
(2018) 05 GAU CK 0133

In the Gauhati High Court

Case No : WP(C) 57 of 2018, WP(C) 1230 of 2016, WP(C) 2002, 2003 of 2015

PDP Steels Ltd.

APPELLANT

Vs

Union Of India

RESPONDENT

Date of Decision : 22-05-2018

Acts Referred:

Kerala Building Tax Amendment Act 1990 — Section 3A
Kerala Tourism Building Tax Rules, 1974 — Rule 14A

Citation : (2018) 05 GAU CK 0133

Hon'ble Judges : ARUP KUMAR GOSWAMI, J

Bench : Single Bench

Advocate : DR. Ashok Saraf, P Das, DR.B Ahmed, S Chamaria

Final Decision : Allowed

Judgement

1. Heard Dr. A.K. Saraf, learned senior counsel for the petitioners. Also heard Mr. S.C. Keyal, learned Assistant Solicitor General of India along with

Mr. M. Phukan, learned CGC and Dr. B. Ahmed, learned standing counsel, Industries and Commerce Department.

2. It is submitted by the learned counsel that in these writ petitions challenge is to a Letter/Circular dated 18.6.2014 on the ground that the same is

unconstitutional and repugnant to the North East Industrial and Investment Promotion Policy, 2007 (NEIIPP, 2007) communicated by Office

Memorandum dated 1.4.2007 and the Central Interest Subsidy Scheme, 2007 (Subsidy Scheme) issued vide Notification dated 27.7.2007. Therefore,

narration of factual matrix of each of the writ petitions is not considered necessary. Learned counsel for the parties submit that for the purpose of

disposal of the writ petitions, the pleadings and the documents produced in respect of WP(C) No.2002/2015 may be referred to.

3. The commensality of facts, as unfolded in the writ petitions, in short, necessary for the purpose of these cases, are that the petitioners had

established industries prior to 1.4.2007 but pursuant to NEIIPP, 2007, had gone for substantial expansion within the meaning of NEIIPP, 2007. The

Government of India approved a package of fiscal incentives and other concessions in the form of NEIIPP, 2007 effective from 1.4.2007. Under the

NEIIPP 2007, various incentives were promised to new industrial units and existing industrial units going for substantial expansion on or after 1.4.2007.

The NEIIPP, 2007 laid down that interest subsidy will be made available at the rate of 3% on working capital loan advanced by Scheduled Banks and

Central/State Financial Institution as was available under North East Industrial Policy, 1997 (NEIP, 1997).

4. To effectuate NEIIPP, 2007 the Government of India framed Subsidy Scheme for grant of interest subsidy on the working capital loan and in terms

of the said Scheme, the industries of the petitioners are existing industrial units. The extent of admissible subsidy is laid down in Clause 5. All eligible

industrial units established newly and existing industrial units located anywhere in North East Region will be given interest subsidy to the extent of 3%

on the working capital advanced to them by Scheduled Banks of Central/State Financial Institution for maximum period of 10 years from the date of

commencement of commercial production.

5. Encouraged by the NEIIPP, 2007 and the Subsidy Scheme, the petitioners undertook expansion work of their existing industrial units by investing

huge amount of money and registered themselves with the jurisdictional General Manager, District Industries and Commerce Centres for the purpose

of undertaking substantial expansion. After substantial expansion was carried out, commercial production also commenced. It is the common case of

the petitioners that they will be entitled to interest subsidy benefits under NEIIPP, 2007 on the working capital for a period of 10 years from the date

of commencement of commercial production after substantial expansion was carried out. Accordingly, claim for grant of interest subsidy was

submitted before the appropriate authority for placing the same before the State Level Committee for approval. It is the common ground of all the

petitioners that while their claims were pending before the State Level Committee, a Letter/Circular dated 18.6.2014 was issued modifying the

determination of the quantum of interest subsidy admissible in cases of existing industrial units which had undertaken substantial expansion under

NEIIPP, 2007.

6. It is the pleaded case of the petitioners that by the aforesaid Letter/Circular dated 18.6.2014, benefit of interest subsidy as was sought to be

conferred by NEIIPP, 2007 and Subsidy Scheme had been arbitrarily curtailed. The petitioners have also invoked the doctrine of promissory estoppel.

7. In the affidavit filed by the respondent Nos. 1, 2 and 3, it is pleaded that the Letter/Circular dated 18.6.2014 is clarificatory in nature clarifying

quantum of interest subsidy admissible in case of an existing industrial unit and such clarification was called for to prevent misuse of subsidy and

availing of dual benefits on the original investments by the existing units and that the said notification did not amend or modify the norms of working

capital calculation. There was no clarity in the Notification dated 27.7.2007 as to whether interest subsidy at the rate of 3% is to be calculated on the

entire working capital or on increased working capital for substantial expansion and it is stated that the interest subsidy would be available only for the

increase in working capital loan actually drawn after undergoing substantial expansion and not on the entire working capital availed of by the

petitioners. There had been inconsistency in the methodology adopted by different State Governments of North East Region in calculating interest

subsidy for the existing industrial units and the Government of Assam and the Government of Tripura had sought for clarification from the Department

of Industries (Policy and Promotion) regarding the extent of admissibility of interest subsidy for existing industrial units going for substantial expansion.

It is also stated that the Letter/Circular dated 18.6.2014 will not have any effect/impact on calculation of interest subsidy of new industrial units. It is

stated that the Letter/Circular dated 18.12.2014 will have prospective effect and that it was already intimated to the State Governments that interest

subsidy claim that had already been considered/recommended by the State Level Committee need not be reopened.

8. A reply affidavit had been filed by the petitioners essentially repudiating the stand taken in the affidavit-in-opposition that the Letter/Circular dated

18.6.2014 is only a clarificatory letter and the same had not amended/modified the norms of calculation of interest subsidy on working capital loan.

9. Dr. Saraf has submitted that the NEIIPP, 2007 and Subsidy Scheme held out a clear and unambiguous promise for grant of interest subsidy at the rate of 3% on the entire working capital advanced to the eligible industrial units by the Scheduled Bank or Central/State Financial Institution and acting on such promise the petitioners had undertaken substantial expansion by making huge investment. He has submitted that when the NEIIPP, 2007 was approved by the Union Cabinet, a department of the Union could not have issued the letter which, in fact, modifies and runs contrary to the policy approved by the Cabinet and therefore, the impugned Letter/Circular is, ex facie, illegal, arbitrary and without jurisdiction. Even otherwise, the petitioners having changed its position pursuant to NEIIPP, 2007 and Subsidy Scheme, incurring huge expenditure while undertaking substantial expansion of the industrial units, the respondent authorities could not have resiled back from the promise/declaration to the detriment of the petitioners.

Dr. Saraf submits that such decision which culminated in issuance of the Letter/Circular dated 14.6.2014 was taken in a meeting which was held under the Chairmanship of a Joint Secretary, Department of Industries (Policy and Promotion) on 10.7.2013. It is submitted by him that there was no lack of clarity in the NEIIPP, 2007 and Subsidy Scheme and the Letter/Circular dated 14.6.2014 itself demonstrates that the admissibility of interest subsidy in case of an existing industrial unit was sought to be changed and therefore, the plea taken in the affidavit that it is merely a clarificatory letter is totally misconceived. He relies on decisions of the Honâ??ble Supreme Court in the case of State of Bihar vs. Suprabhat Steel Ltd., reported in (1999) 1 SCC 31 with particular emphasis on paragraph 7 as well as in the case of Manuelsons Hotels Pvt. Ltd. vs. State of Kerala and ors., reported in (2016) 6 SCC 766.

10. Per contra, abiding by the stand taken in the affidavit filed by the respondents Nos. 1, 2 and 3, Mr. Keyal strenuously urges that by no stretch of imagination can it be said that the impugned Letter/Circular dated 14.6.2014 had sought to amend/modify the NEIIPP, 2007 and Subsidy Scheme. He reiterates that it was clarificatory in nature and it is within the domain of the respondents to see and formulate how the policy evolved is to be implemented and the said Letter/Circular was a step in that direction. He submits that an existing unit cannot avail benefit in respect of loans taken

under another scheme on the ground of substantial expansion of industries and if it is so allowed it will tantamount to allowing availing of dual benefit

on the original investment and therefore, corrective measure was taken by issuing the Letter/Circular dated 14.6.2014 to ensure that the existing units

undergoing substantial expansion do not take undue advantage/benefit. Subsidy Scheme was issued without any Cabinet approval and, therefore, the

department is entitled to give appropriate directions for implementation of the policy. Mr. Keyal submits that there was no restrictive term in the

NEIIPP, 2007 that the existing industrial units would be entitled to interest subsidy in the increase in working capital due to substantial expansion and

this is what is sought to be introduced by the Letter/Circular dated 14.6.2014. According to him, for the purpose of grant of interest subsidy, all new

industrial units as well as existing units which go in for substantial expansion are in the same footing and no classification was sought to be introduced.

In support of his submission, the learned counsel relies on the decision in the case of Brij Mohan Lal vs. Union of India and ors. vs. (2012) 6 SCC 502.

11. Dr. B. Ahmed submits that as there was no clarity in NEIIPP 2007, the Department of Industries and Commerce of the State of Assam had

moved the Central Government for clarification. He also submits that Letter/Circular dated 18.6.2014 is clarificatory in nature and he endorses the

submission of Mr. Keyal.

12. I have considered the submission of the learned counsel for the parties and have perused the materials on record.

13. A perusal of the Office Memorandum dated 1.4.2007 containing NEIIPP, 2007 shows that the Government had taken a policy decision to approve

a package of fiscal incentives and other concessions for the North East Region with effect from 1.4.2007. It is provided that the industrial policy and

other concession in the North East Region under NEIP, 1997, issued vide office memorandum dated 24.12.1997, will cease to operate with effect

from 1.4.2007. However, it is also indicated therein that industrial units which had commenced commercial production on or before 31.1.2007 would

continue to get benefits/ incentives under NEIP, 1997. It further lays down that the Government had reserved the right to modify any policy in public

interest. All concerned ministerial departments of Government of India were directed to amend their respective Acts, Rules, Notifications etc. and

issue necessary instruction for giving effect to that decision. The categorical case of the petitioners is that the package of fiscal incentives and other concessions was approved by the Cabinet and the averments made to that effect is not denied by the respondent Nos. 1 to 3 in their affidavit. It has also not been brought to the notice of the Court by Mr. Keyal that any part of the said policy, as engrafted in NEIIPP, 2007 had been modified by the Government after obtaining Cabinet approval.

14. Having regard to the controversy, it is not necessary for this Court to dwell upon and dialate on all the provisions of NEIIPP, 2007. However, it

will be necessary to refer to Clauses ii, iii and viii, which read as under:

â??(ii) Duration: All new units as well as existing units which go in for substantial expansion, unless otherwise specified and which commence

commercial production within the 10 years period from the date of notification of NEIIPP, 2007 will be eligible for incentives for a period of ten years

from the date of commencement of commercial production.

(iii) Neutrality of location: Incentives will be available to all industrial units, new as well as existing units on their substantial expansion, located

anywhere in the North Eastern Region. Consequently, the distinction between â??thrustâ?? and â??non-thrustâ?? industries made in NEIP, 1997

will be discontinued from 1.4.2007.

(viii) Interest Subsidy: Interest Subsidy will be made available @ 3% on working capital loan under NEIIPP, 2007 as was available under NEIP,

1997.â??

15. The Ministry of Commerce and Industries Department of India (Policy and Promotion) in pursuance to NEIIPP, 2007 formulated Subsidy Scheme

with the avowed object of accelerating industrial development in the North East Region. Subsidy Scheme was effective from 1.4.2007 and was to

remain in force up to 30.1.2017. Clause III lays down the applicability of Subsidy Scheme and it is provided therein that unless otherwise specified, all

new industrial units as well as existing units, which go in for substantial expansion and are located anywhere in North East Region, will be eligible for

interest subsidy under the scheme. That Subsidy Scheme is applicable to the petitionersâ?? industrial units is not in dispute.

16. New industrial unit is defined in Clause 4(b) to mean an industrial unit for setting up of which, effective steps were not taken prior to 1.4.2007;

existing industrial units in terms of Clause 4(c) means an industrial unit set up prior to the operative date of the scheme, i.e.

1.4.2007; substantial expansion, defined in Clause 4(d), means increase in the value of fixed capital investment in plant and machineries of industrial

unit by not less than 25% for the purpose of expansion of capacity/modernization and diversification. The extent of admissible subsidy is spelt out in Clause 5 and it will be appropriate to extract the same for better appreciation:

5. Extent of admissible subsidy: All eligible industrial units located anywhere in the North Eastern Region shall be given an interest subsidy to the

extent of 3% on the working capital advanced to them by the Scheduled Banks or Central/State Financial institutions, for a maximum period of 10(ten)

years from the date of commencement of commercial production.

17. The norms for working capital calculations are laid down in Clause 6. Clause 7 provides the designated agency for disbursement of subsidy and it

is provided therein that North Eastern Development Finance Corporation Ltd., NEDFi, Guwahati shall be the designated agency for disbursement of

interest subsidy on the basis of recommendation of the State Level Committee (SLC) of the concerned State. Procedure for claim as well as

disbursement of interest subsidy is laid down in Clause 8 and 9, respectively, of the Subsidy Scheme.

18. At this juncture, it will be appropriate to extract the relevant portion of the Letter/Circular dated 18.6.2014 which is the subject matter of

controversy in this batch of writ petitions:

To,

The Principal Secretary/Secretary (Industries)

Department of Industries,

State Government of Assam, Arunachal Pradesh,

Manipur, Meghalaya, Mizoram, Nagaland,

Sikkim and Tripura.

Subject: Eligibility of Interest Subsidy claims for Existing Units which had undergone substantial Expansion under NEIP, 1997/NEIIPP, 2007-reg.

Sir,

I am directed to say that eligibility of Interest Subsidy claims for existing units which had undergone substantial Expansion under NEIP, 1997/NEIIPP,

2007 have been examined in this Department and it has been decided that, henceforth, the quantum of interest subsidy admissible in case of an

Existing industrial Unit which had undergone Substantial Expansion under NEIP, 1997/NEIIPP, 2007 will be 3% of the increase in

working capital loan actually drawn after undergoing substantial expansion over and above the average of the working capital loan availed by the

industrial unit during two financial years just preceding the date of commencement of commercial operation after undergoing substantial expansion.

Illustrative examples under different scenario is annexed herewith.

2. Similar interest subsidy claims that have already been considered/recommended by the SLC need not be reopened.

19. The decision taken in the meeting held on 21.6.2013 under the Chairmanship of the Joint Secretary of DIPP finds reflection in the said

Letter/Circular dated 18.6.2014.

20. In Brij Mohan Lal (supra), the Supreme Court had laid down that matters relating to framing and implementation of policy primarily fall in the

domain of the government and normally the Courts would decline to exercise the power of judicial review in such matters. However, this general rule

is not free from exception and the Courts would not refuse to adjudicate upon policy matters if the policy decisions are arbitrary, capricious or mala

fide. It was further held that as the government has the authority to frame its policy, it also has the power to change the same. It is the prerogative of

the Government to decide as to how the policy should be shaped or implemented and what should be its scope, subject to it not being arbitrary or

unreasonable.

21. Basic facts in Manuelsons Hotels Pvt. Ltd. (supra) was that the state government had issued an order accepting the recommendation of the

Government of India suggesting tourism to be declared as an industry and as a consequence thereof those engaged in tourism promotional activities

would become eligible for concession incentives as applicable to industrial sector from time to time. Apart from various other concessions that were

granted, exemption from building tax levied by the revenue department was one such concession. Kerala Building Tax (Amendment) Act was passed

with effect from 6.11.1990 and Section 3A provided that the Government may, if it considers it necessary so to do for the promotion of tourism, by

notification in the gazette make exemption from the payment of building tax under the Act in respect of any building or buildings, the construction of

which is completed during such period and in such areas as may be specified in the notification and having such specification as may be prescribed in

the rules in this behalf. To effectuate such exemption provisions, Rule 14-A was also added in the Kerala Tourism Building Tax Rules, 1974.

However, no notification was issued in terms of Section 3A. Section 3A was thereafter omitted with effect from 1.3.1993.

22. In the above factual matrix, non-issuance of notification under Section 3A was held to be an arbitrary act of the Government and, further, issuing

of the notification was held to be a ministerial act. The Court held that the petitioners having altered their position, their grievance must be remedied by

application of the doctrine of promissory estoppel. It was also made clear that exemption from payment of building tax would not be available after

1.3.1993 as power to grant exemption from that date was deleted in view of the fact that doctrine of promissory estoppel cannot be invoked in such a

situation as the same would run contrary to the express provision of the statute. The judgment thus lays down that when there is a policy, though to

give meaning and life and blood to a policy it may be necessary to issue notification, if such notification is arbitrarily not issued, the same will not result

in denial of benefits if the facts justify application of doctrine of promissory estoppel.

23. In the instance case, Subsidy Scheme came to be issued to take care of the aspect relating to grant of interest subsidy in terms of NEIIPP, 2007.

The extent of admissible subsidy in Clause 5 of Subsidy Scheme, in the understanding of the Court, is clear and unambiguous and not confusing and

lacking in clarity as is sought to be projected in the affidavit. It is categorically stated therein that the industrial units will be given the interest subsidy to

the extent of 3% on the working capital advanced to them without any restriction or limitation for the same. The expression "3% of the increase in

working capital loan actually drawn after undergoing substantial expansion over and above the average of the working capital loan availed by the

industrial unit during two financial years just preceding the date of commencement of commercial operation after undergoing substantial expansion"

in the Letter/Circular dated 18.6.2014 brings in entirely different parameters for

grant of interest subsidy and it is evident from the said Letter/Circular itself that the subsidy payment is sought to be restricted though such restriction was not contemplated in Subsidy Scheme, which in turn was based on NEIIPP, 2007. Subsidy Scheme many not have the approval of the Cabinet but it cannot be lost sight of the fact that Subsidy Scheme was issued to implement the policy decision taken pursuant to the Cabinet approval given and formulated vide Office Memorandum dated 1.4.2007.

24. This Court is also of the opinion that Clause 5 of Subsidy Scheme is in consonance with Clause viii of NEIIPP, 2007. Therefore, I have no hesitation to hold that the Letter/Circular dated 18.6.2014 cannot be construed to be in the nature of clarification but the same, in fact, restricts and limits entitlement of interest subsidy envisaged under NEIIPP, 2007 and Subsidy Scheme.

25. The Supreme Court in State of Bihar (supra), at paragraph 7 stated as follows:

“Coming to the second question, namely the issuance of notification by the State Government in exercise of power under Section 7 of the Bihar

Finance Act, it is true that issuance of such notifications entitles the industrial units to avail of the incentives and benefits declared by the State

Government in its own industrial incentive policy. But in exercise of such power it would not be permissible for the State Government to deny any

benefit which is otherwise available to an industrial unit under the Incentive Policy itself. The Industrial Incentive policy is issued by the State

Government after such Policy is approved by the Cabinet itself. The issuance of the notification under Section 7 of the Bihar Finance Act is by the

State Government in the Finance Department which notification is issued to carry out the objectives and the policy decisions taken in the Industrial

Policy itself. In this view of the matter, any notification issued by the Government Order in exercise of power under Section 7 of the Bihar Finance

Act, if is found to be repugnant to the Industrial Policy declared in a government resolution, then the said notification must be held to be bad to that

extent. In the case in hand, the notification issued by the State Government on 4th of April, 1994 has been examined by the High Court and has been

found, rightly, to be contrary to the Industrial Incentive Policy, more particularly the Policy engrafted in Clause 10.4(i)(b). Consequently, the High

Court was fully justified in striking down that part of the notification which is repugnant to sub-clause (b) of Clause 10.4(i) and we do not find any error committed by the High Court in striking down the said notification. We are not persuaded to accept the contention of Mr. Dwivedi that it would be open for the Government to issue a notification in exercise of power under Section 7 of the Bihar Finance Act, which may over-ride the incentive policy itself. In our considered opinion the expression ""such conditions and restrictions as it may impose"" in sub-section (3) of Section 7 of the Bihar Finance Act will not authorise the State Government to negate the incentives and benefits which any industrial unit would be otherwise entitled to under the general Policy Resolution itself. In this view of the matter, we see no illegality with the impugned judgment of the High Court in striking down a part of the notification dated 4.4.1994.â??

26. From the above, it is manifest that the policy adopted with the approval of the Cabinet cannot be whittled down or abrogated or modified in any manner by a department of the Government.

27. This Court has not interfered with the policy decision of the Government as enunciated in NEIIPP, 2007 and the mechanism evolved for implementation of interest subsidy under Subsidy Scheme. However, as the impugned Letter/Circular dated 18.6.2014 is contrary to the Policy approved by the Cabinet, the same is interfered with.

28. Taking that view, this batch of writ petitions are allowed. The impugned Letter/Circular dated 18.6.2014 is set aside and quashed.

29. No cost.