REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4842 OF 2017
(ARISING OUT OF SLP(CIVIL) NO.34384 OF 2016)

ESSAR STEEL INDIA LTD.
AND ANR. … APPELLANT(S)

VERSUS

STATE OF GUJARAT AND ANR. … RESPONDENT(S)

J U D G M E N T

SUPREME COURT OF INDIA
JUDGMENT

ASHOK BHUSHAN,J.

1. This appeal has been filed against the Division Bench judgment of Gujarat High Court dated 07.09.2016 dismissing Letters Patent Appeal of the appellants affirming the judgment of Learned Single Judge dated 25.02.2010. Special Civil Application

was filed by appellant challenging the order dated 24.09.2099 passed by the State Government as well as the demand notice dated 06.10.2009. Learned Single Judge dismissed the Writ Petition.

2. Brief facts of the case which are necessary to be noticed for deciding this appeal are: -

The appellant no.1 is duly incorporated company under the provisions of Companies Act, 1956 engaged in business of manufacturing and selling steel products. The appellant no.2 is also a duly incorporated company under the provisions of Companies Act, 1956, which is a generating company selling/supplying electrical energy. The appellant no.1 company set up its gas based steel plant at Hazira, in the year 1990 or thereabout for production of HBI. It also set up a 20 MW Open Cycle Power Plant for captive consumption of power for its HBI plant. On the application made by the appellant no. 1 Company, the State Government granted exemption from payment of electricity duty for a

SUPREME COURT OF INDIA
JUDGMENT

period of 10 years commencing from 21.07.1990 with respect to the said Open Cycle Power Plant. Subsequently, the appellant no.1 Company converted the said Open Cycle Power Plant of 20 MW into 30 MW Combined Cycle Mode Power Plant by adding steam turbine. Consequent upon such conversion, the appellant no.1 company was granted by the State Government exemption from payment of electricity duty for a period of 15 years commencing from 21.07.1990. In the year 1991, the appellant no.1 company also desired to put up a composite plant after making substantial investment for production of both HBI and HRC. Therefore, in or about the year 1991-92, the appellant no.1 company thought of setting up another Captive Power Plant of 300 MW of capacity in Combined Cycle Mode at Hazira for meeting its requirement of more power. The appellant thought of doing so, in view of the benefits available to the Captive Power Plant at the relevant time. The Government of Gujarat and the Gujarat Electricity Board granted in principle approval to

SUPREME COURT OF INDIA
JUDGMENT

the appellant no.1 company for setting up the said Captive Power Plant of 300 MW. There was, however, a change in the Power Policy of Government of India, in the year 1991-92, which allowed the participation of private sector in power generation. Government of Gujarat also, with a view to give effect to that policy, issued a Notification dated 27.02.1992 under Section 3 of the Bombay Electricity Duty Act, 1958(hereinafter referred to as 1958 Act). The appellant no.1 Company, therefore, abandoned its plan to set up the said Captive Power Plant of 300 MW in Combined Cycle Mode and in place and instead thereof, promoted and incorporated a separate generating company under the name and style of "ESSAR Power Limited", the appellant no.2 is a Special Purpose Vehicle promoted by the appellant no.1 company for supply of power to the appellant no.1 company as well as to the Gujarat Electricity Board.

SUPREME COURT OF INDIA
JUDGMENT

3. The Government of Gujarat issued an Order dated 16.06.1995 agreeing in principle to the demand of appellant no.2 to set up 510 MW generating station at Hazira. The appellant no.2 started production of electricity w.e.f. 08.08.1995. The appellant no.1 held equity shares of 42% of appellant no.2 company. Out of 515 MW, 300 MW capacity has been allocated to GEB (Gujarat Electricity Board) which constitute 58% of the installed capacity, remaining capacity of 215 MW which constitute 42% to the ESSAR Group of company as per the stipulation contained in the Power Purchase Agreement dated 30.05.1996.

4. The appellant no.1 had filed an application dated 15.03.2001 seeking exemption from payment of electricity duty under the notification dated 27.02.1992 issued under Section 3(3) of the Bombay Electricity Act, 1958 (hereinafter referred to as Act 1958). Another application dated 12.04.2001 was sent by appellant no.1 to the Commissioner of

SUPREME COURT OF INDIA
JUDGMENT

Electricity seeking exemption from electricity duty for a period of 15 years under Section 3(2)(vii)(a)(i) of 1958 Act. The State of Gujarat Vide Order dated 23.12.2002 rejected the request for exemption under Section 3(2). The Order dated 23.12.2002 was challenged in the High Court Wherein High Court vide Order dated 17.03.2003 left open to the Government to take a fresh decision. The State Government again by Order dated 23.01.2006 rejected the application of appellant no.1 for grant of exemption for payment of electricity duty for 215 MW power generation equivalent to 42% of the total generation. The Writ Petition was again filed challenging the Order dated 23.01.2006 in which High Court set aside the Order dated 23.01.2006 and directed the Government to pass a fresh Order. The State Government passed the detailed Order dated 24.12.2009 rejecting the claim of appellant no.1 for exemption of payment of electricity duty both under Section 3(2)(vii)(a)(i) as well as under notification dated 27.02.1992. After decision dated 24.09.2009 recovery notice

SUPREME COURT OF INDIA
JUDGMENT

dated 06.10.2009 was issued for payment of electricity duty amounting to Rs.562/- Crores together with interest totaling Rs.1038.27/- Crores for the period of April 2000 to August 2009. The Order of State Government dated 24.09.2009 was challenged by the appellants before the High Court by means of Special Civil application no. 10946 of 2009. Learned Single Judge dismissed the Writ Petition vide its judgment dated 25.02.2010 aggrieved against which Letters Patent Appeal was filed by the appellants. In Letters Patent Appeal, an interim order was granted on conditions:

i) The appellant shall pay a sum of Rs.50 Crores against the outstanding dues of electricity by 30.04.2010 in two installments of Rs.20 Crores each.

ii) The appellant no.1 shall further pay from 01.05.2010 a sum of Rs.15 Crores every month against the outstanding dues of electricity.

SUPREME COURT OF INDIA
JUDGMENT

5. The Letters Patent Appeal ultimately came to be dismissed by Division Bench on 07.09.2016 against which judgment the present appeal has been filed.

6. We have heard Shri Mihir Joshi, Senior Advocate for the appellants and Shri C.A.Sundram, Senior Advocate appearing for the respondents.

7. Learned Counsel for the appellants contends that the issue is squarely covered in its favour by a decision of this Court in ***A.P. Gas Power Corporation Ltd. Versus AP State Regulatory Commission and another, (2004) 10 SCC 511,*** wherein it was held, inter alia, that the electricity generated by a Special Purpose Vehicle and consumed by the participating member to the extent of its equity contribution would amount to captive consumption of electricity. The High Court in the impugned judgment, however, distinguished the aforesaid judgment of this Court on the ground that in that case the parties were governed by a Memorandum of Understanding ("MoU") which was not

there in the present case and secondly, on the ground that ESIL was purchasing 215 MW of power from EPL.

8. It is further submitted that rejection of the application on the ground that same was not made in the prescribed form under Rule 11 of Bombay Electricity Duty Rules, 1968 is erroneous and had the rejection being only on the ground of non-filing the application at the first stage same could have been done since the State had power to condone the delay. Alternatively, the appellant was entitled for exemption under notification dated 27.02.1992 by reason of the fact that ESIL was jointly generating electricity with EPL and had also purchased the generating sets by making payments of the purchase price to the vendors during the period prescribed. It is further contended that in the similar circumstances the Government of Gujarat had extended the benefit of exemption from payment of electricity duty to GIPCL and therefore, ESIL who is similarly

SUPREME COURT OF INDIA
JUDGMENT

situated cannot be deprived of benefits of exemption.

9. Learned Counsel appearing for the State refuting aforesaid submission contends that Government as well as High Court has rightly rejected the claim of exemption of duty. The appellant neither fulfills the statutory requirements under Section 3(2) nor fulfill the conditions of the notification dated 27.02.1992. ESSAR Power and ESSAR Steel are separate and independent legal entities. ESSAR Steel is not generating energy. ESSAR Steel is not generating either singly or jointly with either GEB or its successor entity, Gujarat Urja Vikas Nigam Limited or even with ESSAR Power. ESSAR Power is not generating energy for its own use. ESSAR Power Limited has established 515 MW power station, out of which 300 MW capacity has been allocated to Gujarat Electricity Board (GEB). Thus 58% of the installed capacity is allocated to GEB and in relation to such

SUPREME COURT OF INDIA
JUDGMENT

capacity; ESSAR Power Limited generates and sells electricity as a generating station and not as a captive Power Plant of GEB. The remaining capacity of 215 MW, which constitutes 42%, is for ESSAR Group of Companies, as per the stipulation contained in the Power Purchase Agreement dated 30.05.1996 entered into between ESSAR Power and GEB as well as the Power Purchase Agreement dated 29.06.1996 entered into between ESSAR Power and ESSAR Steel. The clauses in each of these agreements is clearly inconsistent with ESSAR Power being treated as captive generation and use within the scope of Section 3(2)(vii) of the 1958 Act. The appellant has rightly been denied the benefit of exemption as claimed under the notification dated 27.02.1992. The condition of the notification dated 27.02.1992 specifically states that the generating set or sets shall have to be purchased or installed or commissioned during the period beginning from 01.01.1991 and ending on 31.12.1992. This does not cover order placed for the purchase of generating

SUPREME COURT OF INDIA
JUDGMENT

set. Since ESSAR Steel has merely placed the order for generating set but neither purchased nor installed or generated within the period specified in the aforesaid notification, it is not fulfilling this condition and hence not entitled for benefits of the said notification. In case of purchase, property in goods is transferred to the owner, here, in given case, property in goods cannot be considered as transferred when same is simply ordered.

10. Learned Counsel for the parties have placed reliance on various judgments of this Court in support of their respective submission which shall be referred to while considering the submissions in detail.

11. We have considered the submissions of Learned Counsel for the parties and perused the records.

12. From the facts which have come on the record it is clear that appellant no.1 had claimed

exemption from duty under the provisions of Section 3(2)(vii) as well as under the notification issued under Section 3(3) of 1958 Act for different period which exemption was earlier granted. Details of benefit of exemption availed by appellant no.1 has been extracted by Division Bench of High Court in Para 5.4 of the judgment. It is useful to extract the table quoted in the judgment which is quoted below to the following effect:

Sr. No.	Date of Application seeking exemption from Duty	Prescribed Form No. for making application	Applicable provision for exemption under GED Act, 1958	Source of electricity supply	Date of Issue of Certificate of Exemption	Exemption period
(1)	(2)	(3)	(4)	(5)	(6)	(7)
1.	21.7.1990	Form 'E'	Sec. 3(2) (vii) (a) (ii)	20 MW + 1380 KVA + 590 KVA + 1500 KVA of Self-generating sets of ESSAR Steel	1.9.1995	21.7.1990 to 29.9.1999
2.	30.7.1990	Form 'F'	Sec. 3(2) (vii) (b)	GEB connection No HT 159	28.1.1992	19.12.1991 to 26.3.1995

3.	May, 1995	Form 'F'	Notification dt. 30.6.1993 issued under Sec. 3(3)	GEB connection No HT 0159/ HT 10029 + **215 MW** from ESSAR Power (exclusively for HRC Project)	6.9.1995	31.3.1995 to 30.3.2000
4.	30.1.1996	Form E	Sec. 3(2) (vii) (a) (i)	20 MW (existing) + 11 MW i.e. Co- generation plant	26.11.1998	15.12.1995 to 29.9.2004

13. In the present case, no application in the prescribed form as per Rule 11 of the Rules was filed by the appellant no.1 and for the first time the appellant had come up with an application dated 15.03.2001 seeking an exemption under notification dated 27.02.1992 and subsequently on 12.04.2001 has again claimed exemption under Section 3(2)(vii)(a)(i) of 1958 Act. The exemption from payment of duty as claimed by the appellant is in two parts. Firstly, under Section 3(2)(vii)(a)(i) of 1958 Act and secondly, under the notification dated 27.02.1992. We proceed to examine both the claim separately.

Claim under Section 3(2)(vii)(a)(i)

14. Section 3 of 1958 Act deals with "duty on units of energy consumed". Sub-Section 2 enumerates various circumstances under which duty shall not be leviable on the units of energy consumed. Section 3(2)(vii)(a)(i) and 3(3) is quoted below:

> *"3. **Duty on units of energy consumed... ... ...***
>
> ***(2) Electricity duty shall not be leviable on the units of energy consumed.....***
>
> ***(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 sub-section and sub-sections (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 co-generation.

(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-

....."

15. The keywords in the statutory scheme are "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 undertaking which are jointly generating the energy." We have to look into the facts of the

present case to find out as to whether the statutory conditions enumerated above are satisfied in the facts of the present case or not. The appellant no.1 is a separate registered company which holds 42% equity shares of the appellant no.2. The appellant no.2 has been constituted as a Special Purpose Vehicle for generating electricity. The appellant no.2 is a generating company within the meaning of Section 2(4A) of Electricity (Supply) Act, 1948. The submission which has been pressed by the counsel for the appellant is that both the appellant no.1 and appellant no.2 are generating energy jointly for the use of industrial undertaking which are jointly generating the energy.

16. As noted above, there is a Power Purchase Agreement dated 30.05.1996 and 01.06.1996 which contains various conditions for sale of electricity by appellant no.2. The State Government in its order dated 24.09.2009 has extracted the recitals in Power

Purchase agreement dated 01.06.1996 which are to the following effect: -

> *"...WHEREAS the Company is a Generating Company as defined under clause 4(A) of Section 2 of the Electricity (Supply) Act, 1948*
>
> *AND WHEREAS the Company has substantially implemented a 515 MW combined Cycle Generating Station at Hazira Dist. Surat, Gujarat of which it has already commissioned 3 x 110 MW Gas Turbine Generating Set an aggregate generating Capacity of 330 MW.*
>
> *AND WHEREAS the Company is setting up the said Generating Station and has been permitted as a special case to supply power to its sister concerns viz. ESSAR Steel Ltd. and ESSAR Oil Ltd, hereinafter jointly and severally referred to as 'ESSAR Group Companies'.*
>
> *AND WHEREAS ESTL which is engaged in the manufacture of Steel products at Hazira, intends to purchase electrical output generated by the Generating Station equivalent to 138 MW capacity in the Open Cycle mode and 215 MW capacity in Combined Cycle mode operation (hereinafter collectively or severally referred to as the 'Allocated Capacity') on the terms and conditions set forth in this Agreement.*

SUPREME COURT OF INDIA
JUDGMENT

16. Article 3 of the PPA dated 01.06.1996 between ESSAR Power Limited and ESSAR Steel Limited reads as under:

3.1 ALLOCATION OF CAPACITY

The allocation of capacity shall be as under:

(a) *During Open Cycle mode operation prior to commissioning of the Combined Cycle mode operation the Company shall allocate:*

138 MW to the ESTL; and

192 MW to GEB

(b) During Combined Cycle mode

215 MW to the ESTL; and

300 MW to GEB

...."

17. Even assuming appellant no.1 and appellant no.2 are jointly generating the energy for the use of industrial undertaking which are jointly generating the energy, the Gujarat Electricity Board to whom 300 MW has been allocated cannot be held to be industrial undertaking which is jointly generating the energy with appellant. The Statutory scheme for grant of exemption has to be strictly construed. The appellant no.2 is not jointly generating energy with Gujarat Electricity Board and it is selling the energy to the extent of 300 MW to

Gujarat Electricity Board. The conditions of the statutory provisions of Section 3(2)(vii)(a) are not fulfilled. The High Court has further held that both ESL and EPL being distinct separate legal entities merely because ESL might have 42% shares holding in EPL, it cannot be said that ESL is generating electricity jointly with EPL and EPL is generating electricity jointly with ESL for use of electricity by ESL.

18. The statutory conditions for grant of exemption as contained in Section 3(2)(vii)(a) can neither be tinkered with nor diluted. Learned Counsel for the appellant contends that the State Government had granted permission to the ESSAR Power Plant to set up a generating station as a special case and to supply power generated by it to its sister concerned i.e. ESSAR Steel and ESSAR Oil as a special case. The letter of the State Government dated 05.06.1995 further stated that if there is any excess power generated by EPL, the same may be

SUPREME COURT OF INDIA
JUDGMENT

purchased by the Board at the price decided by the Board. It is useful to extract the letter of permission dated 05.06.1995 issued by the State Government which was to the following effect:-

> *"The Govt. has considered all the aspect on the above matter and after careful consideration, has decided to agree in principle to the demand of ESSAR Power Limited to set up a generating station as a special case, and to supply power generated by it to its sister concern, i.e. ESSAR Gujarat, ESSAR Steels and ESSAR Oil again as a special case only subject to fulfillment of requirements of legal provisions as laid down under Section 15-A and 18-A of the Electricity Supply Act and with the express condition that the power generated through this subject shall never as sold outside the State or to any other person except as mentioned above. Moreover, in case, the power generated by EPL is to be wheeled, GEB shall decide the wheeling rate according to the sound commercial principles. In addition to this, if there is any excess power generated by EPL, the each may be purchased by the Board, at a price decided by the Board subject to the norms laid down by GoI from to time.*

> *It is, therefore, requested that GEB may take further necessary action in the matter."*

19. We have noticed above that Power Purchase Agreement allocated the energy to the Gujarat Electricity Board to the extent of 58% and 42% power supply was to be given to sisters concern i.e. ESSAR Gujarat, ESSAR Steel and ESSAR Oil as a special case. It is well settled that taxing statute are to be strictly construed specifically the exemption notification. It has been held that the statutory provisions providing for exemption has to be interpreted in the light of words employed in it and there cannot be any addition or substraction from the statutory provision. This Court in ***Commissioner of Central Excise, Surat-I versus Favourite Industries, 2012 (7) SCC 153,*** while considering exemption notification issued under Central Excise Tariff Act, 1985 laid down following in paragraph 35 to 40:-

> *"**35.** The notification requires to be interpreted in the light of the*

words employed by it and not on any other basis. There cannot be any addition or subtraction from the notification for the reason the exemption notification requires to be strictly construed by the courts. The wordings of the exemption notification have to be given its natural meaning, when the wordings are simple, clear and unambiguous.

***36**. In Commr. of Customs v. Rupa & Co. Ltd., this Court has observed that the exemption notification has to be given strict interpretation by giving effect to the clear and unambiguous wordings used in the notification. This Court has held thus: (SCC pp. 413-14, para 7)*

"7. … However, if the interpretation given by the Board and the Ministry is clearly erroneous then this Court cannot endorse that view. An exemption notification has to be construed strictly but that does not mean that the object and purpose of the notification is to be lost sight of and the wording used therein ignored. Where the wording of the notification is clear and unambiguous, it has to be given effect to. Exemption cannot be denied by giving a construction not justified by the wording of the notification."

(emphasis supplied)

37. *In CCE v. Rukmani Pakkwell Traders, this Court has also held: (SCC p. 804, para 5)*

"5. … It is settled law that exemption notifications have to be strictly construed. They must be interpreted on their own wording. Wordings of some other notification are of no benefit in construing a particular notification."

(emphasis supplied)

38. *In Kohinoor Elastics (P) Ltd. v. CCE this Court has held: (SCC p. 533, para 7)*

"7. … When the wordings of the notifications are clear and unambiguous they must be given effect to. By a strained reasoning benefit cannot be given when it is clearly not available."

(emphasis supplied)

39. *In Compack (P) Ltd. v. CCE, this Court has observed thus: (SCC p. 306, para 20)*

"20. Bhalla Enterprises laid down a proposition that notification has to be construed on the basis of the language used. Rukmani Pakkwell Traders[16] is an authority for the same proposition as also that the wordings of some other notification are of no benefit in construing a particular notification. The notification does not state that exemption cannot be granted in a case where all the inputs for manufacture

of containers would be base paper or paperboard. In manufacture of the containers some other inputs are likely to be used for which MODVAT credit facility has been availed of. Such a construction, as has been suggested by the learned counsel for the respondents, would amount to addition of the words 'only out of' or 'purely out of' the base paper and cannot be countenanced. The notification has to be construed in terms of the language used therein. It is well settled that unless literal meaning given to a document leads to anomaly or absurdity, the golden rule of literal interpretation shall be adhered to."

(emphasis supplied)

***40**. In CCE v. Mahaan Dairies, this Court has held: (SCC p. 800, para 8)*

"8. It is settled law that in order to claim benefit of a notification, a party must strictly comply with the terms of the notification. If on wording of the notification the benefit is not available then by stretching the words of the notification or by adding words to the notification benefit cannot be conferred. The Tribunal has based its decision on a decision delivered by it in Rukmani Pakkwell Traders v. CCE. We have already overruled the decision in that case. In this case also we hold that the decision of the Tribunal is unsustainable. It is accordingly set aside."

(emphasis supplied)"

20. The statutory provisions of Section 3(2)vii(a) thus have to be strictly construed and in event the condition of generating energy jointly with any other industrial undertaking is not fulfilled, the claim has to be rejected.

21. Learned Counsel for the appellant submits appellant is claiming exemption from excise duty only to the extent of its shareholdings i.e. 42%. The object for grant of exemption to the industrial undertaking which generates energy either singly or jointly is <u>for the use of industrial undertaking which are jointly generating the energy.</u> When in the present case, 58% of the energy generated has been allocated to Gujarat Electricity Board with whom appellant No. 2 is not jointly generating the energy, the Statutory provisions has to be strictly construed and when energy being generated is used by industrial undertaking which is not jointly generating the energy the claim is not covered under Section 3(2)(vii)(a).

SUPREME COURT OF INDIA
JUDGMENT

22. Learned Counsel for the appellant has also referred to the judgment of this Court in ***State of U.P. and Ors. versus Renusagar Power Company & Ors., 1988(4) SCC 59.*** In the above case, M/s Renusagar Company had obtained a sanction to engage in the business of supply of electricity to M/s Hindustan Aluminium Corporation Ltd. In the above case, this Court took the view that corporate Veil should be lifted and Hindalco and Renusagar may be treated as one concern and the Renusagar Powers Plant must be treated as the owned source of generation of Hindalco. Following was held in paragraph 67:-

> "***67.*** *In the aforesaid view of the matter we are of the opinion that the corporate veil should be lifted and Hindalco and Renusagar be treated as one concern and Renusagar's power plant must be treated as the own source of generation of Hindalco and should be liable to duty on that basis. In the premises the consumption of such energy by Hindalco will fall under Section 3(1)(c) of the Act. The learned Additional Advocate-General for the State relied on several*

decisions, some of which have been noted."

23. In the present case, there is no dispute to the fact that appellant No.2 was created as a Special Purpose Vehicle by appellant No.1 itself. Had appellant No.2 would have been supplying energy to appellant No.1 only, the claim deserved consideration. But present is a case where the appellant no.2 is supplying energy to industrial undertakings with whom it is not jointly generating the energy. Judgment of this Court in State of U.P. and Renusagar Company, thus, has no application in the facts of present case.

24. Learned Counsel for the appellant has placed reliance on judgment of this Court in ***A.P. Gas Power Corporation Ltd. Versus A.P. State Regulatory Commission & Another, 2004 (10) SCC 511.*** In the above case, the State Government of Andhra Pradesh and Andhra Pradesh Electricity Board had mooted the idea of setting up of 3 X 33 MW gas-based Combined

Cycle Power Station for establishing a generating station. It was decided to invite private participation in the venture. A Memorandum of Understanding dated 17.10.1988 and on 19.04.1997 was entered according to which Andhra Pradesh State Electricity Board had to have 26% shares in the new company to come up as A.P.GPCL and rest of the participating industries were to have different percentage of shares and the power so generated by company was to share proportionately among the shareholding participating companies and their sister concerns. The question which fell for consideration before this Court was as to whether A.P.GPCL was required to take a license under the law for utilization/sale and supply of power generated by the participating industries, their sister concerns and the companies to whom shares of APGPCL were transferred by the participating industries.

SUPREME COURT OF INDIA
JUDGMENT

25. This Court after noticing the contents of various clauses of Memorandum of Understanding and the provisions of Indian Electricity Act, 1910 and Andhra Pradesh Electricity Reform Act, 1998, laid down following in paragraph 36 and 37:

> *"36. From the perusal of para 4 of the Memorandum of Understanding it is clear that a participating industry has been given a right to transfer its share of energy and power to its sister concern. The term "sister concern" has been explained as "a concern under the same group." There is no further clarification or clue as to which are those concerns which may be considered under the same group. The expression "sister concern" used in para 4 of the Memorandum of Understanding certainly does not mean a concern which is owned or is a subsidiary of the participating industry. It would be a concern or unit different from the participating industry and not a part of it. Maybe,that the same group may manage two different independent units carrying on the same nature of activities. They may be addressed as sister concerns but would definitely have separate entity and identity of their own. Consumption of power, generated by a generating company, by a concern which may be under the same group as any of the participating*

industry cannot be said to be consumption or use of the power by the participating industry itself. In absence of the element of self-consumption by the generating company, it would not fall in the category of "captive consumption". It would surely be a supply to a non-participating industry and in that event it would be necessary to have a licence under the relevant provisions of law. If there is such a legal requirement, merely an agreement amongst certain parties would not exclude the application of law. Provisions of law regulating the situation would prevail over any kind of agreement amongst some individuals as a group or otherwise. We are, therefore, of the view that such a clause in the Memorandum of Understanding would not do away with the requirement of having a licence for supply of electricity generated by A.P.GPCL to such concerns which may be under the same group as the participating industries but not the participating industries themselves.

37. To support the view taken by us, a decision of this Court referred to by the respondents may be cited as in State of U.P. Vs. Renusagar Power Co. This case, however, was decided in a slightly different fact situation. M/s Hindustan Aluminium Corporation Ltd. was established in 1959 on assurance of providing cheap

SUPREME COURT OF INDIA
JUDGMENT

electricity to it. In the year 1964, however, M/s Renusagar Power Co. Ltd. was established as a wholly owned and subsidiary of M/s Hindustan Aluminium Corporation Ltd. It was generating electricity, but incorporated separately and had its own separate Memorandum of Understanding and Articles of Association. To raise the revenue for the State, the U.P. Electricity (Duty) Act, 1952 was enforced to levy a duty on the consumption of electricity. Several amendments were, however, incorporated from time to time and ultimately a provision was inserted providing that there would be levied and paid to the State Government a duty called electricity duty on the energy sold to a consumer by a licensee/Board/the Central Government. The duty on consumption of electricity was leviable even though it may be from his own source of generation. Renusagar Power Co. Ltd. had also obtained a licence under Section 28 of the Act of 1910. In such circumstances, it was held that even though Renusagar Power Co. Ltd. was a subsidiary company owned by M/s Hindustan Aluminium Co. Ltd., yet it would amount to supply of electricity by a licensee to a consumer in view of the provisions of the U.P. Act of 1952 which levied duty on consumption of electricity. The situation in the case in hand is similar only to the extent that the participating industries and the

> *sister concerns are different entities and separately incorporated. Distinction may be there in view of the statutory provisions intervening under the U.P. Act of 1952 but that is not material for this case."*

26. Ultimately, the appeal was partly allowed and judgment of the High Court was modified vide paragraph 57 of the judgment which is to the following effect: -

> *"57. We, therefore, hold that no licence is necessary for utilization of energy generated by A.P.GPCL and utilized by the participating industries and the concerns holding shares of A.P.GPCL transferred to them by the participating industries to the extent of value of the shares so transferred. It would, however, be necessary to have a licence for supply of energy to the sister concerns. In the result, the appeals are partly allowed and the judgment and order passed by the High Court stands modified in the manner indicated above. Parties to bear their own costs."*

27. The judgment of Andhra Pradesh Gas Power Corporation Limited is clearly distinguishable and does not help the appellant in present case. In the aforesaid case the energy was utilized by the participating industries and the concerned holding shares of A.P.GPCL but supply of energy to the sister concerned was required to have license. Present is a case where Gujarat Electricity Board who has been allocated 300 MW is not a participating industry nor appellant no.2 is jointly generating the energy with Gujarat Electricity Board, even if it is held that the appellant no.1 to the extent it holds 42% equity shares of appellant no.2 is jointly generating the energy. The Gujarat Electricity Board which has been allocated 58% of electricity generated can not be said as the industrial undertaking jointly generating the energy.

28. The judgment of this Court in ***Gujarat Urja Vikas Nigam Ltd. Versus ESSAR Power Limited, 2016(9) SCC 103***, has also been referred to. The

above case was a case where parties to the present appeal were at issue and appeal was filed by Gujarat Urja Vikas Nigam, successor of Gujarat Electricity Board under Section 125 of the Electricity Act against the Order of Appellate Tribunal of electricity. The appellant had filed the petition before the Gujarat Electricity Regulatory Commission for adjudication of the dispute arising out of Power Purchase agreement. The appellant had sought compensation for wrongful allocation of electricity by EPL to the sister concerned i.e. ESSAR Steel Limited in preference to the appellant. The Commission had occasion to examine various clauses of Power Purchase Agreement dated 30.05.1996 between the parties. This Court rejected the contention of the EPL that it could sell power to ESL beyond its allocated capacity. In the paragraph 22 of the judgment following was held: -

> *"22. The agreement clearly contemplates the proportion of allocation of a capacity. EPL has to fuel and operate the generating*

station to meet the requirement of electric output that can be generated corresponding to the allocated capacity. The appellant has to pay annual fixed cost as determined in terms of Clause 7.1.1 of Schedule VII of the agreement. The Commission is thus, right in observing that once the entire capacity has been allocated in two parts in a particular proportion, the contention of EPL that it could sell power to ESL beyond the allocated capacity could not be accepted. EPL was under obligation as per Schedule VI to declare weekly schedule of the capacity available and the dispatch instructions were to be issued on the basis of the said declaration. It could not thus be said that EPL had no obligation to declare the capacity and the obligation of GUVNL to issue dispatch instructions was not dependent on declaration of the available capacity by EPL. Contrary view of the Tribunal is clearly erroneous. In para 45 and 46 and elsewhere in its judgment, the Tribunal erred in holding that there was no obligation to declare available capacity on proportionate basis. The finding of the Commission in paras 9.5 to 9.12 of its order quoted above is the correct interpretation of the agreement. We hold accordingly."

29. In the above case the question of exemption in excise duty within meaning of Section 3(2) of 1958 Act had not arisen nor the question was considered whether EPL can be held to be generating energy jointly with appellant no.1 and Gujarat Electricity Board. For the issues which have arisen in the present case, the above judgment does not render any help.

30. Learned Counsel for the appellant has submitted that the High Court had rejected the claim of payment only on the ground that there is no such Memorandum of Understanding between EPL and ECL as was found in ***A.P. Gas Power Limited (Supra)***. The High Court although has noted the fact that in the present case there is no such Memorandum of Understanding between EPL and ECL but the judgment of the High Court is not based only on the above premise rather High Court has clearly found that conditions stipulating under Section 3(2)(vii)(a)(i) of 1958 Act are not satisfied, hence, appellant no.1

is not entitled for exemption. High Court has elaborately considered all the submission raised by the appellant and rightly came to the conclusion that conditions as enumerated in Section 3(2)(vii)(a) are not fulfilled. We do not find any error in the aforesaid finding of the High Court.

Claim under notification dated 27.02.1992

31. The notification dated 27.02.1992 was issued in exercise of power conferred by Section 3(3) of Bombay Electricity Act, 1958. The relevant part of the notification dated 27.02.1992, is as follows: -

"NOTIFICATION
Sachivalaya Gandhinagar
27th February, 1992

BOMBAY ELECTRICITY DUTY ACT, 1958

No. GHC/92/10/JCP/1188/2594/K

In exercise of the powers conferred by Sub Section (3) of the Section 3 of the Bombay Electricity Duty Act,1958(Bom. XL of 1958), the Government of Gujarat hereby remitted with effect on and from the date of publication of this notification in the Official

Gazette. In the whole of the State of Gujarat, the Electricity Duty payable under item (6) of Part I of Schedule II to the said Act, on the energy consumed for motive power and lighting for Industrial purposes by industrial under takings which generate energy jointly for their own use either by establishing an independent joint company solely for this purpose or on pro-rata cost sharing basis, for a period of ten years from the date of commissioning of the generating sets subject to the following terms and conditions namely:-

(a) *The generating set or sets shall have been purchased and installed or commissioned during the period beginning from 1st January, 1991 and ending on 31st December, 1992. Providing that such generating act or sets shall not have been previously used in the State.*

****** ******"

32. The claim raised by the appellant under the above said notification was specifically dealt by the High Court and the Government. The condition which was found lacking for applicability of the notification was that generating sets were not purchased or installed or commissioned during the

period from 01.01.1991 to 31.12.1992. The High Court has recorded categorical finding that the generating sets have been commissioned in the month of August 1995. It is useful to refer to paragraph 12.0 of the judgment of Division Bench which is to the following effect: -

> *"12.0. Now, so far as the alternative claim of the appellants to grant the exemption for a period of 10 years under the Notification dated 27.02.1992 is concerned, on considering Notification dated 27.02.1992, it appears that the conditions precedent laid down in the said notification cannot be said to have been compiled by the appellants more particularly appellant No.1 – ESL. For claiming the benefit of notification dated 27.02.1992 it is to be established that the generating set or sets have been purchased/installed or commissioned during the period beginning from 01.01.1991 and ending on 31.12.1992. From the record it appears that the generating sets have been commissioned in the month of August 1995, the appellants have failed to establish that the generating sets were even purchased during the aforesaid period. It cannot be disputed that in a taxing statute more particularly with respect to the exemption from payment of duty,*

> *all the conditions which can be said to be statutory are required to be fulfilled and unless and until all the conditions stipulated in the exemption notification are satisfied and/or compiled with, there shall not be any exemption under the notification. In the present case, admittedly, the generating sets in question have been commissioned in the month of August 1995. The appellants have failed to establish that they even purchased the generating sets during the period beginning from 01.01.1991 to 31.12.1992. More placement of order for purchase cannot amount to actual purchase of the generating sets."*

33. Another reason given by the High Court was that no application was made within 180 days of application of the notification dated 27.02.1992 or even from the date of installation of generating sets i.e. August 1995. Even if the second reason given by the High Court is ignored, non-fulfillment of condition no.(a) of notification dated 27.02.1992 clearly entailed rejection of claim under notification dated 27.02.1992. There is no foundation or basis laid down even in this appeal to

assail the finding recorded by the High Court that generating set was not purchased from 01.01.1991 to 31.12.1992.

34. We thus do not find any error in rejection of claim of appellant under the notification dated 27.02.1992.

35. The High Court has rightly negatived the claim of the appellant under Section 3(2) as well as under the notification dated 27.02.1992 issued under Section 3(3). We do not find any merit in this appeal, the appeal is accordingly dismissed.

.....J.
(A. K. SIKRI)

.....J.
(ASHOK BHUSHAN)

NEW DELHI,
MAY 02, 2017

SUPREME COURT OF INDIA
JUDGMENT