

GAHC010120192016



2024:GAU-AS:9648

**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : WP(C)/6417/2016

M/S G.W.C. ASPHALT and ANR.

P.O. DUDHNOI, DIST- GOALPARA, ASSAM, A PARTNERSHIP FIRM REGD.
UNDER THE PARTNERSHIP ACT, 1932 HAVING ITS PRINCIPAL PLACE OF
BUSINESS AT DUDHNOI, DIST- GOALPARA, ASSAM

2: NITESH AGARWALA
ONE OF THE PARTNERS OF THE PETITIONER NO.1 FIRM AND A R/O
H/NO.55
BYE LANE NO.9
LACHIT NAGAR
GHY-

VERSUS

UNION OF INDIA
REP. THROUGH SECY. TO THE GOVT. OF INDIA, MINISTRY OF COMMERCE
AND INDUSTRY, DEPTT. OF INDUSTRIAL POLICY AND PROMOTION,
UDYOG BHAWAN, NEW DELHI

2:JT. SECY. TO THE GOVT. OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY DEPTT. OF INDUSTRIAL
POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI

3:UNDER SECY. TO THE GOVT. OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY
DEPTT. OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI

4:PRINCIPAL SECY. TO THE GOVT. OF ASSAM
INDUSTRIES AND COMMERCE DEPTT.
DISPUR

GUWAHATI

5:GENERAL MANAGER
DISTRICT INDUSTRIAL and COMMERCE CENTRE
TINSUKI

Advocate for the Petitioner : DR.ASHOK SARAF, MR.P DAS,MR.P BARUAH,MR.S P SHARMA,MR.Z ISLAM

Advocate for the Respondent : SC, INDUSTRIES and COMMERCE, ASSTT.S.G.I.,DR.B AHMED

Linked Case : WP(C)/6416/2016

UPPER ASSAM PETROCOKE PVT. LTD. and ANR.
A PRIVATE LIMITED COMPANY REGISTERED UNDER THE COMPANIES ACT 1956 HAVING ITS REGISTERED OFFICE AT NO.2 MAKUM PATHAR
P.O. MARGHERITA
DIST. TINSUKIA
ASSAM
PIN - 786181.

2: SMTI BIMLA BAJAJ
W/O SRI SANTOSH BAJAJ DIRECTOR AND SHARE HOLDER OF PETITIONER
NO. 1 COMPANY AND A RESIDENT OF H/NO. 12
HILL VIEW COLONY
NEW GUWAHATI
GUWAHATI - 781020.
VERSUS

THE UNION OF INDIA and 4 ORS
REP. THROUGH SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY
DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI.

2:JOINT SECRETARY TO THE GOVT. OF INDIA

MINISTRY OF COMMERCE AND INDUSTRY
DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION UDYOG
BHAWAN
NEW DELHI.

3:UNDER SECRETARY TO THE GOVT. OF INDIA

MINISTRY OF COMMERCE AND INDUSTRY
DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI.

4:PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM

INDUSTRIES AND COMMERCE DEPARTMENT
DISPUR
GUWAHATI.

5:GENERAL MANAGER

DISTRICT INDUSTRIES and COMMERCE CENTRE
TINSUKIA.

Advocate for : MR.S P SHARMA
Advocate for : SC
INDUSTRIES and COMMERCE appearing for THE UNION OF INDIA and 4 ORS

Linked Case : WP(C)/1125/2019

NEW AGE PETCOKE PRIVATE LTD.
A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE
COMPANIES ACT
1956 AND HAVING ITS REGISTERED OFFICE SITUATED AT PALASHBARI
NH-31C
P.O. KAJALGAON
IN THE DISTRICT OF CHIRANG (BTAD)
ASSAM AND REP. BY MR BIPUL KUMAR DUTTA

ONE OF THE DIRECTORS OF THE PETITIONER COMPANY.

VERSUS

UNION OF INDIA AND 4 ORS.
REP. THROUGH SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY
DEPARTMENT
OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI.

2:JOINT SECRETARY TO THE GOVT. OF INDIA

MINISTRY OF COMMERCE AND INDUSTRY

DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI.

3:UNDER SECRETARY TO THE GOVT. OF INDIA

MINISTRY OF COMMERCE AND INDUSTRY
DEPARTMENT OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI.

4:PRINCIPAL SECRETARY TO THE GOVT. OF ASSAM

INDUSTRIES AND COMMERCE DEPARTMENT

DISPUR
GUWAHATI.

5:GENERAL MANAGER

DISTRICT INDUSTRIES AND COMMERCE CENTRE

CHIRANG.

Advocate for : DR. ASHOK SARAF

Advocate for : ASSTT.S.G.I. appearing for UNION OF INDIA AND 4 ORS.

Linked Case : WP(C)/1657/2019

INDIA CARBON LTD.

A LIMITED COMPANY INCORPORATED UNDER THE COMPANIES ACT

1956 HAVING ITS REGD. OFFICE AT NOONMATI

GHY-20

REP. BY SHRI SHYAMAL KUMAR BHATTACHARJYA

THE GENERAL MANAGER (ADMIN AND COMMERCIAL) OF THE
APPLICANT COMPANY

VERSUS

UNION OF INDIA AND 4 ORS.

REP. THROUGH SECY. TO THE GOVT. OF INDIA

MINISTRY OF COMMERCE AND INDUSTRY
DEPTT. OF INDUSTRIAL POLICY AND PROMOTION

UDYOG BHAWAN
NEW DELHI

2:JOINT SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY
DEPTT. OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI

3:UNDER SECRETARY TO THE GOVT. OF INDIA
MINISTRY OF COMMERCE AND INDUSTRY
DEPTT. OF INDUSTRIAL POLICY AND PROMOTION
UDYOG BHAWAN
NEW DELHI

4:PRINCIPAL SECERTARY TO THE GOVT. OF ASSAM
INDUSTRIES AND COMMERCE DEPTT.
DISPUR
GHY

5:GENERAL MANAGER
DISTRICT INDUSTRIES AND COMMERCE CENTRE
KAMRUP
BAMUNIMAIDAM
GHY-21

Advocate for : DR. A SARAF
Advocate for : ASSTT.S.G.I. appearing for UNION OF INDIA AND 4 ORS.

BEFORE

THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioners :Dr. A. Saraf, Senior Advocate.

For the Respondents : Ms. B. Sarma, CGC (R. 1, 2 & 3)
Mr. A. Kalita, Standing Counsel (R-4)

Date of Hearing : 24.09.2024

Date of Judgment & Order : 24.09.2024

JUDGMENT & ORDER(ORAL)

1. These four writ petitions are taken up together for final disposal as the nature of grievances are similar and the challenges made are also similar.
2. The challenges made in these petitions are the decision of the Union of India dated 25.05.2016 whereby it was clarified that the Units engaged in the manufacture of Calcined Petroleum Coke (CPC in short) and Bitumen Emulsion fall under the negative list of the NEIIPP, 2007 and therefore, the benefit under the NEIIPP, 2007 is not available to the industrial units of the petitioners' company.
3. The petitioners' companies, namely, (i) New Age Petcoke Pvt. Limited -Vs- Union of India &Ors. (**WP(C) No. 1125/2019**), (ii) India Carbon Limited -Vs- Union of India & Ors. (**WP(C) No./1657/2019**), (iii) Upper Assam Petrocoke Pvt. Limited -Vs- Union of India (**WP(C) No. 6416/2016**), (iv) G.W.C ASPHALT and Another -Vs- Union of India &Ors. (**WP(C) No. 6417/2016**), are all Industrial Units established for manufacturing of CPC from raw petroleum coke by investing different amounts of money except the petitioner in **WP(C) No./1657/2019**, which took steps for modernization in its industrial unit for manufacturing CPC. These petitioners claim that they have invested such money inspired by the North East Industrial and Investment Promotion Policy (NEIIPP), 2007 inasmuch as such industrial policy promised amongst others certain benefits in terms of the capital subsidy.
4. Heard Dr. A. Saraf, learned Senior Counsel for the petitioners. Also heard Ms. B. Sarma, learned CGC appearing on behalf of the Union of India representing the respondent Nos. 1, 2 and 3 and Mr. A. Kalita, learned Standing Counsel for the

Industries and Commerce Department, state of Assam representing the respondent No. 4.

5. According to the petitioners, they all satisfied the necessary pre conditions for grant of benefit of capital subsidy in terms of the NEIIPP, 2007 such as the Central Excise Registration Certificate.
6. Before dealing with the arguments advanced by the learned counsels for the parties, it is important to record the litigational history of the present batch of the writ petitions, which is having relevance for determination of the present */is*.
7. From the record, it is discernible that the State Level Committee constituted for examination and implementation of NEIIPP, 2007, in its meeting held on 31.05.2010, took a decision not to consider any claim under the Central Capital Investment Subsidy (CCIS) Scheme for Raw Petroleum Coke (RPC) to CPC conversion Unit till receipt of the Govt. of India's clearance in the matter. It is also on record that on 04.04.2011, the Govt. of Assam in the Industries and Commerce Department by its communication addressed to the Joint Secretary to the Govt. of Assam intimated that the matter as regards the eligibility of subsidy under NEIIPP, 2007 to the industries producing Bitumen Emulsion, where the major raw-materials, Bitumen is a refinery product was discussed in the meeting of the State Level Committee constituted under the NEIIPP, 2007 and it was decided to refer the matter to the DIPP for clarification.
8. Thereafter, the Under Secretary to the Govt. of India, Department of Industrial Policy and Promotion issued Office Memorandum dated 25.05.2011 requesting the Department of Revenue to clarify as to whether Industrial Units engaged in manufacturing of CPC and Bitumen Emulsion can be treated as eligible for the Excise Duty exemption and other benefits under the said NEIIPP, 2007, specifically in view of Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985(for short Tariff Act). Thereafter, the Govt. of India, Ministry of Finance,

Department of Revenue, Tax Research Unit, by its Office Memorandum dated 16.11.2011 clarified the position, which is quoted hereinbelow:

“Calcined Petroleum coke is classifiable under Tariff item 2713 12 00 of the First Schedule to the Central Excise Tariff Act. Hence, if this product is manufactured by a Petroleum oil or gas refinery, it is clear that the benefit of excise duty exemption would not be available. However, if they are manufactured by a stand-alone manufacturer starting with a raw material other than crude petroleum or natural gas, i.e. by a manufacturer, other than petroleum oil or gas refinery, the benefit of excise duty exemption would be available.”

9. Subsequently, the Under Secretary to the Govt. of India by its communication dated 08.02.2013 addressed to the Principal Secretary (Industries) of all the North Eastern States clarified its position, which is quoted herein below.

“The matter has since been examined in this department and it is clarified that the units engaged in manufacture of CPC and Bitumen Emulsion fall under the negative list of NEIIPP 2007 since raw materials used for manufacture of both CPC and Bitumen Emulsion are by products of petroleum refineries and hence are not eligible for subsidy under NEIIPP, 2007.”

10. Thereafter, being aggrieved, the petitioners approached this court with some similarly situated persons raising their grievances, which was registered as WP(C) 2645/2014. In the aforesaid writ petition, the issue of Chapter 27 of the First Schedule of the Central Excise Tariff Act, 1985, the Memorandum discussed and quoted hereinabove and the stand of the respondents in their affidavit was elaborately dealt with by the Court and the said writ petition was disposed of by judgment dated 06.08.2015 concluding that from whatever angle the matter is looked into and from the stand of the respondent in their affidavit, no tangible and cogent reason is discernible towards denial of the benefit that occurred to the

petitioners under the Policy, 2007. Accordingly, the respondents were directed to reconsider the decision contained in the letter dated 08.02.2013 consistently with the observation made in the order and then to pass an appropriate order.

11. Subsequently, the matter was considered afresh in terms of the impugned decision dated 25.05.2016 and intimated its decision once again declining to grant the benefit to the petitioners. The salient feature of such decision can be summarized as follows:

“2. The Government of India is implementing NEIIPP, 2007 with a view to give boost to industrialization in the North Eastern Region (NER). However, the scheme contained in NEIIPP, 2007 is based on executive instructions which are not statutory and intended to confer legally enforceable obligations on the Government. As stipulated in the Policy itself, the Government reserves the right to modify any part of the policy in public interest. As such, the benefits under the Scheme cannot and should not be claimed as a matter of legal right.

3. The objection of the policy is to promote industrialization through certain tax concessions and other monetary incentives in industrially backward NER States to create jobs for the local population. The Government has consciously kept certain types of industries out of the purview of the Policy on multiple considerations such as exclusion of production of certain high revenue yielding goods and/ or goods whose and not of manufacturers. Negative list specifies industrial production of specified goods that will not be incentivized under the scheme. The Policy does not intend to distinguish between different manufacturers of the same product. Hence, all producers of CPC and Bitumen Emulsion are disentitled to incentives under the scheme.

4. It is also mentioned that a Scheme run through executive

instructions has also to factor budgetary considerations. Fresh registrations under NEIIPP, 2007 were suspended by this Department w.e.f. 1.12.2014 as the liabilities under NEIIPP, 2007 had been incurred far in excess of Plan allocations. However, it is clarified that the schemes under NEIIPP, 2007 have neither been cancelled nor withdrawn. The intention of the Government is to broadbase and spread its limited resources effectively to support larger number of industrial units and greater employment generation.

5. The Department had carried out an evaluation study on the impact of Transport Subsidy Scheme (TSS), 1971 in each of the target/ UT, through an independent agency i.e. M/s Deloitte Tohmatsu India (Pvt.) Limited. The study had observed that although disbursement of subsidy spanned across all industrial sectors, the coke manufacturing units had cornered bulk share with limited and in some cases negative contribution in terms of environment, employment, ancillary development, etc."

12. The aforesaid decision is now put under challenge in the present batch of writ petitions.
13. In the aforesaid backdrop, Dr. Saraf, learned Senior Counsel for the petitioners referring to the industrial policy, i.e., NEIIPP, 2007 argues that the industrial policy nowhere puts industries producing CPC and Bitumen Emulsion in the negative list and therefore, the executive authorities shall not be within its competence and jurisdiction to pass the impugned order declaring same to be in the negative list inasmuch as such declaration or decision can be made only by the policy makers by amending the NEIIPP, 2007 and not by way of an office memorandum issued under the signature of the Secretaries/Under Secretaries of the Department. It is his further contention that the Officers in the Finance

Ministry shall have no jurisdiction and competence to interpret the policy framed and such course of action can be adopted by none other than the policy makers and that too by way of amending the policy i.e. NEIIPP, 2007. In this context, Dr Saraf, learned Senior Counsel places reliance on the decision of the Hon'ble Apex Court passed in the case of ***State of Bihar and Others -Vs- Suprabhat Steel Ltd. And Others*** reported in ***1999 1 SCC 31*** and in the decision of this court in the case of ***PDP Steels Ltd. -Vs- Union of India and Ors.*** reported in ***2018 5 GLR 61***, and ***Ms/ Topcem India -Vs- The Union of India and Ors [WP(C)/ 6909/2015].***

14. Per contra, Ms. B. Sarmah, learned CGC representing the Union of India argues that it has rightly been decided not to give benefit to the industries producing CPC and Bitumen Emulsion inasmuch as these are not environment friendly industries and therefore, the Union of India has taken a decision not to promote such kind of industries by giving benefit under the industrial policy and therefore, such policy decision may not be interfered by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India inasmuch as petitioners' companies are having no concluded right to get any benefit under the NEIIPP, 2007.
15. Mr. A. Kalita, learned Standing Counsel for the Industries and Commerce Department, state of Assam submits that they are only the implementing agency and therefore, they are bound to implement the decision taken by the Union of India.
16. This Court has given anxious consideration to the submissions advanced by the learned counsel for the parties. Also perused the materials available on record.
17. The facts of the case as recorded hereinabove, more particularly, at paragraph 7, 8, 9, 10 were also taken note of and recorded in the order dated 06.08.2015, passed by the coordinate bench in WP(C) 2645/2014.

18. It is also clear that in the earlier proceeding the respondents, while declining to grant benefit of NEIIPP, 2007 to the petitioners substantiated their stand by filing affidavit in opposition and rejoinder affidavit and the following stands were taken:

- I. That CPC is classified under tariff item No.27131200 of First Schedule to the Central Excise Tariff Act, 1985 and hence, if this product is manufactured by a petroleum oil or gas refinery, the benefit of excise duty exemption could not be available. However, if they are manufactured by a standalone manufacturer starting with a raw material other than petroleum or natural gas i.e. by a manufacturer, other than petroleum oil or gas refinery, the benefits of excise duty exemption could be available.
 - II. The raw material of CPC is Raw Petroleum Coke (RPC) which is by product of a petroleum oil or gas refinery.
 - III. The process of manufacturing CPC is having pollution potential and their CPC manufacturing units need to install necessary pollution control devices.
 - IV. Though the Department of Revenue was requested to clarify the position but the Department of Revenue remains silent on illegibility in question.
 - V. Therefore, on the basis of aforesaid facts and after detail deliberation it was concluded that units engaged in manufacture of CPC and Bitumen Emulsion qualify in the negative list of NEIIPP 2007.
 - VI. The respondents in their rejoinder affidavit also took a stand that as per circular dated 01.04.2007 on NEIIPP, 2007 goods falling under Chapter 27 of the first Schedule to the Central Excise Tariff Act, 1985.
19. The aforesaid stand of the respondent taken in affidavit-in-opposition was duly considered by the co-ordinate bench in WP(C) 2645/2014 and the co-ordinate

bench finally concluded that from whatever angle the matter is looked into including the stand of the respondents in their counter affidavits, no tangible or cogent reason is discernible towards denial of the benefits that accrued to the petitioners under NEIIPP, 2007.

20. The learned coordinate bench also held that the aforesaid stand of the respondents in their rejoinder affidavit that as per circular dated 01.04.2007 on NEIIPP, 2007 goods falling under Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985 have been placed in negative list for the benefits under the said policy and the CPC has been listed as one of the goods under Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985 is misleading. The learned Bench further opined that the respondents have conveniently ignored that it is only the industries engaged in goods produced as petroleum oil or gas refineries which are put in negatively and no conscious decision in this regard is discernible. It was further held that at one place the respondents have contended that if the particular product is manufactured by petroleum oil or gas refineries, the benefit of excise duty exemption would not be available but in another place they have contended that the production of coke has the adverse effect on environment. It was also concluded that without recording any reason, the respondents have conveyed the purported conclusion that the units engaged in manufacture of CPC and Bitumen Emulsion qualify in the negative list of NEIIPP. Accordingly, in the aforesaid backdrop, the matter was relegated to the respondents to take a fresh look consistent with the aforesaid determination.
21. Thus, from the aforesaid, it is clear that the Coordinate Bench had rejected the stand of the respondent authorities as enumerated hereinabove and remanded the matter to the authorities to take a fresh decision, consistently with the observations made by the learned coordinate bench and to pass a fresh order.
22. It is an admitted position that the aforesaid determination made by the

coordinate bench remained un-assailed and in the meantime has attained finality.

23. Now, the vital issue, therefore is, whether, the impugned decision was consistent with the observation made by the learned Co-ordinate Bench.
24. Before dealing with the fresh decision made pursuant to the direction of the learned Co-ordinate Bench, this court would like to refer to the determination made by the Hon'ble Apex Court in ***A.P. SRTC and Ors VS. G Srinivas Reddy & Ors*** reported in **(2006) 3 SCC 674**, which deals with the manner in which the authorities are to deal with a subject when it is relegated to the authorities for a fresh decision by a court. The relevant paragraph is quoted herein below:

13. We may, in this context, examine the significance and meaning of a direction given by the court to "consider" a case. When a court directs an authority to 'consider', it requires the authority to apply its mind to the facts and circumstances of the case and then take a decision thereon in accordance with law. There is a reason for a large number of writ petitions filed in High Courts being disposed of with a direction to "consider" the claim/case/representation of the petitioner/s in the writ petitions.

13.1) Where an order or action of the State or an authority is found to be illegal, or in contravention of prescribed procedure, or in breach of the rules of natural justice, or arbitrary/unreasonable/ irrational, or prompted by mala fides or extraneous consideration, or the result of abuse of power, such action is open to judicial review. When the High Court finds that the order or action requires interference and exercises the power of judicial review, thereby resulting in the action/order of the State or authority being quashed, the High Court will not proceed to substitute its own decision in the matter, as that will amount to exercising appellate power, but require the authority to 'consider' and decide the matter again. The power of judicial review under Article 226 concentrates and lays emphasis on the decision making process, rather than the decision itself.

13.2) The High Courts also direct authorities to 'consider', in a different category of cases. Where an authority vested with the power to decide a matter, fails to do so in spite of a request, the person aggrieved approaches the High Court, which in exercise of power of judicial review, directs the authority to 'consider' and decide the matter. In such cases, while exercising the power of judicial review, the High Court directs 'consideration' without examining the facts or the legal question(s) involved and without recording any findings on the issues. The High Court may also direct the authority to 'consider' afresh, where the authority had decided a matter without considering the relevant facts and circumstances, or by taking extraneous or irrelevant matters into consideration.

In such cases also, High Court may not examine the validity or tenability of the claim on merits, but require the authority to do so.

13.3) Where the High Court finds the decision-making process erroneous and records its findings as to the manner in which the decision should be made, and then directs the authority to 'consider' the matter, the authority will have to consider and decide the matter in the light of its findings or observations of the court. But where the High Court without recording any findings, or without expressing any view, merely directs the authority to 'consider' the matter, the authority will have to consider the matter in accordance with law, with reference to the facts and circumstances of the case, its power not being circumscribed by any observations or findings of the court.

13.4) We may also note that sometimes the High Courts dispose of matter merely with a direction to the authority to 'consider' the matter without examining the issue raised even though the facts necessary to decide the correctness of the order are available. Neither pressure of work nor the complexity of the issue can be a reason for the court, to avoid deciding the issue which requires to be decided, and disposing of the matter with a direction to 'consider' the matter afresh.

25. Now, in the backdrop of the aforesaid settled propositions of law as well as in the given facts of the present case, let this court now deal with the impugned order dated 25.05.2016.
26. Though the Co-ordinate bench has not set aside and quashed the decision dated 08.02.2013 by any express word but by virtue of the determination made and recorded hereinabove, this court is of the unhesitant view that the coordinate bench had disapproved the decision itself as it did not find the reasons therein to be tangible. Further their stand as regards CPC/Bitumen Emulsion being in negative list was held to be misleading. The Co-ordinate Bench further held that it is only the product of petroleum oil and gas refineries which are in negative list. However, unfortunately the authority has reiterated their stand and decision in the impugned order dated 25.05.2016 and the reasons for rejection are also the same as that of in the order dated 08.02.2013 and their stands in the affidavit-in-opposition and rejoinder affidavit filed in the earlier writ proceeding. This time also the reasons that are discernible from the impugned order dated 25.05.2016 are basically placement of negative list and that CPC/Bitumen

Emulsion being not environment friendly and another reason is that excess plan allocation, which is a new ground. The additional ground is that of excess payment against allocated amount.

27. This issue shall not detain this court any more in view of the determination and the principle laid down by the Hon'ble Apex Court in **G. Srinivas Reddy (supra)**. From the perusal of the judgment of the Coordinate Bench as well as the perusal of the impugned order dated 25.05.2016, this court can safely conclude that the impugned decision is not at all consistent with the determination made in order dated 06.08.2015 passed in WP(C) 2645/2014. The fact remains that such determination remain un-assailed till date. Neither any appeal has been filed nor any review was sought by the respondent. That being the position, they will not be under their authority to sit over the determination made and reiterate the same thing which was held to be not tangible and/or based on no cogent reasons. On this count alone, the impugned order is liable to be set aside.
28. Now, coming to the additional ground of issue of financial constraint, in the considered opinion of this court, such financial constraint cannot be a ground for rejection of the benefit of a policy, when such units are otherwise eligible under the policy. Therefore, in the considered opinion of this court if such ground is allowed, then the same will amount to discrimination resulting in violation of right under Article 14 of the Constitution of India.
29. The Government of India in the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion, announced a package of fiscal incentives and other concessions for the North Eastern region namely, the North East Industrial and Investment Promotion Policy, 2007, (NEIIPP, 2007). The said policy was made effective with effect from 01.04.2007. All new units as well as existing units going in for substantial expansion unless otherwise specified in the said policy

and which commenced commercial production within ten years period from the date of notification of NEIIPP, 2007 were to be eligible for incentives for a period of ten years from the date of commencement of commercial production. By the NEIIPP, 2007 the distinction between 'thrust' and 'non thrust' industries made in NEIP, 1997 was discontinued. The said NEIIPP, 2007 promised for an excise duty exemption, income tax exemption, capital investment subsidy, interest subsidy etc.

30. In the NEIIPP, 2007, a negative list was also given vide clause X of the Policy which declared certain industries to be non-eligible for the benefits under NEIIPP, 2007. The said negative list as specified in NEIIPP, 2007 is reproduced below:-

- I. All goods falling under Chapter 24 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) which pertains to tobacco and manufactured tobacco substitutes.*
- II. Pan Masala as covered under Chapter 21 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986).*
- III. Plastic carry bags of less than 20 microns as specified by Ministry of Environment and Forests Notification No. S.O.705 (E) dated 17.06.2003.*
- IV. Goods falling under Chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) produced by petroleum oil or gas refineries. (emphasis supplied)***

31. The produce of petroleum oil and gas refinery, which are subject of the present litigation comes under tariff item no. 2713. The aforesaid goods falling under Chapter 27 of First Schedule to the Central Excise Tariff Act, 1985 are quoted herein below:-

Tariff Item	Description of goods	Unit	Rate of duty

			Standard	Preferential Arrears
2713	Petroleum coke, petroleum bitumen and other residues of petroleum oils or of oils obtained from bituminous minerals. -Petroleum Coke:			
2713 11 00	Not calcined	Kg	10%
2713 12 00	Calcined	Kg	10%
2713 20 00	Petroleum bitumen	Kg	10%
2713 90 00	Other residues of petroleum oils or of oils obtained from bituminous minerals.	Kg	10%

32. Thus, from the bare reading of the aforesaid, it is clear that the goods falling under Chapter 27 of the First Schedule of the Central Excise Tariff Act, 1985, which are produced by the petroleum oil or gas refinery are put in negative list of NEIIPP, 2007.
33. Another aspect of the matter is that the coordinate bench also recorded that the stand of the respondent are misleading as regards their stands that Bitumen Emulsion and CPC are in the negative list inasmuch as it is discernible that Bitumen Emulsion and CPC when produced by Petroleum Oil or Gas Refinery are only put into negative list of NEIIPP, 2007.
34. It is not in dispute that in view of the enlistment of petroleum coke, petroleum bitumen and other residues of petroleum oils or of oil obtained for bituminous

mineral, calcined and non-calcined etc. in the First Schedule under Chapter 27 of Central Excise Tariff Act, 1985, the claim of the petitioners for grant of benefit under the NEIIPP, 2007 was not considered and accordingly, they filed representation before the authorities.

35. It is very relevant and important to take note of the procedure adopted by the authorities in dealing with such claim of the petitioners in the backdrop of the fundamental argument raised by the learned Senior counsel for the petitioners. At the cost of repetition, it is recorded herein that the Coordinate Bench in its judgment dated 06.08.2015 found the stand of the respondents in letter dated 08.02.2013 and their stand in the rejoinder affidavit to be misleading, on the ground that in the letter dated 08.02.2013, it was clarified that CPC and Bitumen Emulsion fall under the negative list of NEIIPP, 2007 since raw material used for manufacturing both the CPC and Bitumen Emulsion are by products of petroleum oil or gas refineries. Whereas the NEIIPP, 2007 disentitled such produce when it is produced by petroleum oil or gas refineries.
36. The fact remains that CPC and Bitumen Emulsion are listed as one of the goods under chapter 27 of the First Schedule to the Central Excise Tariff Act, 1985. When produced by petroleum oil or gas refineries it is excluded from the benefit of NEIIPP. The fact also remains that these two petroleum products are used by the petitioners industries as raw materials and the petitioners' are not petroleum oil or gas refinaries. Therefore, this court is in total agreement with such view of the co-ordinate Bench. There is nothing in NEIIPP, 2007, even remotely suggesting anything which prescribes that industries using raw materials such as CPC and Bitumen Emulsion, which are byproduct of petroleum oil or gas refineries shall not be entitled for benefits under the NEIIPP, 2007. However, such conclusion was intimated by way of inter departmental communication and no policy decision is discernible either in the form of amendment of NEIIPP, 2007 or any notification in that regard clarifying such policy issued by and/ or under

authority of the policy maker.

37. There is no dispute that the NEIIPP, 2007 was notified by Govt. of India after such policy was approved by the Union Cabinet. This court cannot be oblivious of the fact that the policy maker shall be within its right to make such a prescription in their policy framed in accordance with Article 77 (1) and (2) of the Constitution of India excluding industries from the benefit of the policy, when raw materials produced by petroleum oil or gas refineries and placed in negative list, are used. However such is not a case from the plain reading of the NEIIPP, 2007 and Chapter 27 of the First Schedule under the Central Excise Tariff Act, 1985. This court cannot also be oblivious of the fact that such policy decision can also be modified by Union incorporating such a prescription, however, at the same time, such prescription cannot be incorporated by way of interdepartmental communication such as, communication dated 08.02.2013, inasmuch as such interdepartmental communication cannot override the policy itself.
38. In the case in hand, admittedly there is no modification made to the NEIIPP, 2007 prescribing that when raw materials which are byproduct of petroleum oil or gas refineries are used in manufacturing of CPC and Bitumen Emulsion, such industries using such raw materials shall not be entitled for benefit under NEIIPP, 2007. Though the respondent Union of India was given a chance to take such a decision in the earlier writ proceeding by the coordinate Bench under its order dated 06.08.2015, however, the officials passed the impugned order in complete derogation of the earlier order of the coordinate bench. In this count also, the impugned order dated 25.05.2016 is liable to be set aside and quashed. Accordingly, the writ petitions stand allowed by setting aside and quashing the impugned order dated 25.05.2016.
39. The authorities shall pass necessary consequential order granting benefits to the

petitioners in terms of the determination made hereinabove, if they are otherwise entitled for benefit under the NEIIPP, 2007.

JUDGE

Comparing Assistant