

(2008) 04 SHI CK 0010
In the High Court Of Himachal Pradesh

Union of India (UOI)	Vs	APPELLANT
State of H.P. and Others		RESPONDENT

Date of Decision : 10-04-2008

Acts Referred:

Citation : (2008) 3 ShimLC 97

Hon'ble Judges : Rajiv Sharma, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—This appeal is directed against the judgment of a learned Single Judge of this Court whereby he has allowed CWP No. 812 of 2001 filed by the respondents No. 4 and 5 herein and has held that the petitioner No. 1 is entitled to the amount of transport subsidy.

2. Brief facts of the case are that the petitioner is a public limited Company duly incorporated under the Indian Companies Act, 1956. It is engaged in the manufacture of cement at Barmana in District Bilaspur. The petitioner-company set up its first Unit at Barmana prior to 1984 but the said Unit was commissioned in the year 1984. The Union of India had framed a scheme known as "Transport Subsidy Scheme" in the year 1971. This scheme was applicable in the State of H.P., and has been extended from time to time and admittedly continued to remain in operation with certain modifications. The salient features of the scheme as initially notified were that it would be applicable to the existing and new industrial units. The scheme was also applicable in case of substantial expansion by 25% or more of the licensed or approved capacity. The scheme provided for grant of transport subsidy to industrial units located in the selected areas in respect of raw materials which are brought into and finished goods which are taken out of such areas. Initially, there was no time limit for the period for which transport subsidy was to be granted but vide notification dated 28.7.1993, the scheme was partly modified and the benefits under the scheme were limited to a period of 5 years from the date of commencement of

commercial production.

3. As noted above, the first Unit of the petitioner-company came into production in the year 1984. Thereafter the petitioner-company was granted transport subsidy in respect of this old industrial Unit which for the sake of convenience is referred to as Unit No. 1. A second Unit was commissioned and came into production in the year 1994. It was separately registered with the Excise authorities and was also registered as a separate industrial Unit by the Government of Himachal Pradesh. This Unit being a new Unit claimed transport subsidy w.e.f. 15.9.1994. Admittedly, transport subsidy was initially released in favour of this Unit till 30.9.1997 though according to the petitioner, it is entitled to a higher amount than what has been paid. This subsidy in respect of Unit No. 2 thereafter was discontinued w.e.f. 1.10.1997. The subsidy was discontinued on the ground that the second unit was only an expansion of the first unit and hence not entitled to transport subsidy in terms of the notification dated 28.7.1993. Thereafter correspondence was exchanged between the parties and finally a writ petition was filed which has been allowed. Hence, the present Letters Patent Appeal.

4. The main question which arises for consideration is whether the second Unit is a separate industrial Unit or is only an expansion of the old Unit. In case it is a separate Unit, then there is no manner of doubt that the petitioner-company would be entitled to grant of transport subsidy but in case it is only held to be only an expansion of the original Unit, the petitioner-company would not be entitled to grant of transport subsidy.

5. It would be pertinent to mention that even the appellant-Union of India as well as the various departments of the State of H.P. always treated the Unit No. 2 as a separate Unit. It is only when an objection was raised by the Comptroller and Auditor General (CAG) that the Unit No. 2 was treated as substantial expansion of Unit No. 1. The case of the appellant is based on the reasons given by the CAG which read as follows:

- (i) Unit Nos. 1 and 2 are located at the same place and use the same infrastructure and office facilities. It is not possible to identify or segregate the raw material being brought in and the finished goods exported;
- (ii) Unit No. 2 belongs to the same Company and was doing exactly the same business of Unit No. 1 and functioning from the same premises;
- (iii) The ownership of both the Units is the same and only one consolidated balance sheet is prepared taking capital of the two units together;
- (iv) The sale tax, registration and Pollution Control Certificate issued by the State Authorities do not distinguish between the two Units;
- (v) In January, 1993, the petitioner Company had filed an Industrial Entrepreneur Memorandum (IEM) for effecting substantial expansion of the Unit at Gagai from 7.60 Lakh tons per annum (LTPA) to 10 LTPA. Though Unit No. 2 is

claimed as a new Unit, the date from which commercial production was to start remained the same, viz., 31.10.1993, it appears that the petitioner Company was seeking to take advantage of the Transport Subsidy Scheme for an extended period, as a proposal to restrict the subsidy to a maximum period of five years was under consideration of the Ministry at that time;

(vi) The minimum gestation period for a new cement plant to commence production normally is not less than two to three years. It is not clear how Unit No. 2, which is being claimed as a new Unit, could commence production within a period of 18 months. This can be achieved only when it is a case of substantial expansion;

(vii) In the meeting convened on 26.6.2000 by the Department of Industrial Policy and Promotion (DIPP) to consider whether Unit No. 2 was to be treated as a separate Unit or a case of substantial expansion, officials of the State Government and representatives of the petitioner Company also took part. The issue relating to payment of Transport Subsidy was to be sorted out between DIPP and the State Government. In such circumstances, the propriety of the petitioner Company participating in the meeting was questionable; and

(viii) The Transport Subsidy Scheme seeks to promote the development of industry in remote and inaccessible areas. The intention of the Scheme is to grant subsidy for a period of five years whereafter the Unit became self sufficient to meet its transportation costs in full. Units cannot undertake substantial expansion and claim to be new units for the purpose of Transport Subsidy.

6. It would be relevant to mention that the appellant itself treated the second Unit as a separate and a new unit on account of the following grounds:

(a) It had separate Central Excise Registration number;

(b) A separate Sales Tax Certificate was issued by the H.P. Sales Tax Authority on 13.3.1995 with effect from 15.9.1994;

(c) It was considered as a separate factory by the State Labour Department;

(d) Separate power load was sanctioned and separate power meter(s) were installed by the State Electricity Board for Unit No. 2 to regulate the power supply to the said unit;

(e) The unit was exempted from electricity duty for a period of nine years with effect from 15.9.1994 by the Chief Electrical Inspector under the State Incentive Rules, 1991;

(f) Clearance was granted by the State Pollution Control Board for setting up Unit No. 2;

(g) The petitioner is maintaining separate RG-I and other registers in respect of Unit No. 2, under the Excise Rules for raw materials, production and finished goods, which records are being verified by the Director of Industries from time to

time;

(h) The plan layout of unit No. 2 has been approved by the Central Excise Department; and

(i) Unit No. 2 has been exempted from both Central Sales Tax (CST) and General Sales Tax (GST) for a period of nine years from the date of commencement of commercial production.

Even when the office of the CAG raised an objection, the appellant-Union of India asserted that the grant of transport subsidy to the petitioner-company for Unit No. 2 was legal on the ground mentioned above.

7. Under the transport subsidy scheme new "Industrial Unit" has been defined in para 4-B to mean an Industrial Unit which has been set up and comes into production on or after commencement of the scheme. The Apex Court in *Textiles Machinery Corporation Ltd. Calcutta v. Commissioner of Income Tax, West Bengal* 1997 (2) SCR 762, also dealt with a question as to what comprises a new Industrial Unit. In that case, the assessee sought benefit on the ground that by expansion, he has set up a new unit whereas according to the revenue, he had only extended his existing Industrial Unit. The Apex Court held as follows:

...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.

8. Applying the test laid down by the Apex Court, it is clear that in the present case, the second unit set up by the petitioner-company was a separate unit having its own distinct identity. The mere fact that both units are located at the same place, shared same infrastructure and office facilities does not mean that they are not separate units. Any company can have more than one unit and merely because there is one holding company, it does not mean that the manufacturing unit cannot be a separate and distinct unit. The respondents have relied upon the fact that consolidated balance sheet is being prepared by the petitioner-company. The company is one company and under law is enjoined to prepare one balance sheet itself.

9. On the other hand, it is clear that both the units have separate registration numbers under the Central Excise Act. Similarly, separate Sales Tax and General Sales Tax certificates have been issued by the State of H.P. for the second unit. Both the units are treated as separate factories by the State Labour and Industrial Department. Both the units are having separate power load sanctioned by the Electricity Board and exemption from electricity duty was granted to the 2nd unit under the State Incentive Rules, 1991. Separate clearance was granted by the State Pollution Control Board for setting up the second unit. The second unit has also been exempted from Central Sales Tax and General Sales Tax as a new unit having a separate distinct capacity. The departments on the basis of completing these formalities have granted transport subsidy to the petitioner-company. The reasoning given by the CAG is not correct and proper.

10. It has been argued at length that initially the petitioner-company had submitted its Industrial Entrepreneur Memorandum (IEM) for expansion of the unit at Gaggal but later-on it was sought to be treated as a separate unit. No fault can be found with the same. When the original IEM was filed as per the transport subsidy scheme prior to 1993 even when the manufacturing capacity of an existing unit was increased by more than 25% subsidy was payable. There was also no time limit prescribed. It was only in the year 1993 that the time limit of 5 years was laid down. Therefore, the company by way of better tax management decided to treat the second unit as a separate unit. It applied for and obtained all clearance for the second unit as a separate and distinct unit. Both, the State Government and the Union of India treated the second unit as a separate and distinct unit. Merely because on a petition an objection has been raised by the CAG, the Union of India cannot now change its stand. The learned Single Judge rightly allowed the writ petition. We find no merit in this appeal which is accordingly dismissed.

Cross-objection No. 4 of 2005,

11. By means of these Cross-objections, the respondents No. 4 and 5 have prayed that interest should be awarded on the subsidy which has been found due and payable to them. The learned Single Judge has used his discretion while rejecting their claim. We find no reason to interfere with the same.

12. In view of the aforesaid discussion, we find no merit in the letters patent appeal as well as in the Cross-objections which are accordingly dismissed. No costs.