Incidence of duty-(1) Subject to the provisions of Sub-section (2), there shall be levied and paid to the State Government on the units of energy consumed or sold, excluding losses of energy in the transmission and transformation a duty at the rate or rates specified in the Schedule.

(2) No duty shall be leviable on units of energy-

(a) consumed by the Government of India, or sold to the Government of India, for consumption by that Government;

(b) consumed in the construction, maintenance, or operation of any railway company operating that railway, or sold to that Government or any such ''railway company for consumption in the construction, maintenance or operation of any railway;

(c) consumed by the licensee in the construction, maintenance and operation of his electrical undertaking;

(d) consumed by or sold by any class of persons exempted from payment of duty u/s 9;

(c) consumed by the Dantodar Valley Corporation for the generation, transmission or distribution of electricity by that Corporation;

(f) consumed for any purpose which the State Government may, by notification, in this behalf declare to be a public purpose and such exemptions may be subject to such conditions and exemptions, if any, as may be mentioned in the said notification.

(3) When a licensee holds more than one licence, duty shall be payable separately in respect of each licence.

12. Section 3A of the Act as stood prior to Amendment Act 2 of 2003 was a charging section which is quoted herein below:

Section-3A-Surcharge-(1) Subject to the provisions of Clauses (1),(b) and (c) of Sub-section (2) of Section 3, every licensee for every other person other than the licensee who is liable to pay duty u/s 4 shall pay, in addition to the duty payable under Sub-section (1) of Section 3, surcharge at the rate of two paise per unit of energy consumed or sold;

(2) Notwithstanding anything to the contrary contained in this Act, no licensee, [or other person] who is liable to pay surcharge, shall be entitled to collect the amount of this surcharge as such from the consumer;

(3) All provisions of this Act and the Rules framed there under, relating to the payment, assessment, recovery and refund of the duty shall also apply to the payment, assessment, recovery and refund of the surcharge.]

13. Section 4 lays down the provisions with regard to payment of duty, which reads as under.

Section. 4-Payment of duty-(1) Every licensee shall pay every moth to the [State] Government, at the tine and in the manner prescribed the proper duty payable u/s 3 on the units of energy consumed by him or sold by him to the consumer.

(2) Every licensee may recover from the consumer the amount which falls to be

paid by the licensee as duty in respect of the energy sold to the consumer.

(3) The licensee may, for the purpose of Sub-section 2, exercise the power conferred on a licensee by Sub-section (1) of Section 24 of the Indian Electricity Act, 1910 (9 of 1910) for the recovery of any charge or sum due in respect of energy supplied try him.

(4) Every person including any department of the State government other than a licensee, who generates energy for his own use or for the use of his employees, or partly for such use and partly for sale, shall pay every month at the time and in the manner prescribed the proper duty payable u/s 3, on the units of energy consumed by him or his employees or sole by him.

(4a) Every person other than a licensee who obtains for sale or partly for his own use and partly for sale, bulk supply of energy generated by a licensee or other person shall pay every month to the State Government at the time and in the manner prescribed, the duty payable u/s 3 on the units of energy so obtained and sold or partly sold and partly consumed by him.]

14. From bare reading of the aforesaid provisions, it is manifestly clear that duty shall be levied and paid to the State Government on the unit of energy consumed or sold at the rate specified in the schedule. Section 4 of the Act specify and prescribes the manner of payment of duty. According to this provision, every licensee shall be liable to pay duty on the unit of energy consumed by him or sold by him to the consumer. The duty is also payable by every person including department of the State Government who generates energy for his own use or for the use of his employee or partly for such use and partly for sale in the manner prescribed u/s 3 of the Act. The duty is also payable by a person who obtained bulk supply of energy generated by a licensee for sale or partly for its own use or partly for sale. Sub-section (2) of Section 4 provides that every licensee may recover from the consumer the duty in respect of the energy sold to the consumer.

15. The question that falls for consideration before this Court has been answered by the learned Single Judge and the Division Bench of the Patna High Court and this Court.

16. I would first like to discuss the decisions of the Supreme Court in the case of Damodar Valley Corporation v. State of Bihar and Ors. (surpa), the question that arose for determination before the Supreme Court was as to whether the appellant- DVC is liable to pay electricity duty under the Bihar Electricity Duty Act, 1948 as amended by the Bihar Electricity Duty (Amendment) Act, 1963. Their Lordship took notice of the fact that DVC was established under the Damodar Valley Corporation Act, 1948 for the development of Damodar Valley in the State of Bihar and West Bengal. One of the functions of the DVC is the promotion and operation of the schemes for the generation, transmission and distribution of hydroelectric and thermal electrical energy. Answering the question in affirmative, their Lordship observed:

9. What is required by Clause (2) of Article 288 is that the law made by the State legislature for imposing, or authorizing the imposition of tax mentioned in Clause (1), shall have effect only if after having been reserved for the consideration of the president it receives his assent. Another requirement of that clause is that if such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order. It is, however, not the effect of that clause that even if the abovementioned two requirements are satisfied, the provisions which merely deal with the mode and manner of the payment of the aforesaid tax should also receive the assent of the President and that in the absence of such assent, the provisions dealing with the incidence of tax, which have received the assent of the President, would remain unenforceable.

17. In the case of The Tata. Iron & Steel CO. Ltd v. The State of Bihar and Ors (Supra) the petitioner-TISCO filed a writ petition praying for issuance of a writ of mandamus directing the respondent to refrain from realizing surcharge as contemplated u/s 3A of the Bihar Electricity Duty, 1948 on the electricity energy generated by the petitioner for its own use in its captive collieries. The fact of the case was that the petitioner-company installed a plant for generating electricity for the purpose of supply of electrical energy to its collieries. The case of the Company was that the electricity so generated was meant for captive consumption and not for the purpose of distribution to outsiders. The company was also purchasing electricity from DVC and from the Bihar State Electricity Board. It was contended that the petitioner company is neither a licensee nor a sanction holder within the meaning of Section 28 of the Indian Electricity Act 1910. The petitioner is, therefore, liable to pay surcharge in terms of Section 3A of the Act. The question that fell for consideration before the court was as to whether the petitioner company was liable to pay surcharge in terms of Section 3A of the Act. The Patna High Court holding that the petitioner-company cannot be treated either as a licensee or a sanction holder observed:

19. It, therefore, prima facie appears that at one point of time, the petitioner used to Supply electrical energy to the Jharia Water Board as also to Central Fuel Research Institute but from Annexures 11 and 12 to the reply of the petitioner to the counter affidavit filed on behalf of the respondents, it is evident that for a long time no such supply of electrical energy is being made. Assuming for the sake of argument, that the petitioner still supplies electrical energy to the said authorities, in my opinion, in view of the definition of a. licensee as contained in Section 2(c) of the said Act, it is evident that the petitioner is not a licensee within the meaning of the provisions of Indian Electricity Act nor is a sanction holder within the meaning of Section 28 thereof. The respondents in their counter affidavit have not annexed any copy of licence or sanction granted to the petitioner in terms of the provisions of the Indian Electricity Act, 1910. Even the number of such licence or sanction has not been disclosed. The contention of the respondents to the effect that the petitioner is a licensee is only on the basis of

the application for registration filed by it in the year 1949.

It is not the case of the respondents that any licence or sanction in fact had been granted to the petitioner in terms of the provisions contained in Part II of the Indian Electricity Act.

Their Lordships further observed:

25. The definition of the word ''licensee'' is absolutely clear and unambiguous. Thus, in absence of any document to show that the petitioner is either a licensee or a sanction holder within the meaning of Section 28 of the Indian Electricity Act, the question of its becoming liable to pay any surcharge does not arise.

From a perusal of the definition of licensee, it may be noted that obtaining of ''licence'' or ''sanction'' is required by a person in order to enable him to be engaged in the business of supply electrical energy.

26. Thus, even assuming that the petitioner had been supplying electrical energy illegally to others, it may be proceeded against under the provisions of the Indian Electricity Act, but it cannot be made to pay any surcharge for which it is not liable. It is, therefore, clear that the provisions of Section 3A of the said Act is not applicable. It is profitable to notice that only in this view of the matter, other persons generating electrical energy has also been made liable to pay surcharge by reason of Amending Act of 1990.

18. In the case of Bihar Alloy Steels Ltd. v. State of Bihar and Ors. (Supra) the facts of the case was that the petitioner-company is manufacturer of alloys, tools and special steels and it purchases electricity from DVC which is a licensee for the purpose of its industry under an agreement executed between DVC being a licensee and the petitioner-company as consumer. According to Clause 17 of the agreement, the petitioner- company which was a consumer was liable to pay electricity duty to the Government of Bihar on the electricity purchased by it from DVC. In that case also, the petitioner company got itself registered as an assessee under the provisions of Bihar Electricity Duty Rules 1949. Later on the petitioner company, realizing its mistake, filed an application before the respondent-Deputy Commissioner, Commercial Taxes for cancellation of registration. Subsequently, the Deputy Commissioner, Commercial Taxes, issued notice for payment of surcharge and the said action was challenged by the petitioner by filing a writ petition. Answering the question as to whether the petitioner-company is liable to make payment of electricity duty to the State of Bihar, a Division Bench of the Patna High Court held that the petitioner not being a licensee, is not required to pay electricity duty to the State Government. Their Lordships observed:

8. On behalf of the State, it has been submitted that the petitioner - Company is liable to pay duty u/s 3 of the Act. As stated above, Section 3 lays down incidence of duty on the units of energy consumed or sold. It further lays down that duty shall be levied at such rate as specified in the schedule appended to

the Act, but it is completely silent on the question as to who shall pay duty to the State Government. Section 4 specifies the persons, who are liable to pay duty to the State Government. So far the petitioner-Company is concerned, undisputedly, it being not a licensee is not required to pay duty to the State Government under Sub-section (1) of Section 4 The other two sub-sections under which various persons are required to pay duty are Sub-sections (4) and (4a) of this Section. According to the stand of the State, the petitioner-company is liable to pay duty to the State Government under Sub-section (4) of Section 4 as it is said that it was generating energy for its own use and for the use of its employees. In relation to this stand of the State taken in the counter affidavit, it was stated on behalf of the petitioner-company in affidavit under reply that for captive, use the petitioner-company produces a negligible quantity of electricity, which is neither used for consumption nor for sale. This stand of the petitioner-company in the affidavit under reply is supported by the various returns filed by it before the authorities, which have been enclosed as annexures ''A'' series to the counter affidavit filed on behalf of the respondents, upon which reliance has been placed on behalf of the State in support of the fact that the petitioner-company was generating electrical energy. From the returns aforesaid, it would appear that the petitioner-company was generating electricity in very negligible quantity, which would go to show that the same was for captive use only and was not meant either for consumption or for sale. As for example, from the returns filed in the month of January, 1987, it would appear that in that very month units generated by the petitioner-company were 1330; whereas the units purchased in bulk from DVC were 874000. This being the position, it cannot be said that the petitioner-company was generating energy either for its own use or for the use of its employees or for sale, therefore, it is not possible to hold that it is liable to pay duty to the State Government as required under Sub-section (4) of Section 4 of the Act.

19. On the question as to whether the petitioner company was liable to pay electricity duty observed:

Thus, from a conspectus of the aforesaid decisions, I am of the view that in the present case, dominant object of supplying the electricity to the employees was for rendering services as welfare measure and there was no relationship of seller and buyer between the petitioner-company and its employees, but relationship between them was that of master and servant and if as an incident of relationship of master and servant any electricity is supplied to the employees of the petitioner company to some extent free of charges and thereafter maintenance charge of electricity at the rate of twenty-five paise per unit from the wages of the employees is deducted, the said activity must be treated as part of wages and cannot come within the sweep of sale. Therefore, I have no hesitation in holding that the petitioner-company cannot come within the mischief of Sub-section (4a) of Section 4 of the Act.

Their Lordships further observed:

21. The next question which has to be considered, is as to whether the petitioner-company is liable to pay surcharge as required u/s 3A of the Act. According to Section 3A, every licensee or every other person, who is liable to pay duty u/s 4 of the Act, is liable to pay surcharge at the rate of two paise per unit of energy consumed or sold and the surcharge payable shall be in addition to the duty payable under Sub-section (1) of Section 3. The petitioner-company is undisputedly not a licensee and as laid down above, it does not come within the expression "every other person" as enumerated in Section 4 and consequently hot liable to pay duty u/s 4 of the Act. Therefore, it does not come within the mischief of Sub-section (1) of Section 3A of the Act and is, accordingly, not liable to pay surcharge to the State Government. That part, Sub-section (2) of Section 3A lays down that neither licensee nor any other person who is liable to pay surcharge, shall be entitled to collect the amount of surcharge from the consumer. From the aforesaid facts, it becomes plaint that the petitioner-company is a consumer within the meaning of Sub-section 2(b) of the Act. Therefore, DVC, which is a licensee, is not entitled to collect the amount of surcharge from ti on the quantum of energy sold in its favour in view of the legislative command upon the licensee or other person, who have been injuncted to recover the amount of surcharge from the consumer.

Thus, I hold that the petitioner-company is not liable to pay surcharge under the provisions of the Act and consequently, the proceeding taken against it by the authorities of the Commercial Taxes Department, Government of Bihar, for realisation of surcharge and orders of attachment of its bank accounts, contained in annexures 4, 5 and 6, are liable to be quashed and the amount of Rs. 20, 04, 361. 8.1 paise recovered by them from the banker of the petitioner company is liable to be refunded to it. Since the first two questions have been decided in favour of the petitioner-company, I do not find it necessary to deal with the other question raised in this case by learned Counsel appearing on behalf of the petitioners; as such, I refrain myself from deciding the same.

20. Mr. S.B. Gagodia, learned Advocate General produced before us a copy of the order dated 12.7.96 which shows that an application was filed by DVC for recalling/ reviewing /modifying the judgment passed by the Division Bench in Bihar Alloy Steels Ltd. v. State of Bihar and Ors. (Supra). From perusal of the order, it appears that the DVC filed application for modification of that part of the judgment whereby it was held that DVC is the licensee. After hearing the parties the judgment was modified only by deleting the finding that DVC is a licensee.

21. In the case of Steel Authority of India Ltd v. State of Bihar (Supra) the matter was referred by the Commercial Taxes Tribunal u/s 9D of the Electricity Duty Act 1948 to the Division Bench of this Court for deciding the question inter alia as to whether in view of provision u/s 3A(3) of the Bihar Electricity Duty Act the petitioner is exempted from levy of surcharge in case u/s (3)(2)(c) where under the petitioner is exempted from levy of electricity duty. The fact of the case was that Bokaro Steel Plant, a unit of the petitioner, Steel Authority of India

deals in the manufacturing of Iron and Steel. The petitioner generates electricity in its own captive power plants for utilizing the same in the manufacturing process in the steel plant. The petitioner also purchases power from DVC, which is partly utilized in the aforesaid manufacturing process and partly for its employees for their domestic use in the township maintained by it. The Division Bench answering the reference held that the petitioner-company is not liable" to pay duty. The Court observed:

12. It is the undisputed case of the parties before us that in terms of Clause (c) of Sub-section (2) of Section 3 of the Act, since the licensee (in our case, the petitioner) consumes electricity generated by it in its captive power plant for consumption therein itself and for the purpose covered by Clause (c) (supra), it is exempted from payment of duty by the force of exemption provision contained in Sub-section (2) (supra). We must hasten to clarify that we are dealing in this case only with such matter of energy consumption as it related to maintenance etc. and is consumed by the petitioner in the generation of power in its own captive plant. We are not dealing in this case with consumption of electricity for any other purpose. Therefore, what we find is that for such consumption of electricity in terms of Sub-section (2)(c) of Section 3 (supra), the petitioner is not liable to pay the duty. Viewed thus, we have now to find out if the petitioner in view of Section 3A of the Act is liable to pay surcharge or not on the units of electricity thus consumed.

22. So far the liability of payment of surcharge is concerned, their Lordships observed:

The offshoot of the discussion, therefore, is so far as question. No. (ii) is concerned, is that a reading of Section 3A of the Act clearly suggests that those licensees who are not liable to pay duty u/s 4 or who are not liable to pay duty on units consumed by them or sold by them can also not be made liable to pay surcharge on such units. In the present case, admittedly and undisputedly, the units of electricity forming the subject mater of this case which were consumed by the petitioner squarely fell within the ambit of Clause (c) of Sub-section (2) of Section 3 of the Act and, therefore, these being exempted from payment of duty in terms of Sub-section (2) of Section 3, the petitioner cannot be held liable to pay surcharge thereupon.

23. Having regard to the facts and circumstances of the case and the decisions quoted herein above, we are of the view that petitioner is not liable to pay duty and also not liable to pay surcharge.

24. For the aforesaid reasons, this writ application is allowed and the impugned order dated 3.3.2006 passed by Deputy Commissioner of Commercial Taxes, Giridih Circle, Giridih is set aside. Henceforth, petitioner shall not be liable to pay electricity duty and the surcharge thereupon. However, in the facts and circumstances of the case, the duty and surcharge is already paid by the petitioner shall not be refundable.

