2010 (2) GLR 1684

GUJARAT HIGH COURT

Hon'ble Judges:K.A.Puj, J.

Reliance Industries Limited Formerly Known As Reliance Petroleum Limited
Versus State Of Gujarat

SPECIAL CIVIL APPLICATION No. 5400 of 2001 ; *J.Date :- MAY 6, 2010

- BOMBAY ELECTRICITY DUTY ACT, 1958
- CONSTITUTION OF INDIA Article - 14 , 226

Bombay Electricity Duty Act, 1958 - Schedule I, Clause 5, 7 - Constitution of India - Art. 14, 226 - electricity supply obtained for construction of building - Electricity Company sought to recover duty at enhanced rate - contended that energy consumed for construction prior to commencement of production was liable to duty at 60% as per Clause 7 of Schedule I to Act, 1958 - held, Electricity Company not entitled to recover duty at enhanced rate - recovery notices required to be quashed - petition allowed.

Imp.Para: [22] [23] [24] [25]

Cases Referred To :

1. Carew And Company Ltd., V/s. Union Of India, 1975 2 SCC 791
2. Commissioner Of Central Excise, V/s. Mysore Electricals Industries Ltd., 2006 12 SCS 448
3. Dunlop India Ltd., V/s. Union Of India, 1994 4 SCC 686
4. Hindustan Petroleum Corporation Ltd., V/s. Gujarat Electricity Board, 2005 1 GLR 519 : 2005 (1) GLH 644 : 2005 AIR Guj 164 : 2005 (10) GHJ 500 : 2005 (31) AIC 870
5. Indian Carbon Ltd., & Ors. V/s. State Of Assam, 1997 6 SCC 479
6. M:s.Khemka & Co. (Agencies) Pvt. Ltd., V/s. State Of Maharashtra, 1975 2 SCC 22
7. State Electricity Board V/s. Associated Stone Industries And Anr., 2000 6 SCC 141
8. Tamilnadu Electricity Board & Anr. V/s. Status Spinning Mills Ltd., 2008 7 SCC 353

Equivalent Citation(s):

2010 (2) GLR 1684 : 2010 (25) GHJ 246

JUDGMENT :-

1 The petitioners have filed this petition under Article-226 of the Constitution of India praying for quashing and setting aside the order dated 3.8.2000 passed by the respondent No.3 i.e. Dy. Secretary, Energy, Petrochemicals Department, Gandhinagar. The petitioners have also prayed for quashing and setting aside the decision of the respondent authorities of classifying consumption of electrical energy by the petitioner company under the residuary Clause No.7 of the Schedule to the Bombay Electricity Duty Act, 1958 liable to levy at 60% duty as conveyed by notices dated 5.1.1999 at Annexure-D and E to the petition. The petitioners have further prayed for quashing and setting aside the supplementary bills for differential duty dated 5.1.1999 and also the notices for disconnection dated 8.2.1999 in respect of Consumer Account No.27124 ad 27127. The petitioners have further prayed for the direction to the respondent authorities not to demand the amount of differential duty from the petitioner company or not to adjust the amount of differential duty from the security deposit lying with the respondent No.2 and if already adjusted from the security deposit or any other amount liable to be paid to the petitioner or from the amount of refund to be granted to the petitioner from the respondents or any other authority, then to refund the said adjusted amount of differential duty to the petitioner with interest @ 18% per annum till the date of payment.

2 The petition was admitted on 24.7.2001. Initially the petition was filed by Reliance Petroleum Ltd. During the pendency of the petition the petitioner Company was merged into Reliance Industries Ltd., and hence the name of the petitioner Company was changed as Reliance Industries Ltd. Similarly the petition was filed initially against Gujarat Electricity Board. During the pendency the Board was divided into several companies and hence the Company having the jurisdiction over the petitioner was joined as respondent No.2 - Puschim Gujarat Vij Co. Ltd., in place of Gujarat Electricity Board.

3 It is the case of the petitioners that the petitioner Company applied for 5500 KVA power supply for setting up and constructing their factory premises on 29.4.1995. The power supply of 2400 KVA was released to the petitioner Company on 20.8.1996. From the date of supply of electricity till the date of controversy, the petitioner company was classified as consumption of electrical energy by an "industrial undertaking" and, therefore, was classified under Clause No.5 of the Schedule-I of Bombay Electricity Duty Act and was subjected to 20% rate of duty. On 5.1.1999, the Executive Engineer of the then Gujarat Electricity Board issued notice stating that the electrical energy consumed by the petitioner Company for constructing its factory premises would be classifiable under residuary Clause No.7. Of the Schedule and shall attract 60% of the rate of duty and not 20% under Clause-5 of the Schedule as was being done till date. Vide the notice, the differential amount payable by the

petitioner for connection No.27124 for the period between November, 1996 to December, 1998 was assessed at Rs.1,04,35,263/- and for connection No.27127, the differential amount payable was determined at Rs.6,14,237.95.

4 Being aggrieved by the said notice the petitioners have made the representation on 15.1.1999. The respondent No.5 - Executive Engineer referred the dispute regarding classification to the respondent No.4 and till the said dispute is resolved, status-quo ordered was to be maintained. Despite the fact that the dispute was pending before the respondent No.4, the respondent No.5 issued disconnection notice in respect of Connection Nos.27124 and 27127 on 8.2.1999 calling upon the petitioner to pay Rs.1,04,35,263 and Rs.6,14,237.95 respectively within 10 days, failing which electricity supply would be disconnected. The petitioners vide their letter dated 23.2.1999 once again emphasized the illegality of the demand and requested the concerned authority to suspend the enhanced demand of the electricity duty.

5 The petitioners thereafter filed Special Civil Application No.1442 of 1999 before this Court challenging the disconnection notice. This Court vide its order dated 8.3.1999 disposed of the petition directing the Commissioner to decide the reference within 15 days. Despite the direction of this Court to the Commissioner to decide the dispute within 15 days, the Assessment Officer on his own and without any authority, vide his letter dated 9.3.1999 informed the petitioner that electricity duty was leviable at 60% and not 20%. Despite the pendency of the dispute, the Executive Council on 1.4.1999 adjusted the outstanding dues on account of the differential duty from the Cyclone relief fund which was to be disbursed to the petitioner Company. The respondent No.4 vide his order dated 6.4.1999 upheld the classification under residuary Item No.7 of Schedule-1 of the Bombay Electricity Duty Act and directed the department to recover from the petitioner the amount of difference in duty from 20.11.1996 onwards at the rate of 60% of the consumption of energy.

6 Being aggrieved by the said order of the respondent No.4 the petitioner preferred an Appeal before the respondent No.3 i.e. Dy. Secretary on 6.5.1999 who vide his order dated 30.8.2000 dismissed the said Appeal without dealing with or considering the contention raised by the petitioner.

7 Under the above circumstances, the present petition is filed before this Court.

8 Mr. K. S. Nanavati, learned Senior Counsel appearing for Nanavati Associates for the petitioners submitted that the respondent authorities have completely failed to appreciate that the case of the petitioner Company has to be classified in Item No.5 of the Schedule and not in Item No.7 of the Schedule to the said Act. In this connection, he has further submitted that the petitioner Company is an "industrial undertaking" as defined in Section 2(bb) of the said Act, to mean an undertaking engaged predominantly in manufacture or production of

goods. The petitioner Company has undertaken and set about establishing its Petrochemicals Complex and the preparatory moves culminating in production of goods like acquisition of lands, construction of building, installation of plant and machinery obtaining permission and licenses etc. The consumption of electrical energy was for executing steps culminating in production and hence the petitioner Company could not be denied classification as an "industrial undertaking" by the respondent authorities.

9 Mr.Nanavati further submitted that once the petitioner Company is an industrial undertaking, any consumption of electrical energy would be appropriately classifiable under Item No.5 of Schedule-I and apart from the fact that utilization of energy for preparatory steps to production is certainly used by an "industrial undertaking", the item does not curtail the ambit by any end use specification, except that it should not be consumed in respect of any premises used for residential purpose. He has, therefore, submitted that such consumption as has been consumed by the petitioner company can never be classified under Item No.7 of the said Schedule to the said Act. He has, therefore, submitted that the impugned order passed by the respondent No.3 and the action of demanding differential amount of duties on account of such illegal classification, deserves to be quashed and set aside by this Court.

10 Mr.Nanavati further submitted that the contention of the respondent authorities that the petitioner Company has not commenced production and, therefore, consumption of electrical energy is assessable under residuary Item No.7 of the Schedule, has not substance. There is no justification restricting the definition of the term "industrial undertaking" and changing its classification into pre-production and post-production stages. In any event, the language of the Item No.7 is clear that it covers energy consumed in respect of premises not falling under Items 1 to 6 in the Schedule, which certainly does not cover consumption of electrical energy by the petitioner Company for the purposes as aforesaid.

11 Mr.Nanavati further submitted that the term "industrial undertaking" would also cover the activities prior to commencement of commercial production by the said undertaking i.e. all such preparatory activities for setting up of manufacturing unit for the purpose of production of goods would also be covered by the said term and hence only rate of duty at 20% under Entry No.5 of Schedule-I is attracted.

12 Mr.Nanavati further submitted that perusal of the release order dated 20.8.1996 makes it clear that the applicable rate of tariff as being HTP 1 and the bills raised thereafter, after being aware that the energy of 5500 KVA was required for construction activities of the refinery, the decision taken by the GEB is based on an interpretation of the entries of the Schedule-I of the said Act. The dispute with regard to the applicable Entry was raised only in the year 1999 at the behest of the Office of the Commissioner of Electricity Duty. Even if

it is accepted that the activities of the petitioner Company would be covered by the residuary Entry after the adjudication vide order dated 6.4.1999 of the Commissioner of Electricity Duty, even then, the said classification could only have been effective prospective and not retrospective, especially having regard to the fact that the petitioner Company has acted bonafide, on the basis of the bills raised from time to time stipulating relevant applicable tariff of 20% and especially when the nature of activities carried out by the petitioner Company was specifically made known to the respondent Board, way back in 1995, vide letter dated 29.4.1995. He has, therefore, submitted that the demand is clearly time barred and could not have been made applicable for the period prior to 6.4.1999. He has further submitted that the Schedule to the Act cannot enlarge or curtail the meaning of the terms mentioned in the Act. The amendments carried out in the Schedule are only for the purposes of the applicability of the rate of duty and nothing more. Hence, merely because Entry No.5A may have been deleted from Schedule-I, it cannot be concluded that the energy consumed for setting up a manufacturing unit for production of goods cannot be said to be energy consumed by an industrial unit.

13 Mr.Nanavati in support of his submission that there is no provision in the Statute or Rules to recover differential duty on reclassification, relied on the decision of the Apex Court in the case of M/s.Khemka & Co. (Agencies) Pvt. Ltd., V/s. State of Maharashtra, reported in (1975) 2 SCC 22, wherein the Apex Court was concerned with the provisions contained in Section-9(2) of Central Sales Tax Act 1956, and the question paused before the Court was as to whether the provisions for penalty for default in payment of tax in the State Act are applicable and incidental to and part of the process of payment and collection of tax under the Central Act. The Court by majority took the decision that Section-9(2) of the Act first empowers the State authorities to assess, re-assess and enforce payment of tax on behalf of the Government of India including any penalty payable by a dealer under the Central Act. The second part of Section 9(2) provides that this will be as if the tax or penalty payable by such a dealer under the Central Act is a tax or penalty payable under the general sales tax law of the State. This part of the section sets out the scope of work of the State agencies. The word "assess, re-assess, collect and enforce payment of tax including any penalty payable by dealer under this Act" mean that the tax as well as penalty is payable only under the Central Act. It is unsound to suggest that the words "under this Act" qualify dealer. Therefore, it is only tax as well as penalty payable by a dealer under the Central Act which can be assessed, re-assessed, collected and enforced in regard to payment. The penalty under the State Act cannot be assessed, collected and enforced. The provisions of the State Act shall apply only for the purpose of assessment, re-assessment, collection and enforcement. The extent of liability for tax as well as penalty is not attracted by the doctrine of ejusdem generis in the application of the provisions of the State Act in regard to assessment, re-assessment, collection and enforcement of payment of tax including any penalty payable under the Central Act. The deeming provision in the Central Act that the tax as

well as penalty levied under the Central Act will be deemed as if payable under the general sales tax law of the State cannot possibly mean that tax or penalty imposed under any State Act will be deemed to be tax or penalty payable under the Central Act.

14 The principles laid down in M/s.Khemka & Co. (Agencies) Pvt. Ltd.,(Supra) were reiterated by the Apex Court in the case of Indian Carbon Ltd., & Ors. V/s. State of Assam, reported in (1997) 6 SCC 479, wherein it is held that the provisions relating to "interest" in the latter part of S. 9(2) of the Central Sales Act Act, 1956 can be employed by the States sales tax authorities only if the Central Act makes a substantive provision for the levy and charge of interest on Central sales tax and only to that extent. There being no substantive provision in the Central Act requiring the payment of interest on Central Sales Tax, the States sales tax authorities cannot, for the purpose of collecting and enforcing payment of Central Sales tax, charge interest thereon.

15 Mr.Nanavati in support of his submission that it is not open for the respondent authorities to reclassify the duty retrospectively and reclassification is always prospective and not retrospective, has relied on the decision of the Apex Court in the case of Commissioner of Central Excise, V/s. Mysore Electricals Industries Ltd., reported in (2006) 12 SCS 448, wherein the assessee had filed a classification list effective from 1.3.1993, classifying the single panel circuit-breakers under Heading 85.35 and claiming concessional rate of duty at 5% under Notification No.52/93 dated 8.2.1993. The said classification list was approved by the jurisdictional Assistant Commissioner on 10.6.1993. Thereafter, the assessee cleared the said goods in accordance with the approved classification list. When this approved classification was proposed to be revised to reclassify the single panel circuit-breakers under Heading 85.37 of the Tariff Act, such reclassification can take effect only prospectively from the date of communication of the show-cause notice proposing reclassification. The Court, therefore, held that the reclassification can take effect only from the date of issuance of show cause notice and differential duty can be demanded only from that date.

16 Mr.Nanavati in support of his submission that the word "Industrial Undertaking" is having a very wide connotation, relied on decision of the Apex Court in the case of Carew And Company Ltd., V/s. Union of India, reported in (1975) 2 SCC 791, wherein it is held that 'undertaking' is an expression of flexible semantics and variable connotation, used in this very statute in different senses and defined in legal dictionaries widely enough. The word "undertaking' is used in its economic sense and in its wider connotation of embracing not merely factories which have been commissioned but projects which are embryonic and designed to go into production immediately formal legal personality is acquired and statutory approval under the Act secured. 'Is engaged in production' in the context, takes in not merely projects which have been completed and gone into production but also blueprint stages,

preparatory moves and like ante-production points. It is descriptive of the series of steps culminating in production. Not the tense used but the integration of the steps is what is decisive. What will materialise as a productive enterprise in future can be regarded currently as an undertaking in the industrial sense. It is not distant astrology but imminent futurology, and the phrases of the statute are amenable to service of the purposes of the law, liberally understood.

17 Based on the above facts and legal position, Mr.Nanavati has strongly urged that differential duty demanded from the petitioner is absolutely unjustified and notices issued in this regard are required to be quashed and set aside and any adjustment of amount due to the petitioner against the alleged outstanding demand is required to be granted.

18 Mr.Premal Joshi, learned advocate appearing for Electricity Company, on the other hand, has submitted that electricity duty is leviable as per nature of consumption defined in Schedule-I to the Bombay Electricity Duty Act, 1958 . The consumption for construction activities prior to date of commencement of production of goods by an industrial undertaking does not specifically fall under any Item Nos.1 to 6 and hence get covered in residuary Item No.7 of the Schedule-I. As soon as these facts came to notice of the respondent No.4, the respondent No.5 was instructed by letter dated 27.8.1998 to levy electricity duty at 60% of the consumption charges from the date of the connection. On the basis of this letter the respondent No.5 had issued notice 5.1.1999. He has further submitted that Explanation-I under Item-5 of Schedule-I to the Act, specifies that any energy consumed by an industrial undertaking for installation of additional plants, machineries and equipments of such industrial undertaking shall be construed as energy consumed by such industrial undertaking but consumption for construction of industrial building prior to commencement of production cannot be construed as consumption of an industrial undertaking. He has further submitted that Electricity Duty Act, prior to Amendment of 1983 at Item No.5A in Schedule-I provided the rate of electricity duty same as that applicable to an industrial undertaking for energy consumed in respect of construction of industrial building and installation of plant, machinery and equipment of such industrial undertaking. He has, therefore, submitted that the decision taken by the respondent No.4 on 6.4.1999 as an appointed authority and respondent No.3 on 30.8.2000 as specified Appellate Authority under the Act are in confirmity with the provisions of the Act and Rules framed thereunder. He has further submitted that in the release order dated 20.8.1996 it is specified that the power was released for construction purpose under the HTP1 tariff. The electricity duty on consumption of electricity for industrial purpose other than residential consumption is leviable @ 20% of consumption charges being HT consumer as per Item No.5(a) of Schedule-I to the Act. He has, however, submitted that the electricity bills levying electricity duty at 20% of consumption charges considering HT consumer could not be considered as establishing the

petitioner's right for rate of electricity duty for the consumption for construction purpose. The consumption of electricity for constructional activities prior to commencement of production of goods falls under Item No.7 of the said Schedule as a residuary Item and it never falls under Item No.5 as claimed by the petitioner.

19 In support of his submission Mr.Joshi relied on the decision of this Court in the case of Rajasthan State Electricity Board V/s. Associated Stone Industries and Anr., reported in (2000) 6 SCC 141, in the case of Dunlop India Ltd., V/s. Union of India reported in (1994) 4 SCC 686 and in the case of Hindustan Petroleum Corporation Ltd., V/s. Gujarat Electricity Board, reported in 2005 (1) GLR 519.

20 Ms. Manisha Narsighani, learned Assistant Government Pleader appearing for the respondent State has more or less adopted the arguments of Mr.Joshi and submitted that the State Government is well within its right to recover the amount of differential duty and this being the public money the petitioners are bound to pay the said differential duty to the State Government.

21 In support of her submission she relied on the decision of Apex Court in the case of Tamilnadu Electricity Board & Anr. V/s. Status Spinning Mills Ltd., & And, (2008) 7 SCC 353.

22 Having heard the learned advocates appearing for the parties and having considered their rival submissions in light of the statutory provisions and decided case law on the subject and having judiciously examined the decisions/orders under challenge, the Court is of the view that the respondent authorities are not justified in collecting/adjusting and/or enforcing the recovery of electricity duty at the rate of 60% by reclassifying the electrical energy consumed by the petitioner Company for constructing its factory premises under residuary Clause No.7 of the Schedule-I to the Bombay Electricity Duty Act, 1958 . Schedule-I prescribes rates of duty payable by consumers other than those referred to in Section 2(a)(i) and (ii) of the Act. The petitioner's case does not fall in Section 2(a)((i) and (ii) of the Act. Clause-5 at the relevant time prescribes the electricity duty at the rate of 20% of the consumption charges, whereas Clause-7 prescribes the rate of 60% of such consumption charges. The petitioner had admittedly applied for 5500 KVA power supply for the setting up and construction of its Petrochemicals Complex / Project at Jamnagar vide letter dated 29.4.1995. Alongwith this letter, the petitioner forwarded copy of site plan, sale-deed and certificate from Pollution Control Board and other documents. After considering these documents, the respondent Board/Company released vide its letter dated 20.8.1996, 2400 KVA power supply for construction purpose under HTP-I Tariff. From this date onwards, till the dispute arose on 5.1.1999 for the first time, the consumption of electrical power by the petitioner Company was classified as consumption of

energy by an industrial undertaking under Clause No.5 of Schedule-I and subjected to duty at the rate of 20% of the consumption charges.

23 The word "Industrial Undertaking" is defined in Section 2(bb) of the Act. It says that "Industrial Undertaking" means an undertaking engaged predominantly in the manufacture or production of goods, or any job work which results in the manufacture or production of goods. The word "Industrial Undertaking" has come up for consideration before the Court in many cases. The Court has gone to the extent of saying that the word "Undertaking" is used in its economic sense and in its wider connotation of embracing not merely factories which have been commissioned but projects which are embryonic and designed to go into production immediately formal legal personality is acquired and statutory approval under the Act is secured. The word "an undertaking engaged predominantly in manufacture or production of goods" takes in not merely projects which have been completed and gone into production but also blue-print stages, preparatory moves and like ante-production points. The word is descriptive of the series of steps culminating in production. In view of the interpretation of the word "industrial undertaking" put forward by the petitioner and accepted by the Court, the submission of Mr. Premal Joshi for the respondent Board/Company that energy consumed by an industrial undertaking for construction of industrial building prior to commencement of production cannot be construed as consumption of an industrial undertaking after the amendment of 1983 in Clause No.5A in Schedule-I to the Act, is not tenable and deserves to be rejected.

24 Even otherwise, it is not within the competence of the respondent authorities to reclassify the petitioner's consumption of electricity power from Clause-5 to Clause-7 and thereby to levy electricity duty at 60% in place of 20% retrospectively. The Courts have consistently held that such a reclassification with retrospective effect is not permissible. Knowing fully well that the power supply was required for construction work for the project of petrochemicals, the power supply was released and electricity duty was charged at the rate of 20% by classifying it under Clause-5 of the Schedule-I to the Schedule. The petitioner had been paying such duty till January, 1999 without any dispute. For the first time on January 5, 1999 the notice was issued proposing to levy electricity duty at the rate of 60% of consumption charges by contending that such consumption falls in residuary Clause-7 of the Schedule and duty was demanded at the rate of 60% right from the beginning. Such an action on the part of the respondent authorities is not tenable at law and deserves to be quashed and set aside. The differential duty sought to be recovered by the respondent authorities is, therefore, disapproved and it is held to be illegal and unconstitutional.

25 In the above view of the matter, the supplementary Bills dated 5.1.1999 raised by the respondent Board/Company for differential duty and consequent notices for disconnection dated 8.2.1999 in respect of Consumer Account

No.27124 and 27127 are hereby quashed and set aside and they are directed to grant refund of the amount paid by the petitioner or adjusted by them any other amount to which the petitioner is entitled, against differential duty, with 9% interest p.a. Forthwith, under intimation to the petitioner. It is, however, open for the respondent authorities to adjust this amount of refund against future liability of the petitioner towards electricity duty, under intimation to the petitioner.

26 Subject to the above direction and observation, this petition is accordingly allowed. Rule made absolute to the above extent, without any order as to costs.