(2011) 11 GUJ CK 0022

In the Gujarat High Court

Case No : Special Civil Application No. 13813 of 2010

Maha Shakti Coke and another APPELLANT

Vs

State of Gujarat and others RESPONDENT

Date of Decision : 16-11-2011

Acts Referred:

Gujarat Sales Tax Act, 1969 — Section 49(2)

Citation : (2012) 55 VST 382

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Tanvish Bhatt for M/s. Wadia Ghandy and Co, for the Appellant; Maithli Mehta, Additional Government Pleader, for the Respondent

Judgement

Ms. Sonia Gokani, J.—The petitioners have challenged, by way of the present petition, action of the respondents-authorities praying for quashing of the order passed by the State Level Committee ("the Committee", for short) meant for resolution of the disputes thereby denying the benefit of sales tax incentives to the petitioners under the Scheme for Economic Development of Kutch District, by issuance of a writ of mandamus. The present petition arises in the following factual background. Petitioner No. 1 is a company duly incorporated under the Companies Act, 1956 and petitioner No. 2 is a shareholder of petitioner No. 1-company. On January 26, 2001, on account of devastating earthquake which shook the entire State of Gujarat, and more particularly, the district of Kutch and consequently, the economic development of the Kutch district had come to a major halt. In an attempt to give impetus to the economic development and for creating better opportunities of employment and an environment of industrial activities, respondent No. 1-State vide its Resolution dated November 9, 2001 announced a scheme of sales tax incentives titled as, "Incentive Scheme 2001 for Economic Development of Kutch District" ("the Scheme", for short) and thereby invited existing industrial undertakings arid new industries to set-up units in the said district, by promising the benefit of sales tax exemption or sales tax deferment of eligible fixed capital investment u/s 49(2) of the Gujarat Sales

Tax Act, 1969.

2. The period of the Scheme was initially notified from July 31, 2001 to October 31, 2004, which was extended further by two notifications dated September 13, 2004 and January 7, 2005 by which applicability of the Scheme was extended to December 31, 2005.

3. The petitioner-company is a unit of Saurashtra Fuels Private Limited, which is engaged in the manufacture of low ash metallurgical coke (LAMC). Initially, the petitioner chose to set-up LAMC unit in this area of Kutch under the Scheme. It applied on July 10, 2003 for registration under the Scheme, which was granted on September 15, 2003 and the eligibility certificate for an investment in fixed assets to the tune of Rs. 10.787 crores in relation to LAMC unit was permitted vide letter dated September 18, 2003. When a further request for enhancement of investment under the Scheme was made, the company was permitted to so do it, enhancing the amount to the tune of Rs. 28.32 crores. The company also decided to invest further under the Scheme for setting up pig-iron and power generation plants to the tune of Rs. 231.06 crores and submitted a detailed investment plan for three plants projecting a total investment of Rs. 132.92 crores for LAMC plant by letters dated November 28, 2003 and April 8, 2004, respectively. For two products, viz., LAMC coke and pig-iron facilities, the respondents enhanced the sales tax benefits under the Scheme to Rs. 193.37 crores.

4. Ad hoc sales tax eligibility certificate under the Scheme was requested for by the petitioner, pursuant to commencement of commercial production on June 10, 2004. Vide its letter dated July 6, 2004, the respondents permitted a sum of Rs. 56.1199 crores as investment eligible for benefit under the Scheme and granted provisional eligibility certificate to the extent of 25 per cent of the said amount, being Rs. 14.03 crores. This had an impact of deferring the payment of sales tax for the period from December 12, 2003 to December 11, 2010.

5. A request for enhancement of ad hoc eligibility certificate was made by the petitioners on March 10, 2005 by adducing necessary certificates of chartered accountant/accountants and the amendment in the limit was made by the respondents, enhancing the same to Rs. 22.56 crores.

6. By another letter dated January 5, 2006, the petitioner-company requested the respondents to change their option under the Sales Tax Incentives Scheme from Deferment Scheme to composite scheme, with a further request to increase the limit which was so done and enhanced the sum from Rs. 22.56 crores to 30.235 crores.

7. On October 24, 2007 and November 26, 2007, the respondents vide its communications called for the details of eligible investment and expenditure incurred by the petitioner-company with a view to undertake the exercise of issuing final eligibility certificate and these communications were aptly replied to by the petitioner-company. As averred in the petition, the petitioners furnished

phase-wise expenditure for the period which is inclusive of the expenditure on land; site-development, plant and machinery, etc. The report submitted to the State Level Committee for consideration of eligibility under the Scheme reflected that the company made actual investment of Rs. 1,31,29,90,074. As the team chose not to regard entire sum of this expenses and investment as genuine on various grounds, and thereby disallowed the same before treating it for the purpose of eligible investment, this action of the State Level Committee is under challenge in the present petition. It emerges that the eligible amount of investment for sales tax incentives recommended is only to the tune of Rs. 63.04 crores by the respondents.

8. On issuance of the notice to the respondents, it filed its appearance and affidavit-in-reply is brought on the record, wherein, it is contended that there were justifiable grounds for the State Level Committee to discard the request of the petitioners to treat the entire amount of Rs. 1,31,29,90,074 as an eligible investment. It is also further averred that sufficient opportunities have been made available to the petitioners requesting it to provide various details of expenditure and other informations, but, to no avail. The State Level Committee, according to the respondents, in its meeting on March 14, 2008, finalized the eligibility for the purpose of sales tax benefits in case of the petitioner and had granted the final eligibility certificate for a sum of Rs. 61.04 crores, disallowing, the request for the rest by making the following observations :

(1) The payment paid by the parent company on behalf of Mahashakti Coke for which the details of payment realization is not produced for verification (Rs. 2,327.60 lacs).

(2) The payment made by DD dated June 2, 2005 for which realization detail is not produced at the time of verification (Rs. 200 lacs).

(3) The cash paid to one supplier is considered Rs. 20,000 per day only. The company has paid transportation cost for fire bricks from Dhanbad to Kutch with 5 to 6 trips a day by the same lorry, which is not possible. Hence the team has to restrict eligibility per trip to Rs. 20,000 per day.

(4) The technical consultancy fees paid to technical Director of company Mr. Kunda Singh (Rs. 136.60 lacs).

(5) The expenses capitalized under head of P & P expenses like GEB deposit, legal fees, preheating coal, consultancy fees, etc.

9. A further attempt on the part of the petitioner for reconsidering these investments as eligible also was not acceded to, on the grounds set out in the affidavit-in-reply. It is reiteratively emphasized that the information provided by the petitioners led to decide that investment made was not allowable and on extracting the correct information by the team, it deduced that an unrealistic amount was claimed by the petitioners.

Submissions:

10. Heard learned counsel Mr. Tanvish Bhatt for the petitioner and Ms. Maithli Mehta, learned Additional Government Pleader appearing for the respondents.

11. The learned counsel Mr. Bhatt vehemently contended before this court that there are absolutely no justifiable grounds for the respondents to reject the request of considering entire investment as eligible and issuing the final eligibility certificate on the basis of such investment made by the petitioners. It is further contended that the real intent and spirit of the Incentive Scheme for Kutch district has been misconceived and disregarded by the team. It is further his say that the company has acted on the promise extended by the Government and thereby contributed to the economic development of the State, however, on the frivolous grounds, the State Level Committee has rejected the claim of sales tax benefits. He also further pointed out that the petitioner-company is a unit of Messrs. Saurashtra Fuels Private Limited--which has three units in the State of Gujarat and the initial payments made, were made from the bank account of Messrs. Saurashtra Fuels Private Limited and not from Mahashakti Company Private Limited made towards plant and machinery and this entire amount has been disallowed despite the fact that there is not iota of doubt with regard to the incurring of the expenditure to the extent claimed. He further urged that the certificate had been produced confirming the payment drawn from Messrs. Saurashtra Fuels Private Limited through State Bank of India and yet, the amount of Rs. 2,03,51,187 has been disallowed. Moreover, on the ground that permission u/s 65B of the Bombay Land Revenue Code was not obtained, which was though applied for, the expenses made towards internal roads, reservoirs, bore-wells, etc., were disallowed by the respondents only on the count that while expending the amount, the land was not converted into non-agricultural land. He further urged before the court that the amount expended towards land on the identical ground had been discarded. With regard to the transportation cost, according to the learned counsel, at the request of the transporters, payments are segregated into smaller amounts as transporters did not have bank accounts and the deduction of TDS was also another issue which had actuated the company to adopt this segregation. This was necessary because the factory site is located at a very remote place and many transporters are not desirous to even make a single trip, not to talk of more than one. And, therefore, separate invoices were made for facilitating disbursement in cash, treating the same as separate trips and this methodology was not permitted by the committee, treating the same as manipulation on the part of the company instead of appreciating its practical problems. On elaborate submissions made to this court, he urged the court to allow the petition to uphold and translate the true and real objective of the scheme.

12. As against that, the learned Additional Government Pleader Ms. Mehta appearing for the State urged before this court that though documents and other materials were called for repeatedly from the petitioner-company, it failed to supply them which had left no option with the State Level Committee but to decide the issue on the basis of material available with it. She further urged this

court that the committee has not received letter dated March 15, 2008. She also further urged, by giving different dates of communications to suggest that all these communications were not replied to and the petitioners had turned deaf ear to the same. She also further urged that the State has no hesitation to extend the benefits of sales tax, provided the terms specified in the scheme are duly fulfilled by the companies which had shown its intention to contribute towards the development of Kutch district. She also contended that any manipulation or inflation in the name of investment cannot be sustained by the committee which was specifically meant for availing of enduring benefits in the field of sales tax.

Object of scheme and approach of stakeholders:

13. On considering submissions of both the sides and on closely scrutinizing the materials placed before this court, the present petition is required to be allowed partially with the following reasonings.

14. At the outset, what needs to be emphasized is that the scheme announced by the Government was with a laudable objective and intent for the betterment of Kutch district and its overall economic growth, contemplating participation of established industrial undertakings and all those citizen who were willing to establish new industries for the said purpose. Their participation was intended not only as a call to contribute towards the cause of humanity for, those fellow citizen who experienced untold miseries due to fury of the nature, but, this also essentially meant business by extending large number of benefits of sales tax exemptions for those who came forward. And thus, willingness of participation of business community when was secured by the State promising sales tax benefit or deferment in tax benefits on the capital expenditure to be incurred by them, it is the corresponding duty of the State to ensure that these objectives are not left sight off at the time of final evaluation while granting the final eligibility certificate for the purpose of availing tax benefits. At that stage, industries would have completed their share of tasks by making investment in establishing industries as was required under the scheme and therefore, as the clock cannot be put back, the State needs to surely act to upkeep the intent of investment rather than focusing on technicalities and proceduralities.

15. This is of course not to suggest that requisite scrutiny should be missing while undertaking the task of granting certificate nor is it to encourage any inflated or non-acceptable claim of investment but what is cautioned against is hyper-technical approach disregarding the spirit of the Scheme. It hardly needs over-emphasis that the responsibility of the State and all those committees working for it in such a set of facts enhances manifolds, as compared to that of original businessmen, or a party at whose instance, other party changes its condition substantially. With this note, it would be worthwhile to examine the reasons of disallowance given by the State Committee and those contentious issues raised before this court.

Provisions under the Scheme:

16. Before adverting to the contentions of either side, it would be appropriate to examine the Scheme announced by the respondents for the development of economic activities in Kutch District in the aftermath of devastating earthquake in January 2001, for better understanding of issues raised in this petition.

17. Some of the provisions of the Scheme dated November 9, 2001, titled as "Incentive Scheme, 2001 for the Economic Development of Kutch District" are as under :

17.1 As can be seen, broadly it invites existing industries and new industries to contribute towards development of the district and in lieu thereof, the Government had announced sales tax benefits such as of sales tax exemption or sales tax deferment on eligible capital investment. This was declared to give impetus to the economic development of Kutch District which had received major set back and its growth was stagnant naturally due to earthquake on January 26, 2001.

17.2 Clause 2 provides for operative period and states that the scheme shall come into force from July 31, 2001 and shall remain in force till October 31, 2004. Time initially given was periodically extended and for making eligible expenditure, the cut-off date is extended up to December 31, 2005.

17.3 The term "commercial production" defined in clause 3.3 says that the date of first sale bill shall mean the date of commercial production.

17.4 It also further emerges from clause 3.6 that fixed capital investments are broadly divided under various heads like land, new constructions, other constructions, machineries, etc. For the purpose of dispute before the court, this clause would be relevant.

17.5 Clause 3.6(b) is suggestive of office building store building, and other such buildings meant for plants and machineries excluding those meant for residence of Director and guest house.

17.6 Clause 3.6(c) permits investment in constructing compound walls, internal roads, bore wells, water tanks and other such constructions as are to be made permissible by the State Committee.

17.7 Clause 3.6(d) pertains to purchase of plant and machineries dyes, moulds transformers for the purpose of industry treating them as capital assets.

17.8 Clause 3.6(e) pertains to technical know-how and engineering drawing-design fees.

17.9 Clause 3.7 pertains to investment made on internal facilities related to the project. (Yad karavsho : page 196)

17.10 What is relevant for the purpose of present petition is eligible investment to be considered up to 18 months from the date of production since the project cost is above Rs. 10 crores.

17.11 Clause 4 speaks of "sales tax benefits" (giving option to the party to chose (a) sales tax exemption; (b) deferment in the payment of sales tax; and (c) composite scheme for those industrial units having investment more than 100 crore rupees.)

17.12 Clause 6.1 of the scheme speaks of committees sanctioning the incentives.

17.13 Clause 7 details the procedure for availing of benefits of exemptions and reads thus :

7.0 Procedure

(a) In order to avail of the incentives that the unit will have to apply in the prescribed format and obtain registration from District Industries Center/ Industries Commissioner before going into production. On the basis of this registration, unit will be able to avail of sales tax incentives for 120 days.

(b) After commencement of commercial production, the unit will have to apply in the prescribed format within a period of 120 days from the date of commencement of production. Along with the application, details of fixed capital assets installed up to the date of commencement of commercial production will have to be furnished.

(c) In the case of the unit applying later than 120 days from the date of commencement of commercial production, such period will be considered as the period of delay and the amount of eligible incentives will be reduced in proportion and the eligibility period will be reduced to the extent of delay. However, the units will have the option to avail of the benefit either from the date of commencement of commercial production or from the date of application.

(d) If the project of the unit is not completed, the Industries Commissioner/ General Manager, District Industries Center shall issue provisional eligibility up to 25 per cent of the eligible amount after considering installation of fixed assets.

(e) On completion of the project, the industrial unit shall have to furnish all the details to Industries Commissioner/General Manager, District Industries Center. The fixed assets will be inspected at the location.

17.14 Clause 8 provides for various conditions claiming exemptions and clause 9 pertains to State Level Committee and provides that the committee shall resolve the issues of interpretation and disputes arising in relation to grant of benefit under the scheme.

17.15 Thus, it can be noted from the very glance at the scheme that this had come into being, providing for exemption notification as the economic activities in the district of Kutch had required a fresh lease of life after a large scale devastation on account of massive earthquake. To ensure creation of new employment opportunities as also to facilitate the overall economic development of the district, the State Government had decided to announce these sales tax incentives. Hence, the central idea, as mentioned hereinabove also was to revitalize the district by allowing inflow of investment by creating new opportunities of employment by bringing the industries and granting them sizeable sales tax exemptions. The petitioners, actuated by this industrial policy of the State and the Scheme announced under its banner, chose to apply for registration and afterwards the same it was granted. Looking to the encouraging prospects, it invested huge sum of amount. Initially, it had chosen to invest in the plant of low ash metallurgical coke (LAMC) and gradually, it decided to manufacture all the three items, viz., LAMC ; pig-iron and power and the finance was 60 per cent by the banks and 40 per cent through internal sources of the petitioners.

17.16 As had been contended before this court, initial provisional eligibility certificate granted by the respondent was to the tune of Rs. 12,093.99 lacs on September 11, 2006. Later on, while granting final eligibility certificate on March 29, 2008, this has been reduced to 6,104.03 lacs where the major reduction was made both under the head, "building and project related infrastructure as well as plant and machinery". This is a matter of major challenge before this court. The report of the committee granting the sales tax exemptions, if is examined, it is noticed that Messrs. Saurashtra Fuels Private Limited is engaged in manufacture of low ash metallurgical coke (LAMC) which has a very good demand in the country and since the company wanted to increase its manufacturing activities, a new plant was decided to be set-up at Mundra. Looking to the locational advantage and the sales tax deferment facilities available in Kutch, the said project was set up in the name of Mahashakti Coke and it had commenced commercial production on December 12, 2003. While this was being implemented, the company decided to enhance capacity of metallurgical coke plant and also diversify by setting-up pig-iron plant and power generation plant. The total cost of project had been acknowledged by the committee. It also further noted that the project commenced commercial production after the commissioning of battery I and II, and thereafter, it also intimated the committee of progress made in III and IV battery of the project. The committee appears to have visited all the plants, utility facilities, packaging facilities for physical verification of the assets. It also verified all the original bills, vouchers, etc. The team noted that the company could not provide detailed expenditure statements of the battery I and II, despite constant reminders.

17.17 With regard to land, team noted that NA status of the land was not found and the land purchased after the cut-off date was not considered for incentives. It also further took note of the fact that the total built-up area; including various plants, as per the approved plan was 1,52,485 sq.m. and 2,81,942 sq.mtrs. area covered by RCC road and CC work as flooring to move heavy earth movers. Therefore, it concluded that the eligible land area comes to 1737708 sq.m. and the total cost which was considered was 92.19 lacs only. Thus, sum of Rs. 28,60,577 and Rs. 22,92,062 being the total expenditure incurred by the company towards land and land development, respectively, was not considered eligible by the committee.

18. With regard to building, the committee reported that expenses towards building construction found eligible was Rs. 576.98 lacs out of total investment of Rs. 674.89 lacs. It had also given comparative statement of eligible investments in the building.

19. With regard to plant and machineries also, it found that the company incurred total expenses of Rs. 11,719.10 lacs from which, only Rs. 7,729.32 lacs were found to be eligible on verification. After detailed nothings, the team recommended the eligible investment of Rs. 6,104.03 lacs for availing of the sales tax benefits under the Kutch Economic Development Scheme.

Points of contentions:

20. From the details mentioned hereinabove, it can be seen that though the investment in the capital assets has been made to a much larger extent by the petitioner for the various reasons narrated in the report of the team, it disallowed the eligible investment for the purpose of sales tax benefits on the grounds enumerated in the report itself. It would not be necessary for the court to make a mention of all these contentions, however, it would be sufficient for the court to enumerate the disputes raised by both the sides, which are under the following four heads :

(a) Plant and machineries and transport cost;

(b) Site development expenses ;

(c) Land and land development; and

(d) Technical consultancy cost.

21. Before dilating each issue raised before this court, it would be pertinent to note that it is the case of neither side that investment held to be ineligible is incurred by the petitioner. There is not an iota of doubt created either in the report of the committee or anywhere in the pleadings made before this court or in the extensive correspondence that has been entered into by both the sides to suggest that there was even slightest doubt with regard to such investment. What has been denied is the eligibility on the grounds enumerated in the report as well as in the correspondence, and therefore, in light of the background mentioned hereinabove, the court shall have to find out as to whether action on the part of the respondents in denying the benefit of capital investment is justifiable or not.

21.1 (a) Plant and machineries :

Expenses incurred under this head is to the tune of Rs. 1,17,19,10,000. The amount which has been found eligible by the verification team is Rs. 77,29,32,000. The State Level Committee allowed sum of Rs. 58,01,83,000 and disallowed sum of Rs. 59,28,90,655. It can be noted that under this head, expenses includes electrification and other capital expenditure relating to the project.

21.2 It can be further bifurcated though a huge sum of Rs. 2,327.60 lacs has not been considered on the ground that payment is made by Saurashtra Fuels Private Limited for its unit, i.e., petitioner No. 1. As pointed out by learned counsel for the petitioner, the petitioner is a unit of Saurashtra Fuels Private Limited which is a company having different units in the State of Gujarat and since petitioner No. 1 is not a separate entity and a unit operating in Kutch district, the objection raised is neither justifiable nor acceptable. As also mentioned before this court that this payment has also been reflected before the tax authorities in the return filed. No doubt is raised with regard to the expenditure made. Till the bank account in the name of the present petitioner was opened and till the same started operating, the initial payments were made from the bank account of Saurashtra Fuels Private Limited. This say of the petitioners on affidavit as well as, as reflected in the correspondence would lead this court to note that when there is neither any clandestine design nor doubtful transactions, the parent company making payment for its unit per se would not make the same ineligible investment. More so when expenses incurred is found to be genuine, this technical approach on the part of the State Level Committee of discarding huge sum of investment on the ground of payment having been made by Saurashtra Fuels Private Limited is not found acceptable by the court.

21.3 Again, with regard to payment made by demand draft to the tune of Rs. 2,03,51,187, a certificate is produced of the State Bank of India addressed to the Senior Industrial Commissioner which states that the term loan was disbursed to Messrs. Saurashtra Fuels through which payments were made through demand drafts/banker cheques to the parties whose names have also been mentioned segregating different amount paid to the parties, the total of which is Rs. 2,03,51,187. In this premise, when the State Committee had denied to regard the said amount on account of lack of ascertainment, this certificate from SBI would surely inspire the confidence as the payment were made by demand drafts and banker cheques. Moreover, if there was further scrutiny to be made in this regard, the committee could have so done it, and therefore, in the opinion of this court, denial merely on the ground of non-ascertainment despite there being substantive evidence is not found to have any valid basis.

21.4 The third limb under this head is disallowance of cash payment of Rs. 13,37,21,655 towards transportation expenses. As submitted extensively before this court, the transportation expenses were made by the company at the request of the transporters who did not possess the bank accounts. What had happened was that as the company is located in the remote area and as the availability of the transporters is not easy to procure, the petitioner showed its helplessness where it succumbed to the terms laid by the transporters who, on account of not having the bank account and not having agreed to deduct TDS on the payments made, chose not to accept the payments by cheque. Instead, payments were made in cash in small amounts. In other words, for one particular trip, if the payment would have been made, the same would have been of huge amount. Instead, separate invoices were made for facilitating disbursement of cash-treating each invoice as a separate trip. The committee naturally considered it as an improper and unpalatable situation as so many trips of transportation within one day would be next to impossible considering the distance and the amount of travelling the truck has to do. Although, the dispute is not with regard to the factum of goods received by the petitioner but it poses serious question with regard to transportation of goods in a single day, on a single truck, keeping in mind particularly the distance a truck had to cover for transporting the goods. The petitioner''s practical difficulty was put forth before this court, and as also was argued, the same was communicated to the committee. However, it can be noted that though this would appear to be a manipulative design ostensibly for benefit of the truck operators but the said modus would help both the truck owners and the petitioner as well as for circumventing the statutory provisions as deduction of TDS also is must. In our opinion, the detailed inquiry into this aspect was necessary, instead of straightway rejecting the claim of such huge amount. There is a consolidated balance sheet and P & L account of both the units, i.e., of Messrs. Mahashakti Coke and that of M/s. Saurashtra Fuels Private Limited. As Messrs. Mahashakti Coke is shown as an entity of Saurashtra Fuels Private Limited. To put it differently, for the purpose of the income tax Act arid the Companies Act, as well as under the accounting norms, for both Porbandar and Mundra units, the consolidated balance sheets and P & L account are prepared and the tax return of both are also filed prima facie reflecting these payments. This is not to suggest for a moment that any one can be permitted to circumvent the provisions of law or can be allowed a design which is manipulative to overreach the process of law. But, if there are certain ground realities which are placed on record, a deeper scrutiny of such a claim on ascertaining contemporaneous record could have been done by the committee.

21.5 (b) Site development :

This includes investment made towards project related infrastructures like internal roads, reservoirs, borewells as mentioned in clause 3.6 of the Scheme The disallowance made by the State Level Committee under this head to the tune of Rs. 8,35,26,969 is essentially on the ground that there was no approach road shown by the civil engineer and the expenses towards borewells, reservoirs, etc., cannot be permitted in the land not converted into non-agriculture land. Although, according to the petitioner all necessary documents were adduced and some further details as were required were also provided to the committee, it has disregarded those subsequent adducement of the documents whereas the learned Additional Government Pleader in terms has stated that those subsequent documents have not reached the committee, and therefore, it was unable to taken into account the version of the petitioners. According to the petitioners, the apparent error in rejecting the claim of the petitioners is that for no-industrial site, construction on 100 per cent area of the land is either envisaged or permitted. The same should have to be restricted to 40 per cent of the area of the total land and the remaining portion needs to be kept open for other purposes of the business which would include for drying the coke; open space for storage and for other such ancillary activities which would also include open space for roads, parking, etc.

21.6 As rightly pointed out by learned counsel for the petitioners that the Scheme envisages eligible cost of investment with regard to acquisition of the land and it does not pre-supposes conversion to NA use nor is it a condition-precedent for considering the eligible investment in the land while considering the same for the purpose of granting the tax relief. It would be necessary to mention here that the permission had been granted converting the land into non-agriculture land on April 11, 2005. The extension of the Scheme was up to December 31, 2005 and thus prior to expiry of the stipulated period, the permission was already obtained by the petitioners. The relevant documents granting the NA status to the land on which the industry exists also is brought on the record for our perusal. Certificate issued by the Collector-Kutch is suggestive of bona fide industrial use of the land u/s 65B of the Bombay Land Revenue Code, 1879. Director of petitioner No. 1-company is shown as a habitant of village-Bariya of Taluka Mundra and is occupant of the land admeasuring 95,200.97 sq.mtrs. It is also certified that the use of the said land for bona fide industrial purpose u/s 65B of the Code is valid; subject to the provisions of the said Code. It also further specifies that the land is used for industrial purpose, i.e., low ash metallurgical code and pig-iron. It is also indicative of the fact that the application has been made by the petitioners on June 24, 2003. Therefore, as is rightly pointed out by the learned counsel for the petitioners that all that was needed to be done by the petitioners for conversion of the land into non-agriculture use was already done and as the request was pending with the Revenue Department of the State of Gujarat, no fault can be found with the petitioners nor can the petitioners be denied of the benefit merely because the time was consumed by the Government Department. It can also be noted that petitioner No. 1 had also produced certificate under the Bombay Tenancy Act with regard to the land portion acquired by it. Therefore, it can safely be said that when the Scheme did not envisage pre-condition of NA permission of the land; before putting the land into NA use, while incurring the expenditure towards internal roads, reservoirs, borewells, etc., and when eventually such a permission is granted by the Collector-Kutch. It is not to suggest that prior to conversion, such a use is permissible, however, keeping in mind peculiar facts of this case in mind, when no violation or breach of any statutory provisions that could be made out, mere pendency of the application of the petitioners with the appropriate authorities would not ipso facto permit the committee to hold against the petitioners by adopting highly technical approach, while considering the final eligibility certificate.

21.7 The land purchase expense incurred by the petitioners till June 11, 2005 is to the tune of Rs. 1,20,79,583 and for development of the land the amount spent is Rs. 22,92,062. Amount of expenditure to the extent of Rs. 92,19,006 had been allowed by the State Level Committee, and the remaining sum of Rs. 28,60,577 had been disallowed. Whereas, towards the land development cost, the total amount of Rs. 22,92,062 had been disallowed. This was, as discussed hereinabove, on the ground that non-agriculture use permission was not received, and therefore, investment could not have been considered eligible for the purpose of investment. This was with respect to Survey Nos. 166/2, 170, 269/P, 171, 37/1, 38, 39, 40/2, 44, 45, 42, 43, 50, 166/1, 165, 167 and 168 and the permission was obtained for converting the use to non-agriculture purpose before the cut-off date on June 11, 2005. Of course, with regard to parcels of land bearing Survey Nos. 23/2, 23/3, 219/2, 164 and 269-P/18, permission was though requested for, the same was received subsequently. As the issue has been discussed earlier, the same does not require any further deliberation. Suffice it to note here that when the permission was already requested for by making application within the time permitted and permission also had been obtained by the petitioners before the cut-off date for large area of land whereas for some of the survey numbers; as mentioned hereinabove, permission was received subsequent to the cut-off date, but as the request was already made to the appropriate authority well in time, this investment cannot be disregarded merely on the ground of non-obtaining of the NA permission by the petitioners. Not only there is a complete absence of such prerequisite in the scheme but the intent of the scheme also cannot allow the committee to take such a hyper technical view as any industry which needs to set up its unit will have to buy land which would require-permission for putting the same for the purpose of industrial use. It is in a remote earthquake devastated area where such a permission for land was sought, the only requirement on the part of the petitioner could be to acquire or purchase land in time and to make a request within reasonable period with substantive material following due procedure but otherwise the time spent or consumed in receiving grant of the permission cannot be regarded as a fault on the part of the petitioners so as to disentitle it to the benefits which are otherwise available to the petitioners under the scheme. And therefore, in the opinion of this court, this issue also needs to be considered by the committee afresh, in light of the observations made hereinabove.

Consultancy fees :

21.8 The amount spent towards consultancy charges is to the tune of Rs. 1,36,00,000. On the ground that technical consultancy was being sought from imminent scientist--Mr. Kundan Singh, having high credentials in the field of design. He was engaged in designing of non-recovery coke ovens in the country and he was also an employee of the Government of India during his services with Central Fuel Research Institute and also the winner of Presidential Award for designing TATA type ovens and his latest design of KUMBRAJ type of non-recovery coke ovens has also been recognized by the coke association of the world in London. In the opinion of this court, though the credentials of the scientist whose technical consultancy was sought by the company is commendable and seeking that advice may have been found beneficial by the petitioner but, that would not fit anywhere in the scheme tinder which this industrial unit is set-up and therefore, huge amount of Rs. 136 crores spent on consultancy charges; if has been discarded by the State Level Committee, no interference is warranted from this court in this regard.

21.9 The learned counsel for the petitioners also has not been able to point out to us in this petition as to how this huge amount fits anywhere in the Scheme published by the respondents.

22. The entire discussion can be capsulized hereunder :

22.1 From amongst the four grounds deliberated in this judgment, barring the fourth ground of consultancy expenses, this court is of the opinion as far as rest of the three grounds are concerned that the denial of the benefit of capital investment made by the petitioner up to June 11, 2005 in various fixed assets has been discarded by the State Level Committee either on some misconception or on hyper-technical grounds disregarding the objectives and intent of the scheme. This was so done even when otherwise, the investments made by the petitioner-company is found genuine by the respondents and at no point of time, any doubt is created with regard to the increase of expenditure claimed by the petitioners. And therefore, in light of the observations made by this court, there is a need to have a fresh look at the request of the petitioners of considering this capital investment made in the fixed assets, which have been certified by the chartered accountant and substantiated by the documentary evidence before the State Level Committee, and therefore, petition is being allowed partially with the following directions.

23. Resultantly, this petition is being allowed quashing and setting aside the final eligibility certificate dated March 29, 2008 issued by the respondents to the extent it is adverse to the petitioner with the following specific directions :

(a) Final eligibility certificate dated March 29, 2008 issued in connection with the petitioners granting sales tax benefits under the Scheme to the extent it is adverse to the petitioner is hereby quashed.

(b) The respondents are further directed to treat payment made by Saurashtra Fuels and certified by the SBI (Rs. 23,27,60,000 plus Rs. 2,03,51,187 totalling Rs. 25,31,11,187) as eligible investment under the scheme and to include the said sum as eligible capital investment for the purpose of final eligibility certificate.

(c) The respondents are further directed to consider the payment of amount made towards land development, site development, before finalizing the final eligibility certificate on close scrutiny of the accounts produced by the petitioner and if necessary by also examining and surveying physically existing internal roads at the factory premises.

Nothing said in this petition concerning the expenditure incurred in relation to the land development and construction of internal roads, shall prevent the respondents from independently and justly examining the issue. It is expected that the said exercise shall be carried out with utmost neutrality and without any bias on the nomenclature used in the account.

(d) Transportation expenses incurred shall also be examined in light of observations made hereinabove and without being guided by the payments in cash. Claim of the petitioner be examined afresh.

24. The respondent shall conclude this exercise within four months from the date of receipt of this order and issue fresh final eligibility certificate for the purpose of availing of sales tax benefits.

25. Needless to say that consequent upon the order above, the demand notice dated March 21, 2011 issued by the respondent-authority shall not be acted upon. The petition is disposed of accordingly. No order as to costs.

