

**2016 (0) AIJEL-HC 236188**

**GUJARAT HIGH COURT**

**Hon'ble Judges:A.J.Desai, J.**

Alembic Ltd.(Formelrly Alembic Chemical Works Co.Ltd. Versus State Of Gujarat

SPECIAL CIVIL APPLICATION No. 2683 of 2004 ;

SPECIAL CIVIL APPLICATION No. 8320 of 2009 ; \*J.Date :- AUGUST 24, 2016

- [BOMBAY ELECTRICITY DUTY ACT, 1958](#) Section - [3\(2A\)](#)
- [ELECTRICITY \(SUPPLY\) ACT, 1948](#)
- BOMBAY ELECTRICITY DUTY (GUJARAT) RULES, 1968 Rule - 11(2)
- [GUJARAT ADAPTATION OF LAWS \(STATE AND CONCURRENT SUBJECTS\) ORDER, 1960](#)

**Cases Referred To :**

1. Bhagwant Rai And Others V. State Of Punjab And Others, 1995 5 SCC 440
2. Chhaganlal Keshavlal Mehta V. Patel Narandas Haribhai, 1982 1 SCC 223
3. Giridhar G. Yadalam V. Commissioner Of Wealth Tax, 2016 1 Supreme 172
4. K. P. Varghese V. Income Tax Officer, 1981 1 SC 1922
5. Liberty Oil Mills Private Limited, Bombay V. Collector Of Central Excise, Bombay, 1995 1 SCC 451
6. Md. Zakir Hussain V. State Of Assam And Others, W.P. (C) No.4099 of 2002
7. Shree Hari Chemicals Export Limited V. Union Of India And Another, 2006 1 SCC 396
8. Southern Petrochemical Industries Company Limited V. Electricity Inspector & Etio And Others, 2007 5 SCC 447
9. Union Of India V. Indian Charge Chrome, 1999 7 SCC 314

**Equivalent Citation(s):**

2016 JX(Guj) 1314 : 2016 AIJEL\_HC 236188

**JUDGMENT :-**

**1** The petitioner Company by raising several contentions in two writ petitions has prayed that the two Gas Turbines installed by it in the year 1996 and 1997 for generating electricity has been wrongly compelled to levy electricity duty generated and consumed by petitioner itself, under the provisions the Bombay Electricity Duty Act, 1958 and, therefore, whatever duty is levied so far, be refunded.

**2** The brief facts arise from the record are as under :-

2.1 That the petitioner is a Public Limited Company registered and incorporated under the provisions of the Companies Act, 1956 and is engaged in manufacturing of antibiotic life savings bulk drugs, formulations and veterinary products since 1907.

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Since the continuity of power is critical to the essential manufacturing process of fermentation, the petitioner had purchased and installed 4 second-hand Diesel Generating Sets (hereinafter referred to as D.G. Sets ). The petitioner Company had installed two D.G. Sets of 550 KVA each in the year 1963 and thereafter, the petitioner installed another two D.G. Sets having capacity of 860 KVA each in the year 1974. Therefore, the total capacity of generating electricity from the above said D.G. sets were of 2820 KVA which has maximum capacity of generating 16,46,880 units of energy per month. The said D.G. Sets were registered with the State authority in the year 1986.

2.2 Since the petitioner wanted some more electricity supply, on 14.10.1996, installed another electricity generating system which is known as Gas Turbine Generators and accordingly, it installed one Gas Turbine Generator (hereinafter referred to as GT-1 ) having capacity of generating power of 5,000 KVA which can generate 29,20,000 of units. The petitioner also installed another Gas Turbine Generator (hereinafter referred to as GT-2 ) having same capacity on 20.3.1997 which was commissioned and started generating electric power with effect from 18.5.1997.

2.3 The petitioner submitted applications for registration of the aforesaid GT-1 and GT-2 on 5.6.1997 in the prescribed format under Form "C" as per Rule 9 (1) of the Bombay Electricity Duty (Gujarat) Rules, 1986. The petitioner also seeks exemption from payment of duty as well as filled up form E under Rule 11 of the said Rules. Both the applications for registration were accepted by the respondent on 13.11.1998 and issued certificates for both the sets i.e. GT-1 and GT-2 as per Form H of the said Rules.

2.4 As far as GT-1 is concerned, the respondent authority treated the case of the petitioner as applicable under Section 3 (2A) of the Act and granted exemption provided therein subject to the compliance of certain requirements. It was declared that the petitioner Company would be entitled for exemption from payment of electricity duty under sub-Section (2A) of Section 3 of the Act from 18.11.1996 to 17.11.2011 in respect of such units of additional energy generated by their own additional generating sets of the capacity of 5,000 KVA (co-generation), in excess of 16,46,880 units of energy capable of generation per month from those four DG Sets installed prior to the installation of GT-1. Similarly, for GT-2, certificate was issued on the same day i.e. 13.11.1998 granting exemption from paying the electricity duty from 18.5.1997 to 17.5.2012 in excess of 45,66,880/- units of energy capacity of generation per month from existing generating sets installed prior to the installation of GT-2 (four DG sets = 16,46,880 + 29,20,000 for GT-1).

2.5 The petitioner made a representation to the respondent by a communication dated 19.3.1999 and requested that he may be refunded the amount of duty after proper calculation of the units as well as the rate applied by the respondent per unit generated and consumed by the Company. The same was replied by the respondent by a communication dated 31.5.1999 and granted refund of electricity duty paid on units in excess of 16,46,880 treating such additional units to have been generated from the additional generating sets. Thereafter, the petitioner continued to make representations raising certain grievances with regard to levy of duty. Lastly, a detailed representation was made by the petitioner Company in the month of April, 2003 and informed the respondents that DG Sets though having capacity of 2820

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KVA, was not able to generate to the fullest capacity and, therefore, duty may be levied accordingly. The said request was refused by the department of the State of Gujarat by its communication dated 3.6.2003 and vide communication dated 18.6.2003, it was further clarified by the Chief Auditor appointed under the Electricity Duty Act that the petitioner was entitled for the exemption of electricity duty as per the certificates issued in the year 1997 and was asked to deposit the amount of electricity duty which was not paid by the petitioner.

2.6 Since the petitioner did not comply with the order / communication dated 18.6.2003, the Chief Auditor issued notice dated 12.1.2004 calling upon the petitioner to pay the amount failing which the amount of electricity duty shall be collected as per the provisions under the Bombay Land Revenue Code.

2.7 Being aggrieved with the said decision, the petitioner preferred a writ petition being Special Civil Application No.2683 of 2004 and prayed as under :-

"A. Your Lordships be pleased to issue a writ of or in the nature of mandamus declaring that the action of the respondent Nos.1 and 2 of levying and collecting electricity duty on 16,46,880 units per month being energy deemed to have been generated by the existing DG Sets is illegal, unconstitutional and void.

B. Your Lordships be pleased to issue a writ of or in the nature of mandamus directing the respondent Nos.1 and 2 to refund an amount of Rs.2,03,65,740/or such amount as may become payable as a result of grant of prayer A above, with interest at the rate of 15% per annum from the date of payment of duty till the date of refund. In the alternative Your Lordships be pleased to issue a writ of or in the nature of mandamus directing the respondent No.2 to deduct 2,15,160 units per month as total units of energy which the existing DG sets were capable of generating, from the units of energy generated and consumed by the petitioner for the purpose of determining the exemption and be further pleased to direct the respondent Nos.1 and 3 to refund such amount as may become payable as a result thereof, with interest at the rate of 15% per annum from the date of payment of duty till the date of refund.

C. Your Lordships be pleased to issue a writ of or in the nature of mandamus declaring that the action of the respondent No.3 of demanding differential duty inter alia vide letter dated 18.6.2003 at Annexure Q to the petition is illegal, unconstitutional and void.

D. Your Lordships be pleased to issue a writ of or in the nature of mandamus restraining the respondent Nos.1 to 3 from demanding or recovering electricity duty from the petitioner on the basis of the computation made or demand raised in letter dated 18.6.2003 at Annexure Q to the petition.

E. Pending admission, hearing and final disposal of this petition, Your Lordships be pleased to :

i. Restrain the respondents Nos.2 and 3 from levying and collecting electricity duty on units of energy in excess of the actual units generated by the existing DG sets.

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ii. Restrain the respondents Nos.2 and 3 from demanding or recovering electricity duty from the petitioner on the basis of the computation made or demand raised in letter dated 18.6.2003 at Annexure Q to the petition."

2.8 The matter was listed on 1.3.2004 wherein notice was issued to the respondents and ad-interim relief in terms of paragraph 23 (E) (ii) was granted. Pursuant to the notice issued by this Court, the respondent authority filed affidavit-in-reply on 14.6.2004. The writ petition came to be admitted by this Court on 20.9.2004. The petitioner also filed additional affidavit on 22.12.2009.

2.9 During the pendency of the aforesaid petition, the petitioner Company again started making representations and raised an issue that the Company was never using the electricity generated from the DG Sets for the Industrial unit, however, the same was supplied to the residential colony as well as commercial complex belonged to the petitioner Company and, therefore, the installation of GT-1 and GT-2 could not be treated as additional generating system under Section 3 (2A) of the Electricity Act. A detailed representation was made by the petitioner Company on 27.3.2007 and it was requested that the case of the petitioner Company, as far as installation of GT-1 and GT-2 are concerned, be treated as if the same are installed by the Company for generating electricity for the first time and, therefore, the Company would not be liable to pay any electricity duty under Section 3 (2) (vii) (a) of the Act. The said representation was not entertained by the respondent and the petitioner was accordingly informed by a communication dated 17.6.2008 wherein it was held that when the petitioner had applied for registration of GT-1 and GT-2, though the application was made by the petitioner Company for registration of GT-1 and GT-2 under Rule 11 (2), exemption was granted under Form H clarifying that since the D.G. Sets were generating electricity prior to the installation of GT Sets, whatever electricity duty is levied by the Government is in accordance with law. Hence, second writ petition being Special Civil Application No.8320 of 2009 came to be filed by the petitioner praying for the following reliefs :-

"[A] Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction, quashing and setting aside the decision dated 17.6.2008 (AnnexureK) passed by Respondent No.2 herein;

[B] Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction directing Respondent No.2 herein to grant the benefit of exemption to the petitioner Company under Section 3(2) (vii)(a) of the said Act for GT1 and GT2 and as a consequence thereof directing the respondent authorities to refund Rs.5,49,28,915/being the excess amount as would be calculated after the retrospective exemption w.e.f. 18.11.1996 granted to the petitioners under Section 3(2)(vii)(a) of the said Act;

[C] Pending admission hearing, and final disposal of this petition, Your Lordships may be pleased to restrain the respondent authorities from levying and collecting the electricity duty for the period starting from 18.11.1996;"

2.10 Pursuant to the notice issued by this Court, an affidavit-in-reply has been filed by the respondents on 9.11.2009 and opposed grant of any relief as prayed by the

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petitioner. Rejoinder thereto has been submitted by the petitioner on 1.12.2009. By an order dated 22.12.2009, the coordinate Bench issued Rule and both the petitions were directed to be heard together. Hence, both the petitions have been heard together since the same are interconnected.

3 Mr. K.S. Nanavati, learned Senior Counsel assisted by Mr.Kunal J. Vyas and Mr. Pratik Bhatia, advocates for the petitioner would submit that the Bombay Electricity Duty Act, 1958 came to be enacted on 9.5.1958 which was adopted by the State of Gujarat under the provisions of the Gujarat Adaptation of Laws (State and Concurrent Subjects) Order, 1960. By the said Act, levy of duty on consumption of electricity energy is provided for which each consumer is bound to pay the duty. However, the Electricity Company or Board who have been issued license to generate electricity and supply thereof to its consumer under the Electricity Act, 1948 were not generating sufficient electricity and when there was imminent need of such electricity supply, to promote the generation of electricity duty, certain exceptions were made from making payment of such electricity duty; if an industrial unit generate the electricity for its own consumption.

3.1 He would submit that such exemptions have been granted from the date of enactment of the Act and particularly, Section 3 of the Act deals with the levy of duty and exemption available from the payment. The said Section 3 has undergone various amendments i.e. in the year 1961, 1968, 1976, 1979, 1983, 1999 and thereafter also.

3.2 He would further submit that the petitioner Company is in the business of manufacturing pharmaceutical articles since 1907 and hence is in need of more electricity, therefore, installed Diesel Generating Sets (D.G. Sets). Two DG Sets having capacity of 550 KVA and 860 KVA were installed by the Company in the year 1963. Similar size of two D.G. Sets were installed by the Company in the year 1974. The petitioner installed another generating set i.e. a Gas Turbine Generator (GT-1) having capacity of 5,000 KVA which was installed on 18.11.1996 and applied for registration for the same under the provisions of the Rules. He would submit that the petitioner had filled up Form E and requested to issue certificate for exemption from payment of electricity duty either under Section 3(2)(vii)(a) or Section 3 (2A) of the said Act. He would submit that since the petitioner was not able to generate the electricity supply to its fullest capacity from the D.G. Sets and when the respondent had the relevant data of the electricity generated by the Company from D.G. Sets, the authority ought to have issued certificate under Form G treating the case of the petitioner as if GT-1 is installed for the first time. He would submit that though the respondent has issued certificate under Form H treating the case of the petitioner as if it has installed additional generating set (GT-1), it was bound to consider the case of the petitioner when a representation was made to treat the case of the petitioner Company accordingly. He would submit that the case of the petitioner would fall as per the amendment made in Section 3 of the Act in the year 1983 since both the Gas Turbine sets have been installed in the year 1996 and 1997 respectively. He would submit that under Section 3 of the Bombay Electricity Duty Act, the State Government has power to levy duty on the consumption of electricity subject to the provisions of Section 3 (2A) and 2(AA). He would submit that sub-Sections (a) and (b) of sub-Section (vii) of Section 3 (2) were amended granting exemption for generation of energy if generated by back pressure turbine or if such generation of energy is obtained by co-generation. He would submit that it is not in dispute that the electricity generated from Gas Turbine is treated as if the same is generated by co-

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generation. Therefore, the respondent authority was bound to consider the case of the petitioner under Section 3 (2) (vii) and not under Section 3 (2A) of the Act. He would submit that the petitioner, after receiving bills subsequent to installing GT-1 and GT-2, immediately made representation in the year 1999 and continued to make representations thereafter, suggest that the petitioner Company was vigilant about its legal right and, therefore, the reply filed by the respondent requesting the Court to dismiss the petition on the ground of delay and laches are without any substance. He would further submit that as and when the representations made by the petitioner were rejected on two occasions, writ petitions have been filed within no time and all the contentions which have been raised before the Authority are made part of the present petitions apart from the oral submissions which are being made during the course of the arguments.

3.3 He would further submit that it is a well known principle that there can be no estoppel against a right made available in a Statute. When an individual is entitled for any statutory right, the same cannot be denied on the ground that in past, he had accepted a decision which was contrary to the provisions of law. In support of his submissions, he has relied upon a decision in the case of Chhaganlal Keshavlal Mehta v. Patel Narandas Haribhai, (1982) 1 SCC 223 and in the case of Bhagwant Rai and others v. State of Punjab and others, (1995) 5 SCC 440. He would submit that if the petitioner had paid some electricity duty and it is found that the same has been paid under some misconception, the authority cannot refuse to return the same since the petitioner is entitled under the provisions of law since his case falls under Section 3 (2) (vii) (a) of the Act. In support of his submissions, he has relied upon the case of Shree Hari Chemicals Export Limited v. Union of India and another, (2006) 1 SCC 396 and in the case of Md. Zakir Hussain v. State of Assam and others, delivered by Gauhati High Court in W.P. (C) No.4099 of 2002.

3.4 By taking me through the provisions of Section 3 of the Act, Mr. Nanavati would submit that the demand made by the respondent of electricity duty relying upon Section 3 (2A) and particularly Explanation thereto, is not justified since the case of the petitioner is applicable to amended Section 3 in the year 1983. He would submit that Section 3 (2A) (vii) (a) came to be amended in the year 1983 and for the first time, the concept of generation of electricity by back pressure turbine or by co-generation came to be introduced. Therefore, the Gas Turbine installed by the petitioner for the first time in the year 1996 1997 can only be considered as first installation plants and, therefore, the authority could not have held the installation of GT-1 and GT-2 as additional generating sets. He would submit that the provisions are required to be read and interpreted considering the object and intentions of the Statute. Therefore, literal meaning as interpreted by the respondent authority of Section 3 (2A) is unreasonable and absurd. In support of his submissions, he relied upon the decision of the Hon'ble Supreme Court in the case of K. P. Varghese v. Income Tax Officer, 1981 SC 1922 (1).

3.5 Apart from the above submissions, Mr. Nanavati by taking me through the factual data with regard to generated and consumed electricity from the D.G. Sets and Gas Turbine sets, would submit that if the actual generation from the D.G. Sets are perused, the Company has hardly generated few thousand units though the capacity was upto 16,46,880 units from the four D.G. Sets. However, if the generation of electricity subsequent to addition of GT-1 is concerned, the Gas Turbine could

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produce lakhs of units and, therefore, it is established that the four D.G. Sets were of no use for generation of electricity for the industrial purpose. He would submit that the case of the petitioner that whatever the electricity was generated from the D.G. Sets in past, the same was used for residential and commercial purposes for the petitioner Company itself. This aspect has not been dealt by the respondent authority. Since the petitioner Company was not able to generate sufficient electricity from D.G. Sets, it had installed new two G.T. Sets in the year 1996 and 1997. Therefore, the authority ought to have given exemption from payment of electricity duty generated by GT-1 and GT-2 from the date of their installation in the year 1996 and 1997.

3.6 In alternate to the aforesaid submissions, he would submit that it is an undisputed fact that GT-1 was installed in the year 1996 and, therefore, it was entitled for the exemption for electricity duty for a period of 15 years as per the certificate issued on 18.11.1998. Though such exemption was granted by the respondent, when the petitioner had installed GT-2 in the year 1997, the respondent authority had clubbed the D.G. Sets as well as GT-1 for considering the exemption above the units referred in the second certificate. He would submit that the respondent authority ought not to have clubbed GT-1 while issuing certificate for GT-2. He, therefore, would submit that the petitions be allowed.

4 Mr. P.K. Jani, learned Additional Advocate General assisted by Ms. Ritu R. Guru and Mr. Bharat Vyas, Assistant Government Pleaders for the respondents has vehemently opposed the petitions and submitted that four D.G. Sets whose total capacity was of 2820 KVA and generating about 16,46,880 units and the same was being generated for the industrial purpose itself, any subsequent installation of generating set would be an additional generation unit and, therefore, when the petitioner Company applied under the Rules for registration of GT-1 and GT-2, the exemption was granted by issuing Form H under Rule 11 (2). He would submit that Form H which has been issued to the petitioner in the year 1998 specifically refers existence of D.G. Sets and its capacity. The said exemption was granted from payment of duty keeping in mind the provisions of Section 3 (2A) of the Act. He would submit that similar Form H was issued for the second generating Gas Turbine keeping in mind the capacity of four D.G. Sets + GT-1 which was installed in the year 1996. Therefore, the respondent authority has not committed any error in refusing the representations made by the petitioner and issuing demands, challenged in the petitions.

4.1 He would submit that the petitioner had never objected the method adopted by the respondents while issuing the bills as the exemption granted to it for years together. Even when the first petition was filed, such contentions were not raised. The petitioner has tried to change the contentions raised in the first petition by creating totally different case in the second petition, though had failed in getting the same amended in the first petition. He would submit that in the first petition, it was the case of the petitioner that four D.G. Sets were installed, since there was a need of continuity of power because the same is critical to essential manufacturing of process of fermentation. However, the petitioner came with an application for amendment in the year 2008 that the generated power was being used for residential purpose and commercial purpose and not in the industrial unit which was turned down by the Court. He would submit that there is no material placed before this Court about the use of electricity for residential or commercial purpose.

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4.2 Mr. Jani has taken me through the affidavit-in-reply filed by the respondent authority in each petition and would submit that the petitioner Company had accepted the exemption under the provisions of Section 3(2A) of the Act and continued paying the electricity duty upto 16,46,880 units and thereafter 45,66,880 units without any protest till the year 2008. He would further submit that on 1.4.1999, Section 3(2A) of the Act came to be deleted and hence, the petitioner company was not given the benefit of exemption of electricity for its GT-3 commissioned on 1.9.2000.

4.3 He would further submit that on 14.9.2001, the petitioner Company made a representation to the State Government for exemption from payment of electricity duty to the extent of maximum generation possible by the said two GT Sets to the tune of 58,40,000 units. The petitioner Company thereafter made various representations to the State Government. Since the request of the petitioner Company was against the legal provision under which exemption was granted and the same having been accepted by the petitioner, the Collector of Electricity Duty vide letter dated 18.6.2003 requested the petitioner Company to make the payment in accordance with the exemption granted to the petitioner Company. He would further submit that almost after a decade i.e. on 1.8.2006, the petitioner Company made an application again for grant of exemption from payment of electricity duty in respect of GT-1 and GT-2 under Section 3(2)(vii) (a) of the Act. He would further submit during the pendency of the present petitions, the petitioner Company preferred Civil Application No.2683 of 2004 for amending the writ petition and thereby tried to improvise its stand so as to contend that the petitioner Company had installed four D.G. Sets not for the manufacturing purpose but the same were installed for residential colony and commercial complex. The said effort was made by the petitioner Company with a view to take benefit under the provisions of Section 3(2)(vii)(a) of the Act by treating the installations of additional GT-1 and GT-2 as first installation for industrial purpose.

4.4 Mr. Jani would further submit that the case of the petitioner would not fall under Section 3 (2) (vii) (a) of the Act since GT-1 and GT-2 have been installed subsequent to the installation of earlier four D.G. Sets and, therefore, the submission made by the learned advocate appearing for the petitioner that GT-1 and GT-2 have been installed for the first time and energy is obtained by cogeneration, cannot be accepted. He would submit that it is irrelevant for the levy of electricity duty, where the electricity is generated by different method though introduced by the State for the first time in the year 1983. He would submit that though four D.G. Sets might not have generated the electricity to its fullest capacity, that itself would not entitle a Company to ask for exemption as provided under Section 3(2)(vii)(a) of the Act. He would submit that the case of the petitioner is squarely covered under Section 3 (2A) which makes it clear that if a Company installs an additional generating set, the exemption would be granted to those units which have been generated in addition to the fullest capacity of earlier generating sets. He would submit that the certificate issued in the year 1998 for GT-1 is very clear and was rightly issued that the petitioner Company would be entitled for exemption of electricity duty excluding the capacity of the four D.G. Sets upto 16,46,880 units. Similar method has been adopted by the authority while issuing certificate for GT-2. He would further submit that under the Electricity Act, each consumer is liable to pay electricity duty unless it is exempted and, therefore, even if there is some ambiguity or any doubt with regard to exemption, the same should be



resolved in favour of the revenue and not in favour of the person who claims such exemption.

4.5 Mr. Jani would further submit that the petitioner was granted certificates in the year 1998 under Form H clarifying the availability of the electricity generated by GT-1 and GT-2 and it was paying the same for years together, cannot now claim any benefit which was and is not available. Therefore, he is estopped from claiming any right. He would submit that when the Court is dealing with the provisions of tax duty etc., then strict interpretation to the exemption provisions is to be accorded and, therefore, if the provisions are seen, both the petitions are meritless and are required to be dismissed.

4.6 By relying upon the decision in the case of Union of India v. Indian Charge Chrome, 1999 (7) SCC 314, he would submit that different class is created under Section 3 for availing the exemption and the legislation has granted benefits for each different one in different manner which cannot be treated as violative of Article 14 of the Constitution of India. The intention of the authority is to grant exemption, from payment of electricity duty only on additional generating set, is to see that a unit by not producing the maximum available capacity, should not get exemption from payment of duty, which other consumers are paying to the State Government. Mr. Jani has also relied upon the decision in the case of Southern Petrochemical Industries Company Limited v. Electricity Inspector & ETIO and others, (2007) 5 SCC 447 to submit that the provisions would be attracted only when requisite conditions precedent are satisfied which is not the case on hand. He would submit that it has been held by the Hon'ble Supreme Court in the said case with regard to taxation provisions that the Court cannot give a new meaning which would amount to judicial legislation. Therefore, reading of Section 3 (2A) makes it clear that the consumer who installs an additional generation set, he would be granted exemption from payment of electricity duty excluding the capacity of generating electricity from its earlier generating sets. He, therefore, would submit that the petitions be dismissed.

**5** He would submit that it is not true to suggest that the authority has not granted exemption for GT-1 for 15 years because the authority has calculated the units for dues as per the certificate issued qua GT-1 and GT-2 for respective period.

**6** I have heard learned advocates appearing for the respective parties. Since the case falls under the provisions of Section 3 of the Bombay Electricity Duty Act, 1958, the same is reproduced herein below :-

"3. Duty on units of energy consumed.

[(1) [Subject to the provisions of subsections (2) [(2AA), (2AAA) and (3)], there shall be levied and paid to the State Government a duty on the consumption of electricity (hereinafter in this Act referred to as "electricity duty") at the rates specified below :

(a) the electricity duty shall be payable by consumers other than those referred to in subclauses (i) and (ii) of clause (a) of section 2, at the rates specified in Schedule I to this Act, and (b) the electricity duty shall be payable by consumers referred to in subclauses (i) and (ii) of clause (a) of section 2, at the rates specified in Schedule II to this Act.]

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(2) Electricity duty shall not be leviable on the units of energy consumed, [(i) by the Government of Gujarat (save in respect of premises used for residential purposes); (ia) by or in respect of any municipal corporation, municipality, local board, notified area committee, cantonment board or panchayat constituted under any law for the time being in force in the State for the purpose of, or in respect of, public street lighting, public water works (including headworks and other auxiliary water supply works and pumps used for the purpose), public gardens including zoos, public museums or system of public sewers or drains;]

[(ii) by a consumer in respect of premises used for residential purposes in a rural area, if the total energy consumed by him for the said purpose in a year does not exceed 250 units.]

(iii) in respect of a hospital or dispensary which is not maintained for private gain [(save in respect of premises used for residential purposes);]

(iv) Where the energy is generated by any person for the purpose of supplying it for the use of vehicles or vessels;

(v) Where the energy is generated at a voltage not exceeding 100 volts; [(va) where the energy is generated by any person by solar, wind or biomass energy;]

(vi) [save as provided in clause (vii), in respect of such industrial or agricultural purposes in such areas and subject to such terms and conditions and for such period as the State Government may, having regard to the need and conditions of industrial and agricultural development in the areas by general or special order specify in that behalf;

(vii) for motive power and lighting in respect of premises used by an industrial undertaking for industrial purpose, until the expiry of the following period, that is to say

[(a) in the case of an industrial undertaking which generates energy either singly or jointly with any other industrial undertaking for its own use or as the case may be, for the use of industrial undertakings which are jointly generating the energy (i) fifteen years from the date of commencement of the Bombay Electricity Duty (Gujarat Amendment) Act, 1983 (hereinafter in this subsection and subsections (2A) and (2AA) referred to as "the commencement date") or the date of starting the generation of such energy whichever is later in such generation of energy is by back pressure turbine or if such generation of energy is obtained by cogeneration.

(ii) Ten years from the commencement date or the date of starting the generation of such energy whichever is later if such generation of energy is based on any other process;

(b) in the case of new industrial undertaking established on or after the commencement date, which does not generate energy for its own use, five years from the commencement date or the date on which industrial undertaking commences for the first time manufacture or production of goods, whichever is later.]

Provided that no industrial undertaking shall be entitled to exemption from payment of electricity duty under this clause, unless it has obtained a certificate regarding eligibility for such exemption in prescribed form by making an application therefore in prescribed form and within prescribed period to such officer as the State Government may, by notification in the Official Gazette, specify.

Explanation 1. For the purpose of this clause (vii) of this subsection and subsection (2A), (ii) "a new industrial undertaking" means any such industrial undertaking which (a) is not formed by the splitting up or the reconstruction of a business or undertaking already in existence in the State; or (b) is not formed by transfer to a new business or undertaking of a building, machinery or plant previously used in the State for any industrial purpose, of such value in relation to total investments, as the State Government may, by notification in the Official Gazette, specify; or (c) is not an expansion of the existing business or undertaking in the State];

[2A) (a) Where an industrial undertaking has, by installing an additional generating set started generation of additional energy for its own use at any time during ten years before the commencement of the Bombay Electricity Duty (Gujarat Amendment) Act, 1979 (hereinafter in this subsection referred to as "the Government") electricity duty shall not be leviable on such units of the additional energy so generated as are consumed for motive power and lighting in respect of premises used by the industrial undertaking for industrial purpose, until the expiry of such period after the commencement as would together with the period from the date of starting the generation not exceed ten years.

[(b) Where an industrial undertaking by installing an additional generating set starts generation of additional energy either singly or jointly with any other industrial undertaking for its own use or, as the case may be, for the use of industrial undertakings which are properly generating additional energy at any time on or after the commencement date, electricity duty shall not be leviable on such units of additional energy so generated as are consumed for motive power and lighting in respect of premises used by the industrial undertaking for industrial purpose until the expiry of (i) fifteen years from the commencement date or the date of starting the generation of such additional energy whichever is later if such generation of additional energy is by back pressure turbine or if such generation of additional energy is obtained by cogeneration, (ii) ten years from the commencement date or the date of starting the generation of such energy whichever is later if such generation is based on any other process;]

Explanation For the purpose of this subsection

(a) where any generating set existing at the time of installation of the additional generating set is at any time not operated either wholly or partly, the total units of energy which the existing generating set is capable of generating shall be excluded from the units of the additional energy generated and consumed;

(b) where any generating set existing at the time of installation of the additional generating set is disposed of, the total units of energy which the existing generating set so disposed of was capable of generating shall be excluded from the units of the additional energy generated and consumed.]

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[(2AA) (a) Nothing contained in this Act as amended by the Bombay Electricity Duty (Gujarat Amendment) Act, 1983 (hereinafter referred to as "the Amending Act") shall affect any exemption granted to an existing industrial undertaking before the commencement date and such exemption shall continue for the period provided in clause (vii) of subsection (2), or as the case may be, subsection (2A) before the commencement date.

(b) Notwithstanding anything contained in clause (vii) of subsection (2) or subsection (2A) as amended by the Amending Act, any existing industrial undertaking which was eligible for exemption under the provisions of clause (vii) of subsection (2) or of subsection (2A) before the commencement date but which did not avail of such exemption before the commencement date shall be eligible for such exemption under the said clause (vii) or the said subsection (2A) as if the Amending Act was not passed.

Explanation For the purpose of this subsection an existing industrial undertaking means an industrial undertaking which exists on the commencement date and which manufactures or produces goods for sale or use in the manufacture or production of other goods but does not include an undertaking which manufactures or produces any kind of food and drinks meant ordinarily for consumption on the premises of the undertaking.

(3) The State Government may, by notification in the Official Gazette, and subject to such terms and conditions as may be specified therein, reduce the rate of duty or remit the duty in respect of (a) electrochemical, electrolytical, or electrometallurgical process carried on by an industrial undertaking, or (b) such class of consumers or such class of premises in such areas and for such period as the State Government may specify in the notification.]"

**7** The Bombay Electricity Duty Act, 1958 came to be enacted on 9.5.1958 and was adopted by the State of Gujarat in 1960. The whole object to introduce this Act was for the levy of a duty on consumption of electrical energy in the State. For generating and distribution of electricity, licenses have been issued under the Indian Electricity Act, 1910 as well as under the provisions of Electricity (Supply) Act, 1948 etc. Section 2 of the Electricity Duty Act deals with the definitions like industrial undertaking, licensee, premises used by an industrial undertaking for industrial purpose, rural areas, service undertaking, urban area etc. Section 3 empowers the State Government to levy electricity duty on the consumption of the electricity in the entire State. The said Section also clarify that under certain circumstances, said electricity duty shall not be leviable on the units of energy consumed in cases like when the premises is used by the State Government itself, by Municipal Corporation, Municipality, Local board, notified area committee, hospitals and dispensary which are not maintained for private gain, where the energy is generated by any person by solar, wind or biomass energy etc. A consumer may also be granted exemption from payment of such duty under different contingencies like installing electricity generating sets for its own or for others etc.

**8** In the year 1961, provisions of exemption of payment of electricity duty was there, but only upto 100 Watts generated by an individual. Some amendments were made in Section 3 in the year 1968 as well as in the year 1976. But the limit for exemption was on the lower side. It is an undisputed fact that the petitioner Company who is in business of manufacturing the pharmaceutical drugs since 1907, installed four D.G. Sets, two in the year 1963 and two in

the year 1974. The petitioner Company submitted an application for registration of those four D.G. Sets in the year 1986 and had supplied the details of the maximum capacity of the electricity generation by each set and combined capacity of four D.G. Sets were 2820 KVA and converting the same into units would come to 16,48,818. The same were registered by the Authority.

**9** The petitioner was in need of more electricity and, therefore, installed a Gas Turbine (GT-1) on 18.11.1996 and submitted Form "C" under Rule 9 (1) of the said Rules as well as an application for Form E under Rule 11 (1) (a). The said application was submitted by the petitioner on 29.4.1997. Since the petitioner installed another Gas Turbine (GT-2) on 18.5.1997, he submitted similar type of Form C and E on 5.6.1997. If Form E provided under the Rules is perused, it is a common form for getting exemption either under Sub-Clause (a) of clause (vii) of sub-section (2) of Section 3 or sub-section 2-A of Section 3. If both the Forms E submitted by the petitioner are perused, Clause 18 deals with the information with regard to monthwise generation and consumption of self generated energy, which was provided by the petitioner. Since the respondent authority found that the petitioner is already having four D.G. Sets and having maximum capacity of 550 & 860 KVA respectively (total 2820 KVA), the case was considered under Section 3 (2A) keeping in mind the explanation provided to Section 2A. The certificate was issued as per Form "H" making it clear that the exemption is being granted under sub-Section (2A) of Section 3 of the Act. Proforma of Form H reads as under :- "Form H (See rule 11(2)) This is to certify that M/s..... .. is an industrial undertaking entitled to exemption from payment of electricity duty under subsection 2A of section 3 of the Bombay Electricity Duty Act, 1958 form ..... .. to ..... .. in respect of such units of additional energy generated by their own additional generating set of the capacity of ..... .. excess of ..... .. number of units generated by existing generating sets installed prior to installation of this set of..... .. Signature and Designation of the Officer, By order and in the name of Governor of Gujarat, Secretary to Government."

**10** The case of the petitioner was not treated as if it has installed the Gas Turbines for the first time and, therefore, exemption was not granted under Form G, which grants exemption to an industrial unit which installs electric generating sets for the first time. It was made clear to the petitioner that he was bound to pay the electric duty of initial 16,46,880 units generated per month from the existing generating sets and the exemption was granted from 18.11.1996 to 17.11.2011 i.e. for 15 years and the same was according to the provisions of the Act.

When the petitioner Company installed another Gas Turbine (GT-2) in the year 1997, there were four D.G. Sets and GT- 1 in existence and, therefore, the authority issued certificate for exemption from payment of electricity duty for a period of 15 years i.e. from 18.5.1997 to 17.5.2012 in Form H and was asked to pay duty of initial 45,66,880 units (i.e. 16,46,880 + 29,20,000). It is pertinent to note that data supplied by the state suggests that exemption has been granted as per the certificate for the period referred therein.

**11** Both the Certificates which are issued in Form "H" are self-explanatory which were accepted by the petitioner and it was paying the electricity duty as per the benefits available under it. Though some representations have been made which are placed on record which are of the year 1999, however, the same are with regard to the calculation of electricity units consumed by the petitioner. However, it was never the case of the petitioner till 2004 when

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the first petition was filed and the case was put forward in clear terms only in the year 2009 when the second petition was filed about issuance of incorrect form i.e. Form H . It is true that if the revenue has collected some tax or duty unauthorizedly, such contentions raised by the State that the conduct of accepting and paying the duty would not bar a citizen from raising such contention. However, the Court cannot give a new meaning which would amount to judicial legislation as held by the Hon'ble Supreme Court in the case of Southern Petrochemical Industries Company Limited (Supra).

**12** If provisions of Section 3 (2) (vii) of the Act is perused, the same is applicable to the units which are installing and generating the electricity for its own use for the first time. A close scrutiny of sub-section (2A) of Section 3 read with Explanation amply makes it clear that capacity of generating electricity of existing generating Set/s is required to be excluded from those units of the additional energy generated and consumed by a consumer from the Set/s existed at the time of installation of additional generating set. In the present case, when GT-1 and GT-2 were installed by the petitioner Company, it had already four D.G. Sets having capacity of generating 16,46,880 units. It is true that the petitioner might not have generated electricity to its fullest capacity from those D.G. Sets, however, in view of the above provision, the authority has to levy the duty granting exemption on duty after deducting fullest capacity of existing generating sets which the respondent has done in the present case. It is undisputed fact that petitioner is not a new industrial undertaking which has installed GT-1 and GT-2 for the first time for generating electricity for its own use because it had already installed four D.G. Sets in the year 1963 and 1974 respectively. Explanation to Section 3 (2A) while dealing with additional generating sets, clarify the availability of exemption from payment of duty only after deducting the capacity of existing generating sets. I do not find any ambiguity in the aforesaid provision. However, as per the decision of the Hon'ble Supreme Court reported in Liberty Oil Mills Private Limited, Bombay v. Collector of Central Excise, Bombay, reported in 1995 (1) SCC 451, it has been held that if there is doubt in exemption provision in a fiscal statute, it should be resolved in favour of Revenue and not in favour of assessee.

**13** In another decision of the Hon'ble Supreme Court in the case of Giridhar G. Yadalam v. Commissioner of Wealth Tax, 2016 (1) Supreme 172, it has been held in paragraph 16 as under:-

"16. We have already pointed out that on the plain language of the provision in question, the benefit of the said clause would be applicable only in respect of the building 'which has been constructed'. The expression 'has been constructed' obviously cannot include within its sweep a building which is not fully constructed or in the process of construction. The opening words of clause (ii) also become important in this behalf, where it is stated that 'the land occupied by any building'. The land cannot be treated to be occupied by a building where it is still under construction. If the contention of Mr. Jain is accepted, an assessee would become entitled to the benefit of the said clause, at that very moment, the commencement of construction even with construction the moment one brick is laid. It would be too far fetch, in such a situation, to say that the land stands occupied by a building that has been constructed thereon. Even Mr. Jain was candid in accepting that when the construction of building is still going on and is not completed, literally speaking, it cannot be said that the building 'has been constructed'. It is for this reason that he wanted us to give the benefit of this provision even in such cases by reading the expression to mean the same as 'is being constructed'. His submission was that the

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moment construction starts the urban land is put to 'productive use' and that entitles the land from exemption of wealthtax.

This argument of giving so called purposive interpretation has to be rejected for more than one reasons. These are :

(i) In taxing statute, it is the plain language of the provision that has to be preferred where language is plain and is capable of one definite meaning.

(ii) Strict interpretation to the exemption provision is to be accorded, which is the case at hand.

(iii) The purposive interpretation can be given only when there is some ambiguity in the language of the statutory provision or it leads to absurd results. We do not find it to be so in the present case."

**14** The intention of the legislature to exempt a consumer from payment of duty, is to carve out exceptional cases, which cannot be treated as a right if it is found that case of a consumer does not fall within it. I do not find any force in the argument made on behalf of the petitioner that by installing GT-1 and GT-2, it had generated electricity for the first time by co-generation method since it has no relevance with levy of electricity duty. Explanation (b) to Section 3 (2A) makes it clear that even at the time of installation of additional generating set, old ones are disposed off, the capacity of such generating set is calculated. In the present case, the petitioner Company had continued to generate electricity from the four D.G. Sets, subsequent to installation of GT-1 and GT- 2 and, therefore, the respondent authority has rightly applied explanation (a) of Section 3 (2A) while deciding the case of the petitioner.

I do not find any force in the submission made on behalf of the petitioner that it was using the electricity generated from four D.G. Sets in absence of any material.

**15** Considering the facts and circumstances of the case and the ratio laid down by the Hon'ble Supreme Court referred above, I am of the opinion that both the present writ petitions are meritless and, therefore, they are required to be dismissed. Accordingly, both the writ petitions stand dismissed. Rule discharged. Interim relief granted earlier stands vacated. (A.J.DESAI, J.)

**16** After pronouncement of judgment, Mr. K.S. Nanavaty, learned Senior Counsel appearing for the petitioner has prayed to extend the interim relief granted earlier for a period of eight weeks from today. Considering the facts and circumstances of the case, the interim relief granted earlier is hereby extended for a period of eight weeks from today.