

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.149/MP/2013

Coram:

Shri V. S. Verma, Member

Shri M. Deena Dayalan, Member

Date of Hearing: 13.08.2013

Date of Order: 21.11.2013

In the matter of

Petition under Section 79 (1)(k) of the Electricity Act read with regulations 3(4),14 & 15 of CERC's (Terms and Conditions for Recognitions and Issuance of Renewal Energy Certificate for renewal energy generation) Regulations, 2010.

And

In the matter of

Bajaj Hindusthan Limited
Bajaj Bhawan, 2nd Floor,
J.L.Bajaj Marg, 226, Nariman Point, Mumbai-400 021

Petitioner

Vs

1. National Load Despatch Centre
B-9, Qutab Institutional Area, Katwaria Sarai,
New Delhi-110 016

2. Uttar Pradesh New and Renewable Energy Development Agency,
Vibhuti Khand, Gomti Nagar, Lucknow-226 010, U.P. **Respondents**

Following were present:

Shri Sushil Malik, Advocate for the petitioner
Shri Niraj Kumar, Advocate for the Petitioner
Shri Shailendra Verma, NLDC



ORDER

The petitioner, Bajaj Hindusthan Limited, has filed the present petition with the following prayers after being denied issue of Renewable Energy Certificate by National Load Despatch Center:

- “(a) Pass an order setting aside the Letter dated 29.05.2013 issued by NLDC rejecting the application for issuance of RECs by the Petitioner.;*
- (b) Pass an order directing the NLDC to complete the process of the issuance of the RECs to the eleven co-generation plants of the petitioner immediately;*
- (c) Pass an order directing the NLDC to compensate the petitioner for the delay in issuance of RECs and for the legal costs incurred by the petitioner; and*
- (d) Pass such other Order(s) as this Hon’ble Commission may deem just and proper.”*

2. The petitioner is engaged in the business of manufacture of white crystal sugar and generation of electricity by renewable energy sources (Bagasse). The petitioner has acquired/established 11 units in various parts of Uttar Pradesh which are engaged in co-generation of power.

3. The petitioner has been accredited with regard to its self consumption by the State Agency, namely, Uttar Pradesh New and Renewable Energy Development Agency (UPNEDA) and registered by the Central Agency, namely, National Load Despatch Centre (NLDC) under the REC Regulations.



The details of accreditation and registration of the units of the petitioner are as under:

S.No.	Unit	Date of accreditation	Date of registration
1.	Bilai	8.7.2011	4.10.2011
2.	Kundarki	14.10.2011	14.11.2011
3.	Khamberkhera	14.10.2011	14.11.2011
4.	Thanabhawan	14.10.2011	14.11.2011
5.	Budhana	19.10.2011	29.11.2011
6.	Gangnauli	23.11.2011	23.12.2011
7.	Berkhera	19.10.2011	9.11.2011
8.	Masqsoodapur	14.10.2011	14.11.2011
9.	Paliakalan	14.10.2011	14.11.2011
10.	Kinauni	23.11.2011	23.12.2011
11	Utraula	28.11.2011	23.12.2011

4. The petitioner has submitted that Govt. of UP issued a notification dated 3.1.1997 under Section 3 of the UP Electricity Duty Act, 1952 imposing electricity duty on power consumed by an entity from his own source of generation. Subsequently, Govt. of UP vide notification dated 6.2.1998 abolished the electricity duty imposed on power consumed by an entity from his own source of generation. On 13.9.2012, Govt. of UP issued a notification on electricity duty which did not include duty on consumption from the own sources of generation. The Govt. of UP in its notification dated 7.12.2012 further clarified that the electricity duty on self-consumption which was abolished vide notification dated 6.2.1998 continues to be in force.

5. The petitioner has submitted that despite the clear cut provisions regarding the abolition of electricity duty in UP, NLDC vide its letter dated 24.1.2013 sought information from UPNEDA in respect of electricity duty in the

State of Uttar Pradesh. UPNEDA in its response vide its letter dated 23.3.2013 confirmed that the electricity duty is not leviable in the State of Uttar Pradesh and that all procedures for accreditation in terms of the REC Regulations and approved procedures have been followed in case of RE generators including the petitioner. UPNEDA also enclosed various Notifications dated 3.1.1997, 6.2.1998, and 13.9.2012 issued by Government of Uttar Pradesh, Notification dated 7.12.2012 issued by Energy Department, Government of Uttar Pradesh and letter dated 12.3.2013 issued by the Department of Additional Sources of Energy, Government of Uttar Pradesh. The petitioner has submitted that all these notifications and letters clearly establish that the electricity duty imposed on self consumption has been abolished in the State of Uttar Pradesh and such abolition continues to be in effect now.

6. Despite the clarification and confirmation by UPNEDA regarding abolition of electricity duty on self-consumption in the State of Uttar Pradesh, NLDC did not issue the RECs to the petitioner and directed UPNEDA to review the accreditation granted to the projects for self-consumption and take appropriate action. Also UP Sugar Mills Co-gen Association took up the matter with NLDC to issue the RECs to the members of the Association from November 2011 to March 2013 in its letter dated 24.5.2013. NLDC without considering the submissions of the Association and without considering the specific clarification issued by the Government of Uttar Pradesh concluded in its letter dated 29.5.2013 that there is waiver of electricity duty in the State of Uttar Pradesh



and therefore, the RECs for self-consumption cannot be issued to the petitioner.

7. Aggrieved by NLDC letter dated 29.5.2013, the petitioner filed Writ Petition No. WP (C) 4546/2013 before the Hon`ble High Court of Delhi. However, the same was withdrawn with liberty to file the present applicant before CERC. Accordingly, the petitioner has filed the present petition before the Commission seeking a direction to NLDC to grant REC to the petitioner for its self-consumption.

8. The petitioner has submitted that NLDC has grossly erred in refusing to grant REC to the petitioner while holding that 'exemption from payment of electricity duty amounts to waiver of electricity under the second proviso to Regulation 5 of the REC Regulations, and RECs for self-consumption cannot be issued". Pertinently, a plain reading of the Notifications dated 3.1.1997, 6.2.1998, 13.9.2012 issued by U.P. Government as also the letters dated 12.3.2013 and 23.3.2013, highlights the fact that levy of electricity duty on self-consumption by an entity stood abolished in the State of Uttar Pradesh. Consequently, there was no occasion of any "waiver" as interpreted by NLDC. The petitioner has placed its reliance on the judgment of the Hon'ble Supreme Court in Waman Shrinivas Kini Vs. Ratilar Bhagwandas and Co. (1959 AIR 689) and has submitted that in view of the abolition of levy of electricity duty on self consumption by power generation units in the State of UP, the non-levy of duty



from the petitioner in the instant case is not a situation where the Govt. of UP has not insisted upon an existing right.

9. NLDC in its reply dated 9.9.2013 has submitted that under Section 3 of the Uttar Pradesh (Electricity Duty) Act, 1952 the only method available for removing of levy of electricity duty that was otherwise leviable under Section 3 (1) (c) was by means of an exemption under Section 3 (4) of the Act. Since the parent Act specifically provides for levy of electricity duty on self-consumption, it would not be possible by way of a notification to do away with the levy itself. Therefore, the notification dated 06.02.1998 must necessarily be read as an exemption granted by the State Government under Section 3 (4) from the levy of electricity duty and cannot be construed as a case of duty that has been abolished. Further vide letters dated 23.3.2013 and 1.5.2013, the UPNEDA has clarified that electricity duty for self-consumption in the State of UP is not leviable. NLDC has further considered whether such an exemption amounted to waiver of electricity duty in the context of the fourth proviso to Regulation 5 (1) (c) and came to the conclusion that the exemption granted to self-consumption vide notification dated 6.2.1998 is a benefit or concession provided to persons engaged in generation of electricity for self-consumption, which category would include CPPs as contrasted with other categories of generators of electricity who would have to pay electricity duty. Hence, electricity duty has been waived by the Government of Uttar Pradesh with respect to the petitioner and other co-generation plants, and the same has not been abolished.

10. We have heard the learned counsel for the petitioner and representative of NLDC and perused the documents on record. The case as made out by the petitioner is similar to the case of the co-generation plants in Petition No. 122/MP/2013 filed by Dalimai Bharat Sugar and Industries Ltd. and other related petitions. The Commission in a common order dated 14.11.2013 in said petitions has decided the issue as under:

"13. It is evident from the above notifications that the electricity duty on consumption of electricity from own sources of generation has been abolished by the Government of Uttar Pradesh in exercise of its power under section 3 of the Uttar Pradesh Electricity (Duty) Act, 1952 vide Notification dated 6.2.1998 and there is no change in the policy of the Government of Uttar Pradesh. While the petitioner has argued in its written note that the electricity duty has been abolished by the Government of Uttar Pradesh in exercise of its power of levy under section 3(1) of the said Act, NLDC has argued that the electricity duty has been exempted under section 3(4) of the said Act and since exemption can be considered as waiver, the petitioner has availed the waiver of electricity duty. There is no dispute that the notifications have been issued under section 3 of the UP Electricity Duty Act, 1952 and therefore, it is not necessary for us to go into the controversy whether the notifications have been issued under section 3 (1) or section 3(4) of the said Act. We need to examine the language of the Notification to understand whether electricity duty has been abolished. The Hindi word used in the 1998 notification is "samapt". As per the Legal Glossary published by Government of India, the word "samapti" can be translated into English as "abolition" or "termination". Therefore, electricity duty at the rate of 3 paise per unit which was imposed vide notification dated 3.1.1997 has been terminated or abolished vide notification dated 6.2.1998 and continues to be so till today as a matter of policy of the State Government. It is pertinent to mention that electricity duty was not levied on earlier occasions also by the Government of UP which has been noticed and noted by Hon'ble Supreme Court in State of Uttar Pradesh & Others v. Renuagar Power Company & Others {1988 AIR 1737} in the following terms:

".....As it is apparent on the state of law mentioned hereinbefore, from 1952 to 1970 no duty was payable if electricity was generated from own source of energy. From 1970 to 1973 duty of one paisa was payable in respect of electricity supplied from own source of generation. However, after 1973 no duty was payable in respect of electricity supplied from own source of generation."

From the above discussion, we have come to the conclusion that electricity duty on consumption from own sources of generation has been abolished or terminated in the State of UP since February 1998 and the position continues to be the same.

14. The next question that arises for our consideration is whether such abolition of electricity duty on consumption from generation from own sources amounts to waiver of electricity duty so as to disentitle the petitioner from grant of REC. NLDC has submitted that it considered the notification dated 6.2.1998 as exemption and further considered whether such an exemption amounted to waiver of electricity duty in the context of the fourth proviso to Regulation 5(1)(c) and came to the conclusion that the exemption granted to self-consumption vide notification dated 6.2.1998 is a benefit or concession provided to persons engaged in generation of electricity for self-consumption, which category would include CPPs as contrasted with other categories of generators of electricity who would have to pay electricity duty. Hence, electricity duty has been waived by the Government of Uttar Pradesh with respect to the petitioner and other co-generation plants. First of all, it needs to be clarified that the Commission in its order dated 18.10.2012 has held the petitioner as a generating company and not a Captive Generating Plant as its captive user does not consume 51% of the power produced. Secondly, since classification of a plant as a CGP or a generating station is dependent on the quantum of consumption by the captive user, the Commission as a matter of caution directed that it should be ensured that a co-generation plant is not availing any benefit which is admissible to a CGP. The benefits admissible to a CGP are enumerated in fourth proviso to Regulation 5(1)(c) of REC Regulation which is extracted as under:

“Provided further that a Captive Power Producer (CPP) based on renewable energy sources shall be eligible for the entire energy generated from such plant including self consumption for participating in the REC scheme subject to the condition that such CPP has not availed or does not propose to avail any benefit in the form of concessional/promotional transmission or wheeling charges, banking facility benefit and waiver of electricity duty.”

The words used in fourth proviso are “has not availed or does not propose to avail any benefit in the form of concessional/promotional transmission or wheeling charges, banking facility benefit and waiver of electricity duty”. In other words, the proviso proceeds on the premise of exercise of free will by a CGP either to ‘avail’ or ‘not to avail’ the promotional benefits including the waiver of electricity. The notification

of the Government of UP dated 6.2.1998 does not give such option to any generator in so far as consumption of electricity from own sources of generation is concerned. It is a notification with universal application to all consumers who consume electricity from their own sources of generation. It is not a case where the petitioner has applied to the State Government under section 3(4) of the UP Electricity Duty Act, 1952 and has been granted exemption from payment of electricity duty on self-consumption which is otherwise payable. In the present case, electricity duty on self-consumption is not payable at all and therefore, availing the benefit of waiver of electricity duty does not arise. The term 'waiver' means the voluntary relinquishment of some known right or privilege. The term has been defined in Black's Law Dictionary as under:

"Waiver: the voluntary relinquishment or abandonment- express or implied- of a legal right or advantage. The part alleged to have waived a right must have had both knowledge of existing right and the intention of foregoing it."

For the 'waiver of electricity duty' to operate, there should be some law which permits a person to voluntarily relinquish or abandon the payment of electricity duty. In this case, there is no option or ability for a CGP or co-generation plant to voluntarily relinquish or abandon the payment of electricity duty on self-consumption as levy of electricity duty on self-consumption has been abolished in the State of UP. Therefore, it cannot be insisted that the petitioner must pay the electricity duty on self-consumption before being considered eligible for grant of REC. Such an insistence would be unreasonable, as the benefit of electricity duty abolition has been conferred by the State Government in exercise of its statutory powers, and cannot be voluntarily abandoned by the petitioner. In other words, the requirement of giving up electricity duty exemption/abolition cannot possibly be fulfilled by the petitioner, unless the State Government chooses to withdraw the said exemption/abolition. We also agree with the petitioner that even though it intends to pay the electricity duty on self-consumption, it cannot do so as there is no authority of law to collect such duty at present. In our view, the abolition of electricity duty on consumption from own sources of generation prevalent in the State of Uttar Pradesh cannot be treated as waiver of electricity duty under fourth proviso to Regulation 5(1)(c) of REC Regulations.

15. It needs to be emphasized that REC is a promotional scheme to encourage renewable sources of energy. This Commission has taken the pioneering initiative by introducing renewable energy certificates under the REC Regulations in order to encourage renewable sources of energy. The Commission in its order dated 18.10.2012 and 8.1.2013 had clarified

about the eligibility of the co-generation plants for grant of REC. Subsequently, the Commission has made appropriate provisions in the REC Regulations through amendment and has also done away with the disqualification based on 'availing waiver of electricity duty'. Therefore, the approach of the Commission all along is to encourage promotion of renewable sources of energy. Considering the overall objective and perspective of the REC Regulations, we are of the view that RECs should not be denied to the co-generation plants including the petitioner on the ground that the co-generation plants are not required to pay the electricity duty in the State of UP.

16. In view of the above discussion, we hold that the notification of the Government of UP dated 6.2.1998 which has been clarified to be in force vide notification dated 7.12.2012 abolishing the electricity duty on consumption from own sources of generation cannot be treated as waiver of electricity duty for the purpose of REC Regulations. Accordingly, we set aside the NLDC letter dated 29.5.2013 (Annexure 14 of the petition) and direct NLDC to process the case of the petitioner and other co-generation plants for issue of REC from November 2011 till July 2013 (date of operation of second amendment to REC Regulations) by 31.12.2013."

11. The claim of the petitioner is squarely covered in terms of our decision in the order dated 14.11.2013 as extracted above. Accordingly, we set aside the NLDC letter dated 29.5.2013 and direct NLDC to process the case of the petitioner from November 2011 till July 2013 (date of operation of second amendment to REC Regulations) by 31.12.2013.

12. The petition is disposed of in terms of the above.

Sd/-

(M. Deena Dayalan)
Member

sd/-

(V. S. Verma)
Member

