

(2006) 10 MAD CK 0227

In the Madras High Court

Case No : W.A. No. 701 of 1999 and C.M.P. No. 6929 of 1999 and V.C.M.P. No. 9026 of 1999

Tamilnadu Electricity Board

APPELLANT

Vs

Aruppukottai Sri Jayavilas Ltd.

RESPONDENT

Date of Decision : 17-10-2006

Acts Referred:

Income Tax Act, 1922 — Section 15C

Tamil Nadu General Sales Tax Act, 1959 — Section 20

Tamil Nadu General Sales Tax Rules, 1959 — Rule 24, 43, 45

Tamil Nadu Revision of Tariff rates on Supply of Electrical Energy Act. 1978 — Section 4

Citation : (2007) WritLR 550

Hon'ble Judges : S.J. Mukhopadhaya, J; F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : P.S. Raman, A.A.G for J. Ravindran, for the Appellant; K. Alagirisamy for S. Navaneethakrishnan and S. Kadarkarai, for the Respondent

Judgement

F.M. Ibrahim Kalifulla, J.—The Chairman, the Member (Distribution) and the Superintending Engineer of the Tamil Nadu Electricity Board, are the appellants herein.

2. The challenge in the Writ Appeal is to the order of the learned single Judge, who by the impugned order dated 25.2.1998, passed in W.P. No. 2389 of 1986, while setting aside the order of the second appellant dated 30.12.1997, directed the appellants to treat the "B" Unit of the respondent as a "new industry" and to pass appropriate orders and to take consequential steps for the grant of tariff concession.

3. Brief facts which are required to be stated are as follows:

(a) The respondent own a cotton spinning Mill located at Melakandamangalam Village, Aruppukottai Taluk, Virudhunagar District with High Tension Service Connection (hereinafter referred to as "HTSC") No. 68. The said Mill is called as "A" Unit. Subsequently, the respondent established a new spinning Mill at

Tamilpadi Village, Tiruchuli Taluk, which is known as "B" Unit. The service connection of the "B" Unit which was also HTSC, had the number H.T.S.C. No. 150. The said "B" Unit went into commercial production from 1.9.1995 and for billing purposes, the meter-reading was taken on and from 27.9.1995.

(b) Under the provisions of the Tamil Nadu Revision of Tariff Rates of Supply of Electrical Energy Act, 1978 (Tamil Nadu Act 1 of 1979), the Government of Tamil Nadu, by way of amendment to the Schedule to the said Act in respect of high-tension industries" tariff rates, used to fix the rates by the issuance of Government Orders. While making such amendment to the tariff rates, the State Government also used to announce the tariff concession for high-tension industries coming under the category of High Tension Tariff-I. Such tariff concession was being extended and periodically altered by issuance of different Government Orders.

(c) During the relevant point of time, when the respondent commenced operation of its "B" Unit on 27.9.1995, the relevant Government Order in operation was G.O.Ms. No. 29, Energy (A.2) Department, dated 31.1.1995. The amendment to the Schedule to Tamil Nadu Act 1 of 1979 under the said G.O. came into force on and from 1.2.1995. The said G.O. was in respect of the registered factories, among other industries, the textile industry, falling under High Tension Tariff-I, The rate per KWH and rate per KVA in respect of such industries functioning in the Madras Metropolitan area and Non-Metropolitan area, were separately fixed. It also provided for tariff concession in the case of new industries to be set up in the areas other than the Madras Metropolitan areas, which was to be charged for the first three years from the date the consumer is being given the service connection under high tension tariff.

(d) By way of an explanation to Clause (a) of the said Schedule as amended, it was stated that for the purpose of electricity tariff concession for new industries, the term "new industries" should be taken to mean a new investment by any entrepreneur including by an existing industry in any area other than the Madras Metropolitan areas, subject however to the condition that the assets other than cash of the existing industry, are not transferred and shown as assets of the new industry.

(e) Under Clause (aa) of the said amended Schedule, it is mentioned that the tariff concession should be made applicable to expansion of industry also, to be set up in any City, Municipality, Town-ship or Panchayat Union limit other than the Madras Metropolitan area in which the main industry is functioning. Hereagain, it is stipulated that the assets other than cash of the existing industry, are not transferred and shown as the assets of the expanded Unit.

(f) Further, by way of explanation to Clause (aa), what is meant by "expansion" has been stated to mean that an increase in production of such expanded Unit, which results in an increase of 25% or more in the consumption of electricity by the industry with reference to the highest electricity consumption of such

industry in the three completed financial years preceding the application.

(g) Under Clause (c) of the said amended Schedule, it has been specifically stated that the new industries to be set up in the Madras Metropolitan areas shall not be eligible for any tariff concession.

(h) The respondent applied for tariff concession for its "B" Unit for a period of three years, namely from 27.9.1995 to 26.9.1998. However, the appellants took the stand that the "B" Unit of the respondent can only be held to be an expansion of its "A" Unit and since the "B" Unit satisfied the conditions stipulated in the explanation to Clause (aa) of the amended Schedule as per G.O.Ms. No. 29, dated 31.1.1995, only from 26.2.1996, it would be entitled for such tariff concession (i.e) between 26.2.1996 and 26.9.1998. In other words, the tariff concession extended to "B" Unit of the respondent was restricted between 26.2.1996 and 26.9.1998. To put it differently, in view of the stand of the appellants that the "B" Unit of the respondent was only by way of an expansion to its "A" Unit, it was not entitled for full three years of tariff concession, but only from the date it satisfied the conditions stipulated in the explanation to Clause (aa) of the amended Schedule as per the said G.O.Ms. No. 29, which date was noted as 26.2.1996.

(i) By order dated 10.12.1997, signed on 30.12.1997, the second appellant herein confirmed their earlier stand in their communication dated 27.4.1996 and refused to allow full period of three years by treating the "B" Unit of the respondent as a "new industry".

(j) When the said order of the second appellant was challenged in W.P. No. 2389 of 1998, the learned single Judge, by order dated 25.2.1999, held that the rejection of the respondents claim to treat its "B" Unit as a "new industry" for the grant of tariff concession on the ground that the machineries installed in the said "B" Unit were identical to the one installed in the "A" Unit of the respondent and the products manufactured in the "B" Unit were also the same like that of the "A" Unit was not valid in Law. Accordingly, the learned single Judge directed the appellants to treat the "B" Unit of the respondent as a "new industry" and grant the tariff concession on that basis.

(k) The Writ Appeal preferred against the said order of the learned single Judge, came to be disposed of by the earlier Division Bench of this Court, by judgment dated 26.9.2003. in the said judgment, it was held that the consideration of the issue, namely whether "B" Unit is by way of a new investment by the existing entrepreneur, namely "A" Unit, or an expansion of "A" Unit, would require scrutiny of very many material facts, which cannot be examined in Writ proceedings and trial such exercise can be carried out only before the competent Civil Court. So saying, by the earlier Judgment, the Division Bench set aside the order of the learned single Judge while dismissing the Writ Petition, and held that such decision was without prejudice to the right of the respondent to approach the Civil Court if they are so advised.

(l) As against the above judgment of the Division Bench in the Writ Appeal dated 26.9.2003, a SLP was preferred by the respondent herein before the Supreme Court of India in Civil Appeal No. 899 of 2005 (arising out of SLP(C). No. 1135 of 2004) and the said Civil Appeal came to be disposed of by the Supreme Court, by order dated 4.2.2005, holding as under:

Leave granted.

Heard learned Counsel for the parties.

The Division Bench of the High Court while reversing the order of the learned Single Judge and dismissing the writ petition of the petitioner merely stated that the question whether "B" unit of the company came into existence by new investment made by any entrepreneur including the existing industry could be gone into only in appropriate civil proceedings before the competent Civil Court.

After hearing the learned Counsel for the parties, we do not find that the writ court was, in any way, inhibited from going into the facts on record for deciding the question whether the "B" unit came into existence by new investment or it was merely an old unit so as to be denied the concessional tariff.

In these circumstances, we allow this appeal and remit the writ appeal to the Division Bench for deciding the appeal afresh after hearing the parties on the disputed question.

(m) In the light of the abovesaid order of the Supreme Court, we were obliged to hear this Writ Appeal again and render this judgment.

4. We have heard Mr. P.S. Raman, learned Additional Advocate General appearing for the appellants and Mr. Alagirisamy, learned Senior Counsel appearing for the respondent.

5. In the course of his submissions, learned Additional Advocate General, after referring to G.O.Ms. No. 29, Energy (A.2) Department, dated 31.1.1995 as well as the earlier G.O.Ms. No. 102, Public Works (Electricity) Department, dated 24.1.1992, contended that the benefit of tariff concession extended to expansion of an existing Unit, can only relate to such expanded Unit which also manufactures the very same product. According to him, if the product manufactured in another Unit started by the same entrepreneur is identical to the product manufactured in the existing Unit, that can only be categorised as an "expansion" of the existing Unit and the same can never be called a "new industry".

6. To draw support to his submissions, learned Additional Advocate General would lay heavy stress upon the definition clause of "expansion" in the Government Order and contend that for the purpose of the G.O., increase in production was the necessary criteria and the production would always be one and the same only in the case of "expansion" and therefore, it will have to be held that the "B" Unit which manufactured the very same product of "Hank

Yarn", which is manufactured by "A" Unit, it can only be called as an "expansion" of "A" Unit and not a "new industry".

7. According to learned Additional Advocate General, there can never be a case of a new industry by the existing entrepreneur, if the product manufactured is one and the same, even if other conditions stipulated in the G.O. are satisfied.

8. Learned Additional Advocate General contended that the grant of advantage of benefit from the payment of electricity tax by treating the "B" Unit as a "new industry" under the Tamil Nadu Electricity (Taxation on Consumption) Act. By Itself would not entitle the respondent to claim the benefits under the Tamil Nadu Act 1 of 1979, since the former legislation does not make any distinction between a "new industry" and an "expansion" of an existing industry for the purpose of granting exemption from levy of additional electricity tax.

9. Learned Additional Advocate General however fairly placed before the Court the decision of the Supreme Court reported in Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, and State of Gujarat and Others Vs. Saurashtra Cement and Chemical Industries Ltd., , where the expression "expansion" or "new industry" has been discussed in detail.

10. An extreme stand was also taken on behalf of the appellants that the B Unit of the respondent was not entitled for any tariff concession either by way of "expansion" or a "new industry", since the "B" Unit was established in different village, though failing under the same Panchayat Union.

11. As against the above submissions, Thiru Alagirisamy, learned Senior Counsel appearing for the respondent, by tracing the history of tariff concession granted under different Government Orders, right from the one issued in G.O.Ms. No. 861 dated 30.4.1982 to the one dated 31.1.1995 in G.O.Ms. No. 29, pointed out that originally, the tariff concession was not made available for subsequent expansion or diversification of production in the year 1982. In the year 1988, such concession was extended even to a "new industry" made by the entrepreneur of an existing industry, subject to the condition that there was no transfer of assets of the existing industry and shown as assets of the "new industry". It was pointed out that while making such a relaxation in the year 1988, the restriction, namely that such tariff concession would be applicable only once to a consumer for a new industrial undertaking and the same would not be available for any subsequent expansion or diversification of production. Learned Senior Counsel appearing for she respondent, then pointed out that in the year 1991 and 1982, extension of such tariff concession for any expansion of the industry within the City, Township. Municipality or Panchayat Union limits in which the main industry was functioning, was retained, meaning thereby that such concession would be available in case of expansion of the industry outside the areas in which the main, industry was functioning. By referring to the subsequent G.Os. in G.O. No. 1330, dated 17.9.1992 and G.O. No. 313, dated 26.2.1993, learned Senior Counsel appearing for the respondent contended that a further relaxation came

to be made in respect of expansion of industry also to be set up in the same City, Municipality, Township or Panchayat Union limits in which the main industry was functioning and the only exclusion was the areas where such industry was functioning within the Madras Metropolitan area.

12. Learned Senior Counsel also relied upon a communication of the appellants dated 11.10.1995, wherein, the appellants granted exemption to the respondent from levy of additional electricity tax for the period 27.9.1995 to 28.9.1998 (three years) treating the same as a "new industry" by applying the appellants' Board Proceedings in Permanent B.P.(F.B.). No. 119, dated 17.6.1993. Learned Senior Counsel by drawing the attention of this Court to paragraphs 4 and 5 of the above referred to B.P., contended that when the said B.P. came to be issued by the appellants in tune with the definition of a "new industry", different yardstick applied by the appellants for granting the tariff concession under G.O.Ms. No. 29. dated 31.1.1995, was erroneous in law and therefore, the same is liable to be set aside.

13. Having heard the learned Counsel for the respective parties, for better appreciation of the issue in controversy, namely whether the "B" Unit of the respondent would fall within the category of a "new industry" or "expansion" of its "A" Unit, relevant Clauses in the amended Schedule as per G.O.Ms. No. 29, as well as the B.P. dated 17.8.1993 need extraction.

14. In G.O.Ms. No. 29, Energy (A.2) Department, dated 31.1.1995, the relevant Clauses are Clause (a), Clause (aa) and Clause (c)(i) to the amended Schedule, which are to the following effect:

(a) In the case of new High Tension Industries to be set up in the areas other than the Madras Metropolitan areas the following concessional tariffs shall be charged for the first three years from the date, the consumer is given service connection under high tension tariff:

For the first year....

60 per cent of the High Tension rates.

For the second year....

70 per cent of the High Tension rates.

For the third year....

80 per cent of the High Tension rates.

For the fourth year.... Full tariff.

The above concession shall apply to both unit rates and maximum demand charges. This concession shall not however, be applicable to an industry set up before the 3rd May 1989. The concession shall not also be applicable to a consumer, who utilises power from his own generating units or makes other arrangements for production purposes and utilises the power supplied by the

Board for auxiliary purposes only:

Provided that the High Tension industries set up in any area (including industrially under developed area, notified as such by the Government) before the 3rd May 1989 which are availing tariff concessions or reduction under High Tension Tariff I as on the 2nd May 1989, shall continue to avail the said tariff concession or reduction until the expiry of the period of five years from the date the consumer is given service connection under High Tension Tariff I.

Explanation.-- For the purpose of electricity tariff concessions for new industries the term "new industries" shall mean a new investment by any entrepreneur including by an existing industry in any area other than the Madras Metropolitan areas, provided the assets other than cash, of the existing industry, are not transferred and shown as assets of the new industry."

(aa) The tariff concession shall be applicable to expansion of industry also to be set up in any city, municipality, township or panchayat union limit other than the Madras Metropolitan areas in which the main industry is functioning, provided the assets other than cash of the existing industry are not transferred and shown as the assets of the expansion:

Provided that the tariff concession shall be applicable only once, to a new industry or an expansion of the industry in the area comprising the satellite town of Maraimalai Nagar New Town developed by the Madras Metropolitan Development Authority, irrespective of the fact whether such industry has availed of such concession outside the area of Maraimalai Nagar earlier or not, and also whether such industry is considered new investment or not:

Provided further that the concession for the expansion of industry shall not be applicable to the existing industry availing the concession for the additional load in the High Tension service for its expanded activity beyond the period of three years or five years, as the case may be, as specified in item (a) and the proviso thereto, respectively.

Explanation -- The term "expansion" shall mean an increase in production which results in an increase in 25 per cent or more in the consumption of electricity by the industry with reference to the highest electricity consumption of such industry in the three completed financial years preceding the application."

(c)(i) The new industries to be set up in the Madras Metropolitan areas shall not be eligible for any tariff concessions.

15. The relevant Clauses in B.P. No. 119, dated 17.6.1993, is paragraphs 4 and 5(a), which read as follows:

4. The Government of Tamil Nadu in the Tariff Notification issued u/s 4 of the Tamil Nadu Revision of Tariff Rates on Supply of Electrical Energy Act 1978 has defined new H.T. Industries as indicated below for the purpose of extending concessional tariff for a period of 3 years.

New industries shall mean a new Investment by any entrepreneur including by an existing industry in any area other than Madras Metropolitan area provided the assets other than cash of the existing industry, are not transferred and shown as assets of the new industry

According to the above Classification of new H.T. industry, the Board is allowing concessional tariff rates to the new H.T. industries eligible for such concessional tariff rates.

5. As the Government has defined new industries as above in respect of industries availing H.T. supply, the Board after careful consideration orders as indicated below for giving exemption from payment of additional electricity tax to the New industries availing H.T. supply only.

a. all the new H.T. industries as defined in the Tariff Notification issued by the State Government u/s 4 of the Tamil Nadu Revision of Tariff Rates on Supply of Electrical Energy Act 1978 and who have availed H.T. Supply on or after 30.7.92 may be allowed the Additional Electricity Tax exemption for a period of 3 years from the date of commencement of manufacture or production of the principal product.

16. In the case of the respondent, while its "A" Unit was located at Melakandamangalam Village, Aruppukottai Taluk, Virudhunagar District, its "B" Unit came to be located at Tamilpadi Village, Tiruchuli Taluk, Virudhunagar District, which commenced its commercial production from 1.9.1995. The service connection of the "A" Unit was assigned the No. - H.T.S.C. No. 68, while its "B" Unit was assigned the No. ? H.T.S.C. No. 150. The tariff concession claimed by the respondent was for the "B" Unit for the period 27.9.1995 to 26.9.1998 by treating it as a "new industry".

17. it is admitted that both "A" Unit and "B" Unit are manufacturing "Hank Yarn". It is also not in dispute that while both the "A" Unit and "B" Unit fall within the same Panchayat Union, namely Thiruchuli Panchayat Union, they were located in two different villages.

18. In the abovesaid background, when the stipulations contained in G.O.Ms. No. 29, dated 31.1.1995 are analysed, we find that Clause (a) of the amended Schedule in the said G.O.Ms. No. 29, deals with the applicability of tariff concession to new industries. The relevant criteria to be considered for the grant of such tariff concession are:

(a) Such tariff concession will be available to such new high tension industries set up in the areas other than Madras metropolitan areas.

(b) Such concession shall not be applicable to an industry set up before 3rd May, 1989.

(c) Such concession shall not be applicable to a consumer who utilises power from his own generating Units or by making other arrangements for production

purposes and the power supplied by the Board is used only for auxiliary purposes.

19. If new industry is set up by way of new investment by any entrepreneur of an existing industry, such investment can only be by way of cash investment and not by way of transfer of assets other than cash and such assets shown as assets of the new industry. Such set up of new industry by the entrepreneur of an existing industry, should be in any area other than the Madras Metropolitan areas.

20. under Clause (aa) of the amended Schedule in the said G.O.Ms. No. 29, dated 31.1.1995, the relevant criteria stipulated for the grant of tariff concession applicable to expansion of any industry are:

(a) Such expansion activity should be set up in any City. Municipality, Township or Panchayat Union limit other than the Madras Metropolitan areas.

(b) Hereagain. the assets other than cash of the existing industry should not have been transferred and shown as the assets of the expanded Unit.

21. The proviso to the above Clause (aa) carves out yet another area, namely the Satellite Town of Maraimalai Nagar New Town, developed by M.M.D.A. (now known as "C.M.D.A") and the proviso states that the tariff concession shall be applicable only once to a new industry or an expansion of the industry in the area comprising the said Satellite Town, irrespective of the Fact whether such industry availed of such concession outside the area of Maraimalai Nagar earlier or not and also whether such industry is considered new investment or not. Further, in order to qualify for claiming the concession as an "expanded" Unit, the increase in production should result in a minimum consumption of 25% or more with reference to the highest electricity consumption for such industry for the three completed financial years preceding the application.

22. From the above various criteria stipulated in the G.O., we could discern that the definition of "expansion" by way of explanation to said Clause (aa), was for the purpose of eligibility to claim the concession, in other words, while the qualification for the purpose of categorising a Unit as an "expansion" of an existing industry, the relevant Clause is only Clause (aa). For the purpose of eligibility to grant the concession, such "expanded" Unit has to further satisfy the requirement of ensuring 25% or more of the power consumption in the course of increase in production. To put it differently, while the former prescribes the qualification, the latter is only to test the eligibility criteria for working out the entitlement. It can also be said that even if the Unit by way of expansion satisfies the criteria prescribed in Clause (aa), yet, in order to avail the tariff concession, the minimum requirement by way of increase in power consumption has got to be satisfied. However, it has to be pointed out that the latter cannot be the "sine qua non" for the former, while the converse would require satisfaction of such requirement.

23. On the abovesaid analysis, when we test the submission made by the learned Additional Advocate General, though it can be held that the end-product

of the "expanded" Unit may be the same, it need not necessarily be the same always. We say so because, the "expansion" of an existing Unit can be set up for the production of necessary auxiliary products, which can also go a long way for increasing the production of the existing main product. For instance, if a manufacturer of a car industry goes in for "expansion" and sets up an industry by investment of cash without transfer of any other asset in the expanded Unit, the outcome of the product in the expanded Unit is in the form of spare parts such as suspension unit, gear-box, carburettor or such other auxiliary spare parts which are required for the manufacture of a motor-car, which is the main product, but yet, by virtue of the production in the expanded Unit, the existing Unit could satisfy the requirement of more than 25% consumption by way of electrical energy by way of increase in production of its main product of motor car, and thereby satisfies the relevant criteria stipulated in Clause (aa) as well as the Explanation to the said Clause for availing of the tariff concession as provided therein. Therefore, we are unable to accept the submission of the learned Additional Advocate General that the expansion" should always result in production of the very same product and not otherwise, and only then, it could satisfy the eligibility criteria stipulated in the Explanation to Clause (aa).

24. The submission of the learned Additional Advocate General was to drive home his point that if the product manufactured in the subsequent Unit is the same, It can only be held to be an "expansion" of the existing Unit and can never be declared as a "new industry". When we test the said submission also with reference to the various criteria stipulated in Clause (a), we find that since we have steered clear of the position that an existing industry manufacturing a "A" product, can also set up another industry producing the very same product "A", the only other consideration to be made is whether such a new industry satisfies the other requirements stipulated in Clause (a). If the various criteria called out by us and listed in the foregoing paragraphs, are satisfied by the entrepreneur of an existing industry by setting up another industry anew, even for the production of the very same product, it will have to be held that in the event of satisfying such requirements, the said industry would certainly fall within the category of "new industry", even though the ultimate product manufactured would be the same to that of the one produced by the existing industry of the new entrepreneur.

25. if that is the test and consideration to be made for the purpose of granting tariff concession for a "new industry", it will have to be held that, that and that alone should be the relevant test and consideration to be examined for the purpose of granting tariff concession as provided under G.O. Ms. No. 29, dated 31.1.1996.

26. In this context, it will be worthwhile to refer to the above said decisions of the Supreme Court reported in Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, and State of Gujarat and Others Vs. Saurashtra Cement and Chemical Industries Ltd., , relied on by

learned Additional Advocate General.

27. In *Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal*, the Supreme Court considered the scope of application of Section 15-C of the Indian Income Tax Act, 1922, which provides exemption from tax of newly established industrial undertakings. While considering the benefit to be granted under the said provision, the Supreme Court has set out the factors which are to be considered in order to hold whether an industrial undertaking can be held to be a "new undertaking" or only a "split-up" of the old existing business. Paragraphs 16 to 18 of the judgment of the Supreme Court would be relevant for our purpose, which read as under:

16. the assessee continues to be the same for the purpose of assessment. It has its existing business already liable to tax. It produced in the two concerned undertakings commodities different from those which he has been manufacturing or producing in its existing business. Manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit is the heart of the matter, to earn benefit from the exemption of tax liability u/s 15-C. Sub-section (6) of the section also points to the same effect, namely, production of articles. The answer, in every particular case depends upon the peculiar facts and conditions of the new industrial undertaking on account of which the assessee claims exemption u/s 15-C. No Hard and fast rule can be laid down. Trade and industry do not run in earmarked channels and particularly so in view of manifold scientific and technological developments. There is great scope for expansion of trade and industry. The fact that an assessee by establishment of a new industrial undertaking expands his existing business, which he certainly does, would not, on that score, deprive him of the benefit u/s 15-C. Every new, creation in business is some kind of expansion and advancement. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business. No particular decision in one case can lay down an inexorable test to determine whether a given case comes u/s 15-C or not. In order that the new undertaking can be said to be not formed out of the already existing business, there must be a new emergence of a physically separate industrial unit which may exist on its own as a viable unit. An undertaking is formed out of the existing business if the physical identity with the old unit is preserved. This has not happened here in the case of the two undertakings which are separate and distinct.

17. it is clear that the principal business of the assessee is heavy engineering in the course of which it manufactures boilers, wagons, etc. If an industrial undertaking produces certain machines or parts which are, by themselves, identifiable units being marketable commodities and the undertaking can exist even after the cessation of the principal business of the assessee. it cannot be anything but a new and separate industrial undertaking to qualify for appropriate

exemption u/s 15-C. The principal business of the assessee can be carried on even if the said two additional undertakings cease to function. Again, the converse is also true. The fact that the articles produced by the two undertakings are used by the Boiler Division of the assessee will not weigh against holding that these are new and separate undertakings. On the other hand the fact that a portion of the articles produced in these two industrial undertakings had been sold in the open market to others is a circumstance in favour of the assessee that the new industrial units can function on their own. Use of the articles by the assessee is not decisive to deny the benefit of Section 15-C.

18. Section 15-C partially exempts from tax a new industrial unit which is separate physically from the old one, the capital of which and the profits thereon are ascertainable. There is no difficulty to hold that Section 15-C is applicable to an absolutely new undertaking for the first time started by an assessee. The cases which give rise to controversy are those where the old business is being carried on by the assessee and a new activity is launched by him by establishing new plants and machinery by investing substantial funds. The new activity may produce the same commodities of the old business or it may produce some other distinct marketable products, even commodities which may feed the old business. These products may be consumed by the assessee in his old business or may be sold in the open market. One thing, is certain that the new undertaking must be an integrated unit by itself wherein articles are produced and at least a minimum of ten persons with the aid of power and a minimum of twenty persons without the aid of power have been employed. Such a new industrially recognisable unit of an assessee cannot be said to be reconstruction of his old business since there is no transfer of any assets of the old business to the new undertaking which takes place when there is reconstruction of the old business. For the purpose of Section 15-C the industrial units set up must be new in the sense that new plants and machinery are erected for producing either the same commodities or some distinct commodities. In order to deny the benefit of Section 15-C the new undertaking must be formed by reconstruction of the old business. Now in the instant case there is no formation of any industrial undertaking out of the existing business since that can take place only when the assets of the old business are transferred substantially to the new undertaking. There is no such transfer of assets in the two cases with which we are concerned.

(underlining is ours)

28. In the subsequent decision reported in *State of Gujarat and Others Vs. Saurashtra Cement and Chemical Industries Ltd.*, , the Supreme Court applied the principles set out in the decision reported in *Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal*, in respect of a case which arises under the *Bombay Electricity Duty Act, 1958*, which provided for exemption from electricity duty under that Act. The Supreme Court set out the facts involved so that case in paragraph 2, which are to the following effect:

2. Briefly the facts are that the respondent is engaged in manufacture of portland cement. It installed a manufacturing plant in the year 1960 with a capacity of producing 660 metric tones of clinker per day. The respondent added one more kiln in 1965 and increased its production capacity to 1000 metric tones. By August 1969 the respondent installed further machinery in a new building erected within the same premises to further increase its production capacity. The respondent installed a new kiln along with separate silos, lepol and nodulizers, coal mill and cement mill. This unit started manufacturing cement on 24 June, 1971. The unit was using existing idle capacity of crushers, cranes, packing machines, coal mills, and raw mills

While the respondent in that case claimed that new kiln set up in 1969 was a new industrial undertaking as contemplated by Section 3(2)(vii)(b) of the Bombay Electricity Duty Act, 1958, which contention found favoured with the High Court and the Supreme Court has held as under in paragraph 10:

10. This meaning is to be applied to the facts on record. The respondent company when it initially started had a production capacity of 660 metric tonnes which was subsequently increased to 1000 metric tonnes. In 1989-70 by setting up the alleged new unit, production capacity of the company more than doubled. But as already seen this unit is not self-contained. it is not an independent viable unit, it is dependant on various items of plant and machinery and mills of the existing unit. Further respondent was having two kilns and third is added. This leads to the inevitable conclusion that the new unit is an expansion of an existing undertaking in the State. Once it is held to be a case of expansion, the claim for exemption from electricity duty, set up by the respondent, completely falls to the ground. In the facts and circumstances of the case we are clearly of the view that the respondent is not entitled to exemption from electricity duty. The High Court failed to apply the real test which emerges from the judgment of this Court in Textile Machinery Corporation (supra) which was affirmed in a subsequent decision in Bajaj Tempo Ltd., Bombay Vs. Commissioner of Income Tax, Bombay City-II, Bombay, . Accordingly, this appeal is allowed. The judgment of this High Court under appeal is set aside. The respondent is held not entitled to exemption from electricity duty.

(underlining is ours)

29. From a reading of the above referred two decisions, it will have to be held that in the light of the G.O. Ms. No. 29, dated 31.1.1995, while considering the various material facts relating to the two industries of an entrepreneur, if it were to be held that the subsequent industry was by way of an "expansion" of the existing industry irrespective of the product manufactured in the subsequent industry, if there is inter-dependence as between the former and the latter, the latter can only be called as an "expansion" of the former. In such a situation, it can be seen that the existence of the latter would always depend upon the former, and in the event of the former establishment failing, there would be very little scope for the latter to continue to exist, even though there would be only

cash investment of the former without transfer of other assets by the former to the latter. However, in contra distinction to the above, in the case of a "new industry", both the Units will be independently existing without any inter-dependence. Even if there is any source of supply from the subsequent Unit to the earlier existing Unit, that by itself would not in any way affect the independent existence of the latter, so long as, its trading operation is totally independent of the former. Added to the above test, such other factors, namely independent registration under the relevant Act as well as tax statutes, employment of different set of employees governed by the different set of working condition, independent coverage under the provisions of the Employees' Provident Fund and Miscellaneous Provisions Act, Employees' State Insurance Act and other welfare legislations, would also be available to the entrepreneur to claim that such establishment should be construed as a "new industry" and not an "expansion* of the existing industry.

30. In this context, it would be relevant to refer to Section 20 of the Tamil Nadu General Sales Tax Act and Rules 43 and 45 of the Tamil Nadu General Sales Tax Rules, which read as follows:

Section 20: Registration of dealers -

(1)(a): Every dealer whose total turnover in any year is not less than three lakhs rupees shall, and any other dealer or person intending to commence business may, get himself registered under this Act.

Rule 43: if at any time a registered dealer (a) discontinues of sells or otherwise disposes of, the whole or any part of any business carried on by him, or (b) changes his place of business or any of his places of business, or (c) opens a new place of business, or (d) changes the name of any business carried on by him, he shall notify the fact to the registering authority and to the assessing authority if he is different from the registering authority, and if the registered dealer has more than one place of business, also to the Commercial Tax Officer or the Deputy Commercial Tax Officer in whose area of jurisdiction the registered dealer has a place of business, within thirty days thereafter."

Rule 45: Every dealer who is liable to registration u/s 20 of the Act and who is an undivided Hindu family, an association or a club, society, firm or company or who carries on business as the guardian, or trustee or otherwise on behalf of another person, shall, within the period specified in Rule 24, send to the registering authority and to the assessing authority if he is different from the registering authority and if the dealer has more than one place of business, also to the Commercial Tax Officer or the Deputy Commercial Tax Officer in whose area of jurisdiction the dealer has a place of business, a declaration in Form XI stating the name of the person who shall be deemed to be the manager of such dealer's business for the purposes of the Act. All statements and returns submitted by such manager shall be binding on the dealer. Such declaration may be revised from time to time.

31. To get independent registration of the business, fulfilment of such statutory requirements, would also be relevant to be examined when an entrepreneur claims the benefit of tariff concession under the premise that the subsequent industry is a new industry.

32. in view of the above stated legal background, when the claim of the respondent is to be considered, we find that the particulars, based on which the respondent claims tariff concession on the footing that its "B" Unit should be construed as a new industry", are not sufficient enough to come to a definite conclusion. As far as the impugned order dated 30.12.1997 of the second appellant is concerned, the only reason which weighed with him was that the main machineries installed in both the Units are the same, namely "ring-frame spinning machineries", that both the Units manufactured "60s count yarn" and therefore, the "B" Unit should be held to be an "expansion" Unit of the "A" Unit.

33. At the outset, it will have to be held that such a solitary test applied by the appellants to reject the claim of the respondent, cannot be accepted. Therefore, on the face of it, the order impugned in the Writ Petition is liable to be set aside. However, since the very many factors which are to be considered for reaching a conclusion as to whether the "B" Unit of the respondent is a "new industry" or "expansion" of the "A" Unit, were neither placed before the appellants, nor substantiated with relevant materials, we are not in a position to give a definite finding based on the averments contained in the affidavit filed in support of the Writ Petition. (Sic) it will not be proper for this Court to either grant the relief to the respondent or non-suit it. Since the appellants are the competent authorities to examine any claim for tariff concession based on G.O.Ms. No. 29, dated 31.1.1985. We are of the considered view that the respondent can be directed to furnish all the particulars in supports of its claim that the "B" Unit should be construed as a "new industry" and not an "expansion" of its "A" Unit in the event of such materials being placed before the appellants, the appellants can be directed to consider the same on its own merits and in accordance with law, and in the light of the guidelines set out by as in this judgment and pass appropriate orders as to the respondent's claim for tariff concession under G.O.Ms. No. 29, dated 31.1.1995 either as a "new industry or as an "expansion" of its existing "A" Unit,

34. Though at the instance of the appellants, certain submissions were made as regards the location of the respondents "B" Unit, as has been raised in paragraph 9 of their written submissions, having regard to the fact that the appellants have accepted the position that the respondent is entitled for the tariff concession, we feel it appropriate to hold that such a stand now raised on behalf of the appellants to reject the very claim of the respondent for tariff concession based on G.O.Ms. No. 29, dated 31.1.1995, cannot be made and such a stand of the appellants is hereby rejected.

35. In the light of our above conclusions, we set aside the impugned order of the second appellant dated 30.12.1997 and the respondent is permitted to move the

third appellant in the form of a statement of claim furnishing all the particulars in support of its stand that its "B" Unit is a "new industry" and not an "expansion" of the existing "A" Unit and also submit all the relevant documents in support of the said stand. The respondent shall submit such statement of claim along with supporting materials within one month from the date of receipt of a copy of this judgment. On such statement of claim being filed by the respondent the appellants the same and pass appropriate orders on merits and in accordance with law, expeditiously, preferably within a period of one month from the date of filing of such statement of claim by the respondent. One appellants can pass such under (Sic) by whatever stated by the learned single Judge.

36. The Writ Appeal however fails and the same is dismissed. The order of the learned single Judge is upheld on the reasoning and relief granted herein. No costs, C.M.P. and V.C.M.P. are closed.