IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.20374 of 2021

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M/S Majhaulia Sugar Industries Pvt. Ltd. having its Sugar Mill located at Majhaulia, P.O.-P.S.-Majhaulia, District West Champaran (Bihar) (formerly known as M/S Jai Shree Sugar Mills), represented through Chief General Manager namely Indeep Singh Bhatia, male, aged about 54 years, son of Jaswan Singh Bhatia, resident of D-140, Sector 122 Noida, Near Raghav School, Noida, Gautam Buddha Nagar, Uttar Pradesh-201301.

... ... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.
2. The Secretary-cum-Commissioner of Commercial Taxes, Government of Bihar, Patna.
3. The Assistant Commissioner, Commercial Taxes, Bettiah Circle, Bettiah, West Champaran at Bettiah.
4. Bihar State Power Holding Company, Pvt. Ltd. Through its Law Advisor namely Ritesh Ranju Male, Aged 53 Years Son of Late M. Shankar Sinha, Resident of Flat no. 201, 2nd Floor, Manorama Apartment- near Pani Tanki, New Patliputra Colony, Patna -13.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 20377 of 2021

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Magadh Sugar and Energy Ltd. Unit of Hasanpur Sugar Mills Samastipur P.O. and P.S.- Hasanpur, District- Samastipur through its Executive Vice President (Cane) namely Sri Shambhu Prasad Rai, aged about 59 years, Son of Sri Rambirojan Rai, Resident of Hasanpur Sugar Mills, Samastipur P.O. and P.S.- Hasanpur, District- Samastipur.

... ... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.
2. The Secretary-cum-Commissioner of Commercial Taxes, Government of Bihar, Patna.
3. The Assistant Commissioner, Commercial Taxes, Samastipur Circle, Samastipur.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 20378 of 2021

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Magadh Sugar and Energy Ltd. Unit M/s New Swadeshi Sugar Mills, having its local office at and P.O. Narkatiyaganj, P.S. Narkatiyaganj, District - West Champaran through its Executive Vice President namely Ashish Khanna, aged about 62 years (Male), Son of Late Dr. R.N. Khanna, Resident of Bharat Sugar Mill, P.O. and P.S. - Sidhwalia, District - Gopalganj.

... ... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.
2. The Secretary - Cum - Commissioner of Commercial Taxes, Government of Bihar, Patna.
3. The Assistant Commissioner, Commercial Taxes, Bettiah Circle, Bettiah, District - West Champaran.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 20379 of 2021

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M/s Vishnu Sugar Mills Ltd. having registered office at C-3/3, Gillander House, 8, Netaji Subhash Road, Kolkata- 700001 and local office at Vishnu Sugar Mills, Gopalganj through its General Manager, Sri Sasidhar Panicker, male, aged about 75 years, son of Late Raghav Panicker, resident of Village- Vishnu Sugar Mills, P.O.- Vishnu Sugar Mills- 841428 (Gopalganj), P.S. Gopalganj, District- Gopalganj.

... ... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.
2. The Secretary-cum- Commissioner of Commercial Taxes, Government of Bihar, Patna.
3. The Assistant Commissioner, Commercial Taxes, Gopalganj Circle, District Gopalganj.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 20380 of 2021

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Magadh Sugar and Energy Ltd. Unit of Bharat Sugar Mills, having its local office at and P.O. Sidhwalia, District- Gopalganj through its Executive Vice President namely Ashish Khanna, aged about 62 years (Male), son of Late Dr. R.N. Khanna, resident of BNharat Sugar Mill, P.O. and P.S. - Sidhwalia, District- Gopalganj.

... ... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.
2. The Secretary- cum- Commissioner of Commercial Taxes, Government of Bihar, Patna.
3. The Assistant Commissioner, Commercial Taxes, Gopalganj Circle, Gopalganj.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 728 of 2022

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M/s Riga Sugar Company Ltd. having registered Office at 14, Netaji Subhas Road, Kolkata-700001 and its Distillery Located at Dhanukagram, P.O.-Roga, District-Sitamarhi through its Resolutional Professional, Shri Neeraj Jain, aged about 41 Years (Male, Son of Mr. M.R.jain Resident of Siddhartha, Block-B, 7C, 41/2 Burdwan Road, Alipore, Kolkata Having Local address at C/o Roga Sugar Factory Ltd., Dhanukagram, P.O. and P.S.-Roga, District-Sitamarhi.

... ... Petitioner/s

Versus

1. The State of Bihar through Chief Secretary, Government of Bihar, Patna.
2. The Secretary-Cum-Commissioner of Commercial Taxes, Government of Bihar, Patna.
3. The Assistant Commissioner, Commercial Taxes, Sitamarhi Circle, Sitamarhi.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 9125 of 2024

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M/s. Harinagar Sugar Mills Limited a company registered under the provisions of the Indian Companies Act, 1956, having its registered office at 207, Kolbadevi Road, Mumbai-400002 and its sugar factory at Harinagar, P.O. Harinagar, P.S. Ramnagar, District - West Champaran through its Resident Manager- Rai Giriraj Krishna, male, aged about 60 years, S/o Late Rai Vinay Krishna, R/o 202, Srhreeniwas Apartment, Budh Marg, P.S.-Kotwali and District- Patna.

... ... Petitioner/s

Versus

1. The State of Bihar through the Chief Secretary, Government of Bihar, Patna.

2. The Secretary cum Commissioner of Commercial Taxes, Government of Bihar, New Secretariat, Patna.
3. The Assistant Commissioner of Commercial Taxes, Bagha Circle, Bagha (W. Champaran).

... ... Respondent/s

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Appearance :

(In Civil Writ Jurisdiction Case No. 20374 of 2021)

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Mr. Ashish Giri, Advocate
For the Respondent/s	:	Mr. P.K.Shahi, A.G. Mr. Vikash Kumar, SC-11

(In Civil Writ Jurisdiction Case No. 20377 of 2021)

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Mr. Ashish Giri, Advocate
For the Respondent/s	:	Mr. P.K.Shahi, A.G. Mr. Vikash Kumar, SC-11

(In Civil Writ Jurisdiction Case No. 20378 of 2021)

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Mr. Ashish Giri, Advocate
For the Respondent/s	:	Mr. P.K.Shahi, A.G. Mr. Vikash Kumar, SC-11

(In Civil Writ Jurisdiction Case No. 20379 of 2021)

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Mr. Ashish Giri, Advocate
For the Respondent/s	:	Mr. P.K.Shahi, A.G. Mr. Vikash Kumar, SC-11

(In Civil Writ Jurisdiction Case No. 20380 of 2021)

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Mr. Ashish Giri, Advocate
For the Respondent/s	:	Mr. P.K.Shahi, A.G. Mr. Vikash Kumar, SC-11

(In Civil Writ Jurisdiction Case No. 728 of 2022)

For the Petitioner/s	:	Mr. Y.V. Giri, Sr. Advocate Mr. Ashish Giri, Advocate
For the Respondent/s	:	Mr. P.K.Shahi, A.G. Mr. Vikash Kumar, SC-11

(In Civil Writ Jurisdiction Case No. 9125 of 2024)

For the Petitioner/s	:	Mr. Ramesh Kumar Agrawal, Advocate Mr. Sanjeev Kumar, Advocate Mr. Rishabh Mishra, Advocate
For the Respondent/s	:	Mr. P.K.Shahi, A.G. Mr. Vikash Kumar, SC-11

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY

CAV JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 18-12-2024

The petitioners are industries engaged in the manufacture of sugar, who are generating power, in-house for captive consumption.

2. The petitioners are aggrieved with the provision made for levying duty under the Bihar Electricity Duty Act, 1948, on the 'value of energy' as defined by an amendment; which amendment has also been made retrospectively with effect from 17.10.2002 and also with the provision for validation; to nullify the effect of the judgment in **Bihar Sugarcane Mills Association and Ors. v. The State of Bihar and Ors; 2009 (4) PLJR 460.**

3. The levy, as originally imposed under Section 3 of the Bihar Electricity Duty Act, 1948 was challenged on the ground of legislative incompetence; since it is in the nature of a levy on production clearly coming within Entry 84 of the 7th Schedule of the Constitution of India, and the exemptions to certain establishments, under sub-section (2) of Section 3 making the levy discriminatory. A Division Bench of this Court negatived the challenge based on constitutionality, or the lack of it by a decision reported in **Indian Aluminium Co. v. State of Bihar; 1992 (1) PLJR 55.** The petitioners were all paying the

duty, for the electricity generated, at the rate of Rs. 2 paise per unit of energy. A notification was issued under Section 3(1) by the Government increasing the levy to Rs. 4 paise per unit for electrical energy consumed or sold for the purpose of irrigation and 6 % of the ‘value of energy’ for electrical energy consumed or sold for any other purpose than irrigation; by S.O. 137 dated 21.10.2002. S.O. 14 dated 04.03.2005 made a further entry to the Schedule, including the category of consumption of electrical energy generated by captive DG sets/captive power plants, for whom the rate of duty was provided at 6% of the ‘value of energy’, which shall be equivalent to the energy tariff as fixed by the Bihar State Electricity Board, (for brevity, BSEB).

4. The said amendment & notification were challenged by a batch of writ petitions in which they were held to be unconstitutional for reason of there being available no guideline in the Statute, to ascertain, in which cases the duty would be payable, calculated on the basis of the energy consumed or sold and there existing no guideline for determining the ‘value of energy’ as provided for in the notifications of 2002 and 2005. The State, after the decision in **Bihar Sugarcane Mills Association** (supra) brought in amendments with retrospective effect and a validation clause

specifically providing a definition for ‘value of energy’. The said amendment brought in by the Bihar Finance Act, 2012 is challenged before us in the batch of writ petitions.

5. It is undisputed that the amendment and the challenge raised is confined to the duty levied prior to 14.01.2011. On 14.01.2011 S.O. 1 was issued exempting from payment of electricity duty, electrical energy generated by generators or captive plants, so generated solely for self-consumption. The amendment of 2012, was to ensure that the amounts paid up by the different industries, as per S.O. 14, who were captive consumers of electricity generated by them, remains in the coffers of the State without being refunded, on the provisions being struck down in the **Bihar Sugarcane Mills Association** (supra).

6. Learned Senior Counsel Sri Y.V. Giri, argued for the petitioners and elaborately referred to the judgment in **Bihar Sugarcane Mills Association** (supra) to contend that the defect, for reason of which the notification was declared *ultravires* by this Court, has not been rectified even now. It is emphasized that the petitioners are a separate class from the normal consumers who pay tariff per unit as determined by the BSEB; which is the licensee of the State Government. The tariff is determined based

on a number of factors including loss on transmission, none of which applies to the petitioners. The Division Bench, on the earlier occasion found that the petitioners are a separate class and cannot be treated in the same manner as the consumers, who are supplied electricity based on the tariff determined by the BSEB. It is argued that by the amendment, the State is again resorting to a pick and choose treating un-equals as equals; clearly in violation of Article 14 of the Constitution of India. Reliance is placed on **CTO v. Binani Cements Ltd., (2014) 8 SCC 319.**

7. It is argued that while the earlier notification was held *ultra vires* for reason of excessive delegation; by the present amendment, the delegator has made further delegation by reason of the prescription made of 'value of energy' relatable to the tariff per unit determined by the BSEB. The value of energy, as per the definition, by the present amendment, has a direct relation to the charges paid by a consumer to the BSEB. The BSEB has different tariffs for different categories of consumers; with whom there can be no equation of the petitioners, who are using the electricity generated by themselves. The tariff imposed by the BSEB per unit, change with times based on the escalation in the value of various

factors; which are not applicable to captive power generation in proximity and inside the industrial units. The petitioners make a minimal investment for generation of electricity captively. It has no similarity as compared to the expenses incurred by the BSEB, in generation or purchase and transmission of electricity, which is at a higher scale and involves higher investments; including those for administration of a vast network of consumers with a variety of utility.

8. It is contended that the petitioners being a special category, cannot be treated under the general provisions; for which reliance is placed on **State of Manipur and Ors. v. Surajkumar Okram and Ors.; 2022 SCC OnLine SC 130**. On the various factors involved in determining the tariff of the BSEB reliance is placed on **M/s Gas Authority of India Ltd. v. M/s Indian Petrochemicals Corp. Ltd. & Ors; 2023 (2) BLJ 124-SC**. Specific reference is made to sub-clause (ii) of the definition clause in Section 2(ee) wherein reference is made to the Bihar State Electricity Board constituted under Section 5 of the Electricity (Supply) Act 1948, which act has already been repealed by the Electricity Act, 2003. The reference to a repealed act is by incorporation and on the repeal being effectuated, the entire provision is rendered otiose. Reliance is

placed on **Mahindra & Mahindra Ltd. v. Union of India; AIR 1979 SC 798** and **State of Uttarakhand v. Mohan Singh, (2012) 13 SCC 281**.

9. It is also argued that the notifications having been set aside, the mere introduction of a definition clause in the Act would not cure the defect pointed out by the earlier Division Bench. The amendments according to the learned Senior Counsel cannot lead to the State retaining the money paid by the petitioners, pending the litigation which has been finally decided in **Bihar Sugarcane Mills Association** (supra).

10. It is also argued that the provision as existing in the Bihar Electricity Duty Act, 1948 imposing the levy on captive consumers by Section 4(4) does not permit the measure of charge, by way of the definition of 'value of energy'. Sub-section (4) of Section 4 specifically refers to the duty being levied on the units of energy consumed by the industry, by its employees or sold by the unit; which is generating electricity for captive consumption or sale.

11. Sri Ramesh Kumar Agarwal, learned Counsel for some of the petitioners, adopted the arguments of Sri Y.V. Giri. The learned Counsel also emphasized on the defect pointed out in the earlier judgment not having been removed and there being

no further notification issued even after the amendment; the earlier notification having been set aside by the Division Bench of this Court. On the question of un-equals being treated equals, reliance is placed on **Vishnu Sugar Mills Ltd. v. The State of Bihar and Ors; 1998 (3) PLJR 686 DB**. The Constitution Bench decision in **Mathuram Agrawal v. State of M.P., AIR 2000 SC 109** is relied on to point out the four components of tax, which should be clearly and unambiguously conveyed by the words employed in the Statute. On the principle of validation, nullifying decisions of competent courts, reliance was placed on **Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, AIR 1970 SC 192**, **D. Cawasji and Co. v. State of Mysore, AIR 1984 SC 1780** and **Delhi Cloth & General Mills Co. Ltd. v. State of Rajasthan, (1996) 2 SCC 449**. It is asserted that even in the present definition of 'value of energy' there exists an ambiguity and there are no specific guidelines.

12. The learned Advocate General on the other hand emphatically referred to the definition clause to argue that there is sufficient guideline provided in the Statute itself, by the legislature, to levy and recover duty from the captive consumers. It is pointed out from the definition clause

introduced, as per the amendment, that the 'value of energy' is the charge imposed by the BSEB on its consumer which has a direct link to the unit consumed even in the case of the captive-consumers. Power generation being a monopoly of the State, the duty is imposed for granting the privilege to the units for generation of electricity, for captive consumption and sale. But for this privilege conferred; on the captive power generating industries, they would have to source their power requirement from the BSEB and pay tariff at the rates provided for the category under which the individual unit falls; being industrial use and based on the consumption, whether it is Low Tension, High Tension or Extra High Tension. It is only a nominal percentage of the tariff of electricity as fixed by the BSEB, a licensee of the State, that is levied from the captive generating units.

13. Even with respect to a captive consumer the tariff that would be applicable to him is very clear insofar as the petitioners' industries do not work solely on the electricity generated in-house. The BSEB supplies electricity to the petitioners and the petitioners are also using the electricity generated by themselves. The duty levied is the 'value of energy' which is determined based on the tariff the petitioner

pays for the electricity supplied by the BSEB; 6% of which would be the duty payable on the units self-generated and captively consumed. Otherwise also, if the unit functions only on the captive generation, then too, a mere determination of the category of the Unit, based on its electricity requirement, the nature of utility and the quantum of electricity consumed would only be required to determine the duty based on 'value of energy'.

14. Insofar as the generation of electricity is concerned thus, even if the petitioners did not have to pay any tariff, the duty is determined on the basis of the tariff that would normally be payable on the units of electricity; if consumed by the petitioner as supplied by the licensee. The duty is on the sale and consumption of energy which is permissible under Entry 53 of the State List. The challenge with respect to the levy on the ground of arbitrariness and discrimination has already been negatived by the Division Bench of this Court in **Indian Aluminium Co.** (supra).

15. Section 3 of the Act has an option insofar as the duty being levied on the unit of energy or on the 'value of energy' as determined by the State Government. The 'value of energy' is defined in the Act as those charges which any

consumer would pay to a licensee for the electricity consumed by him; which also has been applied in the definition clause to the captive consumers. Section 4(4) read with Section 3 imposes the levy on the petitioners herein and though units of energy consumed is referred to in sub-section (4), the ‘value of energy’ has a direct nexus with the units consumed which would sustain the amendment and negative the challenge; concludes the learned Advocate General.

16. **Indian Aluminium Co.** (supra) upheld the legislative competence of the State to enact the Duty Act; with the observation that the duty imposed was a tax and not a fee and also upheld the validity of Section 3(2) of the Duty Act; negativing the ground of discrimination. The petitioners have heavily relied on the further challenge after the concept of ‘value of energy’ was introduced in the Act; which was found to be *ultra vires* in the **Bihar Sugar Mills Association** (supra). It is the specific contention of the petitioners that the defect pointed out in the said decision, while striking down the concept of ‘value of energy’, as introduced in Section 3(1) and the Notification, which permitted the captive consumers to be imposed with a duty of 6% of the value of energy, equivalent to the energy tariff as fixed by the BSEB, still vitiates the Duty Act

even though the definition of value of energy has been incorporated in the Act, which makes it imminent that we look at the contentions raised and the findings recorded in the earlier decision.

17. The basic contention, earlier raised, was with respect to the incorporation of value of electrical energy consumed or sold in Section 3(1) and delegating the power to levy tax to the Government on such value of energy, without any guidelines; making it arbitrary and vitiated for reason of unbridled power conferred. The option to levy the duty on the units of energy consumed or sold or on the value of energy consumed or sold was impermissible, since it went against the scheme of the enactment. It was also argued that there was no indication as to how the value of energy consumed or sold would be ascertained, thus, leaving it to the unbridled discretion of an executive without laying any guideline, making it excessive delegation of legislative functions. The Notification issued bearing S.O.No. 14 dated 04.03.2005, further made a delegation by reason of the value of energy being equated to the energy tariff as fixed by the BSEB. Thus, the rate is now fixed by the BSEB and not by the State Government, insofar as the duty levied increases with the change in tariff implemented by

the BSEB. The ground of arbitrary discrimination was also raised on the contention of there being no valid classification between persons who are captive consumers and those who consumed electricity supplied by the BSEB, thus, violating Article 14 of the Constitution of India in treating un-equals as equals.

18. In **Bihar Sugar Mills Association** (supra), the foundational arguments thus were that the power of levying tax on the basis of 'value of electrical energy consumed or sold' under Section 3(1) of the Act was bereft of any guidelines and is *ultra vires,* for the reason of the legislative function having been delegated to the executive without laying down any guidelines. Section 3, while was amended, to bring in a choice to the Government to determine the duty either on the 'units of energy consumed or sold' or on the 'value of energy consumed or sold'. Section 4 and 5 stood un-amended, wherein duty is required to be paid on the units of energy consumed or sold. There was no method by which the 'value of energy consumed or sold' could be ascertained and there was also no guideline as to how the choice of assessment on the basis of units of energy or value of energy, consumed or sold would be made by the Government. The further argument was also that while the delegation is to the

Executive Government to specify the rates at which the duty is to be levied, by issuing notification; the notification issued by the Government further delegates the said power to the BSEB, since the value of energy is made equivalent to the energy tariff, as fixed by the BSEB. When the BSEB increases the tariff, normally the 6% of the value of energy also is increased; making the further delegation violative of the principle "*delegatus non potest delegare'*. The ground of arbitrary discrimination, violating Article 14 was also urged with the argument that 6% of the value of energy, is imposed on captive DG set or power-plants while others were fixed at a different rate, inviting the vice of classification especially since there is no nexus between the basis of classification and the object sought to be achieved.

19. The Division Bench in the cited decision found that there was no precise meaning attributable to the expression 'value of energy' making the amended provision, unworkable and susceptible of being applied discriminately by the Executive without any basic guideline resulting in possibilities of excessive power being resorted to and therefore, becomes vulnerable. The challenge was found to be not only relating to delegation of authority to fix the rate but also regarding the

upper limit being fixed. The challenge was also on the executive being given an unbridled power to determine tax upon the value of energy, without a clear definition being provided. The amendment to Section 3(1) providing for payment of duty on the value of energy, hence, was struck down along with the notifications dated 21.10.2002 and 04.03.2005.

20. Dealing with the present amendment, we have to find that after the un-amended provisions were struck down, the State brought in a definition of value of energy in Section 2(ee) which is extracted hereunder: -

> *(ee) 'value of energy'—*
>
> *(i) in case of energy sold to a consumer by a licensee or by any person who generates energy, means the charges payable by the consumer, to the licensee or to any person who generates such energy, for the energy supplied, by such licensee or to any person, as the case may be, but it shall not include the following charges, namely—*
>
> *(1) Meter charges*
>
> *(2) Interest on delayed payment*
>
> *(3) Fuse-off call charges and reconnection charges:*
>
> *Provided that where no energy has been consumed by a consumer, minimum charges payable by him shall not deemed to be the value of energy:*
>
> *Provided further that where the units of energy actually consumed by a consumer are less than the units of energy for which prescribed minimum charges are payable, the value of energy shall, in the case of such consumer, mean the charges for the units of energy actually consumed by him and not the prescribed minimum charges:*
>
> *(ii) in case of energy consumed by the person generating such energy, means the charges payable by any other consumer for such quantum of power to the Bihar State Electricity Board constituted under section 5 of the Electricity*

(Supply) Act, 1948 (Act 54 of 1948) in respect of energy supplied by the Bihar State Electricity Board within the area where the consumer is located;"

(2) The amendments made in section 2 of the Act shall be deemed to be, and to always have been, for all purposes, as validly and effectively in force at all material times with effect from the seventeenth day of October, 2002.

(3) Any assessment, collection, adjustment, reduction or computation made or any other action taken or anything done or purported to have been taken or done under the Bihar Electricity Duty Act, 1948 (Bihar Act 36 of 1948) and notifications issued and rules made there under shall be deemed to be and to have always been, for all purposes, as validity and effectively, assessed, collected, adjusted, reduced, computed or taken or done as if the said Act as amended by this Act had been in force at all material times and accordingly, notwithstanding anything contained in any judgment, decree, or order of any Court, or Tribunal or other Authority :-

(a) no suit or other proceedings shall be maintained of continued in any Court or Tribunal or other Authority for the refund of any amount received or realized by way of such duty;

(b) no Court, Tribunal or other Authority shall enforce any decree or order directing the refund or any amount received or realized by way of such duty;

(c) recoveries shall be made, in accordance with the provisions of sub-section (ee) of Section 2 read with the provisions of section 3 of the Bihar Electricity Duty Act, 1940 (Bihar Act 36 of 1948), of all amounts which could have been collected as duty under the said Act by reason of amendment made in Section 2 by this Act but which had not been collected.

(4) For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable if this section had not come into force."

21. As of know the legislature has provided a clear definition of 'value of energy' relatable to the charges payable

by a consumer to a licensee or a person who generates energy, which is sold to that consumer. In the case of energy consumed by a person generating such energy, ie: the captive consumers like the petitioners, 'value of energy' is relatable to the charges payable by a comparable consumer of BSEB, for an equivalent quantum of power sold to that consumer by the BSEB. As of now, it cannot be found that there was any excessive delegation by the legislature without any guideline. The legislature itself has provided that the 'value of energy', for a captive consumer, would be the tariff prescribed by the BSEB, to a comparable consumer, for the power sold to him; which quantum of power is consumed by the person who captively consumes the power generated by him or sells it.

22. Thus, the measure of tax, on which the rate is applied, has been specified by the legislature itself, as the tariff notified by the BSEB. In this context we notice **Govind Saran Ganga Saran v. Commissioner of Sales Tax and Ors.; AIR 1985 SC 1041**, regarding the components which enter into the concept of tax. The first of these regarding the character of the imposition is known by its nature prescribing the taxable event; attracting the levy and the second, is the clear indication of the person on whom the levy is imposed, the third, the rate on

which the tax is imposed and the fourth, the measure or value to which the rate would be applied for computing the tax liability. It was held by the Hon'ble Supreme Court that if these components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law and any uncertainty or vagueness in the legislative scheme defining any of these components, would be fatal to the validity itself.

23. Examining the provision in the said perspective, the taxable event essentially is the consumption of power, by an individual or a legal entity and the measure is provided by the value of energy; which is to be determined on the basis of the tariff, as notified by the BSEB. In the case of captive consumers the measure would be that tariff payable by a comparable consumer to the BSEB, for an equivalent quantum of power consumed. That is to say if the captive consumer generates and consumes a particular quantum of power, the value of energy, which is the measure to determine the electricity duty payable, would be the tariff applicable if the captive consumer was sourcing the power from the BSEB; the category being determined by the status of the consumer, whether he be an industrial or commercial user and whether his category of supply is High Tension or Extra High Tension and so on and so

forth.

24. The rate of tax is that notified by the Government which is applied on the 'value of energy' which is the tariff that would be applicable to the quantum of energy consumed, captively, as prescribed by the BSEB for a comparable consumer. The rate as fixed by the Government through the S.O is 6%. The levy is also clearly on the person who consumes or sells the electrical energy, which in the present case would be the entity similar to the petitioners who are generating electricity and captively consuming it or selling the electricity generated. The four components of tax hence are clearly delineated in the statute itself; putting to peril all contentions regarding absence of guidelines, unbridled exercise of power, excessive delegation and even that of the delegate further delegating the power conferred.

25. An argument was also raised that the Electricity (Supply) Act, 1948 has been repealed by the Electricity Act 2003 and the definition Section 2(ee)(3)(ii), referring to Section 5 of the Electricity (Supply) Act and the BSEB would hence be rendered otiose.

26. A specific query was raised by order dated 25.09.2024, as to the continuance of the BSEB after the

Electricity Act, 2003 came into force; which the learned Advocate General had answered that there was passive approval by the Central Government, as is provided for under Section 172 of the Electricity Act, 2003. The Bihar State Power Holding Company Ltd., the successor of the BSEB has filed an intervening application answering our query. It is stated that the BSEB, which was constituted with effect from 01.04.1958 under Section 5 of the Supply Act continued its operations till 09.06.2002 and thereafter up to 31.12.2012, functioned as the State Transmission Utility (STU) in accordance with Section 172 of the Electricity Act, 2003. It was the BSEB who collected the electricity duty on behalf of the State Government, in its capacity as the STU. It is admitted that there is no specific document on record to show that any notification or mutual agreement was entered into between the Central and State Government. However, the Power Finance Corporation (PFC) a centrally owned financial institution, played a pivotal role in the restructuring of BSEB, facilitating the creation of Bihar State Power Holding Company Ltd. and its subsidiaries which commenced operations from 01.11.2012. It was the Rural Electrification Corporation (REC) a public sector enterprise, again under the Ministry of Power of the Central Government, that provided significant funding for infrastructure development and rural electrification projects during the period. Hence, the BSEB from 1958 to 2003 under the Supply Act and as an STU from 2003 to 2012, under the Electricity Act, 2003, was the power distributing company within the State of Bihar collecting the electricity duty on behalf of the State Government. We are satisfied that the BSEB was functioning under the Electricity Act, 2003, as is permitted under section 172 as a State Transmission Utility (STU) and the repeal and saving clause under Section 185 provide for such continuance. Section 185 of the Act of 2003 also validates every action taken under the Electricity Duty Act, read with the Electricity (Supply) Act.

27. Insofar as the discrimination alleged, we have to notice **Indian Aluminum Company** (supra) which had dealt with the specific question as to whether the petitioners have been discriminated against, in the matter of exemptions from payment of electricity duty. While the lack of competence of the State legislature to impose such duty was rejected, following a decision of the Hon'ble Supreme Court in **Jiyajeerao Cotton Mills Ltd. v. State of Madhya Pradesh** reported in **AIR 1963 SC 414*;*** the learned judges also reiterated the well-known principle that power of the State to classify for the purpose of

taxation is of wide range and flexibility. It was held that *"the State has the right to select a person or object to tax and a statute would not be rendered invalid on the ground that it taxes some person or objects and not others"*(sic). Article 14 of the Constitution of India cannot be readily invoked for the purpose of holding that a tax imposed is discriminatory inasmuch as thereby only a class of persons has been taxed. The decision also specifically looked at the various exemptions granted by Section 3(2) of the Duty Act to find that the categories identified for exemption, being; consumption by or sale to the Government of India (clause a), consumed in the construction, maintenance or operation of any railway company, or sold to the government or a railway company for consumption in such activities of any railway (clause b), construction, maintenance and operation of an electrical undertaking (clause c) and that consumed by the Damodar Valley Corporation (clause e) stands on a distinct footing.

28. We extract paragraphs 55, 56, and 57 from **Indian Aluminum Company** (supra): -

> *"55. Supply of electrical energy to a consumer like the Central Government and/or Railway Company for their entire captive consumption must be held to stand on a different footing. Central Government or the Railway companies are not producers of electrical energy but merely consume the same. They*

> *carry out activity in public interest and for the benefit of the public at large. So far as the persons who have been granted exemption by the State of Bihar in terms of section 9 is concerned, they may also stand on a different footing.*
>
> *56. While granting such exemption, the State must take into consideration various relative factors. The exemption granted under section 9 is not automatic but depends on exercise of such jurisdiction by the State of Bihar if in its opinion, consumption by a producer of electrical energy is entitled thereto. However, such an order has to be passed subject to the conditions which may be imposed thereby.*
>
> *57. It is not the case that the petitioner applied for exemption from payment of duty in terms of section 9 of the Act and the same was refused by the State."*

The exemptions granted by the State under Section 9, as is provided under Clause (d) of Section 3(2) also were saved from the *vice* of discrimination.

29. The amendments brought in including the definition of value of energy is made retrospective and is also supported by a validation clause; which enables the State to keep within its coffers, the electricity duty collected based on the unamended provisions, *de hors* the judgment in **Bihar Sugar Mills Association** (supra). The trite principle with respect to a validation clause is that though the legislature does not have the power to overrule a decision of the Constitutional Court; when the Constitutional Court strikes down a legislation on the ground of a legal infirmity, if such legal infirmity is

removed by subsequent legislation and that legislation is given a retrospective effect with a validation clause, the actions taken under the unamended statute would stand legalized. We are of the definite opinion that the definition of value of energy introduced with retrospective effect coupled with the validation clause removes the vice of delegation, as has been held by a Division Bench of this Court in **Bihar Sugar Mills Association** (supra). The legislature itself has defined value of energy, equating it to the tariff imposed by the BSEB for comparable consumers, consuming equivalent units of energy. There is no subsisting delegation nor is there a ground of the delegatee having further delegated its authority. The notification issued by State Government would also stand restored in the wake of the amendments made.

30. The Electricity Duty Act, as it exists after the amendment, satisfies the ingredients as has been stated as essentials in interpretation of a taxing statute in **Mathuram Agrawal** (supra). The principles of a retrospective validation of an enactment which was earlier declared to be ineffective or invalid has been succinctly stated by the Hon'ble Supreme Court in **Shri Prithvi Cotton Mills Ltd. (**supra) in paragraph no. 4 which is extracted hereunder: -

"4. Before we examine Section 3 to find out

whether it is effective in its purpose or not, we may say a few words about validating statutes in general. When a Legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be said to take place effectively. The most important condition, of course, is that the Legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the Court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the Legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometimes this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law. Sometimes the Legislature gives its own meaning and interpretation of the law under which tax was collected and by legislative fiat makes the new meaning binding upon courts. The Legislature may follow any one method or all of them and while it does so it may

> *neutralise the effect of the earlier decision of the court which becomes ineffective after the change of the law. Whichever method is adopted it must be within the competence of the legislature and legal and adequate to attain the object of validation. If the Legislature has the power over the subject-matter and competence to make a valid law, it can at any time make such a valid law and make it retrospectively so as to bind even past transactions. The validity of a Validating Law, therefore, depends upon whether the Legislature possesses the competence which it claims over the subject-matter and whether in making the validation it removes the defect which the courts had found in the existing law and makes adequate provisions in the Validating Law for a valid imposition of the tax."*
>
> [underlining by us for emphasis]

31. The definition introduced with retrospective effect given and the validation provided in clear terms, together, clearly cures the defect as pointed out in **Bihar Sugar Mills Association** (supra) and the defects noted therein stands removed and the invalidity of the enactment is effaced making possible the levy of electricity duty on 'value of energy' neutralizing the cited decision.

32. Despite our finding to that extent, we have to immediately notice Section 4(4) of Bihar Electricity Duty Act, 1948, which is the charging section insofar as the captive consumers are concerned, which is extracted hereunder: -

> *"Every person including any department of the State Government, other than a licensee, who generates energy for his own use or for the use of his employees, or partly for such use and partly for sale, shall pay every month at the time and in the manner prescribed the proper duty payable under Section 3, on the units of energy consumed by him or his employees or sold by him."*
>
> (underlining by us for emphasis)

33. Insofar as the electricity generating units, who are captive consumers, like the petitioners, are concerned, there is no option given to the State Government to levy tax on the units of energy or on the value of energy consumed or sold, as is the power conferred under Section 3(1) of the Act. Insofar as the petitioners are concerned, the duty payable under Section 3 is on the units consumed by any person or his employee/employees or sold by him as has been levied and charged under Section 4(4). Hence, as of now, the measure of tax insofar as the captive consumers are concerned, is still the units of energy and not on the value of energy. The notification S.O. No. 14 issued making the levy 6% of the 'value of energy' consumed or sold by Captive DG Set/ Captive Power Plants lacks legislative sanction.

34. Hence, though we do not find any reason to interfere with the amendments brought in, we find the levy imposed on the petitioners based on the definition of 'value of

energy' to be not permissible. We hence, set aside the levy and collection made on the basis of S.O. No.14 dated 04.03.2005. Any amounts in excess of that provided under the schedule of the Act will hence have to be refunded. While rejecting the contentions against the *vires* of the amending statute, the levy and collection as complained of by the petitioners, are found to be without statutory sanction.

35. The writ petitions stand allowed to the said extent.

(K. Vinod Chandran, CJ)

Partha Sarthy, J: I agree.

(Partha Sarthy, J)

Aditya/Sujit/Ranjan
/Sharun

AFR/NAFR	AFR
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