

CASE NO.:
Appeal (civil) 3658 of 1994

PETITIONER:
The State of Gujarat & Ors.

RESPONDENT:
Saurashtra Cement & Chemical Ind. Ltd.

DATE OF JUDGMENT: 29/01/2003

BENCH:
M.B. Shah & Arun Kumar

JUDGMENT:
J U D G M E N T

ARUN KUMAR, J.

This appeal is directed against a judgment dated 29th November, 1990 of the Gujarat High Court allowing a Writ Petition filed by the respondent seeking exemption from levy of electricity duty and for quashing the orders of the authorities under the Bombay Electricity Duty Act, 1958 (hereinafter referred to as 'Act') whereby exemption had been denied to the respondent. The High Court held that the respondent had set up a new industrial undertaking as contemplated under the Act and was entitled to exemption from electricity duty under Section 3 (2) (vii) (b) of the said Act. The State Government has filed the present appeal against the said judgment of the High Court.

Briefly the facts are that the respondent is engaged in manufacture of portland cement. It installed a manufacturing plant in the year 1960 with a capacity of producing 660 metric tones of clinker per day. The respondent added one more kiln in 1965 and increased its production capacity to 1000 metric tones. By August 1969 the respondent installed further machinery in a new building erected within the same premises to further increase its production capacity. The respondent installed a new kiln alongwith separate silos, lepol and nodulizers, coal mill and cement mill. This unit started manufacturing cement on 24 June, 1971. The unit was using existing idle capacity of crushers, cranes, packing machines, coal mills, and raw mills.

According to the case of the respondent, the new kiln set up in 1969 was a new industrial undertaking as contemplated by Section 3(2)(vii)(b) of the Act and as such was entitled to exemption from levy of electricity duty. At this stage it will be appropriate to reproduce relevant provisions of the Act.

" Section 3(1) : Subject to the provisions of sub-sections (2) and (3) there shall be levied and paid to the State government on the units of energy consumed (excluding losses of energy sustained in transmission and transformation by a licensee before supply to a consumer), a duty (hereinafter referred to as "electricity duty") at the rates specified in the Schedule to this Act.

(2) Electricity duty shall not be leviable on the units of energy consumed-

(i) to (vi)

(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 for its own use, ten years from the date of the commencement of the Bombay Electricity Duty (Gujarat Second Amendment) Act, 1961 (hereinafter referred to as "the commencement date") or the date of starting the generation of such energy, whichever is later;

(b) in the case of a new industrial undertaking established on or after 1st May, 1960, which does not generate energy for its own use, five years from the commencement date or the date on which the 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 clause (vii)-

(i) "an industrial undertaking" means an industrial undertaking which manufactures or produces 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; and

(ii) "a new industrial undertaking" means any such industrial undertaking which-

(a) is not formed by the splitting up or the reconstruction 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."

The respondent made an application on August 4, 1971 as envisaged under Section 3 (2) (vii) (b) read with Rule 11 of the Bombay Electricity Duty (Gujarat) Rules, 1968 for obtaining eligibility certificate for exemption from levy of electricity duty. The Collector of Electricity Duty rejected the said application on 16th September, 1971. As per the procedure prescribed under the Act, the respondent sought a reference to the statutory authority. The reference was answered by the Collector of Electricity Duty vide order dated 29th August, 1975 rejecting the claim of the respondent. It was held by the Collector that installation of new unit and other machinery could not be considered as a new industrial undertaking, particularly, in view of the fact that the respondent was making use of the existing mills, crushers, belts, cranes, packing plants etc. The Collector also relied on statement made by the respondent in its application under Rule 11 to the effect that it had made a substantial expansion of the existing undertaking. The respondent filed an appeal against the said order of the Collector. The Joint Secretary to the Industry, Mines & Power Department, Government of Gujarat, disposed of the statutory appeal vide order dated 22nd March, 1978. The appeal was dismissed and the findings recorded by the Collector were affirmed. The respondent challenged these decisions by way of a writ petition filed in the Gujarat High Court. The High Court took the view that use of the existing plant and machinery by the respondent in the new industrial unit is only incidental. According to the High Court, in the facts and circumstances of the case, it amounted to establishment of a new industrial undertaking and the respondent was entitled to exemption from electricity duty. It was observed by the High Court that if expansion is by way of a totally new factory or new organization, management, establishment, assets and machinery, such expansion would certainly constitute new undertaking. The High Court made reference to the object behind the exemption from duty. The object was to encourage industrial activity in the new State of Gujarat. The High Court noted the fact that in the beginning and towards the end of the process of manufacture of cement, the respondent was making use of old machinery. Yet it was of the view that this was not decisive of the matter. The High Court accordingly set aside the findings of fact recorded by both the statutory authorities and granted relief to the respondent by holding that the respondent was entitled to exemption from electricity duty.

The learned counsel appearing for the appellant, State of Gujarat, laid emphasis on the relevant provisions of the statute particularly clause (ii) (c) of Explanation 1 and submitted that in view of the restrictive definition of a new industrial undertaking contained in the said provision, the respondent is not entitled to exemption from payment of electricity duty. The crucial question for consideration in this case is the meaning of the word 'new industrial undertaking'

contained in clause (b) of Section 3 (2) (vii). Only if a unit can be described as a new industrial undertaking, it will qualify for the exemption. According to sub-clause (ii)(c) of Explanation I an industrial undertaking should not be an expansion of the existing business or undertaking in the State in order to be entitled to the benefit of exemption from levy of electricity duty as a new industrial undertaking. Thus cases of expansion of existing units, irrespective of extent of expansion, will not qualify for being called a new industrial undertaking within the Act. As per facts emerging on record, the respondent is admittedly using its existing crushers, cranes, raw mills, packing machines and old cement mills to complete the process of manufacture of cement in the new unit. According to the learned counsel for the appellant when the existing plant and machinery are used in the process of manufacture of cement in the so called new industrial unit, it is nothing but a case of expansion of the existing business or undertaking. The expansion may be substantial but that would not make any difference. Once it is a case of expansion of existing unit, it will not be entitled to exemption from duty.

The learned counsel appearing for the respondent, however, argued that the use of existing plant and machinery in the new unit was only incidental and actually it is a case of setting up of a new industrial undertaking which entitles the respondent to exemption from duty as envisaged under the Act. In support of his argument, the learned counsel for the respondent relied upon Textiles Machinery Corporation Ltd., Calcutta Vs. Commissioner of Income Tax, West Bengal [1977 (2) SCC 368]. This was a case under the Income Tax Act. The assessee sought exemption under Section 15C of the Act on the ground that it was a newly established industrial undertaking. The statutory provision under the Income Tax Act is materially different from the one under consideration in the present case. The exception carved out for cases of expansion of existing business or undertaking in the State is not there in Section 15C of the Income Tax Act. In the context of Section 15C of the Income Tax Act, this Court in Textiles Machinery Corporation Case observed:

"That manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit is the heart of the matter, to earn benefit from the exemption of tax liability under Section 15C."

Crucial question for consideration before us is whether it is a case of expansion of an existing unit? The case of expansion of an industrial undertaking would qualify for exemption under Section 15C of the Income Tax Act while in view of clause (ii)(c) of Explanation 1 contained in the Bombay Electricity Duty Act, 1958, an expansion of existing business undertaking would not qualify for exemption from electricity duty. Para 18 of the judgment in Textile Machinery Corporation (supra) throws considerable light on the controversy before us. Para 18 reads as below:

"18. The assessee continues to be the same for the purpose of assessment. It has its

existing business already liable to tax. It produced in the two concerned undertakings commodities different from those which he has been manufacturing or producing in its existing business. Manufacture or production of articles yielding additional profit attributable to the new outlay of capital in a separate and distinct unit is the heart of the matter, to earn benefit from the exemption of tax liability under Section 15C. Sub-section (6) of the section also points to the same effect, namely, production of articles. The answer, in every particular case depends upon the peculiar facts and conditions of the new industrial undertaking on account of which the assessee claims exemption under Section 15C. No hard and fast rule can be laid down. Trade and industry do not run in earmarked channels and particularly so in view of manifold scientific and technological developments. There is great scope for expansion of trade and industry. The fact that an assessee by establishment of a new industrial undertaking expands his existing business, which he certainly does, would not, on that score, deprive him of the benefit under Section 15C. Every new creation in business is some kind of expansion and advancement. The true test is not whether the new industrial undertaking connotes expansion of the existing business of the assessee but whether it is all the same a new and identifiable undertaking separate and distinct from the existing business. No particular decision in one case can lay down an inexorable test to determine whether a given case comes under Section 15C or not. In order that the new undertaking can be said to be not formed out of the already existing business, there must be a new emergence of a physically separate industrial unit which may exist on its own as a viable unit. An undertaking is formed out of the existing business if the physical identity with the old unit is preserved. This has not happened here in the case of the two undertakings which are separate and distinct."

It will be seen from the facts on record in the present case that the so called new unit/undertaking is not totally independent of the assets of the existing unit. Admittedly certain assets, to which reference has already been made, are being utilized in the manufacturing activity carried on by the new unit. It cannot be said that the new unit is completely independent or that the new unit could do without the assets of the existing unit. If use of the old plant and machinery etc. was necessary to complete the manufacturing process in the new unit, the new unit is not totally independent nor it is able to complete the process of manufacture of cement on its own as a viable unit. The new unit is dependent on the existing assets. A physical identity with the old unit is preserved. In view of the exception carved out in the definition of a new

industrial unit contained in the Act, it cannot be said that the respondent is entitled to exemption from electricity duty.

To appreciate the exception contained in Explanation 1 to clause (ii)(c) of Section 3 (2) (vii) (b), it is necessary to understand the meaning of the word 'expansion'. The word 'expansion' is a noun derived from the word 'expand', which is a verb. The word 'expand' means 'to become greater or bigger in size, to spread out. As per the New Shorter Oxford English Dictionary, the word 'expand' means 1.v.t. 'spread or stretch (a thing) out 2. Become extended; spread out, unfold. 3.v.t. Give full expression to 4.v.t. Widen the boundaries of, increase the area, scope etc., of; enlarge, dilate 5.v.i. Become greater in area, bulk, capacity etc; become larger; increase the scope of one's activity or the scale of operations of something; take in or go into a new area of activity.

This meaning is to be applied to the facts on record. The respondent company when it initially started had a production capacity of 660 metric tonnes which was subsequently increased to 1000 metric tonnes. In 1969-70 by setting up the alleged new unit, production capacity of the company more than doubled. But as already seen this unit is not self contained. It is not an independently viable unit. It is dependant on various items of plant and machinery and mills of the existing unit. Further respondent was having two kilns and third is added. This leads to the inevitable conclusion that the new unit is an expansion of an existing undertaking in the State. Once it is held to be a case of expansion, the claim for exemption from electricity duty, set up by the respondent, completely falls to the ground. In the facts and circumstances of the case we are clearly of the view that the respondent is not entitled to exemption from electricity duty. The High Court failed to apply the real test which emerges from the judgment of this Court in Textile Machinery Corporation (supra) which was affirmed in a subsequent decision in Bajaj Tempo Ltd, Bombay Vs. Commissioner of Income Tax, Bombay City-III, Bombay [1992 (3) SCC 78]. Accordingly, this appeal is allowed. The judgment of the High Court under appeal is set aside. The respondent is held not entitled to exemption from electricity duty. In the facts of the case there will be no order as to costs.