(2014) 04 CAL CK 0005

In the Calcutta High Court

Case No : W.P. 19690 (W) of 2014

BMA Stainless Ltd. and Others APPELLANT

Vs

The State of West Bengal and Others RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Bengal Electricity Duty Act, 1935 — Section 2(1) 3 3(2) 7B
Electricity Act, 2003 — Section 13 14 184 3

Citation : (2015) 4 CHN 627

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Lakshmi Kumar Gupta, Sr. Advocate, Shyamal Sarkar, Rajesh Gupta, Amitabha Mitra, Billodal Bhattacharya, Dolan Dasgupta and Snehasis Sen, Advocate for the Appellant; Abhrotosh Majumdar and Prithu Dudhoria, Advocate for the Respondent;

Final Decision : Disposed off

Judgement

Harish Tandon, J.

1. The letter dated 16th June, 2014, issued by the Government of West Bengal, Directorate of Electricity Duty through Secretary, Finance Department, Government of West Bengal as the unit enjoying the benefit under the West Bengal Incentive Scheme, 2014, having engaged in the business of manufacture iron and steel items by using electric furnaces, which consumed more that 80% of the total consumption of electricity cannot be charged with the duty at the rate of 5% on net charge for energy consumed.

2. Since, the point raised in this writ petition was purely a question of law, which was decided to dispose of the writ application without calling for the affidavit.

3. Before proceeding to address the core issue, the salient facts are narrated hereinbelow:-

The petitioner No. 1 established the manufacturing unit for production of iron and steel items at Kalyaneswari in the district of Burdwan. To make the final products of electric furnaces in the state, unit was installed which according to the petitioner consumed more than 80% of total consumption of electricity.

4. On an application with Damodar Valley Corporation (hereinafter referred to as DVC,) high voltage energy was catered to the petitioner No. 1 and, therefore, it is not in dispute that the relationship of consumer and supplier was established. After the promulgation of the Electricity Act, 2003, the DVC was treated as a licensee under Section 14, fourth proviso, correspondingly the Bengal Electricity Duty Act, 1935, was also amended and the definition of the licensee, which stands after the amendment, means any person who is granted license or who is deemed to a licensee under Section 14 of the Electricity Act, 2003 and includes a person who is exempted under Section 13, eighth proviso to Section 14 or Section 184 of the Electricity Act, 2003.

5. The commercial production in the said unit started from July 3, 2006. The Government of West Bengal by notification dated 24.03.2004 framed a scheme, namely, the West Bengal Incentive Scheme, 2004 to extend the incentives for promotion of industries in the state. The object behind the said scheme was to promote and encourage the establishment of industrial products both in large and small scale sectors including the cottage and small scale industrial undertakings and the tourism unit within the state of West Bengal. The units which are eligible under the said scheme is clearly defined in the definition clause, i.e. clause 3(XVIII).

6. It is undeniable that the petitioner No. 1 was found eligible under the said scheme and was granted exemption from payment of electricity duty for a period of five years with effect from 03.07.2006 on the entire energy consumption save and respect of premises used for residential purposes. After the exemption period is over, Chief Inspecting Officer, Electricity Duty, Government of West Bengal, Directorate of Electricity Duty issued an order dated 28.07.2011 directing the petitioner No. 1 to submit yearly audited cost statement of manufacture showing detailed calculation for examination of the conditions in Section 3(2) of the Bengal Electricity Duty Act, 1935, any default in submitting, the same shall attract withdrawal of an exemption and electricity duty shall be realized at the appropriate rate as per the provision of the said Act.

7. In the said order it was indicated that since the electrical energy consumed in heating the electric furnaces was more than 20% of the total cost of manufacture, a special rate of electricity duty at the rate of 5% of the net energy charge of the energy consumed at present for the purpose of heating the electric furnaces.

8. Subsequently by issuing the instant notification, the electricity duty was directed to be calculated at the rate of 15% on the net unit charge and the authorities contemplated to take steps for refund of the excess amount of incentives that was paid to the first petitioner under the said incentive scheme,

2004. The petitioner challenged the said order dated May 22, 2014, in WP 17953 (W) of 2014 before this Court. While disposing of the writ petition on 27.06.2014, this Court set aside the demand for refund of excess amount of incentives given to the petitioner without prejudice to the rights and contentions of the West Bengal Industrial Development Corporation Limited and Ors. and granted leave to the said corporation to claim the said amount in future, if occasion so arises. The Court directed the learned advocate appearing for DVC to hand over the letter dated 11.02.2006 together with all annexures containing the calculation within a week from the said date and the petitioner was permitted to make representation before the Executive Director, who was directed to pass a fresh order by putting the petitioner on notice and affording an opportunity of personal hearing.

9. According to the petitioner the bunch of letters, which were handed over in course of the earlier writ petition, contains the impugned letter dated June 16, 2014 by which the corporation was directed to calculate electricity duty at the rate of 15% on the net unit charge as per Bengal Electricity Duty Act and rules framed thereunder.

10. Both the learned advocate of the respective parties have relied upon the different provisions of the Bengal Electricity Duty Act, 1935, the West Bengal Duty on Inter State River Valley Authority Electricity Act, 1973 and the West Bengal Incentive Scheme, 2014 in support of their respective submissions.

11. The Bengal Electricity Duty Act, 1935 was enacted to levy a duty on electrical energy consumed in Bengal. Several amendments are brought from time to time by which the definition clauses are amended and certain provisions relating to the charging of the duty at a prescribed rate are introduced. The ''consumer'' define under Section 2(1) of the said Act means any person, other than a distributing licensee, who is supplied with energy by a licensee or by the state Government or by a generating company for the purposes of its own use, or who is consuming energy from own Captive generating plant. The definition of a ''licensee'' initially did not include the DVC which was brought by a notification dated 28.03.2008 as the fourth proviso to Section 14 of the Electricity Act, 2003, recognises the DVC as deemed licensee under the said Act. By virtue of reference of Section 14 the definition of a ''licensee'' under the West Bengal Electricity Duty Act, 1935 includes DVC.

12. Section 3 of the said Act which has a greater relevance in the present matter, are quoted below:

"3. (1) Subject to the provisions of (sub-section 3) there shall be charged, levied and paid to the State Government a duty (hereinafter referred to as ''electricity duty''), (on the net charge for energy consumed or the units of energy consumed, as the case may be) at the rates specified in the First Schedule.

Provided that during a period of one year with effect from-

(a) the 1st day of June, 1979, no electricity duty (net charge for energy consumed or the units of energy consumed, as the case may be) shall be payable by a person (other than a licensee) who generated energy from a diesel generating plant, or

(b) the 1st day of April, 1985, no electricity duty (net charge for energy consumed or the units of energy consumed, as the case may be,) shall be payable by a person (other than a licensee) who generates energy from a (coal-based generating plant, or)

(c) the 1st day of February, 1990, no electricity duty on the units of energy consumed shall be payable by a person (other than a licensee) who generates energy from a waste gas-based generating plant,

Registered under section 7B, for his own consumption for any industrial or manufacturing process (including cold storage and cinema houses), and for such other purposes as the State Government may, by notification in the Official Gazette, specify in this behalf.

Explanation.- For the purposes of this proviso, "own consumption" shall not include any consumption for domestic purposes:

Provided further that the State Government may, by notification in the Official Gazette, extend the period referred to in the first proviso from time to time but such extension shall not exceed a period of one year at a time.

Provided also that where any electricity duty is charged, levied or paid at the rates specified in any of the clauses of any article of Part C of the First Schedule, such duty may be charged, levied or paid, monthly for a period of three consecutive months on the basis of average monthly consumption during the three months immediately preceding the period as aforesaid, in such manner, in such areas, for such class of consumers and subject to such conditions as may be prescribed.

Explanation.- The expression "month" shall mean a period of not less than 25 days and not more than 35 days and shall be computed in the manner prescribed.

(2) (1) The special rate of duty referred to (sub-clause (ii) of clause (b) of article (2) of Part B of the First Schedule shall not be admissible unless-

(i) the cost of energy consumed for purposes of electrolysis or hearing in electric furnaces is twenty percent or more of the total cost of manufacture by electrolysis or heating in electric furnaces, and

(ii) separate books of account are maintained showing separately the details of the cost of energy consumed for purposes of electrolysis or heating in electric furnaces and the total cost of manufacture by electrolysis or beating in electric furnaces.

(b) An industrial undertaking claiming the benefits of the special rate of duty referred to (sub-clause (ii) of clause (b) of article (2) of Part B of the First Schedule shall make an application in writing to an officer specially appointed in this behalf by the State Government by notification in the Official Gazette and thereupon such officer shall, after giving the applicant in opportunity of being heard and after making such enquiry (if any) as he may thing fit, make an order,-

(i) if he is satisfied that the requirements of this Act and the rules made thereunder have been complied with, allowing the application, or

(ii) if he is not so satisfied, rejecting the application, and such order shall, subject to the provisions or clause (c), be final.

(d) The State Government may on application or of its own motion, revise any order made under clause (b).

(3) Electricity duty shall not be leviable (on the net charge for energy consumed or the units of energy consumed as recorded in the meter, as the case may be,-

(a) by any Government, except to the extent specified in the Second Schedule;

(b) by, or in respect of, any-

(i) local authority,

(ii) railway administration as defined in the Indian Railways Act, 1890."

13. The meaningful reading of the provision contained in the above quoted Section, it empowers the State Government to charge or levy electricity duty on the net charge for energy consumed or the units of energy consumed at the rate prescribed in first schedule. The proviso inserted to sub-section (1) of the said section a moratorium period for the electricity charge of a period of one year was given to a specified class of persons, the second proviso gives power to the State Government to extend the period whereas the third proviso clearly indicated the charging of the electricity duty on a periodical basis.

14. Sub-section (2)(a) postulates a special rate of duty referred to in sub clause (ii) of clause (b) of article (2) or part B of the first schedule provide the conditions specified in clause (i) and (ii) are specified.

15. Sub-section (3) which assumes great importance in view of the respective submissions of the counsels contains the provisions relating to exemption from payment of the electricity duty.

16. Sub clause (iii) of Clause (b) of sub-Section (3) of Section 3 includes the institutions or class of persons specified in second schedule, shall not be leviable to pay electricity duty on the net charge for energy consumed or the units of energy consumed as recorded in the meter, except to the extent specified in the Second Schedule. Clause 13 of the Second Schedule contains exemption from payment of electricity duty by a newly set up industrial unit, save in respect of premises used for residential purpose, for a period of five years from the date of first commercial production.

17. The explanation appended thereto clearly indicates that to avail the exemption under clause 13, ''a newly set up industrial units'' means an industrial unit which is established by its owner for the manufacture of goods in West Bengal for the first time on or after first day of April, 1993 under any scheme approved by the State Government.

18. The parenthesis behind the granting of exemption can be traced from the aforesaid provisions and it is undisputed that the petitioner was found to be eligible under the incentive scheme, 2004 and was granted exemption for a period of five years. Admittedly, the exemption period expired in the year 2011.

19. The dichotomy behind first schedule and the second schedule are well conceived of. The First Schedule prescribed the rate of electricity duty in respect of different persons or institutions. On the other hand, the Second Schedule, which is primarily the Schedule for extending, granting exemption to a specified class of persons or institutions. This exemption is not to run eternally as its life span is confined to five years. After the period of exemption enjoyed by a person or the institution, it is immediately exposed to the electricity duty as specified under first Schedule. This Court hasten to say that the State of West Bengal is competent to frame a scheme or in whatever nomenclature it is called, to exempt the payment of the electricity duty to such person or institutions which cannot be said to be in contravention to the provision of the said act.

20. It leads to another question what could be the rate of the electricity duty chargeable in respect of a unit set up by the petitioner No. 1. Clause B of the first schedule contains the different rates of electricity duty for the units set up for the industrial purposes. Sub-clause (2b) of Clause (b) of the first schedule prescribed 5% of the Electricity duty on the net charge for energy consumed through high voltage energy if it is for the purpose of cottage industry and small scale units or consumed through electrolysis or heating in electric furnaces, by any industrial undertaking and separate meters or sub-meters are installed for indicating the quantity of energy so consumed. Sub-clause (2)(a) prescribed 15% electricity duty to be charged for energy consumed where high voltage energy is consumed by a consumer in any premises in connection with industrial or manufacturing process including cold storage.

21. Two different rates of electricity duty provided under the said sub clause, one is in a broader sense and the other specifying a class of industry or the industrial undertakings. It gives sufficient indication that any financial undertakings in a specified class cannot be charged with the normal rate but such concessional rate provided therein.

22. Support can further be lent to Schedule VI under the first schedule appended to the West Bengal Duty on Inter State River Valley Authority Electricity Act, 1973 containing the similar rate of electricity duty where the high voltage energy is consumed for the purpose of the cottage industry, small scale sector industry, by any undertaking not being a factory as defined in the Factories Act, 1948, or

an industrial undertaking consuming high voltage energy by electrolysis or heating in electric furnaces provided separate meters or sub-meters are installed for indicating the quantity of energy so consumed. The explanation provided therein makes the position more clear and, therefore, it is apt to quote the same, which runs thus:

"Explanation II. -(a) The special rate of duty referred to in clause (ii) of article (b) of Section II. Section III, Section IV of Section V or sub-clause (ii) of clause (b) of article (2) of Section VI of this Part shall not be admissible unless-

(i) the cost of energy consumed for purposes of electrolysis or heating in electric furnaces, and

(ii) separate books of account are maintained showing separately the details of the cost of energy consumed for purposes of electrolysis or heating in electric furnaces and total cost of manufacture by electrolysis or heating in electric furnaces.

(b) An industrial undertaking claiming the benefits of the special rate of duty mentioned in clause (a) of this Explanation shall make an application in writing to an officer specially appointed in this behalf by the State Government by notification in the Official Gazette and thereupon such officer shall, after giving the applicant an opportunity of being heard and after making such enquiry (if any) as he may think fit, make an order,-

(i) if he is satisfied that the requirements of this Act and the rules made thereunder have been complied with, allowing the application, or

(ii) if he is not so satisfied, rejecting the application, and such order shall, subject to provisions of clause (c), be final."

23. The aforesaid explanation clearly indicates the condition for availing the concessional rates and unless those conditions are fulfilled and satisfied, an industrial undertaking is not entitled to concessional rate.

24. The impugned order dated 16.06.2014 cannot be quashed and set aside for the simple reason whether those can be made applicable in case of in industrial units who though enjoyed an exemption but exigible to the higher rate of duty and not at concessional rate as noted above. Whether the petitioner''s unit can be brought under the general duty provided in the schedule as above or is entitled to be charged with the concessional duty because of the nature of the manufacturing process is a question to be considered and decided.

25. In an earlier writ petition the corporation wanted to recover the excess refund which has been quashed and set aside and the matter is sent back to the authority for taking a decision afresh. Since the authorities have not yet decided the matter, it would not be appropriate at this stage to quash the order dated 16.06.2014 as the authorities are yet to decide whether the petitioner''s undertaking is to be changed with the concessional rate of electricity duty or

under the general rate.

26. This Court, therefore, does not interfere with the impugned order in this writ petition. Suffice it to say, that the authority who is entrusted to decide the matter in terms of the order passed in the earlier writ petition shall take into account the observations made herein and shall record its satisfaction whether the petitioner can be charged at the rate of 5% or at the rate of 15% of the electricity duty and should not be swayed by the impugned order.

27. With these observations, the writ petition is disposed of. No costs.

28. Certified copy, if applied for, be given to the parties as usual undertakings.

