BEFORE THE ADDITIONAL CHIEF SECRETARY TO GOVERNMENT,

DEPARTMENT OF ENERGY, BANGALORE

Appeal No. 1/2018

BETWEEN:

M/s.Star Metallics and Power Private Limited
(A Subsidiary of the Sandur Manganese & Iron Ores Ltd.)
Regd Office:
Metal & Ferro Alloys Plant,
Vyasankere, Mariyammanahalli,
Hospete Taluk, Bellary DIst. **... Appellant**

(Shri V.G. Pandit, SMPP Ltd, Sri A.G. Suresh,
Director (Projects), SMPP Ltd, - Representatives of SMPP Ltd)

AND:

1.Chief Electrical Inspector,
Nirman Bhavan, 2nd floor, Dr.Rajkumar Road,
Rajajinagar, Bangalore.560 010.

2. Deputy Electrical Inspector
Office of the Deputy Chief Electrical Inspector
No.37/1, Kappagal Road Gandingar, Ballary **...Respondents**

(Shri D.L. Nagaraju, CEIG, Shri Venkat Reddy,
DCEI, Bellary, Shri Vijay KumarA.N., EI, Bellary)

1. This Appeal is filed under Section 9A of the Karnataka Electricity (Taxation on Consumption or Sale) Act 1959 against the order of the Chief

Electrical Inspectorate Bengaluru on Appeal No.1 of 2017 Order dated 11.9.2018, before the Additional Chief Secretary to Government of Karnataka, Energy Department, Vikasa Soudha, Bengaluru-560001.

2. The Appellant had filed petition before the Hon'ble KERC vide OP NO. 15/2015. The contention of the petition in OP was that earlier, the petitioner was running both submerged electric furnaces for production of Manganese alloys such as Silicon-manganese, Ferromanganese when the business was thriving. The petitioner stated that, subsequently he was unable to operate economically both furnaces due to market constraints as there was severe drop in demand of Ferroalloys. Therefore, the petitioner proposed to restrict its production by operating only one furnace reducing its captive consumption of electricity, so that the petitioner could retain the captive status of its generating plant by consuming not less that 51% of the aggregate electricity generated in such plant determined on an annual basis.

3. The KERC vide Order passed the following order:

   " there is no bar legally to run the generating plant with a minimum operational capacity with a view to maintain consumption of electricity of not less than 51% of the aggregate quantum of electricity generated in such plant determined on annual basis."

   and further stated that

"it is made clear that for claiming captive status the requirements stated in Rule 3 of the Electricity Rules, 2005 shall be complied with."

4. The Appellant further filed OP vide No.14/2016 to KERC in which the petitioner prayed the Hon'ble KERC, "*for declaration that, for ascertaining its 'Captive Consumption' as defined in Section 2(1A) of the Karnataka Electricity (Taxation on Consumption and Sale) Act, 1959 (hereinafter, referred to as the 'Act,1959'), the quantum of energy generated beyond 22 Mega Watts (MW) capacity of its Generating Plant and injected into the State Grid as per the Government Order dated 16.09.2015 issued by the Government of Karnataka under Section 11 of the Electricity Act, 2003, be excluded*".

5. The KERC ordered that "*the quantum of energy generated beyond 22 MW capacity of the Petitioner's Generating Station and injected into the State Grid, as per the Government Order issued under Section 11 of the Electricity Act, 2003, could not be considered for ascertaining the status of the Petitioner as 'Captive User/Captive Consumer.' The quantum of energy that would be supplied by the petitioner beyond 22 MW capacity would be under the compulsion of the Order passed under Section 11 of the Electricity Act, 2003, to supply to the maximum exportable capacity*".

6. The KERC also ordered that "*whether a person falls under the definition of "Captive User' or not, as understood in the Act, 1959, is to be decided as provided by the Authority as stated in the said Act, 1959, alone*". The KERC ordered that in case the Inspecting Officer under Section 6 of the Act gives an adverse finding, the Appellant has the option of preferring Appeals against the finding of the Inspecting Officer, as provided in Section 9 A of the Act.1959.

7. **PRESENT APPEAL:**

In the instant appeal under Section 9A of the Act, the Appellant has sought for the following reliefs:

Appellant's Case:

a. Issue directions to Respondent to adjust the Advolorem tax paid for the financial year 2011-12, paid during 2015 on 31.01.2015 amounting Rs. 93,43,548/- which was paid from the Appellant's end under protest. The amount pertains to Tax liability raised on account of the generation of electricity as per the orders of Government of Karnataka issued under Section 11 of the Electricity Act, 2003.

b. Direct the Respondent to withdraw Rs. 1,35,05,749/-, the demand of Electricity Tax for the financial year 2015-16, raised on account of the generation of Electricity by the Appellant as per the orders of the Government of Karnataka under Section 11 of the Electricity Act, 2003 and to allow 5% charges as required to be paid under Section 9A(2) of the

Karnataka Electricity (Taxation on Consumption or sale) Act, 1959 as charges required to be reimbursed by the Government under Section 11(2) of the Electricity Act, 2003.

c. The Order passed for the year 2012-13, 2013-14 and 2014-15 be squashed/set aside as the Appeal was filed with the Respondent No.1 for refund of Electricity Tax paid for the year 2011-12 & and to withdraw the demand for 2015-16 and To hold that impugned order as bad in law as it has been passed without the assessment by the jurisdictional authority and without giving opportunity of being heard.

8. The Appellant has submitted that the Appeal is filed against the order of the Chief Electrical Inspector issued vide Ltr.No:CEIG/Tax/LC3/23529-31/18-19 dt.11.9.2018 in Appeal No.1/2017, which was passed in his earlier Appeal against the order of the Deputy Electrical Inspector, Bellary claiming electricity tax for the 2011-2012 & for 2015-16.

9. The Appellant has submitted that the Respondent No.1, instead of dealing on the Appeal for the year 2011-12 & 2015-16, has also, in his order dt.11.9.2018, ruled that the Electricity tax is payable for the year 2012-13, 2013-14, 2014-15. Therefore, this appeal has been filed against the order of the Respondent No.1 by the Appellant.

10. The Appellant has submitted that the Order passed by the Respondent No.1 is bad in law and against the Government Order dt. 5.5.2008, whichconferred incentives and concessions as per New Industrial Policy (2006 to 2011), which bars the Respondent from levying electricity tax from a captive generator.

11. He did not wish to operate his plant during the period when there was a severe drop in the market for his product. The Appellant was directed to operate his plant at the maximum exportable capacity since the Govt invoked its power under Section 11 of the Electricity Act, 2003 and directed the Appellant to operate his plant since there was shortage of electricity in the State.

12. The "maximum exportable capacity" is not defined in the Electricity Act, 2003 and the Respondent No.1 has confused "exportable capacity" with the "maximum exportable capacity". As per the Government order invoking Section 11, Government directed the Appellant to operate at the "maximum" exportable capacity. The Respondent No.1 has quoted at Para 32(3) of the Order that as the draft CERC (Grant of Connectivity and General Network Access to the inter-state transmission system and other related matters) Regulations, 2017 has proposed the definition – defined as "Exportable capacity means the generation capacity available with captive generating plant for sale after accounting for the

consumption by its captive user." Thus electricity units generated, if exported to Government under Section 11, after accounting for consumption need not necessarily be after consuming 51% for captive purpose. Since there was severe drop in the market, self consumption of electricity was negligible. However, he was asked to produce maximum exportable capacity and therefore the finding of the Respondent No.1's Order charging electricity tax on the ground that he did not consume 51% for captive consumption is devoid of merit and without scrutiny.

13. On one hand, the Appellant was prevented from conducting his operation on the order of the Hon'ble Supreme Court in mining matters, and on the other hand, Section 11 was invoked by the Government of Karnataka during the period of 2011-12. And thus the slapping by the Respondent No.1 to pay the Electricity Tax for 2011-12, 2012-13 is bad in law and requires to be quashed.

14. The Appellant submitted for exemption from payment of electricity tax under G.O.NO: CI 112 SPI 2008 dated 5.5.2008 approving the New Industrial Policy 2006-2011, & G.O.No: DE 23 PPC 97 Bangalore dated 30th June 2007 where in "all new power projects of Independent Power Producers falling under New Industrial Policy 2006-2011 are entitled to tax concessions available under the Policy.

Respondent No.1's Case:

15. The case of the Respondent is that only after consuming the required 51% of the electricity for captive purpose, the balance electricity generated should have been supplied to the Grid.

16. The Respondent submits that the Appellant is claiming exemption from payment of Electricity Tax under the New Industrial Policy 2006-2011 and Industrial Policy 2009-2014. Under Industrial Policy 2006-2011, Electricity Tax is exempted on captive consumption and under Industrial Policy 2009-2014, the Electricity Tax is exempted for MSME industries. Since the Appellant has not satisfied Rule 3 of the Electricity Rule 2005, and 2(1A) of the Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959 the Appellant is liable to pay electricity tax applicable along with interest as per rules.

17. In view of the above reasons, the grounds urged by the Appellant were found untenable, and the appeal filed by the Appellant was rejected by the Respondent-1 and passed order vide No.1 of 2017, dated 10.09.2018 to pay the applicable electricity tax for the years 2011-2012, 2012-2013, 2013- 2014, 2014-2015 & 2015-2016, and issued directions to the collect the applicable electricity tax as per law for the year 2011-2012 to 2015-2016 with applicable interest.

Examination of the Evidence:

18. As per the definition of the "captive consumption" according to Section 2(1A) of the Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959 is as follows.-"2(1A) 'Captive consumption' means electricity consumed for own use to the extent of not less than fifty one per cent of the electricity generated by a Captive Generating Plant situated within the State of Karnataka determined on an annual basis, provided that in respect of an association the own consumption of members to the extent of fifty one per cent of the electricity generated shall be proportionate to their ownership share in the power plant, within a variation of ten per cent determined on an annual basis, but does not include:-

(a)The electricity consumed in any building used for housing the operating staff; and
(b) The auxiliary consumption; and
(c) Losses sustained in transformation and transmission."

19. The consumption of electricity tax is being governed by the Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959 and the rules the Karnataka Electricity (Taxation on Consumption or Sale) Rules 2014. Section 3 of the said Act reads as under:

> "*3 Levy of tax on (electricity charges etc.) – (1) Subject to the provisions of this Act, there shall be levied and paid to the State Government Electricity Tax on advalorem basis at six percent on the charges payable on electricity sold to or consumed by, any*

consumer (excluding arrears) when electricity is supplied by licensee or non- licensee through licensee or otherwise.

Provided that when the consumer consumes electricity at concessional rate or free of charge the consumer shall be liable to pay on the rate of charges of electricity levied by the licensees to other consumer.

20. Any captive generating plant, to claim the captive status, has to fulfil the requirements as stated in Rule 3 of the Electricity Rule, 2005, which reads as:-

> *Requirements of Captive Generating Plant.- (1) No power plant shall qualify as a 'Captive generating plant' under section 9 read with clause (8) of section 2 of the Act unless-*
> *(a) in case of a power plant-*
> *(i) not less than twenty six percent of the ownership is held by the captive user(s), and*
> *(ii) not less than fifty one percent of the aggregate electricity generated in such plant, determined on an annual basis, is consumed for the captive use; "*

21. The Government of Karnataka vide Order No: EN 2 PPC 2012Bangalore dated 27.01.2012 issued, Government Order which reads hereunder: "In the circumstances explained in the Preamble and in exercise of the power conferred under Section –11 of Electricity Act 2003, the State Government hereby issues the following direction in the public interest with effect from 1st Feb 2012 and will be in force till 31st May 2012 or until further order whichever is earlier. All the Generators in the State of Karnataka shall

operate and maintain their generating stations to maximum exportable Capacity and shall supply all exportable electricity generated to the state grid for utilization within the state subject to the conditions as per 11(2) that the adverse financial impact on the directions issued under Section 11 will be offset.

22. The ambiguity has arisen on account of the fact that while the Appellant felt he was obliged to operate the plant to the "maximum" exportable capacity as he was asked to supply this to the State Grid, the Respondent is claiming that it is only after consuming 51% for captivepurpose that he should have exported the surplus electricity to the Grid.

23. Evidently, there is ambiguity in the direction of the Respondent which did not specify that it is only after consuming the 51% electricity for captive purpose that he should supply "maximum exportable capacity" to the Grid, which led the Appellant to operate the plant incompliance of Government direction, for the purpose of generation of electricity, which according to him, he otherwise would not have. The Government, vide order No. EN 2 PPC 2012, dated: 27.01.2012 and EN 11 PPT 2015, dated: 16.09.2015 had imposed Section 11 of Electricity Act 2003 and directed all the Generators to operate and maintain their generating stations to "maximum" exportable capacity and to supply all exportable electricity

generated to the state grid for utilization within the State. It was for this reason that, the Appellant could not fulfil the captive status under Rule 3 of Electricity Rules 2005 and 2(1A) of the Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959 and supplied the generated Electricity to the state grid.

24. The KERC, in their order dated 30th March 2017 has clearly given a finding that, the quantum of energy generated beyond 22 MW capacity of the Petitioner's Generating Station and injected into the State Grid, as per the Government Order issued under Section 11 of the Electricity Act, 2003, could not be considered for ascertaining the status of the Petitioner as "Captive User/Captive Consumer". "The quantum of energy that would be supplied by the Petitioner beyond 22 MW capacity would be under the compulsion of the Order passed under Section 11 of the Electricity Act, 2003, to supply to the maximum exportable capacity". In light of this, I pass the following:

ORDER

The Appeal is partially allowed, in that, for the purpose of assessing the eligibility of captive consumption, the quantum of energy generated beyond 22 MW capacity and injected into the State Grid as per G.O. issued under Section 11 of the Electricity Act, should not be considered for ascertaining the status of the

Appellant as "Captive User" for the duration of the direction under Section 11. The Respondent is directed to revise the order and re-work the demand for Electricity tax in light of this observation.

(Mahendra Jain) 16/03/202

Additional Chief Secretary to Government,
Energy Department.