

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 6TH DAY OF JANUARY, 2020

BEFORE

THE HON'BLE MRS.JUSTICE S.SUJATHA

WRIT PETITION No.34301/2017 (GM - KEB) c/w

W.P.No.15528/2019 (GM - KEB),

W.P.No.12738/2017 (GM - KEB),

W.P.No.12739/2017 (GM - KEB),

W.P.No.28913/2015 (GM -RES),

W.P.No.34302/2017 (GM - KEB),

W.P.No.34303/2017 (GM - KEB),

W.P.No.43453/2015 (GM - KEB) AND

W.P.No.56372/2015 (GM -RES)

IN W.P.No.34301/2017:

BETWEEN:

M/s HAREKRISHNA METALLICS PVT. LTD.,
CORPORATE OFFICE AT L 59/60,
4TH FLOOR, ALFRAN PLAZA,
NEAR DON BOSCO HS,
PANJIM, GOA-403601
REP. BY ITS VICE PRESIDENT
RAKESH AGRAWAL.

... PETITIONER

[BY SRI H.SRINIVAS RAO, ADV.]

AND:

- 1 . STATE OF KARNATAKA
REP BY THE MINISTRY OF ENERGY
ROOM NO.236, 2ND FLOOR,
VIKASA SOUDHA, Dr. B.R.AMBEDKAR STREET,
BANGALORE, REP BY ITS SECRETARY
- 2 . DEPUTY ELECTRICAL INSPECTOR
NO.37/1, 2ND FLOOR,

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ABOVE SBM, KAPPAGAL ROAD,
BELLARY-583101, KARNATAKA

...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 VIDE ANNEXURE-A MORE PARTICULARLY, SECTION 5 AND SECTION 6 OF THE AMENDMENT ACT INsofar AS IT ATTEMPTS TO LEVY TAX ON CAPTIVE CONSUMPTION, AUXILIARY CONSUMPTION AND INTER-STATE SALE OF ELECTRICITY, AS DISCRIMINATORY, ARBITRARY AND UNCONSTITUTIONAL AND THEREBY STRIKE DOWN THE SAME.

IN W.P.No.15528/2019:

BETWEEN:

M/s BASAI STEEL & POWER PRIVATE LIMITED
A COMPANY REGISTERED UNDER
COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
NO.59, D/1, PARVATHY NAGAR,
THIRD MAIN ROAD, BALLARI-583 103
REP BY ITS AUTHORIZED SIGNATORY
GENERAL MANAGER.

... PETITIONER

[BY SRI H.SRINIVAS RAO, ADV.]

AND:

1 . STATE OF KARNATAKA
MINISTRY OF ENERGY,
ROOM NO.236, 2ND FLOOR,
VIKAS SOUDHA,
Dr. B.R.AMBEDKAR VEEDHI,
BANGALORE-560 001.
REP BY PRINCIPAL SECRETARY.

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2 . ADDITIONAL CHIEF ELECTRICAL INSPECTOR
NO.7, SY NO.2, NEW GHATE LAYOUT,
NEAR CAMPBELLS SCHOOL,
KALABURAGI-585 103 ...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA.]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 VIDE ANNEXURE-A MORE PARTICULARLY, SECTION 5 AND SECTION 6 OF THE AMENDMENT ACT INsofar AS IT ATTEMPTS TO LEVY TAX ON CAPTIVE CONSUMPTION, AUXILIARY CONSUMPTION AND INTER-STATE SALE OF ELECTRICITY, AS DISCRIMINATORY, ARBITRARY AND UNCONSTITUTIONAL AND THEREBY STRIKE DOWN THE SAME.

IN W.P.No.12738/2017:

BETWEEN:

MINERA STEEL AND POWER PVT. LTD.,
CORPORATE OFFICE AT:
PRESTIGE MINERA, NO.6, 3RD FLOOR,
MAIN GUARD CROSS ROAD,
SHIVAJI NAGAR,
BANGALORE-560001.
REP BY ITS DGM-FINANCE
SRI T.G.ASWATHANARAYAN.

... PETITIONER

[BY SRI H.SRINIVAS RAO, ADV.]

AND:

1 . STATE OF KARNATAKA
REP BY THE DEPARTMENT OF ENERGY
ROOM NO.236, 2ND FLOOR,
VIKASA SOUDHA
Dr. B.R.AMBEDKAR STREET,
BANGALORE-560001
REP BY ITS SECRETARY

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2 . DEPUTY ELECTRICAL INSPECTOR
NO.37/1, 2ND FLOOR,
ABOVE SBM, KAPPAGAL ROAD,
BELLARY-583101, KARNATAKA ...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA.]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO ISSUE AN APPROPRIATE WRIT OR ORDER DECLARING KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 VIDE ANNEXURE-A MORE PARTICULARLY, SECTION 5 AND SECTION 6 OF THE AMENDMENT ACT INSOFAR AS IT ATTEMPTS TO LEVY TAX ON CAPTIVE CONSUMPTION, AUXILIARY CONSUMPTION AND INTER-STATE SALE OF ELECTRICITY, AS DISCRIMINATORY, ARBITRARY AND UNCONSTITUTIONAL AND THEREBY STRIKE DOWN THE SAME.

IN W.P.No.12739/2017:

BETWEEN:

ILC IRON AND STEEL PVT. LTD.,
CORPORATE OFFICE AT:
NO.18, 5TH CROSS, 8TH MAIN,
VASANTH NAGAR, BANGALORE-560 052
REP BY ITS GENERAL MANAGER
V.V.B.NAGARAJ

... PETITIONER

[BY SRI H.SRINIVAS RAO, ADV.]

AND:

1 . STATE OF KARNATAKA
REP BY THE DEPARTMENT OF ENERGY
ROOM NO.236, 2ND FLOOR,
VIKASA SOUDHA,
Dr. B.R.AMBEDKAR STREET,
BANGALORE-560 001
REP BY ITS SECRETARY

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2 . DEPUTY CHIEF ELECTRICAL INSPECTOR
NO.37/1, 2ND FLOOR, ABOVE SBM,
KAPPAGAL ROAD,
BELLARY-583 101, KARNATAKA ...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA.]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 VIDE ANNEXURE-A MORE PARTICULARLY, SECTION 5 AND SECTION 6 OF THE AMENDMENT ACT INsofar AS IT ATTEMPTS TO LEVY TAX ON CAPTIVE CONSUMPTION, AUXILIARY CONSUMPTION AND INTER-STATE SALE OF ELECTRICITY, AS DISCRIMINATORY, ARBITRARY AND UNCONSTITUTIONAL AND THEREBY STRIKE DOWN THE SAME.

IN W.P.No.28913/2015:

BETWEEN:

BMM ISPAT LIMITED,
A COMPANY INCORPORATED
UNDER THE PROVISIONS OF
THE COMPANIES ACT, 1956,
HAVING ITS CORPORATE OFFICE AT
10, PRIDE ELITE, MUSEUM ROAD
BANGALORE-560 001,
REP BY ITS GENERAL MANAGER-PR
Mr. SILAS NERELLA

... PETITIONER

[BY SRI UDAYA HOLLA, SENIOR COUNSEL A/W
SRI AJAY J. NANDALIKE, ADV.]

AND:

1 . STATE OF KARNATAKA
REP BY THE MINISTRY OF ENERGY
ROOM NO.236, 2ND FLOOR,
VIKASA SOUDHA,
Dr. B.R.AMBEDKAR STREET,

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BANGALORE-560001
RER BY ITS SECRETARY

- 2 . THE CHIEF ELECTRICAL INSPECTOR
NO.32/1-2, CRESCENT TOWERS,
2ND FLOOR, CRESCENT ROAD,
BANGALORE-560001.
- 3 . ADDITIONAL CHIEF ELECTRICAL INSPECTOR
KALABURAGI ZONE, NO.27,
SY NO.2, NEW GHATGE LAYOUT,
NEAR CAMPBELLS SCHOOL,
KALABURAGI-585103. ...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA.]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE THAT THE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 VIDE ANNEXURE-G MORE PARTICULARLY, SECTION 5 AND SECTION 6 OF THE AMENDMENT ACT INsofar AS IT ATTEMPTS TO TAX CONSUMPTION OF ELECTRICITY BY CAPTIVE GENERATIVE UNITS AND SEEKS TO TAX INTER-STATE SALE OF ELECTRICITY AND TO CHARGE AUXILIARY CONSUMPTION OF ELECTRICITY AND THE KARNATAKA ELECTRICITY (TAX ON CONSUMPTION) RULES 2014 VIDE ANNEXURE-H INsofar AS IT ATTEMPTS TO TAX CONSUMPTION OF ELECTRICITY BY CAPTIVE GENERATIVE UNITS AND SEEKS TO TAX INTER-STATE SALE OF ELECTRICITY AND SEEKS TO CHARGE AUXILIARY CONSUMPTION OF ELECTRICITY IS LIABLE TO STRUCK DOWN AS ULTRA VIRES THE CONSTITUTION.

IN W.P.No.34302/2017:

BETWEEN:

HRG ALLOYS AND STEEL PVT. LTD.,
CORPORATE OFFICE AT: 901,
9TH FLOOR, BARTON CENTRE,
M.G.ROAD, BENGALURU-560001,

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KARNATAKA
REP BY ITS MANAGING DIRECTOR
H.GAVIYAPPA.

... PETITIONER

[BY SRI H.SRINIVAS RAO, ADV.]

AND:

1 . STATE OF KARNATAKA
REP BY THE MINISTRY OF ENERGY
ROOM NO.236, 2ND FLOOR,
VIKASA SOUDHA,
Dr. B.R.AMBEDKAR STREET,
BANGALORE-560 001
REP BY ITS SECRETARY

2 . DEPUTY CHIEF ELECTRICAL INSPECTOR
NO.37/1, 2ND FLOOR,
ABOVE SBM, KAPPAGAL ROAD,
BELLARY-583 101, KARNATAKA

...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA.]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 VIDE ANNEXURE-A MORE PARTICULARLY, SECTION 5 AND SECTION 6 OF THE AMENDMENT ACT INsofar AS IT ATTEMPTS TO LEVY TAX ON CAPTIVE CONSUMPTION, AUXILIARY CONSUMPTION AND INTER-STATE SALE OF ELECTRICITY, AS DISCRIMINATORY, ARBITRARY AND UNCONSTITUTIONAL AND THEREBY STRIKE DOWN THE SAME.

IN W.P.No.34303/2017:

BETWEEN:

JANAKI CORP. LTD.,
CORPORATE OFFICE AT
NO.765, 2ND FLOOR
100 ft. ROAD, INDIRANAGAR

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BANGALORE-560038

REP BY ITS AUTHORIZED SIGNATORY

... PETITIONER

[BY SRI H.SRINIVAS RAO, ADV.]

AND:

1 . STATE OF KARNATAKA
REP BY THE MINISTRY OF ENERGY
ROOM NO.236, 2ND FLOOR,
VIKASA SOUDHA,
Dr. B.R.AMBEDKAR STREET,
BANGALORE-560 001
REP BY ITS SECRETARY

2 . DEPUTY CHIEF ELECTRICAL INSPECTOR
NO.37/1, 2ND FLOOR,
ABOVE SBM, KAPPAGAL ROAD,
BELLARY-583 101, KARNATAKA ...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA.]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 VIDE ANNEXURE-A MORE PARTICULARLY, SECTION 5 AND SECTION 6 OF THE AMENDMENT ACT INsofar AS IT ATTEMPTS TO LEVY TAX ON CAPTIVE CONSUMPTION, AUXILIARY CONSUMPTION AND INTER-STATE SALE OF ELECTRICITY, AS DISCRIMINATORY, ARBITRARY AND UNCONSTITUTIONAL AND THEREBY STRIKE DOWN THE SAME

IN W.P.No.43453/2015:

BETWEEN:

DHRUVDESH METASTEELS PVT. LTD.,
A COMPANY REGISTERED UNDER
THE COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AT
NO.372, "NILAY", 1ST FLOOR
OPPOSITE R.T.NAGAR POLICE STATION,

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R.T. NAGAR MAIN ROAD
BANGALORE-560032
REP. BY ITS AUTHORISED SIGNATORY
VENKATESH S. KAMATH
LIAISONING OFFICER.

... PETITIONER

[BY SRI M.A.VIJAY, ADV.]

AND:

- 1 . THE STATE OF KARNATAKA
REP BY DEPARTMENT OF ENERGY
ROOM NO.236, 2ND FLOOR
VIKAS SOUDHA
Dr. B.R.AMBEDKAR VEEDHI
BANGALORE-560001
- 2 . THE CHIEF ELECTRICAL INSPECTOR
NO.32/1-2, CRESCENT TOWERS,
2ND FLOOR, CRESCENT ROAD,
BANGALORE-560001
- 3 . THE DEPUTY CHIEF ELECTRICAL
INSPECTOR
NO.37/1, KAPPAGAL ROAD
BELLARY-583101

...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA.]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE THAT THE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 IN PARTICULAR, SECTIONS 3(2) AND 4(3) OF THE AMENDMENT ACT INsofar AS IT PROVIDES TO TAX CONSUMPTION OF ELECTRICITY BY WAY OF CAPTIVE CONSUMPTION AND AUXILIARY CONSUMPTION AND INTER-STATE SALE OF ELECTRICITY AS BEING ULTRA VIRES THE CONSTITUTION OF INDIA.

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IN W.P.No.56372/2015:

BETWEEN:

MUKAND LIMITED

A COMPANY INCORPORATED
UNDER THE PROVISIONS OF
THE COMPANIES ACT, 1912
HAVING ITS CORPORATE OFFICE
AT THANE-BELAPUR ROAD
POST OFFICE: KALWE, DIGHE
THANE-400605, MAHARASHTRA
REP BY ITS BUSINESS DEVELOPMENT DIRECTOR
VIRENDRA KUMAR MITAL

*(CAUSE TITLE AMENDED VIDE
COURT ORDER DATED 18.12.2019.)*

... PETITIONER

[BY SRI UDAYA HOILA, SENIOR COUNSEL A/W
SRI AJAY J. NANDALIKE, ADV.]

AND:

1 . STATE OF KARNATAKA
REP BY THE ENERGY DEPARTMENT
ROOM NO.235, 2ND FLOOR,
VIKASA SOUDHA,
Dr. B.R.AMBEDKAR STREET,
BANGALORE-560001
RER BY ITS SECRETARY

2 . THE CHIEF ELECTRICAL INSPECTOR
NO.32/1-2, CRESCENT TOWERS,
2ND FLOOR, CRESCENT ROAD,
BANGALORE-560001.

3 . ADDITIONAL CHIEF ELECTRICAL INSPECTOR
KALABURAGI ZONE, NO.27,
SY NO.2, NEW GHATGE LAYOUT,
NEAR CAMPBELLS SCHOOL,
KALABURAGI-585103.

...RESPONDENTS

[BY SRI DHYAN CHINNAPPA, AAG A/W
SMT.NILOUFER AKBAR, AGA.]

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 & 227 OF THE CONSTITUTION OF INDIA, PRAYING TO DECLARE THAT THE KARNATAKA ELECTRICITY (TAXATION ON CONSUMPTION) (AMENDMENT) ACT, 2013 VIDE ANNEXURE-C1 AND C2 MORE PARTICULARLY, SECTION 5 AND SECTION 6 OF THE AMENDMENT ACT INsofar AS IT ATTEMPTS TO TAX CONSUMPTION OF ELECTRICITY BY CAPTIVE GENERATIVE UNITS AND SEEKS TO CHARGE AUXILIARY CONSUMPTION OF ELECTRICITY AND THE KARNATAKA ELECTRICITY (TAX ON CONSUMPTION) RULES 2014 VIDE ANNEXURE-D INsofar AS IT ATTEMPTS TO TAX CONSUMPTION OF ELECTRICITY BY CAPTIVE GENERATIVE UNITS AND SEEKS TO CHARGE AUXILIARY CONSUMPTION OF ELECTRICITY IS LIABLE TO STRUCK DOWN AS ULTRA VIRES THE CONSTITUTION.

THESE PETITIONS HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF ORDER THIS DAY, THE COURT PASSED THE FOLLOWING:

ORDER

These petitions involving similar and akin issues, have been heard together and are taken up for final disposal.

2. The petitioners have challenged the Constitutional validity of Sections 3[1] and [2] and Sections 4[3] of the 1959 Act amended by Sections 5 and 6 of the Karnataka Electricity [Taxation on Consumption] [Amendment] Act, 2013 ['Act, 2013' for short] insofar as levy of tax on consumption of

electricity by captive generative units is concerned *inter alia* assailing the notification bearing No.EN 27 EBS 2013, Bengaluru dated 24.11.2014 published in the Karnataka gazette dated 19.03.2015 whereby the rate of electricity tax to be collected as electricity tax on captive consumption and auxillary consumption of electricity generated by the captive power generating plant/co-generation plant is fixed and the consequential demand notices issued.

FACTS IN BRIEF:

3. The petitioners are public limited companies registered under the provisions of the Companies Act, 1956. The petitioners assert that they have developed, designed, engineered, financed, constructed, operating and maintaining captive electric power generating stations at various places in Karnataka.

4. The respondent – Additional Chief Electrical Inspector has demanded the electricity tax on electricity

generated and consumed by these petitioners from 19.03.2015. Being aggrieved by the levy of electricity tax on captive and auxiliary consumption, the petitioners are before this Court.

LEGISLATIVE HISTORY:

5. The Karnataka Electricity [Taxation on Consumption] Act, 1959 ['Act, 1959' for short] was promulgated to collect tax on consumption of electricity on 04.08.1959. Section 3 which is the charging section, was amended vide Karnataka Ordinance No.8 of 2003, came to be succeeded by the Karnataka Act No.5 of 2004. The Act was given retrospective effect from the date on which the Ordinance was promulgated i.e., from 16.10.2003 and the levy in terms of the Amended Act was in force during the period from 16.10.2003 to 01.10.2004. Imposition of tax on captive generation effected by way of the said amendment was questioned before this Court in **Biocon Ltd., V/s. State of**

Karnataka and Others¹ case. The Division Bench of this Court has upheld the Amendment Act of 2003, confirming the levy of tax on consumption of electricity which is now pending before the Hon'ble Apex Court but no interim order staying of the order of the division bench is granted.

6. The Government of Karnataka amending the Act, 1959 enacted the Karnataka Electricity [Taxation on Consumption] Amendment Act, 2013 [Karnataka Act No.31 of 2013] vide notification dated 11.03.2013 published in the Extraordinary Gazette Part IV-A, No.562.

7. Further in exercise of the power conferred by Section 10 of the Act, 1959, the Karnataka Electricity [Taxation on Consumption or Sale] Rules, 2014 were formulated by the Government of Karnataka vide

¹ 2011 [5] Kar. L.J. 296

notification No.EN 144 EBS 2013, Bangalore dated 19.08.2014.

8. The objects and reasons for the Karnataka Electricity [Taxation on consumption] Amendment Act, 2013 ['Act 2013' for short] *inter alia* reads as follows:

“[1] to levy and collect tax on the sale of electricity also in addition to consumption

[2] to classify the auxiliary consumption, captive consumption and to levy different rates of electricity by such class of consumers;

[3] to levy electricity tax on supply of electricity by non-licensee to others;

[4] To provide a provision for appeal by the aggrieved person on the orders of inspecting Officer or Chief Electrical Inspector;..”

9. Sections 3[2] and 4 of the Act, 1959 amended from time to time reads thus:

“KARNATAKA ORDINANCE No.8 OF 2003.

2. Amendment of Section 3. –
Section 3 of the Karnataka Electricity [Taxation on Consumption] Act, 1959 [Karnataka Act 14 of 1959] shall be renumbered as sub-section [1] thereof, and, -

[i] in the heading, after the words “electricity charges”, the words “and energy generated” shall be inserted; and

[ii] after sub-section [1] as so renumbered, the following sub-section shall be inserted, namely:-

“[2] Subject to the provisions of this Act, there shall be levied and paid to the State Government, with effect from the date of commencement of Karnataka Electricity [Taxation on Consumption] [Amendment] Ordinance, 2003 and till the first day of July 2004, an electricity tax at the rate of fifty paise per unit on all the units of energy generated by any person not being a licensee who consumes the energy generated by himself or supplies to another person free of charge.”

KARNATAKA ACT No. 5 OF 2004:

2. Amendment of Section 3.- Section 3 of the Karnataka Electricity [Taxation on Consumption] Act, 1959 [Karnataka Act 14 of 1959] [hereinafter referred to as the principal Act] shall be renumbered as sub-section [1] thereof; and,

[i] in the heading, for the words “electricity charges”, the words “electricity charges etc.,” shall be substituted; and

[ii] after sub-section [1] as so renumbered, the following sub-section shall be inserted, namely:-

“[2] Subject to the provision of this Act, there shall be levied and paid to the State Government, with effect from the date of commencement of Karnataka Electricity [Taxation on Consumption] [Amendment] Act,

2004 and till the first day of July, 2004, an electricity tax at the rate of twenty five paise per unit on all the units of energy consumed by any person:-

[i] not being a licensee who has generated such energy; or

[ii] to whom it is supplied free of charge by a person not being a licensee who has generated such energy.”

KARNATAKA ACT No. 31 OF 2013:

5. Amendment of section 3.- In section 3 of the principal Act,- (i) for sub-section (1), the following shall be substituted, namely:-

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

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

except,-

(i) the consumers under agricultural (irrigation pump sets upto and inclusive of ten horse power);

(ii) Bhagya Jyothi and kutira jyothi categories upto the extent of free consumption allowed

*by the State Government from time to time;
and*

(iii) the consumers covered under sub-section (2).”

(ii) for sub-section (2), the following shall be substituted, namely:-

“(2) Subject to the provisions of this Act, there shall be levied and paid to the State Government by every non licensee electricity tax on all the units of electricity consumed by himself at such rates specified by the State Government, by notification, from time to time but not exceeding the rates specified below, namely:-

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

(b) electricity tax not exceeding 25 paise per unit on auxiliary consumption in a generating station whether Captive Generating Plant or cogeneration plant or otherwise, for the auxiliary loads exceeding 50 Kilo Watts.”

6. Amendment of section 4.- *In section 4 of the principal Act,-*

(i) for sub-section (1), the following shall be substituted, namely:-

“(1) Every licensee shall collect and pay to the State Government at the time and in the manner prescribed, the electricity tax payable under this Act,-

(a) on the electricity charges included in the bill issued by him to the consumer. The tax so payable shall be a first charge on the amounts recoverable by the supplier for the electricity supplied by him and shall be a debt due by him to the State Government:

Provided that where the licensee has been unable to recover the amounts due to him for the electricity supplied by him he shall not be liable to pay tax in respect of the electricity so supplied;

(b) on the units of electricity supplied to consumers by non licensee through the licensee."

(ii) for sub-section (3), the following shall be substituted, namely:-

"(3) Every person who consumes electricity generated by himself, and or who supplies electricity free of charge or otherwise to any other person through his own system, shall pay, or collect and pay, as the case may be, to the State Government, at the time and in the manner prescribed, the electricity tax payable under section 3."

(iii) in sub-section (4),-

(a) the words "free of charge" shall be omitted.

(b) for the words "sub-section (1) of section 24 of the Indian Electricity Act, 1910", the words "sub-section (1) of section 56 of the Electricity Act, 2003 (Central Act 36 of 2003)" shall be substituted."

SUBMISSIONS OF THE PETITIONERS:

10. Learned senior counsel Sri.Uday Holla representing the learned counsel for the petitioners submitted that the Act, 2013 falls outside the legislative competence of the State Government. The Taxation on Consumption and Sale is nothing but a Taxation on Generation. The Scheme of the 2013 Amendment and the Rules clearly show that the incidence of taxation i.e., the taxable event is the generation of electricity and not consumption. Taxation on generation is within the Union's Legislative Competence. "Captive consumption" and "Auxiliary Consumption" are the subjects that do not come under the legislative competence of the State under Entry 53 of List II of the Seventh Schedule to the Constitution pertaining to the taxes on the consumption and sale of electricity, but comes within the legislative competence of the Union under Entry 84 of list I dealing with goods manufactured or produced in India.

11. On the pretext of levying tax on consumption indeed tax is levied on the generation of electricity. What is not impermissible directly cannot be made indirectly. The levy of tax on the consumption is nothing but indirectly taxing the generation of electricity which is beyond the purview and competence of the State. Learned senior counsel placing reliance on the judgment in the case of **M.P. Cement Manufacturers Association V/s. State of M.P. and Others**,² submitted that the imposition envisaged was on the production of electricity units. The charge is on the generation and not on the sale or consumption of electricity. It was argued that sub-section [2] of Section 3 of the Madhyapradesh Upkar Adhiniyam, 2001 is akin to the provisions of Section 3[2] and 4[3] of the Amendment Act, 2013. Learned senior counsel has referred to catena of judgments which shall be discussed infra.

² [2004] 2 SCC 249

SUBMISSIONS ON BEHALF OF THE STATE:

12. Learned Additional Advocate General Sri.Dhyan Chinnappa submitted that in view of the Constitutional validity of Sections 3[1] and [2] of the Amendment Act, 2013 being already upheld by this Court in the case of **Vijaya Steels Limited Vs. Bangalore Electricity Supply Company Limited**³, further considered and reiterated in the case of **ACC Limited V/s. The State of Karnataka and Others**,⁴ the challenge to the Constitutional validity of Section 4[3] of the Amendment Act, 2013 is a mere formality since Section 4 of the Act, 2013 contemplates payment of tax in terms of Section 3 of the Act. Learned counsel argued that the incidence of tax is on the consumption not on the generation of electricity. Imposition of tax on consumption is held to be valid by the Division Bench of this Court in the case of **Biocon**¹ supra relating to the earlier Amendment Act 4/2003. In view of the aforesaid

³ W.P.No.14434 of 2016 and allied matters (D.D.4.10.2016)

⁴ W.P.No.12927/2017 [D.D.21.11.2019]

decision, the provisions of Section 4[3] being identical requires to be upheld. It was submitted that the provisions of Madhyapradesh Upkar [Sanshodhan] Adhyadesh, 2001 certainly relates to the levy of tax on the event of generation of electricity, to cure the said defect, explanation was introduced by Sanshodhan Adhiniyam, 2003. In such circumstances, the Hon'ble Apex Court has held that the explanation cannot override the main provision. On the interpretation of the language employed in the main provision, Section 3[2] of the [Sanshodhan] Adhyadesh, 2001, it was observed that the State lacks competence in imposing the electricity tax on the generation of electricity which squarely falls in the domain of the Parliament.

RELEVANT JUDGMENTS:

13. In ***M.P.Cement Manufacturers' Association supra***², the Hon'ble Apex Court while considering Section 3[2] of [Sanshodhan] Adhyadesh,

2001 held that imposing cess on generation of electricity is beyond the competence of the State. The relevant paragraphs are quoted hereunder:

“12. By the impugned amendment in 2001, Section 3 of the 1981 Adhiniyam was substituted to provide for payment of an Energy development cess by producers of electricity as well. While setting out the substituted section, we have highlighted those portions of the section which were introduced by way of amendment.

*"3. Levy of energy development cess:
(1) Every distributor of electricity energy shall pay to the State Government at the prescribed time and in the prescribed manner an energy development cess at the rate of one paise per unit on the total units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during any month:*

Provided that no cess shall be payable in respect of electric energy, -

(i) (a) sold or supplied to the Government of India for consumption by that Government; or

(b) sold or supplied to the Government of India or a railway company for consumption in the construction, maintenance or operation of any railway administered by the Government of India:

(ii) sold or supplied in bulk to a Rural Electric Co- operative Society registered under the Madhya Pradesh Co- operative Societies Act, 1960 (No. 17 of 1961).

Explanation: For the purpose of this sub- section 'month' means such period as may be prescribed.

[2]. Every producer producing electrical energy by his captive power unit or diesel generator set of capacity exceeding 10 Kilowatt in total shall pay to the State Government an energy development cess at the rate of 20 paise per unit on the total units of electrical energy produced whether for sale or supply to a consumer or for consumption by himself or his employees during any month:

Xxxxx

14. A plain reading of Sub-Section (2) of Sub-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 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."

14. In ***Bharti Airtel Limited and Others V/s. State of Assam and Others***⁵, the High Court of Gauhati while considering Section 3[1][c] of the Assam Electricity Duty Act, 1964 as it stood at the relevant time observed as under:

⁵ MANU/GH/0489/2016

“22. A plain reading of Sub-Section (2) of Sub-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 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.”

Section 3 of the Assam Electricity Duty Act, 1964,
reads as under:

Assam	Assam Electricity Duty Act, 1964	Section-3 Levy of electricity duty 3. [1] There shall be levied and paid to the State Government a duty, to be called the “electricity duty”, at the rate of ten paise per unit of energy.- [a] xxxxx [b] xxxxx [c] generated by a person or a company or a firm or any organization for own use or consumption
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15. In the case of ***National Hydroelectric Power Corporation Ltd., and Another V/s. State of Jammu and Kashmir and Others***⁶, the Hon’ble High Court of Jammu & Kashmir at Srinagar while considering the levy of tax by the State in exercise of the powers conferred under Section 3[1] Jammu and Kashmir Electricity [Duty] Act, 1963 on generation of

⁶ 2005 [2] JKJ 5

electric energy in Hydroelectric Power Projects has observed thus:

“33. As a matter of fact, the petition is fit to succeed on a short point that the power to impose levy on production/generation of electricity is the preserve of Parliament in terms of Entry 84 of List I and, therefore, legislature of the state of Jammu and Kashmir has no jurisdiction to make law with respect to such an imposition. The point is squarely covered by a recent decision in M.P. Cement Manufactures Association v. State of Madhya Pradesh, (2004) 2 SCC 249, wherein the Supreme Court categorically held that electricity being goods, the Parliament has exclusive legislative competence to legislate in respect of levy of duty on production of electricity. The Madhya Pradesh Electricity Duty Act, 1949 provided for levy of duty on the consumption or sale of electrical energy. Under Section 3 of the Act, subject to certain Statutory exceptions, every distributor and producer of electric energy was required to pay a monthly duty "on the electrical energy sold or supplied to a consumer or consumed by himself for his own purpose or for purposes of his township or colony". By Upkar Adhiniyam 1981, an energy development cess at the rate of one paisa per unit "on the total units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during any month was levied. As the Supreme Court observed, the similarity in the phraseology used in both these statutes in describing the incidence of tax, namely, sale

or supply of electricity, was significant. By the impugned amendment in 2001, Section 3 of the Upkar Adhiniyam was substituted to provide for payment of energy development cess @ 20 paise by producers of electricity as well. The relevant clause was "on the total units of electrical energy produced whether for sale or supply to a consumer or for consumption by himself or his employees during any month". Responding to the challenge to the constitutional validity of the amended provision, an attempt was made to justify the levy on production. It was submitted that the term "produced" in the impugned amendment had been used in conjunction with the phrase "whether for sale or supply to....." and was therefore intended to relate only to sale and consumption of electricity and hence saved by Entry 53 of List II. Rejecting the submission, the Supreme Court observed:

"A plain reading of the amended provision makes it clear that the levy of cess was 'on 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....."

16. The Hon'ble High Court of Punjab and Haryana in the case of ***Rana Sugars Limited and Others V/s. State of Punjab and Others***⁷ while dealing with the notifications issued by the State of Punjab imposing duty on the sale of electricity from the independent/captive power plants to customers situated outside the state of Punjab under the various segments considering the Constitutional Bench Judgment of the Hon'ble Apex Court in ***State of A.P. V/s. National Thermal Power Corporation Ltd., and Others***⁸, has held thus:

"15. IN OUR VIEW, AFORESAID LEAVES NO MANNER OF DOUBT THAT THE FOLLOWING ASPECTS EMERGE FROM THE AFORESAID JUDGMENT:-

a) Electricity is "goods" even if electrical energy is not tangible or cannot be moved or

⁷ MANU/PH /3167/2013

⁸ AIR 2002 SC 1895

touched. It can be transmitted, transferred, delivered, possessed etc. like any other moveable property;

b) A significant characteristic of electric energy is that its generation or production coincides almost instantaneously with its consumption. Thus, continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as the meter reading is recorded. This means that all three steps or phases, i.e., sale, supply and consumption take place without any hiatus. The produced electricity would pass on from the place of its generation to the sub station and thereafter to the consumer. The sale is at the place where the consumer is located.”

17. The Division Bench of this Court in the case of **Biocon Ltd.**¹, considering the decision of the Supreme Court in **M.P.Cement Manufacturers' Association.**² as well as **National Thermal Power Corporation Ltd.**⁸, case has held thus:

“22. The perusal of the provisions of sub-section [2] of Section 3 of the Amending Act would show that what is sought to be levied under the Amending Act impugned in the writ petitions and in these appeals is, in substance, electricity tax which is levied on consumption and not on production. The mere

fact that some of the appellants are also producers of electricity and the fact that electricity cannot be stored and production and consumption of electricity is simultaneous, would not exempt the appellants from payment of consumption tax in view of the decision of the Hon'ble Supreme Court in JC MILLS's case referred to in the arguments of learned Advocate General. In the said case, the Hon'ble Supreme Court was considering the provisions of Central Provinces and Berar Electricity Duty Act, 1949 as amended by Madhya Pradesh Taxation Laws Amendment Act, 1958 [Act No.7/1956], sub-section 2[a] d[I] and 3 of the said Act wherein tax has been levied was linked to consumption and it was argued that since the petitioners who were also the producers of energy, they cannot be consumers.

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

[emphasis supplied]

18. The Cognate Bench of this Court in **Vijaya Steels Limited**.³, upholding the Constitutional Validity of the Amended Sub-sections [1] and [2] of Section 3 of the Act, 2013 has observed thus:

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

Schedule of the Constitution. In view of the foregoing reasons and provisions of the Constitution and the Act, these petitions are liable to be dismissed and are accordingly dismissed.”

19. The relevant paragraphs of **ACC Limited.⁴**, decided in the context of Amended Sub-sections [1] and [2] of Section 3 of the Act, 2013 are quoted hereunder:

*“18. In the case of **NTPCL**, the Hon’ble Apex Court while analyzing the levy of tax on the sale of electricity, in the context of the inter-state sale has considered the legislative power of the State to levy tax on inter-state sale, whereas the present set of facts deals with the consumption of electricity within the State. Indeed, such levy of tax on consumption within the State under Entry 53 is held to be valid. There is no cavil on the legal proposition that the inter-state movement of electricity in pursuant to contract of sale is an inter state sale. But the consumption of the electricity being the incidence of levy of tax in terms of the Act, the consumption made in the State of Karnataka is exigible to levy of tax notwithstanding the electricity sourced from outside the State of Karnataka as amended Section 3(1) of the Act empowers the levy of tax on electricity “sold to” or “consumed by” any consumers.”*

In the aforesaid judgment, this Court has considered the law enunciated by the Hon’ble Apex

Court in **NTPCL**⁸, as well as the Cognate Bench decision in **Vijaya Steels**³.

ANALYSIS:

20. In view of the Constitutional validity of sub-sections [1] and [2] of Section 3 of the Act, 2013 being upheld by this Court, now the challenge would only revolve around Section 4[3] of the Act, 2013.

21. As aforesaid, Section 4[3] of the Act, 2013 deals with the payment of tax. In terms of sub-section [3] of Section 4, the incidence of tax is on the consumption. The consumption of electricity relates to every person generating electricity by himself, and or who supplies electricity free of charge or otherwise to any other person through his own system.

22. The electricity tax is payable as per Section 3, the charging Section. Section 4[3] is the payment of tax to be made by different class of persons. In the case of **Biocon**¹, the Division Bench of this Court

while dealing with the levy of tax on consumption has categorically observed that such levy is permissible. The State has legislative competence to impose the consumption tax under Entry 53 of List II to the Seventh Schedule to the Constitution of India. The very question inasmuch as the levy of tax on consumption by the producers of electricity was considered, analyzed and decided in paragraph 22 of the judgment extracted supra. The consumers also the producers of electricity are not exonerated from the levy of tax since electricity cannot be stored. Production and consumption being simultaneous, the argument that tax levied is in fact on production only and not on consumption, was negated. In the said judgment, the Division Bench has considered the decision of **M.P.Cement Manufacturers Association²**, rendered by the Hon'ble Apex Court. Indeed in **M.P. Cement Manufacturers Association²** case, the levy of tax was on the generation of electricity as could be seen from

the language employed in Section 3[2] of the M.P Upkar [Sanshodhan] Adhiniyam, 2003 and in order to bring it within the arena of consumption tax, subsequent explanation was added. The Hon'ble Apex Court considering the scope of explanation held that, explanation cannot override the main provision and accordingly, held that the State has no competence to levy tax on the generation which is the domain of the Parliament. Such being the legal position, the arguments of the learned Senior Counsel that the provisions challenged herein do not come within the State competence cannot be countenanced.

23. Thus, the challenge made to Sections 3[1] and [2] as well as Section 4[3] of the Act is no more *res integra* in view of the judgments of our Hon'ble High Court referred to above.

24. The Hon'ble Apex Court in the case of **Govind Saran Ganga Saran V/s. Commissioner of**

Sales Tax and Others⁹, has held that the components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If these 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. Keeping this principles in mind, if the levy of electricity tax in terms of Sections 3[1] [2] and 4[3] of the Amendment Act, 2013 is examined, the taxable event attracting the levy is consumption, the person on whom the levy is imposed may be the generator also

⁹ AIR 1985 SC 1041

who is obliged to pay the tax. That itself would not be construed as the taxable event to find the levy fatal to its validity. These two are different aspects and cannot be integrated together in order to bring the incidence of tax on the generation, merely for the reason that the generator is paying the tax. Moreover, the heading of Section 4[3] denotes payment of tax i.e., the person who is liable to pay the tax, the same cannot invalidate the charging section since generator is made liable to pay the tax on its consumption. The law enunciated by this Court in the judgments referred to above squarely applies to Section 4[3] also. The notification impugned dated 24.11.2014 prescribes the rate of tax on captive consumption and auxiliary consumption of electricity generated by the captive generation plant/co-generation plant which is in conformity with the provisions of the Amendment Act, 2013.

CONCLUSION:

For the aforesaid reasons, the amended Sections 3[1], 3[2] and 4[3] of the Act, 2013 are validly enacted by the State Legislature and held to be intra vires the Constitution.

Accordingly, the Notification dated 24.11.2014 impugned as well as the consequential demand notices are held to be justifiable.

In the result, writ petitions stand dismissed.

No order as to costs.

**Sd/-
JUDGE**

NC.