

GAHC010014902014



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

Case No. : WP(C)/4643/2014

M/S LADI STEEL INDUSTRIES PVT. LTD. and ANR,
HAVING ITS REGISTERED OFFICE 12 M.S. ROAD, FANCY BAZAR,
GUWAHATI, ASSAM.

2: KANHAIYALAL SURANA
R/O- FANCY BAZAR
KAMRUP
GUWAHATI
ASSAM AND ONE OF THE DIRECTORS OF M/S LADI STEEL INDUSTRIES
PVT. LTD.
THE PETITIONER NO. 1

VERSUS

STATE OF ASSAM and 5 ORS,
REP. BY THE SECY. TO THE GOVT. OF ASSAM, DEPTT. OF INDUSTRIES AND
COMMERCE, DISPUR, ASSAM.

2: COMMISSIONER AND SECY. TO THE GOVT. OF ASSAM
FINANCE DEPTT.
DISPUR.

3: ASSAM INDUSTRIAL DEVELOPMENT CORPORATION
HAVING ITS REGISTERED OFFICE AT R.G. BARUAH ROAD
GHY- 24
ASSAM.

4: THE MANAGING DIRECTOR
ASSAM INDUSTRIAL DEVELOPMENT CORPORATION
R.G. BARUAH ROAD
GHY- 24
ASSAM.

5: THE DIRECTOR OF INDUSTRIES

GOVT. OF ASSAM
INDUSTRIAL ESTATE
BAMUNIMAIDAM
GHY- 21.

6:THE ADDL. DIRECTOR
COMMISSIONER OF INDUSTRIES AND COMMERCE
BAMUNIMAIDAN
GHY- 21
ASSAM

B E F O R E
Hon'ble MR. JUSTICE SANJAY KUMAR MEDHI
JUDGMENT & ORDER

Advocate for the petitioner : Ms. M. Hazarika, Sr. Advocate

Advocates for respondents : Shri A. Kalita, SC,

Industries & Commerce Department

Shri B. Gogoi, SC, Finance (Taxation) Department

Shri S. Das, Advocate (AIDC)

Date of hearing : 11.01.2024

Date of judgment : 11.01.2024

Heard Ms. M. Hazarika, learned Senior Counsel for the petitioners. Also heard Shri A. Kalita, learned Standing Counsel, Industries & Commerce Department. Shri B. Gogoi, learned Standing Counsel, Finance (Taxation) Department as well as Shri S. Das, learned counsel for the AIDC are also present and heard.

2. The grievance raised in this petition is with regard to denial of incentives under the Industrial Policy of 2008 which culminated in the issuance of a communication dated 22.08.2014 whereby the petitioners has been directed to refund an amount of Rs.13,07,045/- by terming the same to be excess by the Department. The grounds of challenge raised in this petition, amongst others, are that the impugned action is unreasonable, inconsistent and is in violation of the Policy and guidelines holding the field.

3. Before going to the issue which has arisen for adjudication, the basic facts pertaining to this case may be narrated briefly.

4. The Government of Assam had announced an Industrial Policy in the year 2008 to give certain incentives to new as well as existing units which were undertaking substantial expansion. As per the said Policy, such units would be entitled to Sales Tax exemption of 100%. The petitioner no. 1 which is a Private Limited Company claims to have an industry pertaining to manufacture of M.S. Rod and also claims to be a Small Scale Industry. According to the petitioners, since the petitioner no. 1 fulfills all the eligibility criteria, had submitted and they applied for such exemption and incentives. After examination of the credentials and the documents, an Eligibility Certificate was issued on 12.07.2010 for a total amount of Rs. 452.16 lakhs which included an amount of Rs.63,52,117/- being the component under Electricity Installation other than drawal of power line. Since the aforesaid assessment was done by construing the petitioner no. 1 not as an assessee, the petitioner no. 1 had submitted representation for treating the same as an SSI unit and not as a Medium Scale Unit.

5. With regard to the said issue, the petitioners had earlier approached this Court by filing a writ petition WP(C)/5421/2013. This Court vide order dated 19.02.2014, after recording the submissions and on consent of the rival counsel

had directed the respondents to do a rectification exercise. For ready reference, the relevant part of the order dated 19.02.2014 is extracted herein below:

"19.02.2014.

The petitioner is an Assam based industry and is eligible for incentives under the State's Industrial Policy, 2008 and is entitled to tax exemption under the Assam Industries (Tax Exemption of Pipeline Units) Order, 2005. However in the eligibility certificate issued to the industry, they were categorized as medium scale industry.

Ms. M. Hazarika, the learned senior counsel submits that after the Micro, Small and Medium Enterprise Development Act, 2006 (hereinafter referred to as 'the MSME Act') was enacted to facilitate promotion and development of small industries, under the new definition, a unit will fall under the category of small enterprise where the investment for the plant and machineries is more than 25 lacs but does not exceed Rs. 5 crore. The senior counsel projects that the total investment of the petitioner in plant and machineries is about Rs. 4,22,43,021/- and accordingly they should be categorized as a small enterprise instead of a medium enterprise.

Mr. M. Phukan, learned counsel appearing for the Industries Department and the AIDC refers to the counter affidavit filed by the Dy. General Manager (Tech), AIDC on 8.1.2014 to project that the plea for rectification of categorization made by the petitioner from medium to small enterprise under the MSME Act, 2006 is in process and the eligibility certificate of the petitioner unit is expected to be rectified with new categorization for the petitioner unit.

In view of the above stand of the concerned respondents and as agreed to by the rival counsel, the case is disposed of by directing the respondents to complete the rectification exercise expeditiously and preferably within 3 months from receipt of intimation of this order. The petitioner will do the needful in the matter.

With the above order, the case stands disposed of.”

6. Subsequent thereto, a rectification exercise was done by treating the petitioner no. 1 as a Small Scale Industry. However, while making the assessment dated 23.06.2014, under the component of Electrical Installation other than drawal of power line, the additional investment made for substantial expansion was held to be nil. Accordingly, the petitioners were issued with the refund notice dated 22.08.2014 as mentioned above directing them to refund an amount of Rs. 4,38,87,837/-. It is the legality and validity of the aforesaid action which has been questioned by the petitioners in the instant case.

7. Ms. Hazarika, the learned Senior Counsel has submitted that once the assessment was made and the unit of the petitioner no. 1 was held to be entitled for the amount under the component of electrical installation other than drawal of power line, as would reveal from the Eligibility Certificate dated 12.07.2010, there was actually no scope for deducting the same in the impugned assessment made on 23.06.2014.

8. It is submitted that the exercise for reconsideration, as directed vide the order dated 19.02.2014 by this Court should have been confined only to the aspect as to whether the petitioner no. 1 be treated as a Small Scale Unit or Medium Scale Unit and once the authorities had come to the conclusion that the petitioner no. 1 is a Small Scale Unit, the authorities were not entitled to look

into the other aspects of the matter which were already examined and held to be entitled to by the petitioner no. 1.

9. The learned Senior Counsel has referred to the notification of the Industries & Commerce Department whereby the Policy has been laid down. Clause 7.1 deals with tax incentives wherein fixed investment has been defined.

10. By referring to Chapter 12 of the Policy, more particularly, Clause 12.6 thereof, it is submitted that the said clause contemplates that a set of guidelines including application forms and procedures for getting various incentives would be issued separately. Reference has thereafter been made to the Operational Guidelines which has been made with the Operational Guidelines for the Industrial (and Investment) Policy of Assam, 2008 which were framed under the provisions of Chapter 12.6 of the policy. With regard to the subject which is relevant for the present case relating to investment in plant and machinery / equipment, it has been submitted that such investment would mean, amongst others the price for utility installations including dedicated transformer, gas producer plant, power generating, etc. The expression "Fixed Capital Investment" has also been explained in the said guidelines to mean and include investment in plant and machinery / equipment or additional investment in plant and machinery / equipment and civil constructions work connected directly with the manufacturing process / service rendered. It is submitted that the initial exercise for working of the incentives which would reveal from the Eligibility Certificate dated 12.07.2010 would clearly reveal that the amount in question was worked out by excluding the component of drawal of power line and was confined only to electrical installations.

11. By referring to the affidavit-in-opposition filed by the respondent nos. 1, 5 & 6 dated 15.05.2019, the learned Senior Counsel has referred to the Minutes of

Meeting of the State Level Committee held on 31.05.2010. The discussion of the said Committee would show that a finding was arrived at that the Operational Guidelines cannot supersede a Policy and therefore the assessment earlier made was deemed to be erroneous. The Committee thereafter had made a recommendation for modification and issuance of necessary corrigendum in the Operational Guidelines.

12. Ms. Hazarika, the learned Senior Counsel submits that the aforesaid observation made by the State Level Committee dated 31.05.2010 clearly does not seem to have been acted upon inasmuch as the first Eligibility Certificate is itself dated 12.07.2010 which is after the aforesaid meeting. Accordingly, she submits that the impugned action demanding refund on alleged excess amount is unsustainable in law.

13. To fortify her submissions that guidelines of the Government are binding in nature, the learned Senior Counsel for the petitioners has referred to the following case.

(i) Delhi Development Authority vs. Vijaya C. Gurshaney (Mrs) and Anr. reported in (2003) 7 SCC 301.

(ii) Swaran Singh Chand vs. Punjab State Electricity Board and Ors. reported in (2009) 13 SCC 758.

14. In the case of Delhi Development Authority (supra), the Hon'ble Supreme Court while dealing with the aspect of policy decisions had made the following observations:

"10. The rationale behind the formulation of its policies and guidelines issued by DDA is to curb illegal transactions in favour of persons not of blood relation of the allottee, being practiced rampantly and the property being transferred by an underhand sale in the garb of will and power of attorney etc. DDA has formulated a policy that in such cases the Department would ask for 50% of unearned increase in the value of property. It is always open to the appellants to inquire whether an alleged will is in actuality a sale in the garb of will in total disregard of the policy decision of the authority. Merely because probate / letters of administration are granted, would not preclude DDA from so inquiring. It must be grasped that DDA has been given no notice of the testamentary proceedings. Therefore, it would have no right to appear or oppose such proceedings. As already said, DDA is a creature of the statute and any policy decision or guidelines formulated by such Authority will have a binding effect on the parties, in absence of rules to the contrary."

15. Though the case of ***Swaran Singh Chand*** (supra) pertains to the subject of a compulsory retirement, it has been clearly laid down in paragraph 9 that the guidelines issued by the State are binding on it.

16. The learned Senior Counsel has informed this Court that while issuing notice of motion on 18.09.2014, an interim order was passed directing restraining making of any recovery and the same is holding the field.

17. *Per contra*, Shri Kalita, the learned Standing Counsel of the Department has submitted that while the first Eligibility Certificate was issued on 12.07.2010,

the objective of the Policy was not looked into minutely and by error, the unit was held to be entitled to the incentive of electrical installation other than drawal of power line. By referring to the definition of fixed investment, he submits that such installation would not come within the definition and therefore, the Policy would not allow a unit to be given incentive of the above nature. He clarifies that so far as drawal of power line is concerned, the unit has already availed of the incentives which has been quantified as 25%.

18. With regard to the Minutes of the Meeting dated 31.05.2010, the learned Standing Counsel has submitted that it is the Policy which is the substantive law and guidelines which has been notified in terms of the Policy cannot supersede the substantial law. He further adds that even if the guidelines may take the colour of a delegated legislation, the said guidelines cannot be taken into consideration for matters which are directly in conflict with the Policy. He submits that when the Policy does not provide for such incentives, by the guidelines, providing of such incentives is not permissible.

19. To support his submission, Shri Kalita, the learned Standing Counsel has relied upon the case of ***State of Orissa and Ors. vs. Tata Sponge Iron Ltd.*** reported in ***(2007) 8 SCC 189***.

20. The learned Standing Counsel has further added that by the Minutes of Meeting dated 31.05.2010, a recommendation was given to the Department which was in fact acted upon and subsequently, there was modification in the Operational Guidelines. He further submits that the law being clear on the aspect, the decision taken by the State Level Committee cannot be faulted with, as a guideline cannot supersede a Policy.

21. Shri B. Gogoi, learned Standing Counsel, Finance (Taxation) Department

while endorsing the submissions made by Shri Kalita, the learned counsel has further submitted that mere issuance of an Eligibility Certificate is not the end of the matter which is required to be followed by an Entitlement Certificate and therefore while examining the aspect of the matter, an observation be made that with regard to the issuance of Entitlement Certificate, the same should be done strictly in accordance with law. He has also referred to the Assam Industries (Tax Exemption) Scheme, 2009 to support his submission with regard to the aspect of substantial expansion.

22. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been examined.

23. The issue involved in this case is necessary to be examined from the context of the first approach of the petitioners to this Court by way of filing WP(C)/5421/2013. The grievance expressed in the earlier writ petition which would itself be discernible from a reading of the aforesaid order dated 19.02.2014 is that while making the assessment, the petitioner no. 1, instead of being treated as a small enterprise was treated as a medium enterprise. This Court had also recorded that the remand was made on consent of the parties to do a rectification exercise within a particular period. The order of remand being confined to a particular aspect i.e. as to whether the petitioner unit was a Small Scale Unit or a Medium Scale Unit, it is actually questionable as to whether any other aspect could have gone into on such remand, more so when the assessment done while issuing the first Eligibility Certificate dated 12.07.2010 was otherwise not the subject matter of any challenge. The first Eligibility Certificate dated 12.05.2010 clearly reveals that towards the component of Electrical Installation other than drawal of power line as stated in serial no. 4

(G), an amount of Rs. 63,52,117/- was assessed as additional investment made for substantial expansion. There is no issue raised by the respondents on the factual aspect of the matter regarding such additional investment.

24. The present controversy has arisen only while issuing the subsequent assessment order pursuant to the remand order of this Court where the component of electrical installation other than drawal of power line under Serial No. 4 (G) has been held to be nil.

25. The second Eligibility Certificate dated 23.06.2014 does not state any reasons as to why the petitioner unit was held not to be entitled to any amount under the aforesaid component. The grounds for such action can be traced back to the State Level Committee meeting held on 31.05.2010 wherein it has been held that Operational Guidelines cannot supersede a Policy.

26. This Court finds force in the submission made by the learned Senior Counsel for the petitioners that the first Eligibility Certificate itself which is dated 12.07.2010 was after the Minutes of Meeting which was on 31.05.2010. Whether a State Level Committee would have the jurisdiction / competence to question the Operational Guidelines framed under the Policy is itself a debatable issue. In any case, the operative part of the observation is a recommendation to rectify the Operational Guidelines by issuance of necessary corrigendum. There is no manner of doubt on the part of this Court that a State Level Committee will not have the competence to declare an Operational Guidelines as invalid. It would be a different matter if such guidelines were rectified by the competent authority which in this case was not done at the relevant point of time.

27. So far as the submission made by Shri Kalita, the learned Standing Counsel that such change was made in year 2014, Ms Hazarika, the learned

Senior counsel for the petitioners has clarified that the Policy of 2014 is different from the Policy of 2008 and the Operational Guidelines pertaining to the Policy of 2014 would have no connection for the subject matter in dispute.

28. The decisions referred to on behalf of the petitioners are with regard to the binding effect of the guidelines framed by the State.

29. So far as the decision of ***Tata Sponge*** (supra), referred by Shri Kalita, the learned Standing Counsel is concerned, the facts of the said case are wholly distinguishable from the facts of the present case. In the said case, the grievance was raised by the assessee which had alleged that by issuance of a subsequent guidelines, the substantive part of the Policy by which the unit was claiming incentive was sought to be taken away.

30. Under that context, the Hon'ble Supreme Court has held that a guideline cannot supplant the Policy. The Hon'ble Supreme Court had however also made an observation to the following effect:

"22. It is furthermore a well settled principle of law that an exemption notification must be liberally construed."

31. In the instant case this Court has noticed that it is the case of none of the parties that the Operational Guidelines was / is the subject matter of challenge. This Court is of the view that the Guidelines which were framed under Chapter 12 was only to supplement the Policy and make it workable and till such guidelines were existing, it was the obligation of the authorities to follow the same.

32. This Court has also noticed that while the State Level Committee had raised questions on the guidelines, the Committee had only recommended for

modification of the guidelines and by mere recommendation, the efficacy of the guidelines cannot be held to be obliterated.

33. In view of the above, this Court is of the unhesitant opinion that the decision making process to exclude the petitioner no. 1 from the incentives under the component of electrical installation other than drawal of power line cannot be held to be justified and consequently the impugned demand notice for refund dated 22.08.2014 is set aside and the petitioners unit is held to be entitled for an Eligibility Certificate which includes the incentives amount under the aforesaid head.

34. This Court has also noticed that the interim order dated 18.09.2014 passed by this Court was regarding restraining any recovery and accordingly the aforesaid interim order is made absolute.

35. Writ petition accordingly stands allowed.

36. No order as to cost.

JUDGE

Comparing Assistant