

(2010) 05 GUJ CK 0053
In the Gujarat High Court

Case No : Special Civil Application No's. 373 and 6220 of 2001

Bharat Petroleum Corpn. Ltd.

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 06-05-2010

Acts Referred:

Bombay Electricity Duty Act, 1958 — Section 2
Explosives Act, 1884 — Section 3(1), 3(2), 5, 7
LPG Gas Cylinders Rules, 1981 — Rule 2

Citation : (2010) 05 GUJ CK 0053

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : GN Shah and Minoo A. Shah, for the Appellant; Government Pleader for Respondent 1 and 4 and Premal R. Joshi, for Respondent 3, for the Respondent

Final Decision : Allowed

Judgement

K.A. Puj, J.—The Special Civil Application No. 373 of 2001 is filed by Bharat Petroleum Corporation Ltd., praying for quashing and setting aside the communications dated 16.1.1999 and 9.3.1999 as well as the order passed by the respondent No. 4 on 3.1.2001. The petitioner has also prayed for declaration that the determination by the respondent No. 2 that the Industrial Undertaking of the petitioner at Hariyala is liable to be assessed at 60% of the consumption charges of electricity and for which no reason have been given and hence the said determination is void, illegal and have no legal effect.

2. The brief facts of the case are that the petitioner established (Liquid Petroleum Gas) LPG Bottling Plant at Hariyala, Taluka : Matar, Dist. Kheda on 14.4.1994. Right from its establishment the State Government has been treating the Industrial Undertaking of LPG Bottling Plant of the petitioner as an Industrial Undertaking u/s 2 of the Bombay Electricity Duty Act and collects electricity duty of 20% of electricity consumed by the petitioner every month. The respondent

issued notice on 14.5.1999 to the petitioner to revise this classification of the Industrial Undertaking for the purpose of electricity duty. Thereafter, as per the instruction of State Government, differential duty was demanded from the petitioner to the tune of Rs. 33,80,176.56 ps., failing which the power supply will be disconnected.

3. The petitioner filed Special Civil Application No. 3466 of 1999 before this Court challenging the communication dated 9.3.1999 demanding recovery of differential amount of electricity duty from the petitioner. The said petition was disposed of by this Court on 6.5.1999 directing the petitioner to file Appeal before the Appellate Authority within two weeks from the date of the said order and further directing to deposit 50% of the duty amount claimed from the petitioner. The petitioner filed an Appeal No. 2 of 1999 before the Appellate Authority which came to be dismissed on 3.1.2001.

4. Being aggrieved by the said order, the present petition was filed.

5. This Court has issued rule on 20.4.2001 and directed the petitioner to make the payment of remaining amount within a period of six weeks from the date of the said order and the respondents were restrained from disconnecting the electric supply. The Court has also made it very clear that the payments made and/or to be made by the petitioner shall be subject to the result of the petition and in case the amount paid by the petitioner would be ordered to be refunded to the petitioner, appropriate order as regards payment of interest would be passed by the Court. Pursuant to this order, the petitioner made payment of the remaining amount.

6. The Special Civil Application No. 6220 of 2001 is filed by Hindustan Petroleum Corporation Ltd., seeking declaration that the determination by the respondent No. 2 that the Industrial Undertaking of the petitioner at Village : Piludar is liable to be assessed at 60% of the consumption charges of electricity is void, illegal and of no legal effect and also praying for quashing and setting aside the communication dated 23.11.1998 and directing the respondent to refund the differential amount of electricity duty illegally collected from the petitioner.

7. The brief facts of the case are that the petitioner has established its LPG Bottling Plant at Village : Piludra, Taluka : Ankleshwar, Dist. Bharuch and the petitioner was paying electricity charges and electricity duty at 20% of the consumption charges. The petitioner made an application to the respondents for exemption from payment of electricity duty on 29.4.1998. The petitioner provided all necessary details on 7.5.1998 regarding various processes carried out by the petitioner at the plant. The petitioner has also provided information on 15.5.1998 regarding manufacturing process of LPG Bottling Plant sought by the respondents. On 10.7.1998 further details regarding the manufacturing process carried out by the petitioner were provided. Despite this fact, in November, 1998 the petitioner was informed by respondent No. 1 that electricity duty at 60% of the electricity consumed would be charged as the activities undertaken at the

plant fall under the residuary clause. On 23.11.1998, the petitioner was called upon to pay with retrospective effect from January, 1997 to January, 1998 electricity duty at 60% amounting to Rs. 8,27,278.62 ps. No opportunity was given to the petitioner and only with a view to avoid disconnection the said payment was made under protest and, thereafter the present petition was filed.

8. This Court has issued rule on 17.8.2001 and directed to be heard alongwith Special Civil Application No. 373 of 2001 and Special Civil Application No. 5400 of 2001.

9. Ms. Minoo A. Shah, learned advocate appearing for the petitioners in both these petitions, has submitted, over and above adopting the arguments canvassed by Mr. Nanavati in Special Civil Application No. 5400 of 2001, that the petitioners have obtained the registration of Industrial Undertaking. They have also obtained necessary licenses from the Controller of Explosives, Baroda under the provisions of the Explosives Act for storing compressed gas in pressure vessels. There is no dispute about the fact that the petitioners' undertakings are Industrial Undertakings as defined u/s 2(bb) of the Act. The manufacturing process is also being done at the plant of the petitioner. Bulk LPG is stored in plant of the petitioners and manufacturing process of refilling of LPG in cylinder is carried out at the LPG Bottling Plant. The Government of India in exercise of powers conferred by Sections 5 and 7 of the Indian Explosives Act, 1884 has made rules known as Gas Cylinder Rules, 1981. The Rule 2, Sub-clause-xxv defines the expression "manufacturing of gas" as under:

manufacturing of gas means filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder.

She has, therefore, submitted that filling of LPG Gas Cylinder is evidently a process of manufacture and, therefore, the petitioners are Industrial Undertakings consuming high tension energy as provided by Section 3(1), Clause 5(a) of the Schedule to the Act and as such the respondents had initially correctly levied duty at 20% of the consumption charges.

10. Ms. Shah further submitted that the Act does not authorize the Assessing Officer to change the classification of the consumer of electricity, once such classification has been made by the Assessing Officer. The action of the Assessing Officer in changing the classification is arbitrary, illegal and also opposed to principle of natural justice. Even otherwise, the Assessing Officer cannot change the classification with retrospective effect, once the classification has already been made and electricity duty has been paid and collected accordingly.

11. Ms. Shah has further made an alternative submission without prejudice to her main submission that the plant of the petitioner is an Industrial Undertaking, that the activities carried out at the plat of the petitioners would fall under the activities of a "service undertaking" as defined in Section 2(bb)(a) of the Act. The plant can be deemed to be a service undertaking as the activity of the plant includes reconditioning, restoring, reserving or cleaning LPG received in bulk at

the plant and subsequently producing LPG filled cylinders by using carousel type auto filling system after reconditioning, repairing, restoring etc., for making it usable for domestic, commercial or industrial purposes and prior to such activities the petitioner is preserving LPG Gas in bulk at storage tanks till the aforesaid processes are carried out. She has, therefore, submitted that the action of the respondent authorities demanding the differential duty from the petitioners is required to be quashed and set aside.

12. Ms. Shah has further submitted that even otherwise the issue is concluded by the recent decision of this Court rendered on 25.11.2009 in the case of Vadilal Gases Pvt. Ltd. v. State of Gujarat Special Civil Application No. 9691 of 2000 wherein the Court after considering the nature of process undertaken by the petitioner took the view that the petitioner unit is a manufacturing unit within the definition of the Act and hence the petitioner is required to pay only 10% duty charges and not 60% charges as demanded by the respondent. The Court further held that the finding of the authority that there is no manufacturing process is without any basis. The Court has allowed the petition and quashed the order passed by the respondent authorities and respondents were directed to credit the excess payment made by the petitioner in the future bills. She has, therefore, submitted that since these two cases are identical with the said case, the petitions deserve to be allowed and the respondent authorities are directed to refund the amount with interest.

13. An affidavit-in-reply is filed on behalf of Electricity Company. Mr. Premal Joshi, learned advocate appearing for the respondent - Electricity Company has submitted that electricity consumption of the petitioners falls under Item No. 7 of Schedule-I to the Act as the activities of LPG refilling carried out by the petitioners does not get covered under definition of Industrial Undertaking or service undertaking as per Section 2(bb) or 2(ee) of the Act respectively. As such the petitioners are not covered under the definition of Industrial Undertaking and, therefore, question of exemption from payment of electricity duty as per Section 3(2)(vii)(b) does not arise. He has further submitted that during the course of inspection it was noticed that energy was consumed by the petitioner Company through HTP connection over and above of LPG refilling only at their plant and no manufacturing activity as defined in Section 2(bb) of the Act was carried out by the petitioners. The petitioners were thereafter given show cause notices and differential duty was demanded.

14. Mr. Joshi further submitted that the petitioners received bulk LPG through pipeline directly from ONGC, Ankleshwar and ONGC, Hazira in their factory. There are no predominant manufacturing activities. The only activity carried out by the petitioners is simply refilling of the LPG. The said activity is nothing else but simply refilling of the LPG which is required to be viewed accordingly. Since no predominant manufacturing activities are carried out by the petitioner and LPG manufacturing activity is carried out by the petitioner and LPG manufacturing activity is carried out by other public sector undertaking, namely, ONGC,

Ankleshwar and ONGC, Hazira ad only refilling is done by the petitioner, they cannot claim the benefit of being an industrial undertaking. He has, therefore, submitted that the respondent authorities have rightly demanded the electricity duty at the rate of 60% from the petitioners.

15. Mr. Joshi further submitted that the definition of Industrial Undertaking in the present case is required to be applied under the Bombay Electricity Duty Act, 1958 only. The definitions of Industrial Undertaking under other Acts i.e. Factories Act, 1948 or the Indian Explosives Act, 1948 has no relevance. The important factor for levy of electricity duty is based on the nature of consumption defined under Part-I of Schedule-I to the Bombay Electricity Duty Act, 1958 and hence the rate of electricity duty is applicable to the petitioner under Item No. 7 as a residuary clause.

16. Having heard the learned advocates appearing for the parties and having considered their rival submissions in light of the statutory provisions and decided case law on the subject and having judiciously examined the decisions/orders under challenge, the Court is of the view that the respondent authorities are not justified in collecting/adjusting and/or enforcing the recovery of electricity duty at the rate of 60% by reclassifying the electrical energy consumed by the petitioners for their activities. The Court has at length discussed this issue in Special Civil Application No. 5400 of 2001 decided today and for the reasons stated and findings recorded therein, the petitions deserve to be allowed and are accordingly allowed.

17. Apart from the said reasoning, one more point which is in favour of the petitioners is that as per the definition of "industrial undertaking" given in Section 2(bb) of the Act, the petitioners' activities fall within the ambit of this definition. The Government of India in exercise of power conferred by Sections 5 and 7 of the Indian Explosives Act, 1884 has made Rules known as Gas Cylinder Rules, 1981. The Rule 2, Sub-clause-xxv defines the expression "manufacturing of gas" which means filling of a cylinder with any compressed gas and also includes transfer of compressed gas from one cylinder to any other cylinder." Thus, filling of LPG Gas Cylinder is evidently a process of manufacture and, therefore, the petitioners are Industrial Undertakings consuming high tension energy as provided by Section 3(1) and Clause 5(a) of the Schedule to the Act and as such the respondents had initially correctly levied duty at 20% of the consumption charges.

18. The petitioners' claim is further supported by the decision of this Court in the case of Vadilal Gas Pvt. Ltd. v. State of Gujarat Special Civil Application No. 9691 of 2000 decided on 25.11.2009 wherein the Court after considering the nature of the process undertaken by the petitioner took the view that the petitioner unit is a manufacturing unit within the definition of the Act and hence the petitioners require to pay only 10% duty charges and not 60% charges as demanded by the respondent.

19. In the above view of the matter, the communication dated 16.1.1999 and 9.3.1999 as well as the order passed by the respondent No. 4 on 3.1.2001 in Special Civil Application No. 373 of 2001 are hereby quashed and set aside. Similarly the communication dated 23.11.1998 demanding the differential duty from the petitioner of Special Civil Application No. 6220 of 2001 is hereby quashed and set aside.

20. In the above view of the matter, the respondent authorities are hereby directed to grant the refund of the amount paid by the petitioners against differential duty, with 9% interest per annum forthwith under intimation to the petitioners. It is, however, open for the respondent authorities to adjust this amount of refund against future liability of the petitioners towards electricity duty, under intimation to the petitioners.

21. Subject to the above direction and observation, these two petitions are accordingly allowed. Rule is made absolute to the above extent without any order as to costs.