M/S. UDAIPUR PHOSPHATES FERTILIZERS LTD. A

v.

UNION OF INDIA AND ANR.

JANUARY 31, 2007

[S.B. SINHA AND MARKANDEY KATJU, JJ.] B

Subsidy—Subsidy of fertilizers—Determination of—Manufacturer applied for re-endorsement of the capacity of its unit on the basis of actual production between a specified period—Approval thereof after 3 years also revising fixed cost and reducing the subsidy in view of the fact that manufacture was in excess of the endorsed capacity—Order challenged on the ground that when re-endorsement was granted, benefit of subsidy was not given—Single Judge as well as Division Bench of High Court rejecting the plea of manufacturer—On appeal held: Once re-endorsement takes place on the basis of actual manufacture, the fixed cost is bound to be revised and hence subsidy bound to be reduced. C D

Single Super Phosphate (SSP), was manufactured by the appellant. In 1982, the product was brought under a formal price control known as Retention Price and subsidy Scheme for regulating the price and sale of SSP by Government of India. Under the Scheme the manufacturers were obliged to sell their fertilizers at a subsidized price fixed by the Government which was below the cost of production. Government was to fix the retention price of the product. The difference between the retention price and selling price as fixed by the Government was calculated and paid to the manufacturers as subsidy. E

Government issued Press Note No.1 whereby the capacity indicated in the industrial licence could be reconsidered with reference to the highest production achieved during any of the previous 5 years plus 1/3rd thereof provided that was within the licensed capacity plus 25% Thereafter Press Note No. 9 (1988) was issued which provided a Scheme for re-endorsement of higher capacity of the fertilizers units. In accordance with the Press Note No.9, appellant-manufacturer applied for re-endorsement of the capacity of the appellant unit on the basis of actual production between 1.4.1988 and 31.3.1990. Government accorded approval of re-endorsement in 1993 with retrospective effect from April 1990. Order indicated that in view of the higher F G

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A **capacity, the fixed charges had been recalculated from 1.4.1990. It also demanded recovery on the basis of recalculation.**

Appellant filed Writ Petition challenging the re-calculation of the fixed Charges and recovery. Single Judge of High Court dismissed the Writ Petition. Division Bench of High Court also dismissed the Letters Patent
B **Appeal. Hence the Present appeal.**

Dismissing the appeal, the Court

HELD 1: Once the appellant's case falls within the criteria laid down in Press Note No.9 then the re-endoresement takes place automatically. Once
C **such re-endorsement takes place on the basis of actual manufacture the fixed cost is bound to be revised and hence the subsidy is bound to be reduced. [Para 15] [36-A]**

2. The Press Note No. 9 at paragraph 2f clearly indicates that this scheme is in addition and not a substitution for the facilities already available
D **under any existing scheme. Hence, the grievance of the appellant that from the date of application for re-endorsement i.e. 8.8.1990 till 31.3.1993, when the re-endorsement was granted, the benefit of subsidy was not given is wholly untenable on account of the fact that the appellant overdrew the subsidies on account of the enhanced capacity which was on its own showing an admitted**
E **fact. [Para 16] [36-B-C]**

3. The appellant was duly informed that their capacity has been enhanced with retrospective effect from 1.4.1990 onwards. It is evident that the appellant produced more, and the appellant cannot say that no opportunity to actually manufacture in excess of the endorsed capacity was provided to them. The
F **order of approval has to be deemed to be an *ex-post facto* approval of the maximum production already achieved by the appellant. The benefits in terms of the said scheme have already been availed of and drawn by the appellant company, and in fact some amount has been found to be overdrawn. [Para 17] [36-D-E]**

G CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6202 of 2000.

From the Final Judgment and Order dated 6.9.1999 of the High Court of Delhi at New Delhi in L.P.A. No. 375/1999.

Paul Kaur Majithia (for Prashant Bhushan) for the Appellant.

H Ashok Bhan, Kiran Bhardwaj and D.S. Mahra (for B. Krishna Prasad)

for the Respondents. A

The Judgment of the Court was delivered by

MARKANDEY KATJU, J. 1. This appeal has been filed against the impugned judgment of the Delhi High Court dated 6.9.1999 in L.P.A. No. 375 of 1999 by which the judgment of the learned Single Judge of the High Court B dated 26.5.1999 dismissing the writ petition was upheld.

2. Heard learned counsel for the parties and perused the record.

3. The appellant is a company registered under the Indian Companies Act and is engaged in the manufacture of fertilizers and chemicals. One of C the products it produces is Single Super Phosphate (SSP).

4. Till 1976, the manufacture and sale of SSP was not controlled by the Government. However, from 1976 to 1982, the manufacture of SSP was subjected to a system of uniform subsidy whereby each manufacturer was D given a uniform rate of subsidy.

5. In the year 1982, the Government of India brought SSP under a formal price control known as the Retention Price and Subsidy Scheme (hereinafter referred to as RPS) for regulating the price and sale of SSP. The scheme had been introduced on the basis of a detailed study and recommendation of an E Inter-Ministerial Working Group appointed by the Government. Under the RPS, the manufacturers were obliged to sell their fertilizers at a subsidized price fixed by the Government, which was below the cost of production. The respondent No. 2 calculated the cost of production of each unit on the basis of certain factors such as capacity, location, age of the plant, etc. and added F a certain amount of notional profit, and the result was called the retention price. The difference between the retention price and the selling price as fixed by the Government was calculated and paid to the manufacturers as subsidy. Thus, while price of the fertilizers for the consumers, namely, the farmers was subsidized by the Government, the manufacturers were given an amount which was calculated by the FICC on the basis of normative cost of production G of the unit which was to be calculated on the assumption that the unit performed efficiently at 90% capacity utilization.

6. On 15.1.1986, the Department of Industrial Development, Ministry of Industries issued Press Note No. 1 whereby the capacity indicated in the H industrial license could be re-considered with reference to the highest production achieved during any of the previous 5 years plus 1/3rd thereof,

A provided that was within the licensed capacity plus 25%. Thereafter, the Department of Industrial Development, Ministry of Industry issued Press Note No. 9 (1988 series) on 6.4.1988 w.e.f. 1.4.1988 which provided a scheme for re-endorsement of higher capacity of the fertilizer units. Under the said scheme, the unit could apply for re-endorsement of an enhanced capacity on the basis of the best production actually achieved in any financial year between 1.4.1988 and 31.3.1990.

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7. In accordance with the abovementioned Press Note of 1988, the appellant vide application dated 8.8.1988 applied to the Ministry of Industries for re-endorsement of the capacity of the appellant unit on the basis of the actual production between 1.4.1988 and 31.3.1990.

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8. Thereafter, the respondents asked for several verifications which were provided by the appellant. However, it is alleged that despite repeated follow-ups, after the various verifications, respondent No. 1 issued letter of approval only on 31.3.1993, i.e. three years after the appellant had applied for re-endorsement, stating that they were recognizing the appellant's enhanced capacity of 74,089 MT from the earlier capacity of 66,000 MT with retrospective effect from 1.4.1990. It was further informed that respondent No. 1 was tentatively recovering an amount of Rs. 26.55 lakhs by downward revision of the ex-works price of the appellant from 1.4.1990.

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9. The appellant's grievance is that the Government has retrospectively re-endorsed the capacity of the appellant and reduced the price payable to the appellant with retrospective effect, which effectively denied the appellant from taking advantage of the re-endorsed capacity. The appellant filed the abovementioned Special Leave Petition challenging the order dated 6.9.1999 passed by the High Court of Delhi whereby the learned Division Bench dismissed LPA No. 375/1999 on the ground that when the appellant had applied for re-endorsement of the capacity, in view of the fact that the appellant had already achieved the maximum production, thereby fulfilling the condition of Press Note No. 9 (1988 series), then the re-endorsement was bound to automatically take place. Further, merely because it took some time for inspection by the respondents, it did not mean that the re-endorsement was not automatic.

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10. Press Note No. 9 has been quoted in detail in the impugned judgment and hence we are not quoting it again here.

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11. In pursuance of this Press Note the appellant made an application

for re-endorsing the capacity on the basis of actual manufacture during 1st April 1988 and 31st March 1990. The 1st respondent accorded approval of re-endorsement by letter dated 31st March 1993. The said letter also indicated that in view of the higher capacity the fixed charges had been re-calculated from 1st April 1990. The letter stated that on the basis of re-calculation there would be a recovery of approximately Rs. 26.55 lakhs. A writ petition was filed challenging the re-calculation of the fixed charges and the recovery of approximate Rs. 26.55 lakhs.

12. The learned Single Judge of the High Court dismissed the writ petition on the ground that once an application was made under Press Note No. 9, the re-endorsement was merely a formality in view of the fact that the appellant had already achieved the maximum production. The learned Judge held that as the appellant had already produced more, re-fixation of the fixed cost was bound to take place. The learned Judge held that the fixed cost was bound to come down. The learned Judge also held that the subsidy has been correctly worked out on the basis of actual manufacture as undertaken by the appellant.

13. The learned Single Judge in his judgment has observed that the facts as stated in the application of the appellant dated 8.8.1990 for re-endorsement of its capacity would substantiate the stand of the respondents that the appellant-unit had already achieved maximum production and only needed ex-post facto approval in compliance to the Press Note dated April 6, 1988. It was also observed that it was clear that the appellant produced more and it could not be said that no opportunity to actually manufacturing in excess of the endorsed capacity was provided. The sanction of the respondents vide communication dated March 31, 1993 is in the nature of ex-post facto approval and cannot be held to be discriminatory as the fixed cost obviously will come down while manufacturing more and subsidy had been correctly working out on that basis.

14. In appeal, the Division Bench observed that if the appellant fulfilled the condition of Press Note No. 9 then the re-endorsement was bound to take place automatically. Merely because the respondent would have to make an inspection that there was no additional investment in the plant, machinery and equipment exceeding 10% of the book value, and such inspection takes some time, does not mean that the re-endorsement was not automatic.

15. We agree with the view taken by the learned Single Judge and the

A Division Bench that once the appellant's case falls within the criteria laid down in Press Note No. 9 then the re-endorsement takes place automatically. Once such re-endorsement takes place on the basis of actual manufacture the fixed cost is bound to be revised and hence the subsidy is bound to be reduced.

B 16. The Press Note No. 9 at paragraph 2f clearly indicates that this scheme is in addition and not a substitution for the facilities already available under any existing scheme. Hence, the grievance of the appellant that from the date of application for re-endorsement i.e. 8.8.1990 till 31.3.1993, when the re-endorsement was granted, the benefit of subsidy was not given is wholly C untenable on account of the fact that the appellant overdrew the subsidies on account of the enhanced capacity which was on its own showing an admitted fact.

17. The appellant was duly informed that their capacity has been enhanced with retrospective effect from 1.4.1990 onwards to 74,089 MT (which D was the production achieved by them during 1989-90). It is evident that the appellant produced more, and the appellant cannot say that no opportunity to actually manufacture in excess of the endorsed capacity was provided to them. The communication dated 31.3.1993 has to be deemed to be an *ex-post facto* approval of the maximum production already achieved by the appellant. The benefits in terms of the said scheme have already been availed of and E drawn by the appellant company, and in fact some amount has been found to be overdrawn.

18. In view of the above, we find no merit in this appeal. The appeal is accordingly dismissed. No costs.

F K.K.T. Appeal dismissed.