

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.17429 of 2014

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M/s NTPC LIMITED (A Government of India Enterprises), having its registered office at NTPC Bhawan, 'SCOPE' Complex, 7 Institutional Area, Lodhi Road, New Delhi-110003 and its one of the power plants is situated at Kahalgaon in the district of Bhagalpur (Bihar) through its Group General Manager Sri Prasant Kumar Mohapatra, S/o Late Krushna Chandra Mohapatra Resident of NTPC Premises, Kahalgaon, P.S. Kahalgaon and District Bhagalpur.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna.
3. The Deputy Commissioner of Commercial Taxes, In-charge, Bhagalpur Circle, Bhagalpur.
4. The Commercial Taxes Officer, Bhagalpur Circle, Bhagalpur.
5. The Bihar State Electricity Board, Presently known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna-1.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 17306 of 2014

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M/s NTPC LIMITED (A Government of India Enterprises), having its registered office at NTPC Bhawan, 'SCOPE' Complex, 7 Institutional Area, Lodhi Road, New Delhi-110003 and its one of the power plants is situated at Kahalgaon in the district of Bhagalpur (Bihar) through its Group General Manager Sri Prasant Kumar Mohapatra, S/o Late Krushna Chandra Mohapatra Resident of NTPC premises, Kahalgaon, P.S. Kahalgaon and District Bhagalpur.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna.
3. The Deputy Commissioner of Commercial Taxes, In-charge, Bhagalpur Circle, Bhagalpur.
4. The Commercial Taxes Officer, Bhagalpur Circle, Bhagalpur.
5. The Bihar State Electricity Board, Presently known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna-1.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 17353 of 2014

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M/s NTPC Ltd. (A Government of India Enterprises), having its registered office at NTPC Bhawan, 'SCOPE' Complex, 7 Institutional Area, Lodhi Road, New Delhi-



110003 and its one of the power plants is situated at kahalgaon in the District of Bhagalpur (Bihar) through its Group General Manager Sri Prasant Kumar Mohapatra S/o Late Krushna Chandra Mohapatra Resident of NTPC Premises, Kahalgaon, P.S. Kahalgaon and District Bhagalpur.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna.
3. The Deputy Commissioner of Commercial Taxes, In-charge, Bhagalpur Circle, Bhagalpur.
4. The Commercial Taxes Officer, Bhagalpur Circle, Bhagalpur.
5. The Bihar State Electricity Board, Presently known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna-1.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 17379 of 2014

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M/s NTPC Ltd. (A Government of India Enterprises), having its registered office at NTPC Bhawan, 'SCOPE' Complex, 7 Institutional Area, Lodhi Road, New Delhi-110003 and its one of the power plants is situated at kahalgaon in the District of Bhagalpur (Bihar) through its Group General Manager Sri Prasant Kumar Mohapatra S/o Late Krushna Chandra Mohapatra Resident of NTPC Premises, Kahalgaon, P.S. Kahalgaon and District Bhagalpur.

.... Petitioner/s

Versus

1. The State of Bihar
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna.
3. The Deputy Commissioner of Commercial Taxes, In-Charge, Bhagalpur Circle, Bhagalpur.
4. The Commercial Taxes Officer, Bhagalpur Circle, Bhagalpur.
5. The Bihar State Electricity Board, presently known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 17421 of 2014

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M/s NTPC LIMITED (A Government of India Enterprises), having its registered office at NTPC Bhawan, 'SCOPE' Complex, 7 Institutional Area, Lodhi Road, New Delhi-110003 and its one of the power plants is situated at Kahalgaon in the district of Bhagalpur (Bihar) through its Group General Manager Sri Prasant Kumar Mohapatra, S/o Late Krushna Chandra Mohapatra Resident of NTPC Premises, Kahalgaon, P.S. Kahalgaon and District Bhagalpur.

.... Petitioner/s

Versus



1. The State of Bihar.
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna.
3. The Deputy Commissioner of Commercial Taxes, In-charge, Bhagalpur Circle, Bhagalpur.
4. The Commercial Taxes Officer, Bhagalpur Circle, Bhagalpur.
5. The Bihar State Electricity Board, Presently known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna-1.

.... Respondent/s
with

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Civil Writ Jurisdiction Case No. 17428 of 2014

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M/s NTPC LIMITED (A Government of India Enterprises), having its registered office at NTPC Bhawan, 'SCOPE' Complex, 7 Institutional Area, Lodhi Road, New Delhi-110003 and its one of the power plants is situated at Kahalgaon in the district of Bhagalpur (Bihar) through its Group General Manager Sri Prasant Kumar Mohapatra, S/o Late Krushna Chandra Mohapatra Resident of NTPC Premises, Kahalgaon, P.S. Kahalgaon and District Bhagalpur.

.... Petitioner/s
Versus

1. The State of Bihar.
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna.
3. The Deputy Commissioner of Commercial Taxes, In-charge, Bhagalpur Circle, Bhagalpur.
4. The Commercial Taxes Officer, Bhagalpur Circle, Bhagalpur.
5. The Bihar State Electricity Board, Presently known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna-1.

.... Respondent/s
with

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Civil Writ Jurisdiction Case No. 17468 of 2014

=====

M/s NTPC Limited (A Government of India Enterprises), having its registered office at NTPC Bhawan, 'SCOPE' Complex, 7 Institutional Area, Lodhi Road, New Delhi- 110003 and its one of the power plants is situated at Kahalgaon in the district of Bhagalpur (Bihar) through its Group General Manager Sri Prasant Kumar Mohapatra son of Late Krushna Chandra Mahopatra, resident of NTPC Premises, Kahalgaon, P.S. Kahalgaon and District- Bhagalpur

.... Petitioner/s
Versus

1. The State of Bihar
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna
3. The Deputy Commissioner of Commercial Taxes, In-charge, Bhagalpur Circle, Bhagalpur
4. The Commercial Taxes Officer, Bhagalpur Circle, Bhagalpur



5. The Bihar State Electricity Board, presently known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna- 1

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 17113 of 2014

=====

KANTI BIJLEE UTPADAN NIGAM LTD., Muzaffarpur Thermal Power Station, Kanti, P.O. Kanti Thermal - 843130 District Muzaffarpur (Bihar) through its Chief Executive Officer Sri Tufani Ram son of Sri Ram Raj Ram resident of Kanti Bijlee Utpadan Nigam Ltd., Permises, Kanti, P.O. Kanti, P.S. Kanti Thermal - 843130, District - Muzaffarpur

.... Petitioner/s

Versus

1. The State of Bihar
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna
3. The Deputy Commissioner of Commercial Taxes, In - Charge, West Circle, Muzaffarpur
4. The Bihar State Electricity Board, Presently Known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna - 1

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 17119 of 2014

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KANTI BIJLEE UTPADAN NIGAM LTD., Muzaffarpur Thermal Power Station, Kanti, P.O. Kanti Thermal - 843130 District Muzaffarpur (Bihar) through its Chief Executive Officer Sri Tufani Ram Son of Sri Ram Raj Ram resident of Kanti Bijlee Utpadan Nigam Ltd., Permises, Kanti, P.O. Kanti, P.S. Kanti Thermal - 843130, District - Muzaffarpur

.... Petitioner/s

Versus

1. The State of Bihar
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna
3. The Deputy Commissioner of Commercial Taxes, In - Charge, West Circle, Muzaffarpur
4. The Bihar State Electricity Board, Presently Known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna - 1

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 17123 of 2014

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KANTI BIJLEE UTPADAN NIGAM LTD., Muzaffarpur Thermal Power Station,



Kanti, P.O. Kanti Thermal - 843130 District Muzaffarpur (Bihar) through its Chief Executive Officer Sri Tufani Ram son of Sri Ram Raj Ram resident of Kanti Bijlee Utpadan Nigam Ltd., Permises, Kanti, P.O. Kanti, P.S. Kanti Thermal - 843130, District - Muzaffarpur

.... Petitioner/s

Versus

1. The State of Bihar
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna
3. The Deputy Commissioner of Commercial Taxes, In - Charge, West Circle, Muzaffarpur
4. The Bihar State Electricity Board, Presently Known as Bihar State Power (Holding) Company Limited, Bailey Road, Patna - 1

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 9013 of 2015

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M/s NTPC Limited (A Government of India Enterprises) having its registered office at NTPC Bhawan, 'SCOPE' Complex, 7 Institutional Area, Lodhi Road, New Delhi - 110003 and its one of the power plants is situated at Kahalgaon in the district of Bhagalpur (Bihar) through its Group General Manager Sri Prasant Kumar Mohapatra son of Late Krusha Chandra Mohapatra, resident of NTPC Premises, Kahalgaon, P.S. Kahalgaon and District - Bhagalpur.

.... Petitioner/s

Versus

1. The State of Bihar.
2. The Principal Secretary cum Commissioner of Commercial Taxes, Bihar, New Secretariat, Patna.
3. The Deputy Commissioner of Commercial Taxes, In-charge, Bhagalpur Circle, Bhagalpur.
4. The Assistant Commissioner of Commercial Taxes, Bhagalpur Circle, Bhagalpur.
5. The Bihar State Electricity Board, presently known as Bihar State Power (Holding) Company Limited, North Bihar Power Distribution Company Limited and South Bihar Power Distribution Company Limited, Bailey Road, Patna - 1.

.... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. S.K.Bagaria, Sr. Advocate Mr. R.K.Agrawal, Advocate Mr. Ravi Bharuka, Advocate Mr. Shive Kumar, Advocate
For the State	:	Mr. Lalit Kishore (PAAG) Mr. Vikash Kumar, A.C. to PAAG Mr. S.K.Manal, SC-24



For BSEB : Mr. Vinay Kirti Singh, Advocate
Mr. Anand Kumar Ojha, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA
and
HONOURABLE MR. JUSTICE SUDHIR SINGH
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)
Date: 14.12.2016

Heard learned counsel for the petitioners in all the cases and learned counsels for the State and for the Bihar State Electricity Board (now the Bihar Power Holding Company Ltd.).

All the writ applications raise a common issue and they have accordingly been heard together and are being disposed of by this common order with the consent of learned counsels for the parties at the stage of admission itself.

The challenge in the writ applications is to the assessment orders of different dates and consequential demand notices passed and issued by the Commercial Tax Officer in the cases of both NTPC and Kanti Bijlee Utpadan Nigam.

By way of amendment of relief sought, challenge was also made to certain provisions of the Bihar Electricity Duty (Amendment) Rules, 2015 as ultra vires the provisions of Section 10 of the Bihar State Electricity Duty Act, 1948 and also for declaring as ultra vires Section 4A as amended by the Bihar Finance Act, 2007 and Rule 11 of the Bihar Electricity Duty Rules which has been amended in 2007. However, during the course of



hearing no arguments have been advanced pressing the said relief and the consideration of the writ applications are accordingly confined to the challenges made to the various assessment orders and demand notices and for declaration that the petitioners are not liable to penalty under the Bihar Electricity Duty Act, 1945 for sale of energy to the respondent-Bihar State Electricity Board.

The facts may be noted from CWJC No. 17429 of 2014 as the representative case with regard to the 11 writ applications. The petitioner-NTPC is generating energy and selling it to various Electricity Boards in the country including the respondent-Bihar State Electricity Board (BSEB) as per the power supply agreement dated 25.5.1993 and power purchase agreements dated 12.6.2003. Neither of the petitioners are selling energy to any consumer except to the respondent-BSEB inside the state and to the other State Electricity Boards outside. Earlier there was a dispute between the NTPC and the respondent-State with regard to the sale of electricity made outside the State which was challenged before this Court in CWJC No. 2483/1998 and the orders of the assessing authority was quashed by order dated 14.12.2010 and the matter was remanded back to the assessing authority to pass fresh order, whereupon the petitioners appeared before the Assistant Commissioner and filed statement on 17.3.2011 with regard to the



total energy sold and by his assessment order dated 4.4.2011 for the period 2008-09 duty was imposed on consumption of energy in the petitioner's colony and the office premises although the petitioners disclaim liability for that also but the same is not an issue in the present writ applications.

Thereafter a notice dated 15.3.2014 was issued and served for the said period, i.e., 2008-09 by the Commercial Taxes Officer, Bhagalpur on the ground that the Accountant General (Audit), Bihar has raised objection with regard to non-payment of electricity duty by the petitioners. The objection of the Accountant General was that in the annual return the assessee had not disclosed any sale of energy made to the Bihar State Electricity Board during 2005-06 to 2009-10 but as per the information available to audit, the BSEB had shown purchase of energy of 8451.60 MKWH from NTPC, Kahalgaon in their annual accounts during 2005-06 to 2009-10; thus it was evident that the assessee had concealed the sale of energy of the said amount for which duty was leviable as per the provisions of Sections 3 and 4 of the Bihar Electricity Duty Act, 1948 which also remained undetected by the assessing authority and therefore, the assessee is liable to pay the amount of duty on the concealed sale of energy besides minimum penalty leviable under the provisions of Section 6C (1) totaling to



Rs. 2,21,57,80,452/-.

The petitioners appeared before the Commercial Taxes Officer and filed their show causes disclaiming any liability to pay electricity duty on sale of energy to the BSEB. The Commercial Taxes Officer however, held that the petitioners were responsible for payment of duty under Sections 3 and 4 of the Act and liable to pay duty under Section 4A read with Rule 11 of the Rules and, therefore, had concealed the sale of energy to the respondent-BSEB; hence, in view of the objection of the Accountant General (Audit) Rs. 17,71,37,064/- was assessed as duty and penalty on the said amount for the year 2008-09.

Similarly, duty and penalty were imposed for other periods and on the other petitioner.

The assessment orders have been challenged before this Court on the ground that they have been passed by the Commercial Taxes Officer who is not the prescribed authority under the Bihar Electricity Duty Act and the Rules and therefore the orders passed by him are without jurisdiction.

A counter affidavit was filed by the State on the merits of the matter and several adjournments were taken. Ultimately, the State through its second supplementary counter affidavit filed in the connected CWJC No. 17306/2014 came out



with a copy of notification bearing No. 72 dated 15.5.2015 by which various provisions of Bihar Electricity Duty Rules were amended through the powers conferred by Section 10 of the Bihar Electricity (Amendment) Rules, 2015 under the said notification including the definition of Inspecting Officer and in the procedural Rules relating to assessment in which the Commercial Taxes Officer was also included. The amendments were to come into force with effect from 23.6.2005 so as to cover the entire periods for which assessment has been made by the Commercial Taxes Officer, Bhagalpur. Although the amendments have been formally challenged, but the matter has been argued essentially on the merits of the cases with regard to the very liability of the petitioners to be assessed under the existing provisions of the Bihar Electricity Duty Act.

Learned counsel for the petitioners submits that under Section 3(1) of the Act read with the definition of 'consumer', 'licensee' and 'value of energy' as contained in Sections 2(b), (d) and (ee) of the Act, the petitioners do not at all come within the purview of the charging provisions and thus no liability of paying any electricity duty for the supply made by the petitioners to the BSEB can arise. The said provisions are quoted below :



“2(b) ‘Consumer’ means any person who is supplied with energy, but does not include either a Licensee or the ‘distributing Licensee’ as described in clause 1(a) of clause IX of the Schedule to the Indian Electricity Act, 1910 (9 of 1910) or a person who obtained sanction under Section 28 of the said Act;

(d) ‘licensee’ means any person, including a company or a local authority licensed under Part II of the Indian Electricity Act, 1910 (IX of 1910) to supply energy, or any persons including a company or a local authority who has obtained sanction under Section 28 of the Act to engage in the business of supplying energy and includes the Bihar Electricity Board constituted under Section 5 of the Electricity (supply) Act, 1948 (54 of 1948).

(ee) ‘value of energy’-

(i) in case of energy sold to a consumer by a licensee or by any person who generates energy, means the charges payable by the consumer, to the licensee or to any person who generates such energy, for the energy supplied by such licensee or person, as the case may be, but it shall not include the following charges, namely-

- (1) Meter charges
- (2) Interest on delayed payment
- (3) Fuse-off call charges and reconnection



charges:

Provided that where no energy has been consumed by a consumer, minimum charges payable by him shall not deemed to be the value of energy:

Provided further that where the units of energy actually consumed by a consumer are less than the units of energy for which prescribed minimum charges are payable, the value of energy shall, in the case of such consumer, mean the charges for the units of energy actually consumed by him and not the prescribed minimum charges:

(ii) in case of energy consumed by the person generating such energy, means the charges payable by any other consumer for such quantum of power to the Bihar State Electricity Board constituted under section 5 of the Electricity (Supply) Act, 1948 (Act 54 of 1948) in respect of energy supplied by the Bihar State Electricity Board within the area where the consumer is located;”

3. Charge of Tax.- (1) There shall be levy and collected tax on entry of scheduled goods into a local area for consumption, use or sale therein at such rate not exceeding 5 per centum of the import value of such goods as may be specified by the State Government in a notification published in a official gazette subject to such conditions as may be prescribed:

Provided different rates for different scheduled goods and different local areas may be specified by



the State Government.

(2) The tax leviable under this Act shall be paid by every dealer liable to pay tax under Bihar Finance Act, 1981 or any other person who brings or own account or on account of his principal or takes delivery or is entitled to take delivery of such goods on such entry:

Provided no tax shall be leviable in respect of entry of scheduled goods effected by a person other than the dealer if, the value of such goods does not exceed 25 thousands in a year.

(3) Notwithstanding anything contained in sub-section (1) and (2) of this section and subject to the provisions of this Act there shall be levied and collected a tax on the entry of any motor vehicle into any local area for use or sale therein which is liable for registration in the State under the Motor Vehicles Act, 1988. The rate of tax shall be at such rate or rates as may be specified by the State Government by a notification published in the official gazette on the purchase/import value of motor vehicle but not exceeding the rate prescribed for sale, tax for such motor vehicles under the Bihar Finance Act, 1981:

Provided that no tax shall be levied and collected in respect of any motor vehicle which was registered in any other State or Union Territory under the Motor Vehicles Act, 1988 for a period of fifteen months or before the date on which it is registered



in the State under this Act.”

It is pointed out that the insertion of the fresh definition of “value of energy” under clause (ee) of Section 2 was made with prospective effect 17.10.2002 on account of the provisions of Section 3(1) having been struck down on the ground that there was no guideline provided under the statute with regard to the payment of duty on the value of energy as to in which case the duty will be paid on the basis of the value of energy consumed or sold and for the same reasons the notification dated 21.10.2002 providing for payment of duty at 6% of the value of energy and the subsequent notification dated 4.3.2005 were also struck down in the following terms in paras 19 and 20 of the judgment in the case of Bihar Sugar Mills Association & Ors. Vs. The State of Bihar & Ors.: 2009 (4) PLJR 460:-

“19. In view of the above discussion, the amendment of Section 3(1), so far as it provides for payment of duty “on the value of energy”, is liable to be struck down as there is no guideline provided in the statute as to in which case the duty will be payable calculated on the basis of the value of energy consumed or sold. Similarly, the notification dated 21.10.2002 providing for payment of duty at 6 per centum of the value of energy is liable to be quashed as there is no



guideline provided for ascertaining the value of energy. The subsequent notification-S.O. No. 14 dated 4.3.2005 is also liable to be struck down on the selfsame ground. Since the amendment and the notifications are found to be inoperative, it is obvious that the duty will be payable as per the schedule which was in vogue by virtue of the Bihar Electricity Duty (Amendment) Act, 1993.”

20. All the writ petitions are allowed to the extent indicated above. Fresh assessments are required to be made in accordance with the conclusions made in the present judgment. If any excess amount has been paid, such amount may be adjusted against the future bills.”

It is stated that on account of the Section 3(1) having been struck down, the new definition clause with regard to the ‘Value of Energy’ has been introduced. However, it is submitted by learned counsel that it is evident from the said definition clause read with the provisions of the charging Section 3(1) of the Act and the definition of consumer and licensee that the petitioners are in no way liable to payment of any electricity duty, as they do not come within purview of the Act. It is urged that under Section 3 of the Act the electricity duty is levied and paid to the State Government at 6% either on the units or the value of energy consumed or sold at the rate or rates to be specified by the



State Government by notification. It is pointed out that the notification dated 21.10.2002 provided for rate of electricity duty at 6 per centum of the value of energy consumed or sold for any purpose other than irrigation. Since this Court had held that there was no guideline with regard to the meaning of the term 'value of energy' and it struck down, the provisions of Section 3 as also the notification dated 21.10.2002 on that ground, therefore, the new definition clause with regard to the 'value of energy' was instituted in the Act. It is thus, submitted that the leviability of the duty in the present matter would depend on the issue as to whether the electricity sold by the petitioners to the BSEB would come within the purview of the newly introduced definition of 'value of energy'. The said newly introduced definition contained in Section 2(ee) provides for two types of case, the first is in the case of energy sold to a consumer by the licensee or by any person who generates energy. It is submitted that the petitioners neither sell energy to a consumer nor are they licensee rather the petitioners including NTPC and Kanti Bijli Utpadan Nigam are both generators of energy.

It is submitted that the BSEB does not come within the definition of 'consumer'; rather the definition of consumer clearly excludes either licensee or distributing licensee



which the Board is, and has been expressly included in the definition of 'licensee' under Section 2(d) of the Act. Thus on the same line of reasoning as adopted by this Court in the case of Bihar Sugar Mills Association (supra) the charging Section cannot be applied to the petitioners and thus the charge would fail and no assessment could have been made in the case of the petitioners.

So far as the other category in the definition of value of energy is concerned, the same is not involved in the present writ applications which relate only to the supply of electricity by the petitioners to the BSEB.

It is thus submitted by learned counsel for the petitioners that in view of the settled position with respect to strict interpretation of a taxing statute and further that it must be shown that the case falls within the ambit of the charging provision by clear words used in the section, which is to be construed strictly and if the revenue is unable to bring the case within the ambit of the charging section in clear words, it cannot be taxed at all.

It is submitted that in view of the strict interpretation of the provisions of a taxing statute, it is evident that the petitioners fall outside the ambit of the applicable amended charging section and therefore no liability of tax can be imposed upon them and the assessment orders are clearly without any



authority of law.

In support of the same, learned counsel relies upon a decision of the Supreme Court in the case of Hansraj & Sons Vs. State of Jammu & Kashmir & Ors.: (2002) 6 SCC 227, in paras 22 to 25 of which it has been held as follows:-

“22. A constitution Bench of this Court in the case of A.V.Fernandez V. State of Kerala: AIR 1957 SC 657: 1957 SCR 837 observed: (AIR p. 661, para 29).

“29. It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come to the conclusion that the appellant was liable to assessment as contended by the Sales Tax Authorities.”



In that case this Court noted with approval, the following observations of Lord Russel of Killowen in IRC V. Duke of Westminster: 1936 AC 1: 1935 All ER Rep. 259: 104 LJ KB 383(HL), AC at p. 24: (AIR p. 661 para 27).

“I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a court’s view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case.”

The observations of Lord Russel in the aforementioned case were also referred by the Privy Council in Bank of Chettinad Ltd. vs. CIT: AIR 1940 PC 183: (1940) 8 ITR 522. The Privy Council did not accept the suggestion that in revenue cases “the substance of the matter” may be regarded as distinguished from the strict legal position.

23. A similar view was taken in CWT V. Ellis Bridge Gymkhana: (1998) 1 SCC 384 in which it was observed:

“5. The rule of construction of a charging section is that before taxing any person, it must be shown that he falls within the ambit of the charging section by clear words used in the section. No one



can be taxed by implication. A charging section has to be construed strictly. If a person has not been brought within the ambit of the charging section by clear words, he cannot be taxed at all.”

24. Again in the case of *Diwan Bros. V. Central Bank of India*: (1976) 3 SCC 800, a three-Judge Bench of this Court, construing the principles of interpretation of fiscal statutes, quoted with approval, the observations in *A.V.Fernandez Vs. State of Kerala* (supra) and in *State of Maharashtra V. Mishrilal Tarachand Lodha*: AIR 1964 SC 457 (1964) 5 SCR 230 in which it was observed: (AIR p. 459, para 9)

“The Act is a taxing statute and its provisions therefore have to be construed strictly, in favour of the subject litigant.”

25. Following the ratio in the aforementioned decisions it was observed: (SCC p. 807, para 7)

“7. These observations manifestly show that the courts have to interpret the provisions of a fiscal statute strictly so as to give benefit of doubt to the litigant. The principles deducible from the decision referred to above are well established and admit of no doubt.”

It is also submitted by learned counsel that the three ingredients of a taxing statute are the subject of tax, the person liable to pay the tax and the rate of tax which is to be paid and in the absence of any one of the ingredients, there can be no



levy of the tax. In support of the said proposition, learned counsel relies upon a decision of a Constitution Bench of the Supreme Court in the case of Mathuram Agrawal Vs. State of Madhya Pradesh: (1999) 8 SCC 667, in the relevant part of para-12 of which it was held as follows:-

“..... The intention of the legislature in a taxation statute is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. In a taxing Act it is not possible to assume any intention or governing purpose of the statute more than what is stated in the plain language. It is not the economic results sought to be obtained by making the provision which is relevant in interpreting a fiscal statute. Equally impermissible is an interpretation which does not follow from the plain, unambiguous language of the statute. Words cannot be added to or substituted so as to give a meaning to the statute which will serve the spirit and intention of the legislature. The statute should clearly and unambiguously convey the three components of the tax law i.e. the subject of the tax, the person who is liable to pay the tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute then there is no tax in law. Then it is for the legislature to do the needful in the matter.”



Learned counsel also submits that it is the charging section and the computation provisions which together constitute an integrated code in most taxing statutes and in a case where computation provision may not apply then it has to be held that such case was not within the charging section. It is submitted that the same is true of Section 3(1) (b) in which charging section the definition of 'value of energy' being the computation provision and since the petitioners do not come within the purview of the computation provision, which does not apply to the case of the petitioners, the charging section must fail. In support of the same, learned counsel relies upon a decision of the Supreme Court in the case of CIT, Bangalore & Ors. Vs. B.C. Srinivasa Setty & Ors.: (1981) 2 SCC 460, in para-10 of which it has been held as follows:-

“10. Section 45 charges the profits or gains arising from the transfer of a capital asset to income tax. The asset must be one which falls within the contemplation of the section. It must be that quality which brings Section 45 into play. To determine whether the goodwill of new business is such an asset, it is permissible, as we shall presently show, to refer to certain other section of the head, “Capital gains”. Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted



detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All transactions encompassed by section 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by Section 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the Income tax Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to



run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head.”

Learned counsel’s further contention is based on reliance upon the constitutional provisions and the interpretation drawn by the Apex Court in the petitioners’ own case in State of Uttar Pradesh Vs. NTPC: (2002) 5 SCC 203. It is submitted that in the said case it was held that electricity being goods, it is covered both by Entry Nos. 53 and 54 of list II of Schedule VII to the Constitution of India which provides taxes on the consumption or sale or purchase of goods including electricity other than newspaper subject to the provisions of entry 92-A of List I. It is submitted that it was pointed out by the Apex Court that the consumption of electricity is simultaneous to the supply



and the word 'supply' should therefore be interpreted as including sale or consumption of electricity and Entry 53 should be read as "taxes on the consumption or sale for consumption of electricity".

It is thus submitted by learned counsel that the same characteristics should be considered under Entry 53 or Entry 54 of list II and therefore the meaning of 'sale' in both the Sections would be same and the tax leviable whether under Entry 53 or 54 can only be on the consumption or sale for consumption of electricity. Since admittedly the petitioners did not sell the energy to the BSEB for its consumption, hence the very levy of sales tax on such a transaction would be outside the constitutional purview and hence the charging Section 3(1) of the Act even irrespective of the definition of the value of energy will have to be read in the similar manner and the words used therein for levy and payment of duty on energy is for consumption or sale for consumption and thus there can be no levy of electricity duty on a sale made by the petitioners to the BSEB. Paras 20,21, 22 and 23 of the said judgment are quoted below:-

Electricity, what it is

20. Before we deal with the constitutional aspects let us first state what electricity is, as understood in law, and what are its relevant characteristics. It is settled with the pronouncement of this Court



in Commissioner of Sales Tax, Madhya Pradesh, Indore v. Madhya Pradesh Electricity Board, Jabalpur - [1969]2SCR939 that electricity is goods. The definition of goods as given in Article 366(12) of the Constitution was considered by this Court and it was held that the definition in terms is very wide according to which "goods" means all kinds of moveable property. The term "moveable property" when considered with reference to "goods" as defined for the purpose of sales-tax cannot be taken in a narrow sense and merely because electrical energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be moveable property when it has all the attributes of such property. It is capable of abstraction, consumption and use which if done dishonestly is punishable under Section 39 of the Indian Electricity Act, 1910. If there can be sale and purchase of electrical energy like any other moveable object, this Court held that there was no difficulty in holding that electric energy was intended to be covered by the definition of "goods". However, A.N. Grover, J. speaking for three-Judge Bench of this Court went on to observed that electric energy "can be transmitted, transferred, delivered, stored, possessed etc. in the same way as any other moveable property". In this observation we agree



with Grover, J. on all other characteristics of electric energy except that it can be 'stored' and to the extent that electric energy can be 'stored', the observation must be held to be erroneous or by oversight. The science and technology till this day have not been able to evolve any methodology by which electric energy can be preserved or stored.

21. Another significant characteristic of electric energy is that its generation or production coincides almost instantaneously with its consumption. To quote from Aiyar's Law Lexicon (Second Edition, 2000) –

'Electricity in physics is "the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves." Its true nature is not understood. Imperial Dict. (quoted in Spensley v. Lancashire Ins. Co., 54 Wis. 433, 442, 11 NW 894, where the court, quoting from the same authority, said, "We are totally ignorant of the nature of this cause whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of



motion from one body to another.”

This characteristic quality of electric energy was judicially noticed in Indian Aluminium Co. etc.etc. v. State of Kerala and Ors. [1996]2SCR23. Vide para 25 this Court has noted.

"Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases (i.e. sale, supply and consumption) take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical higher-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place." "as soon 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."



These properties of electricity as goods are of immense relevance as we would state hereafter.

List II, Entries 53 and 54, how to be read:

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* AIR1963SC906 . 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 fortiori 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. 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 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 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."

Learned counsel for the State, on the other hand, submits that as per the Rule 2(b) of the Bihar Electricity



Duty Rules, 1949 the petitioners are admittedly assesseees as has been defined thereunder to mean licensees or any other person who is liable to pay duty under the Act. It is further submitted that it is not in dispute that the petitioners are sellers at first point to the BSEB. Thus it is urged on the basis of Section 4A of the Act that the duty is to be levied at each point in a series of sales of energy in the State of Bihar and duty paid would be adjusted against the amount due and payable at each subsequent stage of sale. It is therefore, submitted that since the petitioner has made a sale at the first point, therefore duty would be leviable at the said point.

It is further submitted that under the Rules the levy of duty and imposition of penalty is required and since the Accountant General had rightly pointed out the concealment of turnover by the petitioners, therefore action under Section 6(c) (i) is also warranted. It is urged that Section 4A of the Act has been introduced for the purpose that the State is able to generate revenue on the entire amount of electricity that is sold, as the ultimate sale by the BSEB to its consumer after transmission and distribution loss to the tune of 52% would reduce the levy only to the consumption amount of energy; hence the provisions of Section 4A of the Electricity Duty Act levying duty at each point of series of sales of energy and the duty paid would be adjusted



from duty paid at the preceding stage from the sale made at the subsequent stage.

In view of the aforesaid, it is submitted that rightly assessment and levy of penalty has been made upon the petitioners.

With regard to the newly amended provisions of Section 2(ee) regarding the valuation of energy, it is submitted that it should be interpreted as sale by licensee to the consumer and sale by any person who generates energy. According to learned counsel the word “or” used in the said provision has to be read as “and” so as to keep it in accord with other provisions of the Act and so interpreted, the liability of the petitioners for payment of duty is certainly there. Learned counsel also submits that the decision of the Apex Court in NTPC’s case (supra) is not at all relevant as the same was a case of inter-State sale.

We have considered the submissions of learned counsels for the parties. It is difficult to accept the submission of learned counsel for the State that the decision of the Apex Court in NTPC’s case (supra) is not relevant in the present matter as that was a case of inter-State sale. In our view the constitutional propositions discussed in the said case based upon a long line of earlier decisions of the Apex Court, are something which cannot



be ignored merely because it was a case of inter-State sale, while the fact of the matter remains that the Apex Court has interpreted Entry 53 to be read as taxation on the consumption or sale for consumption of electricity. That being the position whether the tax levied is under Entry 53 of List II as a tax on consumption or sale for consumption of electricity, or under Entry 54 of List II as taxes on sale or purchase of goods, it will make no difference since the goods which are to be taxed, that is, 'electricity' remains the same under both the circumstances and the levy can only be on the consumption or sale for consumption of electricity in terms of what has been laid down by the Apex Court in the NTPC's case (supra). The distinction between the two entries in respect of electricity has been clarified in para 23 of the said judgment where it has been said that if the State Legislature chooses to impose tax on consumption of electricity it will not be possible to do so under Entry 54, because it does not provide for taxes on consumption whereas Entry 53 permits the same.

Thus, the charging Section 3(1) of the Act when it speaks of levy of duty on either units or on the value of energy consumed or sold, has to be similarly read as the Constitutional Entry 53 providing the power to the State Legislature, to levy electricity duty either on the unit or on the



value of energy consumed or sold for consumption. In the said circumstances, any sale of electricity which is not a sale for consumption would be beyond the purview of the State Legislature to enact and thus the charging Section 3(1) of the Act has to be read in the said light as levy of electricity duty for consumption or sale for consumption of electricity. Reliance in this regard by learned counsel for the State upon the provisions of Section 4A for levy of duty at each stage of sales would again not be of any assistance in view of the fact that interpretation has to be given to the charging section itself, in terms of what has been decided by the Apex Court in the NTPC's case (*supra*); if the charging section does not permit a transaction to be taxed, no benefit can be derived from any other provision of the Act to levy tax upon the same, as has been held in the catena of decisions of the Supreme Court cited above.

We are also in agreement with the submission of learned counsel for the petitioners on the basis of the provisions of Section 3(1) read with Section 2(b),(d) and (ee) of the Act. It is evident from the definition of value of energy in Section 2(ee) which is the computation provision brought in by amendment, after the earlier provisions and notifications had been struck down by the Court as providing no guidelines, that it provides for only



two type of cases under sub-clause (i) that is, firstly, energy sold to a consumer by a licensee and, secondly, energy sold to a consumer by a person who generates energy. Since we are not concerned with the 2nd type of case mentioned in sub-clause (ii) with regard to the person generating energy consuming the same, the only circumstance under which a generation company like the petitioners or any other person who generates energy would be liable for payment of electricity duty would be when it sells the energy to the consumer itself. The petitioners are evidently not a licensee in the matters in hand, they are certainly not selling energy to the consumer; rather they are selling it to the BSEB, which is a licensee under Section 2(d) and which in turn sells the energy for ultimate consumption.

The submission in this regard of learned counsel for the State does serious violence to the provisions of the Act as it stands by submitting that the word 'or' in Section 2(ee) should be read as 'and' since even the second part of sub-clause (i) provides for the charges payable by the consumer either to the licensee or to the person who generates such energy. Thus in no case where the generator of energy does not directly receive payment of charges from the consumer, it can be covered within the purview of Section 2(ee) (i) of the Act. In this regard one



should also bear in mind that the provision of a taxing statute should be strictly construed, and the benefit of any ambiguity must go to the assessee.

Therefore, even on the ground of the applicability of the charging provision it has to be held that the charging provision under Section 3(1) read with the definition of ‘consumer’, ‘licensee’ and ‘value of energy’ as provided in the Act cannot be used to levy any tax on a generating company supplying energy to a licensee like the Electricity Board as in the present matter, as no tax can be computed in their cases.

In the light of the aforesaid discussions, all the writ applications are allowed and the assessment orders and demand notices are quashed.

(Ramesh Kumar Datta, J)

S.Pandey/-

I agree.

(Sudhir Singh, J)

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