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(2002) 02 JH CK 0073

In the Jharkhand High Court

Case No : Tax Case No''s. 15 to 20 of 2000 P

Steel Authority of India Limited APPELLANT

Vs

State of Bihar RESPONDENT

Date of Decision : 26-02-2002

Acts Referred:

Bihar Electricity Duty Act, 1948 — Section 3A, 3A(1)(3)
Bihar Electricity Duty Rules, 1949 — Rule 14(II)

Citation : (2002) 02 JH CK 0073

Hon'ble Judges : Vinod Kumar Gupta, C.J;Vishnudeo Narayan, J

Bench : Division Bench

Advocate : S.B. Gadodia, Rajiv Ranjan and R.K. Verma, for the Appellant; B. Poddar, Addl. A.G., Anubha Rawat Chaudhary and Deepak Kr. Prasad, for the Respondent

Judgement

1. This reference u/s 9D of the Bihar Electricity Duty Act, 1948 has been made by the Commercial Taxes Tribunal, Patna, arising out of the application made before that Tribunal under Sub-section (1) of Section 9D of the said Act. The Tribunal has referred the following two questions of law for our decision:--

(i) "Whether under the facts and circumstances of case the delay occurred in initiating the review proceeding is such that it goes to affect the validity of the case."

(ii) "Whether in view of the provisions u/s 3A (3) of the Bihar Electricity Duty Act the petitioner is exempted from the levy of surcharge in case u/s 3 (2) (c) whereunder the petitioner is exempted from levy of electricity duty."

2. The Bokaro Steel Plant at Bokaro Steel City is a unit of the petitioner Steel Authority of India which deals in the manufacture of iron and steel. The petitioner at Bokaro generates electricity in its own captive power plants for utilising the same in the manufacturing process in the Steel Plant. The petitioner also purchases power from the Damodar Valley Corporation which is partly

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utilised in the aforesaid manufacturing process in its plant, and partly for its employees for their domestic use in the town shop maintained by it. We are not concerned with this aspect of the matter in this case.

3. The Bihar Electricity Duty Act, 1948 is a legislative enactment meant for the levy of Duty on the sale and consumption of electrical energy in the State. Section 3 being the charging section in so far as the levy of "duty" is concerned, lays down that there shall be levied and paid to the State Government on the units consumed or sold, a duty at the rate specified in the Schedule. Sub-section (2) of Section 3 however exempts six categories or class of consumption of electrical energy from payment of this duty. For ready reference we reproduce Section 3 which reads thus:--

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

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

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

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

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

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

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

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

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

4. Section 4 of the Act stipulates that every licensee shall pay every month to the State Government ''duty'' payable u/s 3 of the units of energy consumed by it or sold by it to the consumers and that the licensee may recover from its consumers the amount which falls to be paid by the licensee as duty in respect of the energy sold by it to the consumers. Section 4 reads thus:--

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

(2) Every licensee may recover from the consumer the amount which falls to be paid by the licensee as duty in respect of the energy sold to the consumer.

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

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

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

(5) The licensee or other person who is liable to pay duty under this Act shall, subject to the prescribed conditions, be entitled to a rebate of such percentage as may be prescribed on the amount of duty paid by him within the prescribed time."

These two sections thus deal with the issues relating to the chargeability of the duty and the liability to pay the same to the State Government. Section 3A was introduced in the Act by way of an amendment in the year 1985. It reads thus:

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

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

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

5. By the introduction of this new section in the Act through the amendment carried out in 1985, the Legislature created a provision whereby such persons who are paying duty were also made liable to pay surcharge @ 2 ps. per unit of

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the energy consumed or sold.

6. In so far as the petitioner is concerned, the assessment proceeding in respect of period 1985-86 to 1991-92 in so far as the payment of the duty u/s 3 was concerned, were completed some time between 1988 and 1993. However, later on, it was found out and detected that in so far as the issue relating to the petitioners liability to pay surcharge in terms of Section 3A (supra) was concerned, this has escaped assessment and, therefore, exercising power and jurisdiction in terms of Section 9A(4) read with Rule 14 of the Bihar Electricity Duty Rules, 1949, sanction of the Commissioner was obtained for review of the assessment order. The said sanction having been communicated, the aforesaid originally passed assessment order was reviewed and consequentially an order was passed where by surcharge for the aforesaid period was levied in terms of Section 3A of the Act. The appeal preferred by the petitioner against the aforesaid order was dismissed by the appellate forum leading the petitioner to filing Revision before the Tribunal in terms of Sub-section (3) of Section 9A of the Act.

7. The Tribunal allowed the Revision petition of the petitioner by holding that as contemplated and required under Rule 14 (11) of the Bihar Electricity Duty Rules, 1949 sanction granted by the Commissioner was not a valid sanction and the same being defective, the review-proceedings having been initiated on the basis of such a defective sanction order were invalid and, therefore, on that ground the Tribunal set aside the fresh assessment order passed in the review jurisdiction. However, during the course of the judgment, the Tribunal did return a positive and definite finding that the petitioner was liable to pay the surcharge in terms of Section 3A of the Act and the Tribunal also, during the course of judgment held that the review proceedings were not time barred as no limitation period as such was prescribed in law for initiating review proceedings under the Act. As noticed at the outset, on an application filed by the petitioner in terms of Sub-section (1) of Section 9D of the Act, the Tribunal has referred the aforesaid two questions of law for our decision.

8. The jurisdiction to review an order passed under the Act finds its place and mention in Sub-section (4) of Section 9A of the Act. It reads thus:--

''4 Subject to such rules as may be prescribed, any order passed under this Act or the rules made there under may be reviewed by the authority passing it or by its successor-in-office."

9. As is evident, no period of limitation is prescribed for reviewing an order passed under the Act. In so far as the procedural aspects relating to the review is concerned, sub-rules (9), (10) and (11) of Rule 14 of the Bihar Electricity Duty Rules, 1949 deal with the subject matter. These read thus:--

"14. Appeal revision and review.-

(9) Where an authority reviews under Sub-section (4) of Section 9A, an order

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passed by it under the Act, or these rules, it shall record its reasons in writing for doing so."

(10) Save with the previous sanction of the Commissioner recorded in writing an order, other than order passed by the Commissioner, shall not be reviewed more than twelve months after the date of passing of the order which is sought to be reviewed.''

(11) No authority below the rank of Commissioner, shall review an order which has been passed by its predecessors in office, except with the previous sanction of the Commissioner."

10. Rule 14, therefore, clearly suggests that where review proceedings are initiated after obtaining the sanction from the Commissioner, no period of limitation is prescribed in sub-rule (10) of Rule 14 only if the review proceedings are to be initiated by an officer below the rank of Commissioner in respect of an order passed by such an officer and that too without the sanction of the Commissioner. 12 months period is prescribed as limitation with respect to such review proceedings. Such an Officer (below the rank of Commissioner) if wants to initiate review proceedings after the expiry of 12 months with respect to an order passed by him. he can do so only if he obtains the sanction of the Commissioner.

Our short answer to question No. 1, therefore, is that in this case since the sanction order was obtained from the Commissioner (rightly or wrongly) there was no limitation period prescribed either in the Act or in the Rules for initiating of review proceedings.

11. Question No. (ii) : This question is also not very difficult to answer. It is a simple, not complicated, question.

Whereas Section 3 of the Act deals with the incidence of levy of duty as also its char-geability, it clearly suggests that there shall be levied and paid to the State Government duty on the units of energy consumed or sold. It also, in Sub-section (2) envisages six clauses of consumption where the levy of such duty has been exempted. Clause (c) is none of such exempted consumptions.

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

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not liable to pay the duty. Viewed thus, we have now to find out if the petitioner in view of Section 3A of the Act is liable to pay surcharge or not on the units of electricity thus consumed.

13. Undoubtedly, Section 3A opens with the words "subject to the provisions of Clauses (a), (b) and (c) of Sub-section (2) of Section 3....." what it mainly and primarily says is that every licensee who is liable to pay duty u/s 4 shall, in addition to the duty payable under Sub-section (1) of Section 3, also pay surcharge on the energy consumed.

14. What is most important and relevant for arriving at a correct interpretation of Section 3A are two things. Firstly, for falling within the surcharge net u/s 3A, the licensee must be a licensee who is liable to pay duty u/s 4 and secondly, the licensee must be the licensee who, in addition to duty payable under subsection (1) of Section 3, has also to pay surcharge on the units of energy consumed by him. In other words, what it means is that on such consumption of energy by it on which it is liable to pay duty u/s 3, it shall also be liable to pay surcharge. If, therefore, conversely speaking, the licensee who is not liable to pay duty u/s 4 cannot be made liable to pay surcharge and similarly a licensee who is not liable to pay duty u/s 3 on the units consumed by him cannot be asked to pay surcharge on these units. To explain more clearly, it also means that the liability to pay surcharge is directly linked with the liability and obligation to pay duty, if the units consumed by the licensee do not attract liability to pay duty, these cannot attract the liability to pay surcharge. Exemption provided in Clauses (a) (b) and (c) of Sub-section (2) of Section 3 of the Act can be categorised in an altogether different context. These three categories of consumers not being liable to pay duty in any case irrespective on the nature of consumption, they cannot be equated or compared with a class of consumer like the petitioner.

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

16. In the reference order with respect to question No. (ii), the Tribunal has mentioned about Sub-section (3) of Section 3A of the Act. Primarily and basically Sub-section (3) of Section 3A has neither any applicability nor any relevance to the issues involved in this case. Secondly, in the view that we have taken of Sub-section (1) of Section 3A and that view clearly and squarely being applicable to the facts of this case, Sub-section (3) Section 3A need not detain us in the disposal of this Reference.

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Having answered both the questions, therefore, the Reference is disposed of accordingly. No order as to costs.

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