IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 04TH DAY OF OCTOBER 2016

BEFORE

THE HON'BLE MR. JUSTICE L. NARAYANA SWAMY

WRIT PETITION NO.14434 OF 2016 (GM-KEB)
C/W
WRIT PETITIONS NO.38406 OF 2013, 7238 OF 2015, 8686 OF 2015 AND 29195 OF 2015

WRIT PETITION NO.14434 OF 2016

BETWEEN:

VIJAYA STEELS LIMITED
A COMPANY REGISTERED UNDER THE
PROVISIONS OF THE COMPANIES ACT, 1956,
HAVING ITS REGISTERED OFFICE AT
SY.NO.84/1, KALLANAYAKANAHALLI,
ANCHEPALYA POST,
KUNIGAL TALUK,
KUNIGAL – 572 130.
(REPRESENTED BY MR.AKKSHYE TULSYAN)
(MANAGING DIRECTOR) ... PETITIONER

(BY SRI. SHRIDHAR PRABHU, ADV.)

AND:

1. BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED
A COMPANY REGISTERED UNDER THE PROVISIONS OF
COMPANIES ACT, 1956 HAVING ITS REGISTERED
OFFICE AT K.R. ROAD,
BENGALURU-560001.
(REPRESENTED BY ITS MANAGING DIRECTOR)

2. ASSISTANT EXECUTIVE ENGINEER (E)
C, O & M SUB DIVISION,
BANGALORE ELECTRICITY SUPPLY COMPANY LIMITED,
KUNIGAL – 572 130.

3. STATE OF KARNATAKA
KARNATAKA STATE ELECTRICAL INSPECTORATE,
NO.32/1-2 CRESCENT TOWERS, 2ND FLOOR,
CRESCENT ROAD, BENGALURU 560001,
REP. BY CHIEF ELECTRICAL INSPECTOR TO THE
GOVERNMENT OF KARNATAKA.

... RESPONDENTS

(BY SRI.S SRIRANGA, ADV. FOR R1 & R2;
SRI.ADITYA SONDHI, ADDL. ADV. GENERAL WITH
SRI.V.SREENIDHI, AGA FOR R3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE RESPONDENTS HAVE NO AUTHORITY TO COLLECT THE ELECTRICITY TAX ON THE ENERGY PURCHASED AND CONSUMED FROM SOURCES OUTSIDE THE STATE OF KARNATAKA BY THE PETITIONER THROUGH INTER STATE OPEN ACCESS AND DECLARE THAT THE SAME IS ILLEGAL, UNTENABLE AND ULTRA VIRES THE CONSTITUTION OF INDIA AND THE LAW DECLARED BY THE HON'BLE SUPREME COURT OF INDIA AND ETC.

WRIT PETITION NO.38406 OF 2013

BETWEEN:

1. M/S SOUTH INDIA SUGAR MILLS ASSN.,
A SOCIETY REGISTERED UNDER THE
SOCIETIES REGISTRATION ACT, 1960,
HAVING ITS OFFICE AT
FARAH WINSFORD, 133/6, INFANTRY ROAD,

BANGALORE-560 001,
REPRESENTED BY ITS
SECRETARY, SHRI RAMAKRISHNA

2. M/S. COROMANDEL SUGARS LIMITED
(FORMERLY KNOWN AS ICL SUGARS LIMITED)
MAKAVALLI VILLAGE, TALUK, K.R.PET),
DISTRICT: MANDYA,
REPRESENTED BY ITS
VICE PRESIDENT
SHRI PAWAN KUMAR.

3. M/S. DAVANAGERE SUGAR COMPANY LIMITED
NO.73/1, P.B.NO.312,
SHAMANUR ROAD,
DAVANAGERE - 577 304.
REPRESENTED BY ITS MANAGING DIRECTOR,
SHRI S.S.GANESH.

4. UGAR SUGAR WORKS LIMITED,
HAVING ITS OFFICE AT,
317, 9TH MAIN, 14TH CROSS,
JAYANAGAR, 2ND BLOCK,
BANGALORE – 560011
REPRESENTED BY ITS MANAGER,
BANGALORE OFFICE
MR.N.S.NAYAK.
(Cause title amended vide Court
order dated .12.11.2013)

... PETITIONERS

(BY SRI.SHRIDHAR PRABHU, ADV.)

AND:

1. THE STATE OF KARNATAKA
BY ITS CHIEF SECRETARY,
VIDHANA SOUDHA,
BANGALORE-560 001.

2. THE ADDITIONAL CHIEF SECRETARY
GOVERNMENT OF KARNATAKA,
DEPARTMENT OF ENERGY,
VIKAS SOUDHA,
DR.B.R.AMBEDKAR VEEDHI,
BANGALORE-560 001.

3. DEPUTY CHIEF ELECTRICAL INSPECTOR
OFFICE OF THE DEPUTY CHIEF
ELECTRICAL INSPECTOR,
ANIKETHAN ROAD,
G & H BLOCK, KUVEMPU NAGAR,
MYSORE-570023. ... RESPONDENTS

(BY SRI. ADITYA SONDHI, ADDL. ADV. GENERAL WITH
SRI.V.SREENIDHI, AGA FOR R1 - R3)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE SUB-SECTION [1] OF SECTION 3 AND SUB-SECTION [2] OF SECTION 3 OF THE KARNATAKA ELECTRICITY [TAXATION ON CONSUMPTION] [AMENDMENT] ACT 2013 AS UNCONSTITUTIONAL AND ULTRA VIRES OF THE CONSTITUTION OF INDIA VIDE ANN-A BEARING NOTIFICATION DATED 11.3.2013 AND QUASH THE IMPUGNED NOTIFICATION DATED 10.5.2013 ISSUED BY RESPONDENT NO.3 VIDE ANN-B.

WRIT PETITION No.7238 OF 2015

BETWEEN:

AT & S (INDIA) PRIVATE LIMITED
A COMPANY REGISTERED UNDER THE PROVISIONS
OF THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE
AT 12/A, INDUSTRIAL AREA,
NANJANGUD – 571 301

KARNATAKA
REPRESENTED BY ITS MANAGING DIRECTOR
MR AMIT KUMAR ROY ... PETITIONER

(BY SMT.GAYATHRI BALU, ADV.)

AND:

1. CHAMUNDESHWARI ELECTRICITY SUPPLY
CORPORATION LIMITED
A COMPANY INCORPORATED UNDER THE
PROVISIONS OF THE COMPANIES ACT, 1956
AND HAVING ITS OFFICE AT
NO.927, L J AVENUE,
NEW KANTHARAJ URS ROAD, SARASWATHIPURAM
MYSORE – 570 009
REPRESENTED BY ITS MANAGING DIRECTOR

2. THE ASSISTANT EXECUTIVE ENGINEER (AEE)
CHAMUNDESHWARI ELECTRICITY SUPPLY COMPANY
LIMITED
CESC OPERATION AND MAINTENANCE SUB DIVISION
R P ROAD,
NANJANGUD-571301
MYSORE DISTRICT.

3. CHIEF ELECTRICAL INSPECTORATE TO
THE GOVERNMENT OF KARNATAKA
#32/1-2, CRESCENT TOWERS, SECOND FLOOR
CRESCENT ROAD,
BANGALORE-560001

4. INDIAN ENERGY EXCHANGE LIMITED
A COMPANY REGISTERED UNDER THE PROVISIONS OF THE
COMPANIES ACT, 1956,
HAVING ITS REGISTERED OFFICE AT
FOURTH FLOOR, TDI CENTRE,
PLOT NO.7, JASOLA,
NEW DELHI – 110 025

REPRESENTED BY ITS MANAGING DIRECTOR.

... RESPONDENTS

(BY SRI.ADITYA SONDHI, ADDL. ADV. GENERAL WITH
SRI.V.SREENIDHI, AGA FOR R3;
SRI.HARIKRISHNA S HOLLA, ADV. FOR R1 & R2)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO a) DECLARE THAT THE RESPONDENTS HAVE NO AUTHORITY TO MAKE A FISCAL DEMAND IN RESPECT OF TAXATION OF CONSUMPTION OF ELECTRICITY PURCHASED THROUGH OPEN-ACCESS FROM GENERATING COMPANIES IN OTHER STATES UNDER THE PROVISIONS OF THE CONSTITUTION OF INDIA AND THE LAW AS DECLARED BY THE HON'BLE SUPREME COURT OF INDIA AND ETC.

WRIT PETITIONS NO. 8686 OF 2015

BETWEEN:

KHYATI STEEL INDUSTRIES PVT. LTD.
A COMPANY REGISTERED UNDER
THE PROVISIONS OF THE COMPANIES ACT, 1956,
HAVING ITS REGISTERED OFFICE AT
THANDYA INDUSTRIAL AREA
NANJANGUD – 571 301
(REP BY ITS AUTHORISED SIGNATORY)

... PETITIONER

(BY SRI.SHRIDHAR PRABHU, ADV.)

AND:

1. CHAMUNDESHWARI ELECTRICITY SUPPLY
COMPANY LTD.
A COMPANY INCORPORATED UNDER

THE PROVISIONS OF THE COMPANIES ACT, 1956,
AND HAVING ITS OFFICE AT NO.927,
L.G. AVENUE, NEW KANTHARAJ URS ROAD,
MYSURU-570009
(REP BY MANAGING DIRECTOR)

2. THE ADDITIONAL CHIEF ELECTRICAL INSPECTOR
TO THE GOVERNMENT OF KARNATAKA
NO.1360, ANIKETANA ROAD,
G AND H BLOCKS, KUVEMPU NAGARA,
MYSURU – 570 023

3. STATE OF KARNATAKA
KARNATAKA STATE ELECTRICAL INSPECTORATE
NO.32/1-2 CRESCENT TOWERS, 2ND FLOOR,
CRESCENT ROAD, BENGALURU-01
(BY CHIEF ELECTRICAL INSPECTOR TO THE
GOVERNMENT OF KARNATAKA)

... RESPONDENTS

(BY SRI.ADITYA SONDHI, ADDL. ADV. GENERAL WITH
SRI.V.SREENIDHI, AGA FOR R2 & R3;
SRI.HARIKRISHNA S HOLLA, ADV. FOR R1)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE RESPONDENTS HAVE NO AUTHORITY TO COLLECT THE ELECTRICITY TAX ON THE ENERGY PURCHASED AND CONSUMED FROM SOURCES OUTSIDE THE STATE OF KARNATAKA BY THE PETITIONER THROUGH INTER STATE OPEN ACCESS AND DECLARE THAT THE SAME IS ILLEGAL, UNTENABLE AND ULTRA VIRES THE CONSTITUTION OF INDIA AND THE LAW DECLARED BY THE HON'BLE SUPREME COURT OF INDIA AND ETC.

WRIT PETITIONS NO. 29195 OF 2015

BETWEEN:

JUBILANT GENERICS LIMITED
A COMPANY REGISTERED UNDER THE PROVISIONS
OF THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
PLOT 1A, SECTOR 16A
INSTITUTIONAL AREA - NOIDA
NOIDA, UTTAR PRADESH – 201 301
AND ALSO HAVING OFFICE AT:
AT 56, INDUSTRIAL AREA, NANJANGUD,
DISTT. MYSORE-571302, KARNATAKA
REPRESENTED BY ITS POWER OF ATTORNEY
HOLDER: MR.SANJAY GUPTA

... PETITIONER

(By SMT GAYATHRI BALU, ADV.)

AND:

1. CHAMUNDESHWARI ELECTRICITY SUPPLY CORPORATION LTD
   A COMPANY INCORPORATED UNDER THE
   PROVISIONS OF THE COMPANIES ACT, 1956
   AND HAVING ITS OFFICE AT:
   NO.927, L.J.AVENUE,
   NEW KANTHARAJ URS ROAD,
   SARASWATHIPURAM
   MYSORE-570 009
   REPRESENTED BY ITS MANAGING DIRECTOR

2. THE ASSISTANT EXECUTIVE ENGINEER (AEE)
   CHAMUNDESHWARI ELECTRICITY SUPPLY COMPANY LIMITED
   CESC OPERATION AND MAINTENANCE SUB DIVISION
   R.P.ROAD

NANJANGUD - 571 301
MYSORE DISTRICT

3. CHIEF ELECTRICAL INSPECTORATE TO
THE GOVERNMENT OF KARNATAKA
#32/1-2, CRESCENT TOWERS,
SECOND FLOOR
CRESCENT ROAD
BANGALORE-560 001

4. INDIAN ENERGY EXCHANGE LIMITED
A COMPANY REGISTERED UNDER THE PROVISION OF THE
COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
FOURTH FLOOR, TDI CENTRE,
PLOT NO.-7, JASOLA,
NEW DELHI – 110 025
REPRESENTED BY ITS MANAGING DIRECTOR

... RESPONDENTS

(BY SRI.ADITYA SONDHI, ADDL. ADV. GENERAL WITH
SRI.V.SREENIDHI, AGA FOR R3;
SRI.S SRIRANGA, ADV. FOR R1 & R2
NOTICE TO R4 IS D/W V/O DATED 16.07.2015)

THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE RESPONDENTS HAVE NO AUTHORITY TO MAKE A FISCAL DEMAND IN RESPECT OF TAXATION OF CONSUMPTION OF ELECTRICITY PURCHASED THROUGH OPEN-ACCESS FROM GENERATING COMPANIES IN OTHER STATES UNDER THE PROVISIONS OF THE CONSTITUTION OF INDIA AND THE LAW AS DECLARED BY THE HON'BLE SUPREME COURT OF INDIA AND ETC.

THESE PETITIONS HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 09.08.2016, COMING ON FOR

PRONOUNCEMENT OF ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

O R D E R

The common prayer made by the petitioners in all these writ petitions are for issuance of writ of mandamus or any other appropriate writ order or direction declaring that the respondents have no authority to collect electricity tax on the energy purchased and consumed from sources outside the State of Karnataka by the petitioners through interstate open access; and to declare that the same is illegal, untenable and *ultra vires* the Constitution of India. Petitioners have also sought for a writ of certiorari or order or direction quashing demand notice Annexure-A dated 20th February 2016 issued by the second respondent at the behest of the first respondent and also declare the same as illegal and arbitrary.

2. In Writ Petition No.38406 of 2013 a prayer has been made to declare sub-sections (1) and (2) of Section 3 of the Karnataka Electricity (Taxation and Consumption) (Amendment) Act, 2013 as unconstitutional and *ultra vires* of the Constitution of India. In this petition, the learned counsel appearing for the

petitioners submitted that he would like to file a memo for withdrawing the writ petition. Therefore, the Registry was directed to de-link this petition from Writ Petition No.29195 of 2015 and connected petitions. Despite submission made by the petitioner the he would file a memo for withdrawal of the writ petition, so far, no memo is filed seeking to that effect.

3. The learned counsel appearing for the petitioners submitted that the first petitioner is the Association of various Sugar Mills established in the State of Karnataka and registered under Societies Registration Act, 1960. Its primary object is to espouse the cause of its Members and on its roll it has more than forty sugar mills. It can sue and be sued by its name. The second and third petitioners are the Sugar Mills having co-generation facility and are affected by the legislation impugned. The Karnataka Electricity (Taxation on Consumption) (Amendment) Act, 2013 (for short, hereinafter referred to as 'the Act') effected changes to Section 3 of the Karnataka Electricity (Taxation on Consumption) Act, 1959. The amended Sections are as follows:

(1) Subject to the provisions of the Act, there shall be levied and paid to the State Government electricity tax on *advolorem* basis at six per cent on the charges payable on the electricity sold to or consumed by, any consumers (excluding arrears) when electricity is supplied by licencee or non-licencee through licencee or otherwise;

Provided that when the consumers electricity at concessional rate or free of charge the consumer shall be reliable to pay on the rate of charges electricity levied by the licencees to the other consumers

Except

(i) the consumer under agricultural (irrigation pumpsets upto and inclusive of 10 horse power)

(ii) Bhagya Jyoti and Kutira Jyoti categories up to an extent of free consumption allowed by the State Government from time to time; and

(iii) The consumers covered under sub-section (2).

(2) Subject to the provisions of this Act, there shall be levied and paid to the State Government by every non-licencee electricity tax on all the units of

electricity consumed by himself at such rates specified by the State Government by notification from time to time but nut exceeding the rates specified below, namely;-

(a) Electricity tax not exceeding 50 paise per unit on captive consumption;

(b) Electricity tax not exceeding 50 paise per unit on auxillary consumption in a generating station whether captive generating plant or co-generation plant or otherwise for the auxiliary loads exceeding 50 kilo watts."

4. The effect of the amendment is, it directs every generator of electricity to pay electricity tax not exceeding 50 paise per unit for captive consumption, and to pay not exceeding 25 paise on auxiliary consumption. The amendment also brings effect on co-generation facilities maintained by sugar mills; and consequently, makes them liable to pay tax under the said amendment. It is submitted that the co-generation facility can be classified into two categories, viz. (1) Co-generation facility that effect sale of energy through open access by way of inter-state transmission; and (2) co-generation facility who sells

electricity to the State Distribution Licencees. The state is empowered under Entry 53 List II (State List) of the VII Schedule of Constitution to impose tax on consumption or sale of electricity. Entry 54 of the same List states that taxes on sale or purchase of goods other than newspaper, subject to the provisions of Entry 92A of List I (Union List), which states that Taxes on the sale or purchase of goods other than Newspaper where such sale or purchase takes place in the course of inter-state trade or commerce.

5. As things thus stood, the learned counsel submitted that the impugned legislation which imposes tax on sale of electricity, is un-constitutional. To substantiate his submission, the learned counsel referred a judgment of Hon'ble Supreme Court in the case of STATE OF A.P. v. NATIONAL THERMAL POWER CORPORATION LIMITED AND OTHERS reported in (2002)5 SCC 203 wherein the Hon'ble Supreme Court has declared that taxes on the consumption or sale of consumption of electricity within the meaning of Entry 53 of List II (State List) must be consumption within the State and not beyond the

territory of the State. Entry 53 of List II of the VII Schedule of the Constitution of India deals with consumption or sale of electricity. Since the petitioner gets supply of electricity through open access transaction which is not within the purview of either the Act or Entry 53 of List II of VII Schedule of Constitution of India or any other provision. It is submitted that since electricity is the 'goods' for the purpose of levy of tax and the petitioners get electricity supply from outside the State, Entry 92A of List I (Union List) operates and Central Sales Tax comes into picture, and under these circumstances, the amendment made to the Act is *ultra vires* and hence, the same is liable to be set aside.

6. It is further submitted that Section 6 of Central Sales Tax Act, 1956 specifically exempts liability to pay tax on interstate sale of electrical energy. In this regard the judgment of Hon'ble Supreme Court in the case of ANDHRA PRADESH v. NATIONAL THERMAL POWER CORPORATION LIMITED (supra) is relied upon wherein it is held that the act on the part of the State to levy the tax for interstate sale would result in

hampering the smooth movement of electricity between the States.

7. The learned Additional Advocate General appearing on behalf of the State submitted to dismiss these petitions. He submitted that the petitioners, except the petitioner in Writ Petition No.38406 of 2013, have not challenged the *vires* of the Consumption Act or the Amendment Act but have only sought relief in the nature of a writ of mandamus to declare that the respondents do not have the authority to collect electricity tax on consumption; and that such a prayer made without challenging the *vires* of the Act is misconceived in law especially when the power of the State is traceable to the Constitution and to Statute. By referring the judgments of Hon'ble Supreme Court in the case of KESAVANANDA BHARATI v. STATE OF KERALA reported in (1973)4 SCC 225; in the case of R C COOPER v. UNION OF INDIA reported in (1970) 1 SCC 248; and the judgment of High Court of Australia in the case of QUEEN v. KIRBY reported in (1956) 94 CLR 295 it is submitted that in the absence of specific prayer challenging the *vires* of the Act, there

is always a presumption as to constitutionality of such act. It is further submitted that it is the settled law that Courts act upon the presumption of validity until the law is specifically challenged, and further, the Courts must proceed on the presumption of constitutionality of all legislations. By referring to the order dated 12th April 2016 passed in respect of Writ petition No.38406 of 2013 wherein the petitioner was permitted, acceding to his submission, to file a memo to withdraw the writ petition, and the Registry was directed to de-link the said writ petition from other connected petitions, however, no such memo is filed by the petitioner and the said conduct of the petitioner does not enable it any equity since the petitioner was permitted to file a memo to withdraw petition as also the Registry was directed to de-link the said petition from other connected petitions.

8. The exemption sought by the petitioners is for the reason that they are purchasing electricity through open access from outside the State of Karnataka. Purchasing electricity from outside the State is for the purpose of Section 2(47) of the

Electricity Act, 2003. It is an open access regulated by the Central Act and the State legislation has no competency to tax for consumption of electricity. It is further submitted that the respondents have the sole legislative competence and authority to levy tax on the consumption of electricity within the State of Karnataka and this competency is clear from a bare reading of the relevant Entries of the State List of the VII Schedule of the Constitution of India. Entry 52 of List II (State List) provides for taxes on the entry of goods into a local area for consumption, use or sale therein. Entry 53 of the said List provides for Taxes on the consumption or sale of electricity. In response to the submission advanced by the learned counsel for the petitioner relying upon the judgment of the Hon'ble Supreme Court in the case of ANDHRA PRADESH v. NATIONAL THERMAL POWER CORPORATION LTD. (supra), the learned Additional Advocate General submits that in the said judgment it is held that in respect of purchasing electricity from outside the State, it is made clear that the State of Karnataka is not levying tax on electricity or its consumption. The State is not attempting to artificially appoint a *situs* of sale, as was sought to be done by

the States of Andhra Pradesh and Madhya Pradesh in the National Thermal Power Corporation Ltd. case. He further submitted that the Hon'ble Supreme Court has made that clear in paragraph 5 of the judgment that, *"However, in the present case we are not concerned with those exclusions, nor with levy of duty on consumption. The limited question arising for our consideration is – Whether sales of energy by NTPCL, Respondent 1, to several Electricity Boards situated outside the State of Andhra Pradesh and to the State of Goa, attract the incidence of taxation under Section 3 of the Act."* The taxable event in the given case is consumption of electricity and not on sale or production or manufacture. As such, it is a tax on consumption and not a sales tax. The incidence of tax on consumption is in contradistinction to any other event. The Constitution permits the State to levy tax on consumption under Entries 52 and 53 of List-II (State list) of the VII Schedule of the Constitution which the State is conscious that the levying of tax on inter-state sale falls under Entry 54 of List II (State List) subject to the provisions of Entry 92A of the List I (Union List);

and in the light of the same, the learned Counsel to submits to dismiss these petitions.

9. Heard the learned counsel for the petitioners and the learned Additional Advocate General. The prayer made by the petitioners is for issuance of a writ of mandamus and writ of certiorari on the demand made by the respondents in levying tax on electricity. When a writ of mandamus is sought, the courts shall not issue directions to the Government to refrain from enforcing the provisions of a valid law. The valid law is the amendment brought in the year 2013 i.e. the Karnataka Electricity (Taxation and Consumption) (Amendment) Act, 2013 on the Karnataka Electricity (Taxation and Consumption) Act, 1959. When such validity of law has not been challenged by the petitioner, it is not appropriate for this Court even to entertain the petitions. In Writ Petition No.38406 of 2013, in which the petitioner has sought for a declaration of Sections 3(1) and 3(2) of the Karnataka Electricity (Taxation on Consumption) (Amendment) Act, 2013, but the same was not pressed and submission was made by the learned Counsel for the petitioner

that he may be permitted to withdraw the petition and submitted that he would file a memo to that effect; and this Court by its order dated 12th April 2016 permitted the petitioner to file memo for withdrawal of the petition and further directed the Registry to de-link Writ Petition No.38406 of 2013 from the connected writ petitions. When such submission is made it gets the effect that the petitioner has given up its prayer and would file a memo seeking to withdraw the petition. But, so far, no memo is filed by the petitioner for withdrawal of the petition. The said conduct of the petitioner in not filing a memo for withdrawing the writ petition even when permission was accorded by the Court to file a memo, is bad and such attitude is to be discouraged.

10. Moreover, writ of mandamus could be issued where a petitioner has established his right and at the same time if he espouses the duty of the respondent to do it in a particular manner. In the instant cases, the Amendment Act enables the State to levy tax on the consumption and when such being the provision of law, and as long as the same has not been

challenged before this Court, the presumption goes to show that the same is valid and there is no arbitrariness or illegality on the part of the respondents and hence no *ultra vires* could be found, on the contrary, it is *intro vires* of the Constitution of India. It is pertinent here to note that the Hon'ble Supreme Court in the case of NAVINDER CHAND HEMRAJ v. Lt. GOVERNOR reported in AIR 1971 SC 2399 has held that based on the prayer made seeking writ of mandamus, if a direction is issued, it results in violation of law or to violate the law. This is contrary to the writ jurisdiction of the High Court. When a validity of law and its presumption goes with it, it is not appropriate and would be contrary to the writ jurisdiction to high court to entertain the petition. Hence, the prayer made by the petitioners are to be rejected and accordingly it is rejected.

11. As submitted by the learned Additional Advocate General, the Hon'ble Supreme Court in the cases of KESHAVANAND BHARATI; in R.C. COOPER; and the judgment of High Court of Australia in the case of QUEEN V. KIRBY (supra) have held that the presumption has no validity until the specific

challenge is made, and further, that the Courts must proceed on the presumption of constitutionality of legislations. The act on the part of the petitioners in making a prayer for writ of mandamus and a writ of certiorari is nothing but a misconception of law.

12. The case of the petitioners is the interstate trade or commerce for which Entry 92A of List I (Union List) operates and it is always the Central Government which has got power to levy tax under the provisions of Central Sales Tax Act. The position of the petitioners in the present petitions is altogether different from the above as is made clear by the learned Additional Advocate General that the tax is not levied on the interstate trade and commerce but it is levied only on the consumption of electricity in Karnataka. Entries 52 and 53 of List II of the VII Schedule make it clear that it enables the State to impose tax for consumption, use or sale and to impose tax on the consumption or sale of electricity. Here, the electricity which is wired from outside on open access, has not been taxed by the State Government but is taxed on its consumption within

the State, which is permissible in law. Hon'ble Supreme Court in the case of BIOCON LTD. AND OTHERS v. STATE OF KARNATAKA, MINISTRY OF LAW JUSTICE AND PARLIAMENTARY AFFAIRS AND OTHERS reported in 2011(5) KAR.L.J. 296 at paragraph 22 and 23 has held thus:

> *"22. The perusal of the provisions of sub-section (2) of Section 3 of the Amending Act would show that what is sought to be levied under the Amending Act impugned in the writ petitions and in these appeals is, in substance, electricity tax which is levied on consumption and not on production. The mere fact that some of the appellants are also producers of electricity and the fact that electricity cannot be stored and production and consumption of electricity is simultaneous, would not exempt the appellants from payment of consumption tax in view of the decision of the Hon'ble Supreme Court in JC MILLS's case referred to in the arguments of learned Advocate General. In the said case, the Hon'ble Supreme Court was considering the provisions of Central Provinces and Berar Electricity Duty Act, 1949 as amended by Madhya Pradesh Taxation Laws Amendment Act, 1958 (Act No.7/1956), sub-sections 2(a), d(I) and 3 of the said Act wherein tax has been levied was linked to consumption and it was argued that since the petitioners who were also the producers of energy, they cannot be*

consumers. The Supreme Court has repealed the said contention and has held as follows:

> *'Producer' as defined S. 2 (d-1) of the Act means a person who generates electrical energy at a voltage exceeding hundred volts for his own consumption or for supplying to others". If we read the two definitions together, omitting the non-essentials, 'consumer' would include any person who consumes electrical energy supplied by a person who generates electrical energy for his own consumption". Under S.3 a person who generates electrical energy over hundred volts for his own consumption is liable to pay duty on the units of electrical energy consumed by himself. A producer consuming the electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself. The Table prescribes rates of duty payable with respect to electrical energy supplied for consumption and, therefore, the levy on the appellant falls squarely within the Table under S.3 of the Act and Mr. Viswantha Sastri's argument is devoid of substance.*
>
> *(6) It is difficult to see how the levy of duty upon consumption of electrical energy can by*

regarded as duty of excise falling within Entry 84 of List I. Under that Entry what is permitted to Parliament is levy of duty of excise on manufacture or production of goods (other than those excepted expressly by that entry). The taxable event with respect to a duty of excise is "manufacture" or "production. Here the taxable event is not production or generation of electrical energy but its consumption. If a producer generates electrical energy and stores it up, he would not be required to pay any duty under the Act. It is only when he sells it or consumes it that he would be rendered liable to pay the duty prescribed by the Act. The Central Provinces and Berar Electricity Act was enacted under Entry 48-B of List II of the Government of India Act 1935. The relevant portion of that Entry read thus:

"Taxes on the consumption or sale of electricity……"

Entry 53 of List II of the Constitution is to the same effect. The argument of Mr. Sastri is that the word "consumption" should be accorded the meaning which it had under the various electricity Acts, including the Indian Electricity Act, 1910. Under that Act and

under the various Provincial and State Acts, consumption of electricity means according to him, consumption by persons other than producers and that both in the Government of India Act and under the Constitution the word 'consumption' must be deemed to have been used in the same sense. The Acts in question deal only with a certain aspect of the topic "electricity", and not with all of them. Therefore, in those Acts the word "consumption" may have a limited meaning, as pointed out by learned counsel. But the word "consumption" has a wider meaning. It means also "use-up", "spend" etc. The mere fact that a series of laws were concerned only with a certain kind of use of electricity, that is consumption of electricity by persons other than the producer cannot justify the conclusion that the British Parliament in using the word "consumption" in Entry 48-B and the Constituent Assembly in Entry 53 of List II wanted to limit the meaning of "consumption" in the same way. The language used in the legislative entries in the Constitution must be interpreted in a broad way so as to give the widest amplitude of power to the Legislature to legislate and not in a narrow and pedantic sense. We cannot, therefore, accept either of the two grounds

urged by Mr. Viswanatha Sastri challenging the vires of the Act.

23. The same principles have been reiterated in the case of STATE OF A.P. vs NATIONAL THERMAL POWER CORPORATION LTD cited supra, wherein the Three Judges Bench of the Hon'ble Supreme Court has held as follows:

> *22. We now come to the question on the interpretation of Entry 53 in List II of Seventh Schedule. It provides for taxes on the consumption or sale of electricity. The word 'sale' as occurring in Entry 52 came up for the consideration of this Court in Burmah Shell Oil Storage & Distributing Co. India Ltd. v. The Belgaum Borough Municipality 1963 Supp. (2) SCR 216. It was held that the act of sale is merely the means for putting the goods in the way of use or consumption. It is an earlier stage, the ultimate destination of the goods being "use or consumption". We feel that the same meaning should be assigned to the word 'sale' in Entry 53. This is for a fortiorari reason in the context of electricity as there can be no sale of electricity excepting by its consumption, for it can neither be preserved nor stored. It is this property of electricity which persuaded this Court in Indian Aluminium Co. Ltd. etc's*

case (supra) to hold that in the context of electricity, the word 'supply' should be interpreted to include sale or consumption of electricity. Entry 53 should therefore be read as 'taxes on the consumption or sale for consumption of electricity'.

23. With these two things in mind, namely, that electricity is goods, and that sale of electricity has to be construed and read as sale for consumption within the meaning of Entry 53, the conflict, if any, between Entry 53 and Entry 54 ceases to exist and the two can be harmonized and read together. Because electricity is goods it is covered in Entry 54 also. It is not disputed that duty on electricity is tax. Tax on the sale or purchase of goods including electricity but excluding newspapers shall fall within Entry 54 and shall be subject to provisions of Entry 92A of List I. Taxes on the consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the State and not beyond the territory of the State. Any other sale or electricity shall continue to be subject to the limits provided by Entry 54. Even purchase of electricity would be available for taxation which it would not be if

electricity was not includible in the meaning of term "goods". A piece of legislation need not necessarily fall within the scope of one entry alone: more than one entry may overlap to cover the subject matter of a single piece of legislation. A bare consumption of electric energy even by one who generates the same may be liable to be taxed by reference to Entry 53 and if the State Legislature may choose to impose tax on consumption of electricity by the one who generates it such, tax would not be deemed to be a tax necessarily on manufacture or production or a duty of excise.

Therefore, there is no merit in the contention of learned Sr. Counsel and the learned counsel appearing for the appellants that since the appellants are also producers of electricity and consumers and since electricity cannot be stored, production and consumption is simultaneous and tax levied is in fact on production only and not on consumption, cannot be accepted.

13. The Division Bench of Madhya Pradesh High Court (Gwalior Bench) in the case of STERLING AGRO INDUSTRIES v. STATE OF MADHYA PRADESH in Writ Petition No.6616 of 2013

decided on 02nd July 2014 at paragraphs 3, 6, 8 and 10 has observed thus:

> *"3. The State Legislature enacted an Act named as Madhya Pradesh Vidyut Shulk Adhiniyam 2012 (hereinafter referred to as "Act of 2012"). The object of the Act to provide for the levy of a duty on sale or consumption of electricity in the State of Madhya Pradesh. Section 3(2) of the Act of 2012 reads as under:*
>
> > *(2) Every consumer consuming electricity obtained through open access from outside the state shall pay every month to the State Government at the prescribed time and in the prescribed manner a duty circulated at the rates specified in Part-B of the Schedule on the units of electricity consumed by him.*
>
> *4. and 5. xxx xxx xxx*
>
> *6. The entry empowers the State to collect levy taxes on the consumption of electricity. In the aforesaid entry, there is no mention to the fact that if the person is receiving electricity from outside of the State, then the levy could not be imposed. The mandate is that the State can levy duty on consumption of electricity. Admittedly, the petitioner has been consuming the*

electricity even though it has received the aforesaid electricity from the outside of the State.

7. xxx xxx xxx

8. Constitution Bench of Hon'ble Supreme Court has clearly held that the persons who receive the electricity for consumption or distribution for consumption within the State would be covered under the entry. Up to that extent the State is competent to levy the duty. In such circumstances, in our opinion, the argument of the learned counsel for the petitioner is not acceptable.

9. xxx xxx xxx

10. It is a vague argument. The entry empowers the State to levy duty as discussed above and as held by the Constitution Bench of the Hon'ble Supreme Court, the State Legislature is empowered to impose the duty if the consumption or distribution of electricity is within the State. Apart, from this, it is admitted fact that the petitioner has been receiving electricity from outside of the State of Madhya Pradesh. At that point of time no levy was imposed and if no levy was imposed in the State of Madhya Pradesh also, in such circumstances, the petitioner would be beneficiary in contrast to the other consumers, who have been consuming electricity within the State of Madhya Pradesh which is received from the outside of State."

14. The petitioners have relied upon the judgment of Hon'ble Supreme Court in the case of ANDHRA PRADESH v. NATIONAL THERMAL POWER CORPORATION LTD. (supra) and submitted that the law laid down by the Hon'ble Supreme Court is in respect of interstate electricity and levy of tax. But, by reading of paragraph 5 of the judgment, it makes clear that as regards the present cases are concerned, tax is levied on consumption of electricity through interstate on open access and the consumption is within the State. Paragraph 5 of the judgment in the said case is extracted hereunder:

> *"5. A bare reading of the provision shows that duty is leviable at the prescribed rate on 'all sales of energy' effected by the licensee during the previous month at a price of more than 12 paise per unit. Duty is also leviable on all energy consumed by the licensee. There are certain categories of sales and consumption saved and excluded from what would otherwise have been dutiable. However, in the present case, we are not concerned with those exclusions, nor with levy of duty on consumption. The limited question arising for our consideration is -whether sales of energy by NTPCL, the respondent No.1, to several Electricity Boards situated outside the State of Andhra Pradesh and to the State of*

Goa, attract the incidence of taxation under Section 3 of the Act."

15. As regards Entries 53 and 54 of List-II of VII Schedule of the Constitution is concerned, it has been held that the tax is levied on consumption of electricity within the State and are covered by the said entries and in paragraphs 23 to 28 of the judgment it has been held as follows:

"23. With these two things in mind, namely, that electricity is goods, and that sale of electricity has to be construed and read as sale for consumption within the meaning of Entry 53, the conflict, if any, between Entry 53 and Entry 54 ceases to exist and the two can be harmonized and read together. Because electricity is goods, it is covered in Entry 54 also. It is not disputed that duty on electricity is tax. Tax on the sale or purchase of goods including electricity but excluding newspapers shall fall within Entry 54 and shall be subject to provisions of Entry 92A of List I. Taxes on the consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the State and not beyond the territory of the State. Any other sale of electricity shall continue to be subject to the limits provided by Entry 54. Even purchase of electricity would be available for taxation which it would not be if electricity was not includible in the meaning of

term 'goods'. A piece of legislation need not necessarily fall within the scope of one entry alone; more than one entry may overlap to cover the subject-matter of a single piece of legislation. A bare consumption of electric energy even by one who generates the same may be liable to be taxed by reference to Entry 53 and if the State Legislature may choose to impose tax on consumption of electricity by the one who generates it, such tax would not be deemed to be a tax necessarily on manufacture or production or a duty of excise, as held by the Constitution Bench in Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior Vs. State of Madhya Pradesh 1962 Supp.(1) SCR 282. A mere consumption of goods (other than electricity), not accompanied by purchase or sale would not be taxable under Entry 54 because it does not provide for taxes on the consumption and Entry 53 does not speak of goods other than electricity. Thus in substance, Entries 53 and 54 can be and must be read together and to the extent of sale of electricity for consumption outside the State, the electricity being goods, shall also be subject to provisions of Entry 92A of List I. This, in our opinion, is the best way of reading the two entries. In C.P. Motor Spirit Act Re., AIR 1939 FC 131, it was held that two entries in the lists may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them. The Court should strive at searching for reasonable and practical construction to seek

reconciliation and give effect to all of them. If reconciliation proves impossible, the overriding power of Union Legislature operates and prevails. Gwyer, C.J. observed

> *"A grant of the power in general terms, standing by itself, would no doubt be construed in the wider sense; but it may be qualified by other express provisions in the same enactment, by the implication of the context, and even by considerations arising out of what appears to be the general scheme of the Act."*

And again he said,

> *"an endeavour must be made to solve it, as the Judicial Committee have said, by having recourse to the context and scheme of the Act, and a reconciliation attempted between two apparently conflicting jurisdictions by reading the two entries together and by interpreting, and, where necessary, modifying, the language of the one by that of the other. If needed such a reconciliation should prove impossible, then and only then, will the non-obstante clause operate and the federal power prevail."*

In Calcutta Gas Co. Ltd. Vs. The State of West Bengal & Ors., 1962 Supp (3) SCR 1, the Constitution Bench has

held that the same rules of construction apply for the purpose of harmonizing an apparent conflict between two entries in the same list.

What is inter-State sale?

24. It is well settled by a catena of decisions of this Court that a sale in the course of inter-State trade has three essential ingredients:

(i) there must be a contract of sale, incorporating a stipulation, express or implied, regarding inter-State movement of goods; (ii) the goods must actually move from one State to another, pursuant to such contract of sale, the sale being the proximate cause of movement; and (iii) such movement of goods must be from one State to another State where the sale concludes. It follows as a necessary corollary of these principles that a movement of goods which takes place independently of a contract of sale would not fall within the meaning of inter-State sale. In other words, if there is no contract of sale preceding the movement of goods, obviously the movement cannot be attributed to the contract of sale. Similarly, if the transaction of sale stands completed within the State and the movement of goods takes place thereafter, it would obviously be independently of the contract of sale and necessarily by or on behalf of the purchaser alone and, therefore, the transaction would not be having an inter-State element. Precedents are

legion; we may briefly refer to some of them. In English Electric Company of India Ltd. Vs. Deputy Commercial Tax Officer, 1977 (1) SCR 631, this Court held that when the movement of the goods from one State to another is an incident of the contract, it is a sale in the course of inter-State sale and it does not matter which is the State in which the property passes. What is decisive is whether the sale is one which occasions the movement of goods from one State to another. In Union of India Vs. K.G. Khosla and Co. Ltd., (1979) 2 SCC 242, it was observed that a sale would be an inter-State sale even if the contract of sale does not itself provide for the movement of goods from one State to another provided, however, that such movement was the result of a covenant in the contract of sale or was an incident of the contract. Similar view was expressed in M/s. Sahney Steel and Press Works Ltd. and Anr. Vs. Commercial Tax Officer and Others (1985) 4 SCC 173. In Manganese Ore (India) Ltd. Vs. The Regional Assistant Commissioner of Sales-tax, Jabalpur 1976 (4) SCC 124, after referring to Balabhagas Hulaschand Vs. State of Orissa, (1976) 2 SCC 44, it was observed that so far as Section 3 (a) of the C.S.T. Act is concerned, there is no distinction between unascertained or future goods and goods which are already in existence, if at the time when the sale takes place these goods have come into actual existence.

Effect of Entry-53, List-II, having remained unamended

25. Having seen the properties of electricity as goods and what is inter-State sale, let us examine the effect of Entry 53, List II, having been left unamended by Sixth Amendment from another angle. The Sixth Amendment did not touch Entry 53 in List-II and so the contents of Entry 53 were not expressly made subject to the provisions of Entry 92 A of List I and arguments were advanced, with emphasis, on behalf of the States of Andhra Pradesh and Madhya Pradesh contending that such omission was deliberate and therefore the restriction which has been placed only in Entry 54 by making it subject to the provisions of Entry 92A of List I should not be read in Entry 53. It was submitted that so far as sale of electricity is concerned even if such sale takes place in the course of inter-State trade or commerce the State can legislate to tax such sale if the sale can be held to have taken place within the territory of that State or if adequate territorial nexus is established between the transaction and State legislation. For the several reasons stated hereinafter, such a plea cannot be countenanced.

26. The prohibition which is imposed by Article 286(1) of the Constitution is independent of the legislative entries in Seventh Schedule. After the decision of larger Bench in Bengal Immunity Company Limited (supra) and Constitution Bench decision in Ram Narain Sons Ltd. & Ors. Vs. Asst. Commissioner of Sales Tax & Ors., 1955 (2) SCR 483, there is no manner of doubt that the bans

imposed by Articles 286 and 269 on the taxation powers of the State are independent and separate and must be got over before a State legislature can impose tax on transactions of sale or purchase of goods. Needless to say, such ban would operate by its own force and irrespective of the language in which an Entry in List-II of Seventh Schedule has been couched. The dimension given to field of legislation by the language of an Entry in List-II of the Seventh Schedule shall always remain subject to the limits of constitutional empowerment to legislate and can never afford to spill over the barriers created by the Constitution. The power of State legislature to enact law to levy tax by reference to List II of the Seventh Schedule has two limitations : one, arising out of the entry itself; and the other, flowing from the restriction embodied in the Constitution. It was held in Tata Iron and Steel Co. Ltd. Bombay Vs. S.R. Sarkar and Ors. - 1961 (1) SCR 379 (at pages 387 and 388) that field of taxation on sale or purchase taking place in the course of inter-State trade or commerce has been excluded from the competence of the State Legislature. In 20th Century Finance Corporation Limited (supra) the Constitution Bench (majority) made it clear that the situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce. In view of Section 3 of the Central Sales Tax, 1956 all that has to be seen is whether the sale or purchase (a) occasions the movement of goods from one State to another; or (b) is effected by a transfer of documents of title to the goods

during their movement from one State to another. If the transaction of sale satisfies any one of the two requirements, it shall be deemed to be a sale or purchase of goods in the course of inter-State trade or commerce and by virtue of Articles 269 and 286 of the Constitution the same shall be beyond the legislative competence of a State to tax without regard to the fact whether such a prohibition is spelled out by the description of a legislative entry in Seventh Schedule or not.

27. It is well settled, and hardly needs any authority to support the proposition, that several entries in the three lists of Seventh Schedule are legislative heads or fields of legislation and not the source of legislative empowerment. [To wit, see The Calcutta Gas Co. Ltd. Vs. The State of West Bengal & Ors. (supra)]. Competence to legislate has to be traced to the Constitution. The division of powers between Parliament and the State Legislatures to legislate by reference to territorial limits is defined by Article 245. The subject-matters with respect to which those powers can be exercised are enumerated in the several entries divided into three groups as three Lists of Seventh Schedule. Residuary powers of legislation are also vested by Article 248 in the Parliament with respect to any matter not enumerated in any of the lists in the Seventh Schedule. This residuary power finds reflected in Entry 97 of List I. If an Entry does not spell out an exclusion from field of

legislation discernible on its apparent reading, the absence of exclusion cannot be read as enabling power to legislate in the field not specifically excluded, more so, when there is available a specific provision in the Constitution prohibiting such legislation.

28. It is by reference to the ambit or limits of territory by which the legislative powers vested in Parliament and the State Legislatures are divided in Article 245. Generally speaking, a legislation having extra territorial operation can be enacted only by Parliament and not by any State Legislature; possibly the only exception being one where extra territorial operation of a State legislation is sustainable on the ground of territorial nexus. Such territorial nexus, when pleaded, must be sufficient and real and not illusory. In Burmah Shell Oil Storage & Distributing Co. India Ltd. (supra), which we have noticed, it was held that sale for use or consumption would mean the goods being brought inside the area for sale to an ultimate consumer, i.e. the one who consumes. In Entry 53, 'sale for consumption' (the meaning which we have placed on the word 'sale') would mean a sale for consumption within the State so as to bring a State Legislation within the field of Entry 53. If sale and consumption were to take place in different States, territorial nexus for the State, where the sale takes place, would be lost. We have already noticed that in case of electricity the events of sale and consumption are inseparable. Any State legislation levying duty on

sale of electricity, by artificially or fictionally assuming that the events of sale and consumption have taken place in two States, would be vitiated because of extra territorial operation of State legislation."

16. The submission of petitioners counsel that Entry 54 of List II of the VII Schedule of the Constitution is subject to Entry 92A of List I (Union List). The question that would arise for consideration is, in case, if the state legislation orders tax on interstate electricity, as is submitted by the learned Additional Advocate General, that the State is not levying the tax on electricity on purchase or production, but what is levied is on the consumption only. Electricity is also 'goods' for the purpose of levying tax as is held by the Hon'ble Supreme Court in the case of CENTRAL SALES TAX v. MADHYA PRADESH ELECTRICITY BOARD JABALPUR, reported in (1969)1 SCC 200. The definition of 'goods' given under Article 366(12) of the Constitution of India was considered and held that the definition of 'goods' is very wide and according to which the 'goods' also comprise of moveable property.

17. In SWAROOP VEGETABLES PRODUCTS INDUSTRIES v. STATE OF UTTAR PRADESH AND OTHERS reported in (1983)4 SCC 24, the Hon'ble Supreme Court has held that the Electricity duty is chargeable in respect of energy consumed by a person from his own source of generation regardless of the fact that he 'also' purchases electricity from some other source. At paragraphs 4 and 5 of the said judgment, it is observed thus:

> *"4. The original writ Petitioners who canvass the view that electricity duty is not leviable or payable by a person consuming energy from his own source of generation under section 3(1)(c) read with Section 4(l)(c) of the Act lay great stress on the expression 'any other person' occurring in Section 3(l)(c) and Section 4(1)(c) of the Act. It is contended that in view of the user of this expression only those consumers who wholly fall outside the orbit of Sections 3 (1) (a) or 3 (l) (b) are exigible to electricity duty under section 3(1) (c). In case a consumer fails 'both' under Sections 3 (1) (a) and 3 (1) (c) or sections 3 (1) (b) and 3 (1) (c) (it is so argued) such a person would not be exigible to electricity duty. The same argument is urged protanto in the context of clauses (a), (b) and (c) of Section 4(1). In our opinion this submission is altogether untenable and has been rightly repelled by the Pull Bench of the Allahabad High Court in its well considered judgment. On a plain reading of Section 3 (1) (c) it is evident that duty has been*

levied on the energy consumed by a person from his own source of generation without anything more. There is no rider or qualification engrafted in Section 3 (1) (c) or Section 4 (1) (c). The fact that the user of electricity from his own source of generation purchases electricity from some other source as well, is an altogether irrelevant factor from the stand point of the liability imposed by the said provisions. Be it realized that duty is levied on the consumption of energy. The taxing event is the consumption of energy. The source from which the electricity is acquired is altogether irrelevant. . A person having his own source of energy who also purchases energy from another source indicated in Section 3 (1) (a) will be covered by 3 (1) (a) to the extent he purchases electricity from such a source, and will be equally covered by Section 3 (1) (c), insofar as he consumes energy from his own source of generation. He will be covered by both the provisions read conjointly. The same reasoning applies in the context of clauses (a) (b) and (c) of Section 4 (1). There is no rational basis for exonerating a person from payment of duty merely because he has his own source of generation and he also purchases electricity from some other source. In fact it will be irrational to do so and it would give rise to an anachronism. Why make him pay 'only if he generates his own energy and why exempt him altogether merely because he 'also' purchases from some other source ? Duty is levied as a measure of taxation in order to raise additional revenue as is made abundantly clear by the prefatory note and the extract from the

statement of objects and reasons published in U. P. Gazette Extraordinary dated September 1, 1952 which reads as under:

> *"The minimum programme of development which this State must carry out within the next three or four years for the attainment of the objective of a welfare State is set out in the Five Year Plan drawn up by the Planning Commission. This plan provides for an expenditure of 13.58 crores of rupees on power development projects. Such a huge expenditure cannot be met from our present resources. It is, however essential for the welfare of the people that the expenditure should be incurred and that noting should be allowed to stand in the way of the progress of the plan. Additional resources have therefore to be found, the bulk of which can be raised only by means of fresh taxation.*
>
> *A tax on the consumption of electrical energy will impose a negligible burden on the consumer and is a fruitful source of additional revenue. The bill has been so prepared as to ensure that the tax payable by a person will be related to the quantity of electricity consumed by him. The bill is being introduced with the above object. Vide Statement of*

Objects and Reasons published in U. P. Gazette. Extraordinary dated September 1, 1952."

5. How would this object be promoted or served by adopting such an irrational course ? The taxing event being the consumption of energy, the source from which the electricity is acquired would become altogether irrelevant. Section 3 (1) as also Section 4 (1) has to be read as a whole and has to be interpreted in a harmonious and meaningful manner. To do otherwise would be to defeat the legislative intent which is abundantly clear, whilst at the same time exposing the provision to the charge of being irrational and arbitrary, by placing such an unwarranted construction thereon. The Full Bench of the Allahabad High Court, was, therefore, perfectly justified in taking the view that duty was chargeable in respect of energy consumed by a person from his own source of generation regardless of the fact that he 'also' purchased electricity from some other source indicated in Section 3 (1) (a) and Section 4 (1) (a). The appeal preferred by the State, being Appeal No. 1312/1977 will therefore have to be allowed and the appeals preferred by the consumers of electricity challenging the correctness of the decision rendered by the Full Bench must therefore be dismissed."

18. The scheme under the Constitution under Article 245 of the Constitution of India vests Parliament with power of

legislation in all matters enumerated in List I and also the matters enumerated in List II of the VII Schedule of the Constitution of India. The State too have got exclusive right to legislate the matter specified in the Entries contained in List II. When exclusive power has been vested by the Constitution on the State to legislate and the State Legislature has enacted on the same, then that is to be treated as a constitutional purpose. Unless the petitioners place reliance on the *ultra vires* or contravention of provisions of Constitution, the presumption is to be drawn in favour of the Constitution itself.

19. The Hon'ble Supreme Court in the case of INDIAN ALUMINIUM CO. AND OTHERS v. STATE OF KERALA AND OTHERS reported in (1996)7 SCC 637 at paragraph 25 has observed thus:

> *"25. … But the moment electricity is supplied through the meter, consumption and sale simultaneously take place. It is true that in the definitions given in the* New Encyclopaedia Britannica, *Vol.4, p.842 cited before us, distinction between supply and consumption is stated but adopting a pragmatic and realistic approach, we are of the considered view that as son as the electrical*

energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place. Charge will be quantified at a later date as per the recorded meter reading or escaped metering, as they case may be. The word 'supply' used in the charging Section 3 should, therefore, receive liberal interpretation to include sale or consumption of electricity as envisaged in Entry 53 of the State List."

20. In the light of the above discussion, it is pertinent to state that the action of the respondents is not arbitrary or illegal in not amending the 2013 Act or levying the tax on the consumption of electricity. The state is empowered by Entries 53 and 54 of List II of VII Schedule. Since the Act has legislated well within the provisions of Constitution, it has to be held that it is constitutional and not *ultra vires* or illegal. What is levied is on the consumption of electricity but not for supply of electricity. No matter whether a person generates electricity on his own or takes it from outside the State through open access system, but levying of tax is on consumption. As is held by the Hon'ble Supreme Court in the case of ANDHRA PRADESH v. NATIONAL THERMAL POWER CORPORATION LTD. (supra), the

moment electricity is generated it is to be consumed and it cannot be stored. The moment electricity is generated within the State or from outside the State, it is to be consumed and accordingly, the State is empowered to levy tax on consumption. In the said case, the Hon'ble Supreme Court has not laid down law in respect of consumption of electricity and on the other hand it has been held that the State is empowered to levy tax as per Entries 53 and 54 of the List II of VII Schedule of the Constitution. In view of the foregoing reasons and provisions of the Constitution and the Act, these petitions are liable to be dismissed and are accordingly dismissed.

21. It is also necessary to observe here that once the petitioner submits to the Court that he would file a memo for withdrawal of the petition, it shall be presumed that the petition has been withdrawn and only the formality of filing a memo to that effect remains and order also has been passed by this Court on 12th April 2016 permitting the petitioner to file a memo for withdrawal and Registry was also directed to de-link Writ Petition No.38406 of 2013 from other connected petitions. The

non-filing of memo for withdrawal of petition is a misconduct on the part of the petitioner. In that view of the matter, writ petition No.38406 of 2013 also stands dismissed.

Sd/-
JUDGE

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