IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

WP Nos. 6095 of 2004 and batch

Between:
Rane Engineering Valves Ltd,
Rep by its Vice President
Ranga Reddy district .....Petitioner

and

State of Andhra Pradesh
Rep by its Principal Secretary,
Hyderabad and others .....Respondents

DATE OF JUDGMENT PRONOUNCED: 19.05.2016

SUBMITTED FOR APPROVAL:

HON'BLE THE ACTING CHIEF JUSTICE DILIP B.BHOSALE

AND

HON'BLE SRI JUSTICE P.NAVEEN RAO

1	Whether Reporters of Local newspapers may be allowed to see the Judgments?	Yes/No
2	Whether the copies of judgment may be marked to Law Reports/Journals	Yes/No
3	Whether His Lordship wish to see the fair copy of the Judgment?	Yes/No

*** HON'BLE THE ACTING CHIEF JUSTICE DILIP B.BHOSALE**
AND
HON'BLE SRI JUSTICE P.NAVEEN RAO
+ WP Nos. 6095 of 2004 and batch

% Dated :19.5.2016

Rane Engineering Valves Ltd,
Rep by its Vice President
Ranga Reddy district petitioner

AND

$ State of Andhra Pradesh
Rep by its Principal Secretary,
Hyderabad and others respondents

! Counsel for Appellant : Mr. E Manohar, Senior counsel
for Mr Challa Gunaranjan.
Sri K Gopal Chowdary
Sri Vedula Srinivas

^Counsel for Respondents : The Advocate General (AP)
The Addl Advocate General (TS)

<GIST :

>HEAD NOTE :

? Cases referred :
(1985) SUPPLEMENT SCC 205
1993 (49) DLT 83 (DB)
2016(2) Supreme 103
(2004) 2 SCC 249
AIR 1953 SC 375(1)
[Privy Council – (1939) AC 117]
AIR 1959 SC 1124
(2002) 5 SCC 203
(2004) 10 SCC 201
AIR 1963 SC 414
2010 SCC Online Ori 96 : (2011) 111 CLT 16
AIR 1962 SC 1562
(1996) 3 SCC 15
AIR 1964 SC 1284
(1991) 2 SCC 154
(1996)4 SCC 596
(2000) 5 SCC 488

AIR 1960 SC 1080(1)
1980 (4) SCC 697
AIR 1955 SC 540

HON'BLE THE ACTING CHIEF JUSTICE DILIP B.BHOSALE
AND
HON'BLE SRI JUSTICE P.NAVEEN RAO

Writ Petition Nos. 6095, 5358, 5916, 5917, 5927, 6083, 6220, 6340, 6544, 6545, 6769, 6786, 6789, 6792, 6797, 6810, 6991, 7027, 7037, 7049, 7143, 7144, 7145, 7198, 7230, 7256, 7276, 7340, 7358, 7364, 7374, 7448, 7467, 7475, 7551, 7552, 7798, 7829, 7835, 7836, 7856, 7901, 7916, 8031, 8038, 8102, 8215, 8285, 8300, 8479, 8562, 8659, 9626, 9639, 10283, 10398, 12072, 12429, 12544, 14570, 17805, 18575, 19038, 20342, 21444, 21612, 21950, 23018 **of 2004,** 2415, 4268, 5186, 6090, 7668, 8090, 8226, 10762, 22599 **of 2005,** 16934, 17068, 17069, 17637, 17643, 17859, 18036, 18254, 18517, 18518, 18519, 19304, 20138, 24349, 24350, 24364 **of 2006,** 6634, 7979, 9411, 9446, 13540, 15786, 18247, 18598, 19629, 19891, 21332, 21333, 21334 **of 2007,** 8100, 8101, 10268, 14798 **of 2008,** 3539, 6980, 9262, 11557, 13154, 13576, 13844, 25316, 15235, 15250, 19285, 19846, 20480, 20536 **of 2009,** 1782, 13728, 13729, 18577, 19560, 21734, 23897, 28810, 28981, 29717 **of 2010,** 520, 1950, 7561, 18953, 20181, 25920, 27845, 28063, 28867, 28875 **of 2011,** 13002, 16645, 18090, 18241, 22182, 22187, 22189, 24651, 25990 **of 2012,** 6466, 6471, 7733, 9072, 9797, 15771, 18164 and 28910 **of 2013**

Date:19-05- 2016

WP 6095 of 2004
Between:
Rane Engineering Valves Ltd,

Rep by its Vice President
Ranga Reddy district

…..Appellant/
Petitioner

And

State of Andhra Pradesh
Rep by its Principal Secretary,
Hyderabad and others

…..Respondents

The Court made the following:

HON'BLE THE ACTING CHIEF JUSTICE DILIP B. BHOSALE
AND
HON'BLE SRI JUSTICE P. NAVEEN RAO

Writ Petition Nos. 6095, 5358, 5916, 5917, 5927, 6083, 6220, 6340, 6544, 6545, 6769, 6786, 6789, 6792, 6797, 6810, 6991, 7027, 7037, 7049, 7143, 7144, 7145, 7198, 7230, 7256, 7276, 7340, 7358, 7364, 7374, 7448, 7467, 7475, 7551, 7552, 7798, 7829, 7835, 7836, 7856, 7901, 7916, 8031, 8038, 8102, 8215, 8285, 8300, 8479, 8562, 8659, 9626, 9639, 10283, 10398, 12072, 12429, 12544, 14570, 17805, 18575, 19038, 20342, 21444, 21612, 21950, 23018 **of 2004,** 2415, 4268, 5186, 6090, 7668, 8090, 8226, 10762, 22599 **of 2005,** 16934, 17068, 17069, 17637, 17643, 17859, 18036, 18254, 18517, 18518, 18519, 19304, 20138, 24349, 24350, 24364 **of 2006,** 6634, 7979, 9411, 9446, 13540, 15786, 18247, 18598, 19629, 19891, 21332, 21333, 21334 **of 2007,** 8100, 8101, 10268, 14798 **of 2008,** 3539, 6980, 9262, 11557, 13154, 13576, 13844, 25316, 15235, 15250, 19285, 19846, 20480, 20536 **of 2009,** 1782, 13728, 13729, 18577, 19560, 21734, 23897, 28810, 28981, 29717 **of 2010,** 520, 1950, 7561, 18953, 20181, 25920, 27845, 28063, 28867, 28875 **of 2011,** 13002, 16645, 18090, 18241, 22182, 22187, 22189, 24651, 25990 **of 2012,** 6466, 6471, 7733, 9072, 9797, 15771, 18164 and 28910 **of 2013**

COMMON ORDER: (Per Hon'ble Sri Justice P Naveen Rao)

In all the writ petitions disposed of by this common order, petitioners own captive power generating plants. Petitioners challenge constitutional validity of Section 3-B of Andhra Pradesh Electricity Duty Act, 1939 (for short Act, 1939) as introduced vide amendment Act No. 14 of 2003. This provision vests power in the Government to impose duty at the rate of 0.25 paise per unit on consumption of electric energy by captive generating units.

2. All the petitioners are involved in industrial activity such as manufacture/production/storage etc., of various products that require high volume of uninterrupted electricity energy. They are enrolled as consumers with State Public Sector power Utilities (for short, Power Utilities). The Power Utilities classify consumers as Low Tension (LT) and High Tension (HT) consumers depending on the volume of electricity supplied. Petitioners are HT consumers. For the sake of convenience, the facts as narrated in W.P.No.6769 of 2004 are taken.

3. Petitioner is a company incorporated under the Companies Act and is engaged in manufacture of synthetic yarn at its factories at Sadshivpet, Medak District (forming part of State of Telangana) and Doddavarapadu in Ongole district (forming part of residuary State of Andhra Pradesh). On account of acute shortage of electricity energy, the power utilities resorted to imposing cut in power supply and such power cuts were more severe on industries. Certain time slots were earmarked in a day for enforcing power cuts. In addition to the fixed time schedule for power cuts, State power utilities also resorted to unscheduled power cuts. There were power holidays. The power cuts were more acute during summer months. Due to severe power cuts, the economic viability and competitiveness of the petitioner company was seriously affected. The petitioner had no option, but to look out for alternative source of electricity to run its units and make them economically viable.

4. By resolution dated 06.11.1996, Central Government laid down policy for establishment of co-generation power plants to improve energy efficiency in industries to optimum level and more beneficial utilization of fuel resources. In the meeting held on 16.10.1996 followed by another meeting on 03.12.1996, the Chief Ministers of all States adopted a Common Minimum Action Plan on power generation with specific reference to reducing the gap between the demand and supply in electric power and urgent necessity to reform and restructure the State Electricity Boards; and to encourage private sector participation in generation, transmission and distribution. The Central Government also urged the State Governments to evolve captive generation

policy. The composite State of Andhra Pradesh also formulated policy to encourage industries to generate power for captive use.

5. In pursuant to the policy initiatives of the State and Central Governments, petitioner company installed four generating plants, which include two diesel generating plants within the premises of respective manufacturing units; Wind power project in Ramagiri, Ananthapuram, and Gas based power project at Y.Kothapalli of East Godavari District.

6. On account of incorporation of Section 3-B in A.P. Electricity Duty Act, 1939, impugned herein, for the first time electricity energy consumed by captive power generating unit for its own purpose is also subjected to levy of duty at the rate of 0.25 paise per unit. As a consequence to the amendment of Act, 1939, and introduction of Section 3-B impugned herein, the State Government amended the A.P. Electricity Duty Rules, 1939, defining 'captive consumption' and introduced the provision for recovery of the amounts due from the power generating units by the District Collectors as arrears of land revenue. In the above backdrop, petitioner sought for the following relief:

> "To issue an appropriate writ, order or direction more particularly one in the nature of a mandamus or declaration a) declaring section 3B of the Andhra Pradesh Electricity Duty Act 1939, as ultra vires of the constitution colourable legislation beyond the legislative competence of the state, discriminatory, violaltive of fundamental rights, illegal and unconstitutional and to strike down the same; and b). declaring the notification of the Government of Andhra Pradesh in G.O. Ms.No. 117, Energy (RES) dated 13-10-2003 as ultra vires of the constitution and the Andhra Pradesh Electricity Duty Act 1939, colourable exercise of power discriminatory, illegal and unconstitutional and to strike down the same ; and c) declaring Rule 2 (h) (i) of the Andhra Pradesh Electricity Duty Rules 1939, as colourable delegated legislation, irrational, illegal and unconstitutional and to strike down the same and d) declaring Rule 4B of the Andhra Pradesh Electricity Duty Rules 1939 as ultra vires of the A.P. Electricity Duty Act 1939 colourable exercise of power , illegal and unconstitutional e) and /or pass such further or other orders as this honourable Court may deem fit and proper so that justice may be done."

Similar prayers are sought in all the writ petitions.

7. Similarly, all the petitioners have also established captive generating units to augment electricity supply. Some of the petitioners consume entire electricity generated by the units established by them for personal use and some of them, in addition to personal use also sell to other consumers. All the petitioners have sought similar relief as sought by petitioner in

W.P.No.6769 of 2004, extracted above.

8. Before delineating the respective submissions of learned counsel, it is necessary to clear two aspects:

i) Though Section 3-B(1) vests power in the State to levy duty on electricity consumed for its own purpose by the Captive Generating unit, Section 3-A and Section 3B(3) of the Act, 1939 enables the Government to exempt any such unit permanently or for a specified period from levying of duty. In exercise of said power, G.O.Ms.No.25 dt.23.5.2013 was issued granting exemption from levying of duty on electricity consumed by captive generating units if they consume entire power generated by them for own purpose. Such of the units covered by said exemption raise limited grievance against granting exemption prospectively from the date of G.O., i.e., 23.05.2013 is not extended and they seek extension of such exemption retrospectively from 16.07.2003.

i i) Though petitioners have also challenged the legality of Rules, 1939, they have given up their challenge to the validity of said rules and made submissions only against constitutional validity of Section 3-B.

9. Heard Sri E.manohar, learned senior counsel for Sri Challa Gunaranjan, Sri K Gopal Chowdary and Sri Vedula Srinivas appearing for respective petitioners and Sri P Venugopal, learned Advocate General (AP) and Sri J Ramchander Rao, learned Additional Advocate General(TS).

10.1. Leading the arguments in the batch of writ petitions, Sri Gopal Choudary took us through the various stages of promulgation of Central and State enactments and various incentives introduced to encourage captive power generation.

10.2. Learned counsel would contend that in exercise of power vested in the Union of India under entry 38 of list-III of the VII schedule to the Constitution, Electricity Act 2003 was enacted and this act occupies the field. With reference to all the provisions covered by the said enactment, States are denuded of their power to bring out any legislation which is contrary to the

provisions of the Act, 2003. The impugned enactment brought out by the State Legislature amounts to colourable legislation as it seeks to interfere with the central legislation occupying the entire field of electricity. Impugned enactment is beyond the legislative competence of the state legislature.

10.3. The duty levied on the captive generating units amounts to levying tax on generation of electricity. As per entry 84 of List-I only Union is competent to levy duty on generation of electricity. The State cannot interfere and intermeddle with the effectuation of Parliament Legislative Policy by resort to its mere taxing power.

10.4. He further emphasized that the electricity is goods. The levy of duty on the production of the electricity falls within the phrase “other goods manufactured” in entry 84 of list-I and, therefore, it is within the exclusive domain of Indian Parliament. The state legislation has no competence to levy tax on generation/production of electricity. What is sought to be imposed on petitioners is nothing but levying of duty on generation. Generation is taxable event for attracting the levy and, therefore, does not fall within the purview of the state legislature. Unless there is generation of electricity, the provision in Section 3-B is not attracted. Without generation there cannot be consumption and, therefore, obviously the impugned provision is intend to levy tax on generation and thus, beyond the competence of state legislature.

10.5. He further contended that this provision is brought out only to mulct and discourage the generation of electricity for captive consumption by an onerous impost for regulatory effect which is beyond the legislative competence. This provision is brought out only to see that the cost of captive generation of electricity is higher than the industrial tariffs determined by the distribution licensee and only intend to force the captive generating unit to repatriate electricity generated by them to the grid. The real intention can be gauged from the business plans of the States in the field of electric energy notified from time to time. The fact that the levy of duty four times higher on consumption by the captive generating unit as compared to the duty levied on licensee clearly points out the intendment to discourage captive generating units to consume electricity generated by them and to divert the entire

electricity generated to the grid. Because of higher duty levied on the captive generating plants, effectively marginalise the cost benefit of self generation and the cost of generation would be higher than the industrial tariffs. Therefore, the impugned legislation amounts to colourable exercise of power.

10.6. Introduction of the impugned provision is a retrograde step and defeats the object and purpose to bring about the Act, 2003. When the Electricity Act, 2003 was brought in to bring sweeping reforms in the field of electric energy generation, distribution and consumption.

10.7. By extensively referring to the decisions of the Privy Council and the Supreme Court, learned counsel contended that it is not competent for the State legislature, under the guise or pretence to levy duty on consumption, in purported exercise of its own powers to carry out an object which is beyond its powers, and transgress into the powers vested in the central legislature. What cannot be directly permissible, cannot be indirectly brought about and the same would amount to colourable exercise of power as the field is occupied by the central legislature. It is not permissible for the State legislature to make a provision which is in direct conflict with the central legislation. The true import of impugned provision is levying of duty on generation of electricity, which is within the exclusive domain of union. In order to ascertain the true object, design and purpose, it is permissible for the Court to examine the circumstances in which legislation was made and the business policy formulated by the State would highlight the ulterior design of the State to make such provision.

10.8. The primary purpose of the taxation is to collect revenue. There is difference between the power to regulate and power to tax. Power to tax may be used as a tool to regulate only if the same legislature has power to tax and the power to regulate. If power to regulate is vested in one legislature or is already covered by the legislation made by the central legislature, even if power is vested to tax, in another legislation, it cannot exercise such power in any manner if such legislature is not vested power to tax even to regulate or control. As discernible from the business plan for power sector, the intendment to bring about this provision to levy duty on

consumption is primarily to regulate the generation of electricity by the private captive generating units and, therefore, it is not within the scope of the entry 58 of list-II. As per Entry 58 of List II, the State legislature may be competent to levy tax on consumption of electricity or sale for consumption of electricity, but cannot regulate the electricity generation even in the guise of levying duty.

10.9. Learned counsel further submitted that assuming that the impugned provision is within the competence of the state legislature, this provision is also liable to be set aside on the touch stone of Article 14 read with Article 19(1)(g) of the Constitution of India. Elaborating on this submission, learned counsel would contend that there is invidious discrimination against captive generating plants. An artificial differentiation is created only to levy higher duty on captive generating units. Such differentiation is impermissible without real nexus to the permissible object and purpose and is without intelligible differentia. There cannot be difference in levying tax based on the source of drawing electricity for consumption, i.e., levying higher duty on the person, who generates electricity and consumes for his own purpose and levying lesser duty on a person who purchases electricity from the licensee. Such variations in levying duty is clearly arbitrary and discriminatory. No such classification is permissible. Further, levying of higher duty, more than 4 times duty levied on electricity purchased, is clearly arbitrary and discriminatory.

10.10. By referring to the averments in the counter affidavit filed on behalf of the central government, learned counsel contended that the stand of Central Government is clear and specific. It does not oppose levying of electricity duty if it is not discriminatory and emphasize uniform levy of the electricity duty on the consumers without making a distinction on the source of generation as the duty is on consumption and not on generation and levying of 0.25 paise per unit on consumption by the generating units as compared to duty levied on purchase made from the grid is discriminatory. In the National Tariff Policy, Central Government highlighted that cess on sale or consumption of electricity could potentially distort competition and optimal use of resources if such levies are used selectively and on a non-uniform

basis.

10.11. Lastly learned counsel contended that the impugned legislation is also vitiated on the ground that there is violation of mandate of Section 12(4) of the A.P.Electricity Reform Act, 1998. This provision mandates state to consult the Regulatory Commission before any legislation is proposed and to take into account the recommendations by the Commission before making any legislation. Admittedly, the State Government has not consulted the Regulatory Commission and, therefore, the provision vitiated on that ground also.

11. Learned senior counsel Mr E.Manohar, contended that the duty is levied on every person/generating company who generates energy and uses for his/its own purpose. The tax levied amounts to tax on generation as the taxable event is generation and measure of payment and liability is on consumption. The impugned provision to levy duty is one of the components that constitute concept of tax as held by Supreme Court in **Govind Saran Gana Saran Vs Commissioner of Sales Tax**[1].

11.1. He further submitted that Delhi High Court in **The Delhi Cloth and General Mills Company Limited Vs The Municipal Commissioner, Delhi**[2] on identical issue held that such **differentiation** in levy of duty between a person who generates and consumes and a person who purchases from licensee for consumption is discriminatory. In the instant case also the levy of higher duty on captive generating unit on electricity consumed as against electricity drawn from licensee is clearly arbitrary and discriminatory. Mr. E.Manohar, further contended that as held by the Delhi High Court in **The Delhi Cloth and General Mills company**, the impugned action is arbitrary and discriminatory.

12. Sri Vedula Srinivas, learned counsel appearing for petitioners in W.P.No.21950 of 2004 made the following submissions:

12.1. It is only by way of an amendment to Act, 2009 in the year 2003 that Section 3-B was introduced in the Act and duty at the rate of 0.25 paise

per unit of energy has been imposed on every person or a generating company who generates energy and uses for his own purpose. This amendment led to levy and demand of duty on the petitioners on the electrical energy generated by them in the captive plants and consumed within their factory itself. By extensively referring to provisions of A.P. Electricity Duty Act, 1939 and Indian Electricity Act, 2003, learned counsel contended that the A.P. Electricity Act, 1939 was made only for imposing duty on the licensees, on their sale and consumption of electrical energy. The State legislature has no competence to levy duty under this Act on any other person except on a licensee or else the levy would be contrary to the scope of the Act itself. The scope of the Act can be ascertained from the preamble of the Act, whereas the impugned amendment of the year 2003, brings in a new class of persons, who are not licensees, within the fold of the Act and tries to levy duty on them. The same is impermissible.

12.2. Learned counsel contended that one of the established modes of statutory interpretation is to read the preamble of the Act to ascertain the intention of the legislature in making the Act. The preamble of a statute is the key to the understanding of the statute and the preamble may legitimately be consulted to resolve any ambiguity or to fix the meaning of words which may have more than one or to keep the effect of the Act within its scope, whenever the enacting part is in any of these respects open to doubt.

12.3. The legislature cannot, even it is competent to legislate, include a totally different class of persons when the Act itself was made to include only a particular class of persons. Hence, the impugned provision is beyond the competence of the State Legislature and is liable to be declared so.

13. Sri J.Ramchander Rao, learned Additional Advocate General (Telangana State) made the following submissions:

13.1. State is empowered to levy of tax on the consumption or sale of Electricity as per Entry-53 of List-II of the Constitution of India. A plain reading of Section 3-B would abundantly make it clear that the tax/duty imposed is only on the consumption, but not on the generation of energy. Further, no Central legislation is made on the same subject. Thus,

when there is no Central legislation occupying the field, Article 252 is not attracted.

13.2. The A.P. Electricity Duty Act, 1939 as amended from time to time is applicable to all sales and consumption of electric energy.

13.3. He further submitted that when power to legislate and make provision to levy duty on consumption of electricity is traceable to Entry 53 of List II of the constitution, there is no substance in alleging colourable legislation to the State Legislature.

13.4. Section 12 (4) of the A.P. Electricity Reforms Act, 1999 has no application to the issue in these writ petitions. Consultation with the Commission is necessary only in cases of structure of tariffs for supply of electricity and not in case of levy of tax/duty.

13.5. It is competent to impose duty on consumption and to impose different slabs to different categories of consumers. The captive generating units who consume electricity generated by them and also sell electricity so generated form a separate class and, therefore, no comparison can be drawn with licensee. He therefore submitted that there is no discrimination as sought to be contended. He further submitted that any relaxation can be prospective only and no right is vested in any consumer to seek retrospective relaxation.

14. Learned Advocate General for the State of AP is broadly in agreement with the submissions made by the learned Additional Advocate General for the State of Telangana. He would further submit that in a taxing statute regard must be had to the clear meaning of the words. The intendment of the impugned provision is clear and there is no ambiguity. It intend to cover such of those captive power generating units which generate electricity and which consume electricity generated by them as also sell. In exercise of power vested in Sections 3A and
3B (3), the composite State of AP issued orders exempting such of those captive power generating plants which consume entire power generated for its own purpose. In view of the same, the provision as it stands now in section 3B is applicable for such of those captive power generating plants

which partially consume power and sell the balance power. These units have to pay duty as levied by this provision. The intendment of the legislation is clearly discernible from reading of this provision.

15. He would further submit that when the Act was originally made, Electricity Act, 1910 was in force. Having regard to the subsequent liberalization in electricity generation by bringing about changes in the legal regime by the Act, 2003 and establishment of captive power generating units necessitated to bring in amendments to Electricity Duty Act, 1939. The amended Act brings within its fold the captive power generating units. He, however, submits that the captive power generating units which partially consume electricity for its use and sell the balance electricity to the others, alone are levied with higher duty. Therefore, it is no more open to anybody to contend that objects and reasons when the Act, 1939 was made should alone be seen to understand the scope of the Act. It cannot be said that legislature was unaware of the scope of the Act as originally made, when it introduced section 3B into Act. By placing reliance on **State of Jharkhand and others vs. Tata Steel Limited and others**[3], learned Advocate General would submit that the Court must discover the purpose or object of the Act by looking at surrounding circumstances.

16. Learned counsel appearing for respective parties placed reliance on plethora of precedents in support of respective contentions. We have considered all the decisions relied on and referred to during the course of their submissions.

17. Based on the submissions made, points that arise for determination are:

1) Whether Section 3-B of the Andhra Pradesh Electricity Duty Act, 1939 is liable to be declared as ultra-vires the powers of the State legislature as it trenches into the field occupied by Central Legislation by virtue of Entry 84 of List-I in Schedule VII of the Constitution?

2) Whether Section 3B of Act, 1939 is repugnant to Electricity Act, 2003 ?

3) Whether levying of higher duty at 0.25 paise per unit on Captive

Generating units for its own consumption as compared to 0.06 paise per unit on licensee is discriminatory?

4) Whether non consultation with Electricity Regulatory Commission as enumerated in Section 12 (4) of A.P. Electricity Reforms Act, 1998 vitiates the very existence of Section 3-B in the Statute book?

5) Whether the collection of duty in accordance with Section 3-B is invalid retrospectively also insofar as such of those captive power generating units for whom exemption is granted subsequently? Incidentally, whether relaxation granted prospectively to some Captive Generating Units is legal and valid?

18. To appreciate the rival contentions on the above issues, it is necessary to look into the relevant provisions of the Constitution, Act, 1939 and Act, 2003 :

18.1.1 **Entry 84 of List-I of the Schedule VII of Constitution of India:**

84. Duties of excise on tobacco and other goods manufactured or produced in India except-

(a) alcoholic liquors for human consumption

(b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

18.1.2 **Entry 53 of List – II of Schedule VII of the Constitution**

53. Taxes on the consumption or sale of electricity

18.1.3 **Entry 38 of List –III of Schedule VII of the Constitution**

38. Electricity

18.2. **<u>The Electricity Act, 2003</u>**

18.2.1 **Object :** An Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

18.2.2 **Section 2(8): "Captive generating plant**" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association.

18.2.3 **Section 2 (28) : "generating company**" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station.

18.2.4 **Section 2 (29): "generate"** means to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given.

18.2.5 **Section 9: 'Captive Generation'**

(1) Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company.

(Provided further that no licence shall be required under this Act for supply of electricity generated from a captive generating plant to any licensee in accordance with the provisions of this Act and the rules and regulations made there under and to any consumer subject to the regulations made under sub-section (2) of section 42)

(2)Every person, who has constructed a captive generating plant and maintains and operates such plant, shall have the right to open access for the purposes of carrying electricity from his captive generating plant to the destination of his use:

Provided that such open access shall be subject to availability of adequate transmission facility and such availability of transmission facility shall be determined by the Central Transmission Utility or the State Transmission Utility, as the case may be:

Provided further that any dispute regarding the availability of transmission facility shall be adjudicated upon by the appropriate commission.

18.3 **The Andhra Pradesh Electricity Duty Act, 1939:**

18.3.1 **Section 2(b): 'Licensee'** means-

(i) any person including a company or a local authority licensed under Part II of the Indian Electricity Act, 1910, to supply energy, or any person including a company or a local authority who has obtained the sanction of the State Government under Section 29 of that Act to supply energy;

(ii) The Andhra Pradesh State Electricity Board constituted under Section 5 of the Electricity (Supply) Act, 1948.

(iii) The National Thermal Power Corporation or any other corporation engaged in the business of supplying energy.

18.3.2 **Section 3: Levy of a duty in certain sales of electrical energy:**

(1) Save as otherwise provided in sub-section (2), ***every licensee*** in the State of Andhra Pradesh shall pay every month to the State Government in the prescribed manner, ***a duty calculated at the rate of six paise per unit of energy, on and in respect of all sales of energy*** except sales to the Government of India for consumption by that Government or sales to the Government of India or a railway company operating any railway for consumption in the construction, maintenance or operation of the railway effected by the licensee during the previous month at a price of more than Twelve paise per unit ***and on and in respect to all energy which was consumed by the licensee during the previous months for purposes other than those connected with the construction, maintenance and operation of his electrical undertaking and which, if sold to a private consumer under like conditions, would have fetched a price of more than Twelve paise per unit.***

"Provided that no duty under this sub-section shall be payable on and in

respect of sale of energy effected

(a) by the Andhra Pradesh State Electricity Board to any other licensee;

(b) by the National Thermal Power Corporation to the Andhra Pradesh State Electricity Board.

(2) A licensee shall be exempt from duty under sub-section (1) in any month if in the previous month the total sales of energy effected by him at whatever price together with the energy consumed by him for purposes other than those connected with the construction, maintenance and operation of his electrical undertaking, did not exceed ***16,666*** units :

Provided that if at the end of any financial year, it is found that in such year the total sales of energy effected by the licensee at whatever price together with the energy consumed by him for purposes other than those connected with the construction, maintenance and operation of his electrical undertaking, were not less than 2,00,000 units, the licensee shall pay the duty in respect of any month or months comprised in such year in which the total of the sales and of the consumption as aforesaid did not exceed 16,666 units.

(3) Where a licensee holds more than one licence duty shall be calculated and levied under this section separately in respect of each licence.

(4) Where a licensee who is liable to pay duty under this section sells energy to the Government of India for consumption by that Government or to a railway company operating any railway for consumption, in the construction, maintenance or operation of that railway, the price charged on such sales shall be less by the amount of the duty than the price charged to other consumers of a substantial quantity of energy, provided the price last mentioned is more than twelve paisa per unit. In this sub-section, the expression 'price charged to other consumers' shall include the duty, if any, recoverable from the consumer under sub-section (1) of Section 7.

Explanation:- The expression 'railway' in this section and in Section 9 shall have the meaning assigned to it in clause (20) of Article 366 of the Constitution.

18.3.3 **Section 3A: Power to exempt:**

Not withstanding anything contained in this Act, the Government may, in public interest, by notification, setting out the grounds therefor, exempt, either permanently or for a specified period, a licensee from payment of the whole or part of the duty payable under Section 3, subject to such terms and conditions as may be specified in the said notification.

18.3.4 **Section 3B: "Levy of duty on certain energy generated and consumed":**

(1) Every person or a generating company who ***generates energy and uses for his own purpose*** shall pay every month to the State Government, ***a duty calculated at the rate of twenty five paise per unit of energy on and in respect of such energy consumed*** during the previous month.

Provided that no duty shall be leviable in respect of the energy consumed in the auxiliaries of the generating plant.

(2) The State government, may, by notification specify from time to time the minimum aggregate capacity of the generating plant from which the energy generated and used shall attract levy of duty under sub-section (1) thereof.

(3) The State Government, may, by notification exempt either permanently or for a specified period any person or a generating company from payment of the whole or part of the duty payable under sub-section (1) subject to such terms and conditions as may be specified in the said notification."

(emphasis supplied)

19. Electricity (Supply) Act, 1948 created a monopoly in the State run Electricity Boards in generation, transmission and supply of electricity. Initially no generating plants were allowed in the private sector. However, by

virtue of amendment brought out in the year 1991 to the above Act, facility was provided to private entrepreneurs, with prior consent from the State Electricity Board to establish new generation station or extend or make major replacement of existing generation station. This did not improve generation of electricity. In order to bring about reforms in the electric energy field and to evolve more and more private persons in the generation, transmission and distribution of electricity energy and in super session of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948, the Electricity Act, 2003 (for short, Act, 2003) was enacted.

20. As seen from the statement of objects and reasons and the provisions of the Electricity Act, 2003, it is intended to encourage private sector participation in generation, transmission and distribution of electricity. Individuals are permitted to set up captive generating plants to generate electricity primarily for their own use. An electricity generating unit is called as the captive generating plant, if the consumer accounts for ownership of 26% in the generating plant and consumes at least 51% of the electricity generated for personal use. In other words, the Act, 2003 envisages that the captive generating unit can sell the electricity generated to a maximum extent of 49%. This is a comprehensive legislation in the field of electric energy. It broke the shackles of the State control in electricity generation.

21. Even before the above Central enactment was brought in, in order to streamline the electricity generation, transmission and supply system in the state, the composite State of A.P., enacted A.P. Electricity Reforms Act, 1998 (for short the Act, 1998). The existing electricity board was abolished and in its place separate entities were established for generation, transmission and distribution of electric energy.

22. A.P. Electricity Duty Act, 1939 was made to levy duty on the sale and consumption of electricity. This Act was made even before doors were opened to private participation in generating electricity and it primarily addresses issue of levy of duty on sale and consumption of electricity. As per Section 3 a licensee is required to pay only 0.06 paise on electricity sold or consumed. By virtue of impugned amendment, the levy of duty is also

extended to captive generating units who consume electricity for their own purpose at the rate of 0.25 paise per unit consumed. The frontal attack on this amended piece of legislation is on competence of state legislature to make such a law and as violative of Article 14 of the Constitution.

23. **POINT: 1**

23.1 The Constitution of India stipulates sphere of legislative authority on State and central legislative bodies. Schedule VII of the Constitution delineates legislative sphere of respective legislatures. It contains three lists. On subjects mentioned in List I, Union Parliament is alone competent to legislate. On subjects mentioned in List II State Legislature is alone competent to legislate. List III contains residuary items and power to legislate is vested in Indian Parliament and State legislatures. The three lists in Schedule VII merely demarcate legislative fields between Parliament and States legislature.

23.2 The parameters to test the legislative competence to make law is well laid down and need no reiteration. Suffice to note, in the context of contentions urged in these cases is, that judicial review of legislative action is limited to examination whether State legislation transgressed its limits of jurisdiction to legislate and trenched into List I subject and if so, whether the offending piece of legislation is liable to be struck down on that ground. Wherever offending piece of legislation trenches on to sphere occupied by another legislative body, even by disguise, covert and indirect, it is called as colourable legislation. The contentions urged on the competence of State legislature to levy duty on consumption of electricity by captive generating unit for own use need to be tested with reference to relevant entries in respective lists of schedule VII of the Constitution. In the cases on hand, three relevant provisions are, entry 84 of List-I, entry 53 of List-II and entry 38 of List-III. Entry 84 of List I vests power in Parliament to levy tax on various goods including tax on generation of electricity. Entry 53 of List-II vests power in the State legislature to enact law to levy duty on consumption or sale of electricity. Entry 38 of list III deals with 'Electricity'. If what is levied by the impugned provision is on consumption of electricity, the impugned piece of legislation stands this test. If impugned provision passes this test, the

attack in the form of 'colourable legislation' falls flat.

24. To test the spirited challenge mounted by the counsel for petitioners on the impugned provision as amounting to 'colourable legislation', a brief parade of precedent decisions placed on record by learned counsels, to the extent relevant is necessary.

25. Mr. Gopal Choudary placed heavy reliance on the decision of Supreme Court in '**M.P.Cement Manufacturers' Association v. State of M.P. and others**[4] to drive home the contention that what is sought to be levied is duty on generation which is vested in the Union Government by virtue of entry 84 of List I of Schedule 7 of the Constitution. In the said case, amendment brought out by the State of Madhya Pradesh to M.P.Upkar Adhiniyam, 1981 to levy cess @ 20 paise per unit on **'electrical energy produced'** by captive power producer was under challenge. The High Court repelled the challenge holding that levy of duty was not on generation but was on consumption. The High Court observed that the word 'production' used in the offending provision was for the purpose of calculation of amount of cess to be paid and what is levied is only on consumption. Therefore, it is within the competence of State legislation as per entry 53 of List-II. The decision of High Court was assailed in the Supreme Court.

25.1. Supreme Court held that the intention to levy cess on generation of electricity is clearly discernible from the words employed in the offending provision and therefore the State legislature has no competence. Supreme Court observed as under:

> "14. A plain reading of sub-section (2) of Section 3 introduced by the amendment to the 1981 Adhiniyam makes it clear that the levy of cess was "*on* the electrical energy produced". ***The phrase "whether for sale or supply" merely clarified that all electricity produced irrespective of its destination would be liable to cess at the specified rate. The use of the word "whether" after the phrase "energy produced" means that the cess would apply on units produced, whichever of the alternatives mentioned after the word "whether", namely, sale or supply or consumption is the case.*** There is no reason to assume that the words used did not reflect the intention of the legislature. **The imposition envisaged was on the production of electricity units. The charge was on generation and not on the sale or consumption of electricity.** There is a conscious linguistic departure from the language used in Section 3 of the Electricity Duty Act, 1949 and indeed the language used in Section 3(1) of the same Act where the cess is levied on the total units of electrical energy sold or supplied by distributors of electrical energy. When

dealing with producers under sub-section (2) of the same section, the cess is required to be paid "on the total units of electrical energy produced". ***If, as is contended by the respondents, the incidence of levy under sub-section (1) and sub-section (2) were identical, the same language should have been used in both sub-sections. The deliberate change in language reflects an intention to alter the subject-matter of levy as far as producers were concerned***. "

(emphasis supplied)

25.2. In **K.C.Gajapati Narayana Deo and others v State of Orissa**[5], one of the contentions urged was that the Orissa Agricultural Income-Tax (Amendment) Act, 1950 is not a bonafide taxation statute but is a colourable piece of legislation though the real object was to reduce, by artificial means, the net income of the intermediaries. Supreme Court observed as under:

"9. It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of bona fides or mala fides on the part of the legislature. ***The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law.*** If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power

.....
.....

In other words, ***it is the substance of the Act that is material and not merely the form or outward appearance,*** and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, ***the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design.*** But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers."

(emphasis supplied)

25.3. In **Govind Saran Ganga Saran** (cited supra)**,** Supreme Court delineated important components of concept of tax as, (1) character of imposition known by its nature which prescribes the taxable event attracting levy; (2) clear indication of the person on whom the levy is imposed and who is obliged to pay the tax; (3) rate at which the tax is imposed; and (4) the measure or value to which the rate will

be applied for computing the tax liability. It is further observed that, "If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

25.4. For the proposition that in order to examine the effect of legislation, the Court must take into account any public general knowledge, examine the historical background and circumstances under which it was passed and take judicial note of them, **Attorney General – Alberta vs. Attorney General – Canada**[6] and the **Lord Krishna Sugar Mills Ltd. and another vs. the Union of India and another**[7] were relied.

25.4.1. In **Lord Krishna Sugar Mills Ltd**., Supreme Court considered Privy Council decision in **Attorney General – Albert** and held .

> "26. ..... The Court in judging the reasonableness of a law, will necessarily see, not only the surrounding circumstances but all contemporaneous legislation passed as part of a single scheme. The reasonableness of the restriction and not of the law has to be found out, and if restriction is under one law but countervailing advantages are created by another law passed as part of the same legislative plan, the Court should not refuse to take that other law into account.
>
> 27. The existence of such other law is not difficult to establish. The Courts can take judicial notice of it."

25.5. In **State of Andhra Pradesh v. National Thermal Power Corporation Ltd and Ors**[8], the question for consideration by Supreme Court was whether State of Andhra Pradesh was competent to levy duty on the sale of electrical energy generated by NTPC at the Thermal Power Station located in Andhra Pradesh (then combined State) and sold to the States of Karnataka, Kerala, Tamilnadu and Goa. Supreme Court construed the entries 53 and 54 of List II of Schedule 7 of the Constitution and observed thus:

> "22. We now come to the question on the interpretation of Entry 53 in List II of

the 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. of India Ltd.* v. *Belgaum Borough Municipality (AIR 1963 SC 906)*. 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. vs. State of Kerala [(1996) 7 SCC 637]* 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".***

(emphasis supplied)

25.6. At this stage, it is also relevant to note Supreme Court decision in **State of West Bengal v Kesoram Industries Ltd. and others**[9]. Supreme Court considered the scope of power of 'regulation and control and power of 'taxation'. Supreme Court observed, 'primary purpose of taxation is to collect revenue. Power to tax may be exercised for the purpose of regulating an industry, commerce or any other activity. The purpose of levying tax, an impost to be more correct, is the exercise of sovereign power for the purpose of effectuating regulation incidentally the levy may contribute to the revenue. Supreme Court culled out from precedent decisions, the relevant principles, which read as under:

"129**.** The relevant principles culled out from the preceding discussion are summarised as under:

(*1*) In the scheme of the lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.

(*2*) ***Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation.*** Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. ***As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject-matter of two taxes by reference to the two lists is different.*** Simply because the methodology or mechanism adopted for assessment and quantification is similar, the two taxes cannot be said to be overlapping. ***This is the distinction between the subject of a tax and the measure of a tax.***

.....

(*4*) Entries 52, 53 and 54 in List I are not heads of taxation. They are general entries. Fields of taxation covered by Entries 49 and 50 in List II continue to remain with State Legislatures in spite of the Union having enacted laws by reference to Entries 52, 53 and 54 in List I. It is for the Union to legislate and

impose limitations on the States' otherwise plenary power to levy taxes on mineral rights or taxes on lands (including mineral-bearing lands) by reference to Entries 50 and 49 in List II, and lay down the *limitations* on the States' power, if it chooses to do so, and also to define the *extent and sweep of such limitations*.

(*5*) ***The entries in List I and List II must be so construed as to avoid any conflict***. ..... ".

(emphasis supplied)

25.7. It was forcibly contended by learned counsel for petitioners that the duty sought to be levied amounts to taxation on generation of electricity and therefore beyond the competency of State legislature. In Electricity, generation and consumption are intertwined and whatever is generated has to be consumed. The taxable event is generation and therefore, the impugned levy of duty amounts to taxation on generation. Similar contention was urged in **Jiyajeerao Cotton Mills Ltd, Birlanagar, Gwalior v. State of Madhya Pradesh**[10]. Having observed that a producer consuming the electrical energy generated by him is also a consumer, Supreme Court went on to hold as under:

"6. It is difficult to see how the levy of duty upon consumption of electrical energy can be 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 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."

(emphasis supplied)

25.8. Similar issue has come up for consideration before Orissa High Court in **M/S Indian Metals and Ferro Alloys Ltd and another vs. Stage of Orissa and Another**[11]. The captive generating units challenged vires of Section 2, 3 and 5 of the Orissa Electricity Duty Act, 1961, the notification fixing duty at 12 paise per unit on energy consumed for own purpose which was subsequently enhanced to 0.20 paise. The relevant provisions on levy of duty was challenged on the ground that the levy of duty is on generation/production and therefore beyond the scope and ambit of entry 53 of List II and falls within the legislative field under entry 84 of the List I. The Orissa High Court repelled the said contention. Following the decision in **Jiyajee Rao Cotton Mills Ltd**, Orissa High Court held levy of duty upon consumption of electric energy cannot be regarded as duty of excise falling within entry 84 of the List I. The Orissa High Court also upheld levy of higher duty on captive generating units who consume electricity for own purpose as compared to lower duty levied on licensee.

25.9. In **Raja Jagannath Baksh Singh v. State of Uttar Pradesh and another**[12]**,** Supreme Court was dealing with the validity of U.P. Large Land Holdings Tax Act (31 of 1957), where under the erstwhile Taluqadar was called upon to pay annual value of the land in his possession based on the provisional assessment of the land holding held by him. A distinction was sought to be made that the 'lands' word used in the Act does not include the agricultural lands and, therefore the U.P. State Legislature was not competent to levy tax. In the said context Supreme Court observed as under:

"It is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are words of wide amplitude, they must be interpreted so as to give effect to that amplitude. It would be out of place to put a narrow or restricted construction on words of wide amplitude in a Constitution."

25.10. The summatation of the principles that can be culled out from above precedents is, State legislature cannot levy duty on electricity generated even by indirect method (**M.P.Cement Manufacturers**

Association); The word 'Sale' in Entry 53 means use or consumption, since in electricity there cannot be sale without its use or consumption (**NTPC);** As the fields of taxation are to be found clearly enumerated in Lists I and II, there is no overlapping and subject matter of two taxes in two lists is different (**Kesoram Industries**); A producer of electrical energy need not pay duty on electricity generated and stored until he consumes electricity but once he consumes electricity, he will be brought into duty net under Section 3 –B (**Jiyaji Rao Cotton Mill**); and levying of duty on consumption does not amount to levy of duty on generation as envisaged in Entry 84, List I (**M/s Indian Metals and Ferrow Alloys Ltd- Orissa High Court**).

25.11. What is required to be seen is substance of the Act and not merely the form or outward appearance. In testing the validity of a statutory provision the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. The language used in the legislative entries in the Constitution must be interpreted broadly so as to give the widest amplitude of power to the legislature to legislate and not in a narrow and pedantic sense.

25.12. On analysis of relevant provision impugned, the historical background and the statement of objects and reasons to introduce impugned provision and the principles that emerge from precedent decisions, it is beyond pale of doubt that the impugned legislation is within the scope of entry 53 of List II. As held by Supreme Court in **Kesoram Industries** fields of taxation are included in list I and List II and if legislation is made in respective fields earmarked, it cannot be said that there is overlapping. Union is competent to levy tax on generation of electricity (entry 84, List I) and State is competent to levy

tax on consumption of electricity (entry 53, List II). The subject matter of impugned Section 3B is directly under entry 53 of List II. As held in **Jijajee Cotton Mills Ltd** that a producer of electricity can also be a consumer. Such person is playing a dual role. Levying of tax/duty on such person towards consumption of electricity is directly under entry 53 of List-II. Merely because he also generates electricity, levying duty on consumption does not and cannot amount to levying tax on generation. In **M.P. Cement manufacturers Association** is duty levied was on generation and said decision do not come to the rescue of petitioners. Thus, the attempt to nullify impugned provision fails.

26. **POINT NO.2:**

26.1. By relying on **Thirumuruga Kirupananda Variyar Thavathiru Sundara Swamigal Medical Education & Charitable Trust**[13], **State of Orissa and another v. M/s. M.A.Tulloch & Co.**[14], on the principle of **'repugnancy'**, it was feebly contended that as there is repugnancy in State Act vis-a-vs Central Act, the impugned clause of the Act, 1939 is not sustainable.

26.2. Para 26 of **Thirumuruga Kirupananda** reads as under:

> "26. It cannot, therefore, be said that the test of two legislations containing contradictory provisions is the only criterion of repugnance. Repugnancy may arise between two enactments even though obedience to each of them is possible without disobeying the other if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole field."

26.3. In **Thirumuruga,** Supreme Court considered the decision on **M/s.M.A.Tulloch and Co.** In **M/s. M.A. Tulloch,** Supreme Court observed in para-14 as under,

> "14. …….. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces

> by its legislation an intention to cover the whole field, the enactments of the other legislature whether passed before or after would be overborne on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed comparison of provisions of the two statutes but by the mere existence of the two pieces of legislation."

26.4. No Central legislation is brought to our notice which imposed tax on consumption of electricity. Entry 84 of List-I provides power to legislate on impost on generation of electricity. The impugned provision in Act, 1939 deals with levying of duty on consumption of electricity. Once it is held that what is levied is duty on 'consumption of electricity', which power is traceable to entry 53 of List II of Schedule VII of the Constitution and when the filed is not occupied by Central legislation, this contention fails.

27. **POINT NO.:3**

27.1. It was alternatively contended that even assuming that incorporation of Section 3B is within the competence of the State legislature imposing duty at 0.25 paise per unit on consumption of electricity by captive generation units as compared to 6 ps per unit on sale is arbitrary and discriminatory. It was contended that higher levy of duty is deliberately imposed only to stultify the functioning of the captive power generating units and to subjugate them to sell entire electricity generated by them to open grid. This contention of the learned counsel for the petitioners was strongly repelled by learned Advocate General for state of A P and learned Additional Advocate General for the State of Telangana by relying on the statement of objects and reasons to introduce section 3B of the Act and decisions of the Supreme Court in **Raja Jagannath Baksh Singh** (supra) and **Spences Hotel Pvt. Ltd. and another v State of West Bengal and others**[15].

27.2. It is discernible from the reading of the statement of objects and reasons to introduce section 3B into Act, 1939 that this particular class of captive power generating units was not subjected to levy of duty. Having realized that large segment of captive power generating units are not contributing to the state exchequer and were not covered by Act,1939, Section 3B is incorporated. As seen from the provision in Section 3, the captive power generating units which utilize the power generated for its

own consumption and also indulge in sale were not covered by the Act, 1939. Thus, no duty was levyable on them. The amended provision fills this gap.

27.3. It was also contended that Act, 1939 was intended to cover only licensee and captive power generating units are not licensees and by introducing Section 3-B scope of the Act cannot be widened. Further, on sale, even petitioners are levied only 0.6 paise and this increase is wholly illegal and arbitrary. By relying on **S.Gopal Reddy vs. State of A.P.**,[16], **Arnit Das vs. State of Bihar**[17], it was also contended that to understand the scope of the Act, 1939, it is necessary to consider the statement of objects and reasons as originally envisaged.

27.4. In **Kavalappara Kottarathil Kochuni @ Moopil Nayar and others Vs. The State of Madras and Kerala and others**[18], Supreme Court observed thus:

> "35.....The preamble of a statute is "a key to the understanding of it" and it is well established that "it may legitimately be consulted to solve any ambiguity, or to fix the meaning of words which may have more than one, or to keep the effect of the Act within its real scope, whenever the enacting part is in any of these respects open to doubt".....

27.4. In **S.Gopal Reddy v State of A.P.** (supra), Supreme Court observed that the Court must look to the object which the statute seeks to achieve while interpreting any of the provisions of the Act
(paragraph 12)

27.5. In **Arnit Das vs State of Bihar** (supra), Supreme Court observed that the ambiguity can be resolved by taking into consideration the preamble and statement of objects and reasons. In paragraph 22, Supreme Court observed, *"The Preamble is a key to unlock the legislative intent. If the words employed in an enactment may spell a doubt as to their meaning it would be useful to so interpret the enactment as to harmonise it with the object which the legislature had in its view."*

27.6. Broadly, there are two leading rules of construction. First is the

primary /elementary rule of construction that is called 'golden rule of construction'. The golden rule of construction is 'to assess that the words and phrases are used in a statute in their ordinary and natural meaning'. The second rule of construction 'the mischief rule', is to first ascertain the general situation in which the legislation was made and secondly the particular situation for which the state legislature was providing a remedy. The general purpose of Act, 1939 is not difficult to discern, i.e., to augment revenue to the State'. When the Act, 1939 was made, it intended to cover the licensees. It was made in the backdrop of generation of electricity in the hands of State and its instrumentalities as then prevailing. Thereafter, much water has flown under the bridge. Several reforms are brought in with reference to generation of electricity. The generation of electricity has also moved into private hands. Private entrepreneurs are now allowed to establish power generation plants which can generate millions of units. In the process of liberalisation and to attend to some extent huge power shortage captive power generation by private persons was allowed. The Act, 1939 as originally made did not cover this segment of generation units which also consume electricity. By virtue of the amendment brought out to the principal Act, the net is widened and the captive power generation plants are also brought into compulsory levy of duty on consumption of electricity.

27.7. While construing the impugned provision of the Act, it is necessary to look into the statement of objects and reasons to introduce the amendment in addition to the original statement of objects and reasons. The subsequent legislative history is also a relevant factor to consider the scope of the offending legislation. Furthermore, it is the substance of the Act that is material and not merely the form or outward appearance (**K.C. Gajapati Narayan Deo**).

27.8 On a careful reading of offending section and the statement of objects and reasons, legislative history, reforms brought about in Electricity generation, transmission and distribution, we have no hesitation to hold that scope of the Act, 1939 is expanded to cover captive power generating units which consume and sell electricity. The captive power generating units which consume electricity generated by them partially for their own purpose and

also resorts to sell a portion of electricity generated is a class by itself distinguished from other power generating units and consumers. The impugned provision address this particular class of consumers of electricity to levy duty.

27.9. In **Spences Hotel Pvt. Ltd**.,(supra), Supreme Court was dealing with levy of luxury tax at flat rate on air conditioned floor space in hotels and restaurants irrespective of locality, quality, standard or size of hotels and restaurants, a challenge to the relevant provision of West Bengal Entertainments and Luxuries (Hotels and Restaurants) Tax Act, 1972 on the ground of offending Article 14 of the Constitution was repelled. Dealing with this submission, Supreme Court observed that:

> "24. ….. The system of taxation has changed a great deal from Kautilya to kaldor and even thereafter. The history of taxation is one of evolution as is the case in all human affairs. Its progress is one of constant growth and development in keeping with the advancing economic and social conditions; and the fiscal intelligence of the State has been advancing concomitantly , subjecting by new means and methods hitherto un-taxed property, income, service and provisions to taxation. With the change of scientific, commercial and economic conditions and ways of life new species of property, both tangible and intangible gaining enormous values have come into existence and new means of reaching and subjecting the same to contribute towards public finance are being developed, perfected and put into practical operation by the legislatures and courts of this country, of course within constitutional limitations. The ability or capacity to pay has no doubt been regarded as the test in determining the justness or equality of taxation.
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> 25. .. As was pointed out by Gustav Radbruch in his Legal Philosphy (p.90):
>
> Justice demands that equals be treated equally, different ones differently according to their differences; but it leaves open the two questions, whom to consider equal or different, and how to treat them. Justice determines only the form of law. In order to get the content of the law, a second idea must be added, viz. expediency. The question of justice has been raised and answered independently of questions of expediency or suitability for any purpose, including the purpose of the state. But within the framework of the question of the purpose of law, the state for the first time enters the scope of our investigation. Since law, or an essential part of it, is the will of the state, and the state, or an essential part of it, is an institution of law, the questions of the purpose of law and the purpose of the state are inseparable.
>
> 26. What then 'equal protection of laws' means as applied to taxation? Equal protection cannot be said to be denied by a statute which operates alike on all persons and property similarly situated, or by proceedings for the assessment and collection of taxes which follows the course usually pursued in the State. It prohibits any person or class of persons from being singled out as special subject for discrimination and hostile legislation; but is does not require equal rates of taxation on different classes of property, nor does it prohibit unequal taxation so long as the inequality is not based upon arbitrary classification. ***Taxation will not be discriminatory if, within the sphere of its operation, it affects alike all persons similarly situated. It, however, does not prohibit special legislation, or legislation that is limited either in the objects to which it is directed, or by the territory within which it is to operate.*** In the words of Cooley: It merely requires that all persons subjected to such legislation

shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. The rule of equality required no more than that the same means and methods be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. ***Nor does this requirement preclude the classification of property, trades, profession and events for taxation-subjecting one kind to one rate of taxation, and another to a different rate.*** "The rule of equality of taxation is not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it choses, exempt certain classes of property from any taxation at all, may impose different specific taxes upon different trades and professions." "It cannot be said that it is intended to compel the State to adopt an iron rule of equal taxation." In the words of Cooley:

Absolute equality impossible. Inequality of taxes means substantial differences. Practical equality is constitutional equality. ***There is no imperative requirement that taxation shall be absolutely equal.*** If there were, the operations of government must come to a stop, from the absolute impossibility of fulfilling it. The most casual attention to the nature and operation of taxes will put this beyond question. No single tax can be apportioned so as to be exactly just and any combination of taxes is likely in individual cases to increase instead of diminish the inequality.

(Cooley on Taxation, 4th Edn. Vol.I.p. 558)

"Perfect equality in taxation has been said time and again, to be impossible and unattainable. Approximation to it is all that can be had. Under any system of taxation, however, wisely and carefully framed, a disproportionate share of the public burdens would be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principle, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges that courts can interpose and arrest the course of legislation by declaring such enactments void." "Perfectly equal taxation", it has been said, "will remain an unattainable good as long as laws and government and man are imperfect." 'Perfect uniformity and perfect equality of taxation', in all the aspects in which the human mind can view it, is a baseless dream.

27. The equal protection of the law's provision in our Constitution prohibits a discrimination by the State against its own citizens as well as to one in their favour in imposing the luxury tax. The provision requiring luxury tax to be equal and uniform has to be interpreted in light of its characteristics. The luxury tax is 'uniform' as it is equal upon all persons belonging to the described class upon which it is imposed, namely, the owners of air-conditioned hotels and restaurants. The Act requires the luxury tax to be in proportion of or proportional the air-conditioned space and it requires the tax to be uniform upon the same class of owners of air-conditioned hotels and restaurants which means that all similarly situated owners shall be treated alike. It does not suffer from lack of classification but instead impliedly authorises it by leaving out non-air-conditioned hotels and restaurants. ***Equality and uniform policy means uniform and equal rates of assessment and taxation which has been followed in this tax. The concept of equality and uniformity has to adjust from time to time to new and advancing social and economic conditions and needs of public finance and fiscal policy, of course within constitutional limitations."***

(emphasis supplied)

27.10. It is opt to quote Supreme Court observations in **Kesoram Industries**:

"(*3*) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. ***Defining the subject of tax is a simple task; devising the measure of taxation is a far more***

complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by the legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.

(emphasis supplied)"

27.11. In **State of Jharkhand**, Supreme Court took note of the view expressed by Lord Denning, as considered by the Supreme Court in **Oxford University Press v. Commissioner of Income Tax** [(2001) 3 SCC 359]. The relevant observations are as under:

> "As Lord Denning said it would be idle to expect every statutory provision to be drafted with divine prescience and perfect clarity. As Judge learned Hand said, we must not make a fortress out of dictionary but remember that statutes must have some purpose or object, whose imaginative discovery is judicial craftsmanship.
>
> …
>
> It is said that it is now well-settled rule of construction tht where the plain literal interpretation of a statutory provision produces a manifestly absurd and unjust result which could never have been intended by the legislature, the court may modify the language used by the legislature or even "do some violence" to it, so as to achieve the obvious intention of the legislature and produce a rational construction. In such a case the court may read into the statutory provision a condition which, though not expressed, is implicit in construing the basic assumption underlying the statutory provision. .."

27.12. The primary object of the Act, 1939 is to levy duty on sale and consumption of electricity and to augment revenue to the state exchequers. The State realizes that there is imperative need to augment revenue by all available sources. The state justifies its decision to levy duty @ 0.25 paise per unit consumed internally as state require to augment resources to undertake social obligations in providing assistance to the power sector. Guided by the principles of law enunciated in plethora of precedents and on forensic analysis of the legislation, we see no infirmity in the impugned amendment.

27.13. In the counter affidavit filed on behalf of power utilities it is contended that levy of 0.25 paise is not exorbitant as those who consumed electricity from captive generation would ordinarily incur the fuel costs of approximately Rs.4/- per unit and fraction of it is being charged towards duty, which is reasonable and levying of such duty is necessary to augment state resources. The state also recognizes that this class of consumers do have paying capacity and levying small percentage of cost incurred by them to

generate electricity would not burden them and this additional source of revenue is intended to be utilized to fulfil its other obligations, such as, supply of electricity to all classes of consumers.

27.14. As seen from section 3B, sufficient safeguards are incorporated into the section. Section 3B requires the State to determine the minimum aggregate capacity of generating plants from which the energy generated and used shall attract levy of duty. Sub-section 3 of section 3B vests power in the state to exempt generating company from payment of whole or part of the duty payable under sub section (1). In exercise of power vested by these two provisions, State Government issued notification published vide G.O.Ms.No.82, dated 7.7.2003 exempting all agricultural consumers permanently from levy of electricity duty under Section 3. Further notification was issued which was published in A.P. Gazette (part-1 Extraordinary) bearing No.428-A dated 13.10.2003, which was subsequently amended, notification of which was issued vide G.O.No.88 Energy Department dated 15.07.2004 prescribing the generating capacity of 1000 KVA and above to levy 0.25 paise per unit on energy generated and used for own purpose. By way of notification issued vide G.O.No.123 Energy Department, dated 28.10.2003, Ferro Alloys units are exempted from levying of the electricity duty. Bu virtue of G.O.No.25 Energy Department, dated 23.05.2013, captive power generating units, which utilize entire power generated for their own internal use are completely exempted from levying of duty under the Act. This was further amended vide G.O.No.63 dated 16.11.2013. By virtue of this amendment, Government also clarified that if any captive power generating unit after utilizing the electricity generated for its own internal purpose still left with some surplus electricity generated, it can sell it to the Grid and such sale would attract, to that extent, electricity duty in accordance with the provision in Section 3 of the Act, 1939.

27.15. On account of these orders, it is now clear that only small group of captive power generating units which are brought into the duty net under Section 3B are those who consume only partially the captive power generated by them and sell balance to the grid even though they have

requirement of electricity for their own use. By this, two fold object of the legislation is discernable i.e. to augment revenue to the State and to discourage captive generating units from indulging in sale of electricity. The primary object in encouraging captive power generating units was that economic activity should not suffer on account of acute shortage of power and therefore the business enterprises others can make their own provision to generate electricity for its internal use. The captive power generating units which consume electricity generated by them only partially and sell the balance electricity form into a separate homogeneous group. This is a separate class by itself and, therefore, this particular class is treated differently as compared to any other consumers. As long as there is a justification for such classification and within the same class there is no discrimination, offending statutory provision stands the test of Article 14 and it cannot be said that such action is arbitrary and discriminatory.

27.16. It is permissible to treat equals alike and different ones differently. It is settled principle of law that there is no imperative requirement that taxation shall be absolutely equal. As held by Supreme Court in **Spences Hotel Pvt.Ltd.**, *"Equality and uniform policy means uniform and equal rates of assessment and taxation which has been followed in this tax. The concept of equality and uniformity has to adjust from time to time to new and advancing social and economic conditions and needs of public finance and fiscal policy, of course within constitutional limitations."* It being a taxation provision with the object to augment the resources for the State for its utilization in welfare activities, the Court cannot strike down such provision merely on the ground that what is levied by the impugned provision is higher on the petitioners as compared to the duty levied on a licensee selling it to others. As long as power is traceable to entry 53 of List II of schedule VII of the Constitution and there is no discrimination among same class of persons, merely because a class of consumers are treated as separate group and higher duty is levied cannot be a ground to strike down such provision.

27.17 In the field of taxation interference of writ Court is in a very narrow compass. It must be left to legislative wisdom. Court cannot trench into such field unless it is shown as patently illegal offending mandate of Constitution.

Furthermore, respondents have given sufficient justification to target a particular class of captive power generating units to impose higher duty.

27.18. In this context its apt to quote the following observations of Supreme Court in **State of Karnataka and Another Vs. Hansa Corporation**[19]:

> "16. **Let it be remembered that the impugned measure is a taxing statute and in the matter of taxing statute the legislature enjoys a larger discretion in the matter of classification so long as it adheres to the fundamental** principle underlying the doctrine of classification. The power of the legislature to classify is of wide range and flexibility so that it can adjust its taxation in all proper and reasonable ways. In Khyerbari Tea Co. Ltd., and Anr. v. The State of Assam MANU/SC/0048/1963 : [1964]5SCR975 this. Court observed as under :
>
> > It is, of course, true that the validity of tax laws can be questioned in the light of the provisions of Articles 14, 19; and Article 301 if the said tax directly and immediately imposes a restriction on the freedom of trade; **but the power conferred on this Court to strike down a taxing statute if it contravenes the provisions of Articles 14, 19 or 301 has to be exercised with circumspection, bearing in mind that the power of the State to levy taxes for the purpose of governance and for carrying out its welfare activities is a necessary attribute of sovereignty and in that sense it is a power of paramount character.**
> >
> > **It was also observed that legislature which is competent to levy a tax must inevitably be given full freedom to determine which articles should be taxed, in what manner and at what rate.** It would, therefore, be idle to contend that a State must tax everything in order to tax something. In tax matters, "the State is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably" (see Willis on 'Constitutional Law', p. 587). This statement of law has been approved by this Court in the case of East India Tobacco Co. v. State of Andhra Pradesh MANU/SC/0064/1962 : [1963]1SCR404 . The question, therefore, is, whether a tax of a certain kind can be levied on entry of goods in certain local areas, the classification of local areas, if found to be reasonable, the levy of tax would not be invalid on the ground that choosing certain areas only excluding some others would violate Article 14. Whether in this case the classification is reasonable would be presently examined but the contention that if the State Government is granted a choice in the matter of selection of local area, ipso facto, the statute would be unconstitutional as being violative of Article 14, must be negatived."
>
> (emphasis supplied)

28. **POINT NO.4:**

28.1. It is next contended that the enactment is brought out without prior consultation with the State Electricity Regulatory Commission.

28.2. On this issue also, heavy reliance is placed on judgment in **M.P. Cement Manufacturers Association** (cited supra). However, it is to be

noted that Supreme Court declined to go into the issue and left the issue open. However, by referring to provision in Section 12 (3) of the M.P.State Act, 2000, Supreme Court observed that atleast in future the State would consult State Electricity Regulatory Commission before proposing any enactment/amendment to existing enactment on subject covered by said provision.

28.3. In order to appreciate the contention of learned counsel for petitioners, we have had a closure look at the provision in Section 12 (4) of the Act, 1998.

28.4. Section 12 of the Andhra Pradesh Electricity Reform Act, 1998 read as under:

> **Section 12**: **Powers of the State Government**
>
> ***(4) The State Government shall consult the Commission in relation to any proposed legislation or rules concerning any policy direction and shall duly take into account the recommendation by the Commission on all such matters.***
>
> (emphasis supplied)

28.5. Section 12 (4) requires State Government to consult before proposing to make any law. Provision do not mandate legislature to consult State Electricity Regulatory Commission before making a law concerning electricity. As discussed supra, the composite State Legislature was competent to make law to levy duty on consumption of electricity by captive generation units by introducing Section 3 –B in the Act, 1939. it is beyond cavil of doubt on the competency of State legislature to make law on subjects enumerated in List II, subject of course to limitations imposed by the constitution. As held by Supreme Court in **Maharaj Umeg Singh Vs State of Bombay**[20] which decision is noticed in **M.P.Cement Manufacturers Association** (supra)**,** no fetters can be imposed on State legislature from exercising its plenary powers to legislate on the legislative heads specified in List-II and List-III of the Seventh Schedule to the constitution, unless prohibition is contained in the constitution.

28.6. Having analysed the precedents on the subject and scope of Section 12 (3) of the M.P. Act, 2000, Supreme Court held as under:

> "38. In our opinion, the consequence of non-consultation in terms of Section 12(3) of the Sudhar Adhiniyam would not be an incompetent piece of legislation

but a legislation introduced in breach of a salutary requirement to consult an expert statutory body. The statutory requirement for consultation with a body of experts before proposing legislation will serve as an inbuilt safeguard against a challenge under Article 14 of the Constitution apart from anything else.

39. Nevertheless, we do not propose to decide, whether by reason only of such non-consultation, Section 3(2) of the 1981 Adhiniyam is violative of Article 14, nor do we propose to decide whether the cess of 20 paise is excessive, nor the other grounds urged by the appellants pertaining to Article 14. We have referred to the provisions of the Sudhar Adhiniyam so that the State Government may in future act in consonance with Section 12(3)."

28.7. The said decision does not come to the aid of the petitioners. It may be true that State Government ought to have consulted the State Electricity Regulatory Commission. But, mere non-consultation with State Electricity Regulatory Commission by the State government before introducing the bill in the State legislature to make law does not invalidate the impugned provision on that ground, when the State legislature is otherwise competent. The power of State legislature is to legislate on imposing duty on consumption of electricity is traceable to Entry 53 of List II in Schedule VII of the Constitution and such power is plenary. It can not be circumscribed by any other legislation.

29. **POINT No.5**

It is also contended by the learned counsel for petitioners in some of the writ petitions that though relaxation from levying duty in accordance with provisions of Section 3-B is granted to them, but such relaxation is applied prospectively and once State has granted relaxation same must be applied from the date when the provision is made and action of the respondents in not extending relaxation from the inception is *ex facie* illegal. Section 3B imposes duty on consumption of electricity by captive power generating units. Thus, ordinarily all such units are liable to pay duty on electricity consumed. Sub section 3 of Section 3-B enables the State to extend relaxation from applying the provisions of Section 3-B(1). This being an exemption provision, it is for the State to exercise discretion so vested whenever State is of the opinion that such relaxation to a particular person or sector is in the larger interest of the public. Having regard to the power vested in Section 3–B, initially the Government granted relaxation to agricultural farmers. Subsequently relaxation was extended to Ferro Alloy

Industry. Having noticed that some of the captive power generating units are utilising the entire power generated by them, the Government felt it appropriate to grant them relaxation from payment of duty. Similarly, having noticed that in certain industrial units, more than the required electricity for internal use is generated, further relaxation is granted to such units also from applying the provision. Thus, whenever, it is felt necessary by the Government, such power to relax is exercised. By very nature, the relaxation is to be prospective and it cannot be made retrospective. Until the relaxation is granted, the captive power generating units are liable to pay the duty as levied. We have held that provision in Act, 1939 to levy duty at the rate of 0.25 paise per unit consumed on the power generated by captive power generating units as valid. Thus, only from the date of relaxation they need not pay the duty. When statute vests discretion on the Government, Court cannot issue mandamus to exercise such discretion in a particular manner. More so, when intendment of the relaxation is only prospective and State never intended to extend such relaxation retrospectively. In matters involving State finances, Court cannot direct to grant relaxation retrospectively. State cannot be burdened with the financial liability by directing to refund nor not to collect the duty. Thus, there is no merit in the plea of the petitioners for refund of the amount of duty collected/exemption for them from collection of duty till the date when relaxation was granted, by relying on the subsequent relaxation granted to some of them.

30. All the points are answered against the petitioners. We see no merit to the challenge mounted to impugned statutory provision and levy of duty on petitioners. The writ petitions are accordingly dismissed.

No costs. Miscellaneous petitions, if any, stand dismissed.

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DILIP B. BHOSALE, ACJ

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P.NAVEEN RAO, J

Date:19-05-2016
kkm/tvk

HON'BLE THE ACTING CHIEF JUSTICE DILIP B.BHOSALE
AND
HON'BLE SRI JUSTICE P.NAVEEN RAO

Writ Petition Nos. 6095, 5358, 5916, 5917, 5927, 6083, 6220, 6340, 6544, 6545, 6769, 6786, 6789, 6792, 6797, 6810, 6991, 7027, 7037, 7049, 7143, 7144, 7145, 7198, 7230, 7256, 7276, 7340, 7358, 7364, 7374, 7448, 7467, 7475, 7551, 7552, 7798, 7829, 7835, 7836, 7856, 7901, 7916, 8031, 8038, 8102, 8215, 8285, 8300, 8479, 8562, 8659, 9626, 9639, 10283, 10398, 12072, 12429, 12544, 14570, 17805, 18575, 19038, 20342, 21444, 21612, 21950, 23018 **of 2004,** 2415, 4268, 5186, 6090, 7668, 8090, 8226, 10762, 22599 **of 2005,** 16934, 17068, 17069, 17637, 17643, 17859, 18036, 18254, 18517, 18518, 18519, 19304, 20138, 24349, 24350, 24364 **of 2006,** 6634, 7979, 9411, 9446, 13540, 15786, 18247, 18598, 19629, 19891, 21332, 21333, 21334 **of 2007,** 8100, 8101, 10268, 14798 **of 2008,** 3539, 6980, 9262,

11557, 13154, 13576, 13844, 25316, 15235, 15250, 19285, 19846, 20480, 20536 **of 2009,** 1782, 13728, 13729, 18577, 19560, 21734, 23897, 28810, 28981, 29717 **of 2010,** 520, 1950, 7561, 18953, 20181, 25920, 27845, 28063, 28867, 28875 **of 2011,** 13002, 16645, 18090, 18241, 22182, 22187, 22189, 24651, 25990 **of 2012,** 6466, 6471, 7733, 9072, 9797, 15771, 18164 and 28910 **of 2013**

Date:19-05- 2016

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[1] (1985) SUPPLEMENT SCC 205

[2] 1993 (49) DLT 83 (DB)

[3] 2016(2) Supreme 103

[4] (2004) 2 SCC 249

[5] AIR 1953 SC 375(1)

[6] [Privy Council – (1939) AC 117]

[7] AIR 1959 SC 1124

[8] (2002) 5 SCC 203

[9] (2004) 10 SCC 201

[10] AIR 1963 SC 414

[11] 2010 SCC Online Ori 96 : (2011) 111 CLT 16

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[13] (1996) 3 SCC 15

[14] AIR 1964 SC 1284

[15] (1991) 2 SCC 154

[16] (1996)4 SCC 596

[17] (2000) 5 SCC 488

[18] AIR 1960 SC 1080(1)

[19] 1980 (4) SCC 697

[20] AIR 1955 SC 540