HIGH COURT OF ANDHRA PRADESH

* * * *

W.P. Nos.16619, 21616, 25165, 26807, 28108, 29614, 30036, 30742, 30801, 32559, 32605, 32609, 33988, 36442, 36883, 37271, 37272, 37273, 37274, 37275, 38328, 40830 and 42301 of 2022

&

W.P.Nos. 506, 1543, 1546, 1572, 1658, 1665, 1666, 2165, 2334, 2601, 2610, 2922, 2935, 3009, 3067, 3315, 3557, 4124, 5617, 5800, 7163 & 7246 of 2023

Between:

SAIGLOBAL YARNTEX INDIA PVT LTD
a Company incorporated under the provisions of the Companies Act 1956 having its registered office at Vellampalli Maddipadu Mandal Prakasham District-523211, rep by its Authorized Signatory Mr M M V Srinivasa Rao & others

..... PETITIONERS

AND

THE STATE OF ANDHRA PRADESH
Energy Department, Secretariat, Velagapudi,
Amaravathi, Guntur District
Rep. by its Principal Secretary & others

.....RESPONDENTS

DATE OF COMMON JUDGMENT PRONOUNCED: **15.09.2023**
SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

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 Reporters/Journals Yes/No

3. Whether Your Lordships wish to see the fair copy of the Judgment? Yes/No

RAVI NATH TILHARI, J

* THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

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a Company incorporated under the provisions of the Companies Act 1956 having its registered office at Vellampalli Maddipadu Mandal Prakasham District-523211, rep by its Authorized Signatory Mr M M V Srinivasa Rao & others

....Petitioners

Versus

$ THE STATE OF ANDHRA PRADESH
Energy Department, Secretariat, Velagapudi,
Amaravathi, Guntur District
Rep. by its Principal Secretary & others

....Respondents

! Counsel for the Petitioners: Sri K. Gopal Chowdary,
Sri Sricharan Telaprolu,
Sri Challa Gunaranjan,
Sri Nimmala Satyanarayana, learned counsel, representing Sri G. Sudheer Kumar,
Sri V.R.N.Prashanth,
Sri O. Manohar Reddy, learned Senior Counsel, assisted by Sri K. Dheeraj Reddy,
Sri Alladi Ravinder, learned Senior Counsel, assisted by J. Srinadh Reddy

^ Counsel for respondents : Sri P. Shreyas Reddy, learned Government Pleader, attached to the learned Advocate General's Office
Sri V. R. Reddy Kovvuri, learned standing counsel along with Sri Abhay Jain,
Sri Metta Chandrasekhar Rao, learned standing counsel for the Central Power Distribution Corporation of A.P.Ltd.

< Gist :

> Head Note:

? Cases Referred:

1. (2017) 14 SCC 80
2. AIR 1953 SC 375
3. 1938 SCC Online PC 43
4. 259 US 20 – 1922
5. AIR 1959 SC 1124
6. (2004) 10 SCC 201
7. AIR 1962 SC 1406
8. W.P.No.1554 of 2006
9. 1990 SCC OnLine AP 245
10. 1992 SCC OnLine Del 495
11. (1981) 1 SCC 722
12. AIR 1996 SC 1431
13. 2010(1) U.P.L.J. 182 (HC)
14. 2022 SCC OnLine AP 2574 (DB)
15. (1981) 1 SCC 653
16. (1991) 4 SCC 239
17. 1997 SCC OnLine DRAT 50
18. 2015 SCC OnLine Ori 301
19. Case No.05/2017, decided on 06.04.2017 by Consumer Grievance Redressal Forum, Baramati
20. Case No.03/2021, decided on 29.02.2022 Of Odisha Electricity Regulator Commission, Bhubaneswar
21. AIR 2017 SC 5372
22. (1963) 1 SCR 404
23. AIR 1970 SC 1133
24. AIR 2010 P & H 121
25. AIR 1976 SC 670
26. 2022 SCC OnLine SC 1622
27. (1989) 3 SCC 634
28. W.P.No.6095/2004, decided on 19.05.2016 Erstwhile High Court of A.P
29. (2002) 2 SCC 333
30. (2007) 5 SCC 447
31. (2004) 1 SCC 195
32. (2002) 5 SCC 203
33. AIR 1963 SC 414
34. AIR 1988 SC 1737
35. AIR 1996 SC 1431
36. AIR 2017 SC 5372

37. (2004) 1 SCC 195
38. (2014) 16 SCC 212
39. (2007) 5 SCC 447
40. 1963 AIR SC 1742
41. (2002) 5 SCC 203
42. AIR 2010 P&H 121
43. (2008) 10 SCC 139
44. 2022 SCC OnLine SC 1622
45. (2023) 5 SCC 1
46. (1963) 1 SCR 404
47. AIR 1970 SC 1133
48. AIR 1976 SC 670
49. (2002) 2 SCC 333

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

W.P. Nos.16619, 21616, 25165, 26807, 28108, 29614, 30036, 30742, 30801, 32559, 32605, 32609, 33988, 36442, 36883, 37271, 37272, 37273, 37274, 37275, 38328, 40830 and 42301 of 2022
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COMMON JUDGMENT:

Heard Sri K. Gopal Chowdary, Sri Sricharan Telaprolu, Sri Challa Gunaranjan, Sri Nimmala Satyanarayana, learned counsel, representing Sri G. Sudheer Kumar, Sri V.R.N.Prashanth, Sri O. Manohar Reddy, learned Senior Counsel, assisted by Sri K. Dheeraj Reddy, and Sri Alladi Ravinder, learned Senior Counsel, assisted by J. Srinadh Reddy, learned counsels appearing for the petitioners, and Sri P. Shreyas Reddy, learned Government Pleader, attached to the learned Advocate General's Office for the State of Andhra Pradesh and Sri V. R. Reddy Kovvuri, learned standing counsel along with Sri Abhay Jain, and Sri Metta Chandrasekhar Rao, learned standing counsel for the Central Power Distribution Corporation of A.P.Ltd. (APCPDCL), appearing for the respondents.

2. The petitioners in the batch of the above writ petitions except in W.P.No.33988 of 2022, have challenged the notification in G.O.Ms.No.7, Energy (Power-III) Department, dated 08.04.2022 with further consequential reliefs.

3. The W.P.No.16619 of 2022 is being taken as the leading writ petition. The prayer of this writ petition is reproduced hereinafter. In rest of the writ

petitions, except in W.P.No.33988 of 2022, there are same prayers in substance, worded differently. However in W.P.Nos.2601, 2610 of 2022, there is no prayer for refund, may be because any duty pursuant to G.O.Ms.No.7 might not have been collected from them.

> "….to issue an appropriate Writ Order or direction more particularly one in the nature of Writ of Mandamus declaring the action of the 1st Respondent in issuing G.O.Ms.No. 7 Energy Power-III Department dated 08.04.2022 exorbitantly increasing the levy of electricity duty from Rs. 0.06 per unit to Rs.1 per unit on the energy sales made to commercial and industrial consumers in colourable exercise of the powers conferred under Section 31 of the Andhra Pradesh Electricity Duty Act, 1939 and the consequential action of the 2nd Respondent in seeking to levy electricity duty at the enhanced rate inter alia by raising RT Bill Nos. 2201593300, 2201584106 and 2201576585 dated 05.05.2022 for the month of May, 2022 and HT Bill Nos.2201630500, 2201628436 and 2201632042 dated 05.06.2022 for the month of June, 2022 as arbitrary illegal unjust unfair unreasonable excessive violative of the fundamental and constitutional rights guaranteed under the Constitution of India violative of the principles of natural justice contrary to the National Tariff Policy 2016 contrary to the Common Order on Tariff for Retail Sale of Electricity during financial year 2022-2023 dated 30.03.2022 passed by the Andhra Pradesh Electricity Regulatory Commission and contrary to law and to consequently set aside G.O.Ms No.7 Energy Power-III Department dated 08.04.2022 as well as the aforesaid RT Bills dated 05.05.2022 and HT Bills dated 05.06. 2022 to the extent of the enhanced electricity duty by directing the 2nd Respondent to refund the excess electricity duty paid by the Petitioners for the month of May, 2022 and not levy electricity duty on the Petitioners at the enhanced rate anymore and pass such other orders….."

4. The petitioners in the above batch of the Writ Petitions are the commercial and industrial consumers.

5. In Writ Petition No.33988 of 2022, the petitioners are the proprietors/owners of the cold storages and claim to be not the commercial and industrial consumers, but the agriculture category consumers. Their stand is that they shall stand exempted from levy of any such duty, like agricultural consumers, and they cannot be asked to pay any duty pursuant to G.O.Ms.No.7, dated 08.04.2022.

6. The prayer in W.P.No.33988 of 2022 is as under:

> "…..to issue an order or writ or direction more particularly one in the nature of writ of Mandamus declaring that the demand made by the respondents to the petitioners to pay the electricity duty at the rate of Re 1/ per unit increasing the same from Re. 0.06 Ps Per unit from April 2022 and True Up Charges in pursuant to the G.O.Ms.No.7, Energy Power III Department, dated 8-4-2022, is illegal and arbitrary and against to the constitution of India and exorbitant and it is just and unfair and unreasonable excessive and violative of fundamental rights guaranteed under the Constitution of India and also it violates the principles of natural justice and consequently directing the respondents not to demand and collect the electricity duty and TRUE UP charges and further direct the respondents to refund the amount collected at the enhanced rate which is paid to the respondents from April 2022 onwards and pass such other reliefs …."

7. By the impugned notification G.O.Ms.No.7, issued in exercise of powers conferred by Section 3 (1) of the Andhra Pradesh Electricity Duty Act, 1939, in short (APED Act, 1939), the Government of Andhra Pradesh levied electricity duty of Re.1 per kilowatt hours (kwh) unit on energy sales for the commercial and industrial consumers category, as indicated in the yearly 'Retail Supply Tariffs Order 2022-23' (in short 'the Tariffs Order') issued by the Andhra Pradesh Electricity Regulatory Commission (in short 'APERC').

8. The G.O.Ms.No.7 further provides that for the domestic consumers the existing electricity duty of 6 paise per kwh unit shall continue to be levied, and for the agriculture consumers they shall continue to be exempted from levy of any such duty.

9. The challenge to the impugned notification is to the extent of levy of electricity duty of Re.1 per kwh unit on energy sales for the commercial and industrial consumers category and also that such rate is excessive.

10. The challenge to the impugned notification is mainly on the ground that it makes hostile discrimination against the industrial and commercial consumers and suffers from colorable exercise of power also violating Article 14 of the Constitution of India.

11. The challenge to the demand of electricity duty by the 2nd respondent-Central Power Distribution Corporation of Andhra Pradesh Limited (in short 'APCPDCL') in its monthly current consumption bills, is additionally on the ground that it cannot be recovered from the petitioner consumers, by the 'licensee', as under Section 3 of the APED Act, it is the duty of the 'licensee' to make the payment of electricity duty and there is no previous sanction of the State Government under Section 7 (1) of the APED Act, 1939, permitting the 'licensees' to recover the electricity duty either wholly or partly from the industrial and commercial consumers. Consequently, the payment of electricity duty already paid/recovered, also deserves to be refunded to the petitioners.

12. The respondents have filed counter affidavit in the leading writ petition and in rest of the writ petitions in some same counter affidavit and in others Memo of adoption of the counter affidavit, has been filed.

13. Facts are not in dispute.

Submissions of learned counsels for the petitioners:

14 Sri K. Gopal Chowdary, learned counsel for the petitioners, submitted that the impugned notification dated 08.04.2022 is colourable exercise of power. He submitted that what cannot be done directly by the State, can also not be done indirectly. He submitted that initially the duty was imposed by the Statute itself, but now by legislature, this power has been given to the State Government after amendment of Section 3 of APED Act. Consequently, the sovereign power to tax which was being exercised by the legislature is now delegated and is being exercised by the executive. Consequently, the doctrine of colourable exercise of power as applicable in the matter of legislation would equally apply to the exercise of power by the executive.

15. Sri K. Gopal Chowdary submitted that the tariff policy notified under the Electricity Act is a statutory document and has force of law, placing reliance in ***Energy Watchdog v. Central Electricity Regulatory Commission***[1]. He submitted that the APERC passed the Tariff Order dated 30.03.2022 and considering that the industrial and commercial category consumers are already saddled with high tariffs and any further increase in tariff for those categories was highly unsustainable for them, and if it becomes unsustainable, it will lead

[1] (2017) 14 SCC 80

to closure of their industries affecting the livelihood of millions of people and the economy of the State as a whole, the APERC, did not increase the tariff rate on these categories.

16. Sri K. Gopal Chowdary submitted that as per the order of Appellate Tribunal for Electricity (in short 'APTEL') the tariffs of subsidizing categories was not to be increased beyond the cap of 120% of their cost of service, which in his submission is already significantly over 120% of the cost of service in the case of 11 KV consumers and only just less than 120% in the case of 33 KV consumers. In this respect, he referred to Tables 70 and 72 in the Tariff Order as also mentioned in the writ petition. He submitted that the ratio of tariff, considered as Average Billing Rate (in short 'ABR') as approved for 2022-23 and the Average Cost of Service (in short 'ACOS') for the different voltage levels, is referred in Table-72 as under:

Table-72: Ratio of Average Billing Rate (ABR) per unit and Average Cost of Supply (ACoS) per Unit (Voltage wise)

Particulars	ABR Approved for FY2022-23			ACOS			ABR/ACOS (%)		
	SPDCL	EPDCL	CPDCL	SPDCL	EPDCL	CPDCL	SPDCL	EPDCL	CPDCL
For LT Level	3.42	4.60	4.66	7.18	6.72	7.09	47.67%	68.49%	65.77%
For 11kV Level	9.90	9.37	9.43	7.18	6.72	7.09	137.89%	139.52%	132.94%
For 33 kV Level	8.07	7.72	7.67	7.18	6.72	7.09	112.49%	114.90%	108.09%
For 132 kV Level and above	7.53	6.22	7.18	7.18	6.72	7.09	104.97%	92.60%	101.28%
Average for the licensee	**5.07**	**5.71**	**5.63**	**7.18**	**6.72**	**7.09**	**70.69%**	**85.05%**	**79.37%**

Referring to Table 72, he submitted that ACOS as shown in Table-72, uniformly, for all voltage levels for each DISCOM, is incorrect. The Commission approved the ACOS separately for each voltage level for each DISCOM in Table-70 of the Tariff Order, which is as under:

Table 70: Approved: Cost of Service for FY2022-23 (Rs. Unit)

Particulars	APSPDCL	APEPDCL	APCPDCL	For the three DISCOMs
CoS for LT consumers	7.40	6.89	7.21	7.18
CoS for 11 kV consumers	7.09	6.69	6.95	6.87
CoS for 33kV consumers	6.87	6.52	6.73	6.71
CoS for 132kV & above consumers	6.66	6.34	6.52	6.50
Average cost of service (ACoS)	**7.18**	**6.72**	**7.09**	**6.98**

Consequently, he submitted that the petitioner has given a table, of his own, in para No.10 of W.P.No.25165 of 2022, substituting ACoS as in Table-70, in place of ACoS as given in Table-72 and based thereon it is submitted that the cap of 120% is already exceeded in the case of 11 KV consumers and it is just below in case of 33 KV consumers. Table 72 as in para-10 of the writ petition is as under:

Voltage	ABR			ACOS			ABR/ACOS%		
	SP	EP	CP	SP	EP	CP	SP	EP	CP
LT	3.42	4.6	4.66	7.4	6.89	7.21	46.22	66.76	64.63
11kV	9.9	9.37	9.43	7.09	6.69	6.95	139.63	140.06	135.68
33 kV	8.07	7.72	7.67	6.97	6.52	6.73	115.78	118.40	113.97
132>kV	7.53	6.22	7.18	6.66	6.34	6.52	113.06	98.11	110.12

17. Sri K. Gopal Chowdary submitted that while making determination of tariff, the APERC also considers the aspect of subsidy, if the State Government so requires, with respect to any consumer or class of consumers, for which the State Government has to pay in advance and in specified manner, the amount to compensate the person effected by the grant of subsidy. The submission is that the aspect of subsidy is a matter to be considered by the APERC under Section 65, while determining the tariff under Section 62 of the Electricity Act. The Government has to make the payment of an amount towards subsidy, which is to compensate the category of consumers affected by the grant of subsidy. Once that was taken into consideration by the APERC in the determination of the tariff order, imposition of duty or enhancement of duty and levying the same in respect of industrial and commercial consumers, to fill the gap or to recover the loss, by virtue of grant of subsidy to agricultural consumers, is directly a burden being imposed on the industrial and commercial consumers, which as per the tariff order, are already saddled with high tariff and for that reason the APERC did not enhance tariff on them. He further submitted that the impugned G.O.Ms.No.7 was issued on 08.04.2022 just 8 days after the APERC issued its tariff order, enhancing the Electricity duty on the energy sales made to the commercial and industrial consumers, which is indicative of subsidy to agriculture consumers being realized from the industrial and commercial consumers.

18. Sri K. Gopal Chowdary submitted that so long as levy of tax is in a reasonable manner and made fairly and not selectively, it could be done. But,

here, the Government grants subsidy, while determination of tariff, to the agriculture consumers and realizes the same by imposing duty on commercial and industrial consumers. It is nothing but cross subsidy. The subsidy, in fact, is granted at the cost of industrial and commercial consumers and this cross subsidy interferes with the scheme of determination of tariff. He submitted that the Government has the power to tax, but not arbitrarily nor to tax diffferently. There is no differentia to exempt domestic and agriculture consumers.

19. Additionally, he referred to the following judgments in support of his aforesaid submissions:

1. ***K. C. Gajapati Narayan Deo v. State of Orissa***[2]
2. ***Attorney General-Alberta v. Attorney General-Canada***[3]
3. ***Bailey v. Drexel Furniture Co.***[4]
4. ***The Lord Krishna Sugar Mills Ltd. v. Union of India***[5]
5. ***State of W.B. v. Kesoram Industries***[6]
6. ***Automobile Transport (Rajasthan) Ltd. v. State of Rajasthan***[7]

20. Sri K. Gopal Chowdhary, further submitted that the Electricity Duty is imposed upon the 'licensee' under Section 3 of the APED Act. In the absence of any previous sanction of the State Government under Section 7 of APED Act, it cannot be recovered by the 'licensee' from the consumers. He submitted that there was no such previous sanction. As such the demand made in the

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[2] AIR 1953 SC 375
[3] 1938 SCC Online PC 43
[4] 259 US 20 - 1922
[5] AIR 1959 SC 1124
[6] (2004) 10 SCC 201
[7] AIR 1962 SC 1406

electricity bills and its payment or recovery, being unsustainable, the petitioners are entitled for refund of such amount from the respondents.

21. Sri Challa Gunaranjan, learned counsel for the petitioners submitted that the ground of grant of subsidy to the category of agriculture consumers in tariff, cannot be a ground for enhancement of electricity duty. He submitted that the point of subsidy is to be considered while determining the tariff under Section 62 of the Electricity Act, 2003, in view of Section 65 thereof and once that aspect was taken into consideration and tariff order was issued on dated 30.03.2022 the impugned G.O, within a gap of 7 to 8 days could not be issued. It amounts to, on the one hand granting subsidy to the agriculture consumers category, but on the other hand to realize the same from the industrial and commercial consumers category by burdening them of such duty. He submitted that the tariff was not enhanced by the APERC for such category of consumers i.e. industrial and commercial, on objective considerations and in the tariff order itself it is mentioned that it could be only upto the cap of 120%. He also submitted that what could not be done directly before the APERC in determination of tariff, could also not be done indirectly by imposing the duty, adopting the submission of Sri K. Gopal Chowdary.

22. Sri Challa Gunaranjan, however, further submitted that no procedure has been prescribed for determination of rate of duty. The increase in the amount of duty from 0.06 paise to Re.1/- and charging the same only from the two (02) category of consumers, Industrial and Commercial, but exempting the

other categories, Domestic to some extent and Agriculture, full exemption, is discriminatory and violative of Article 14 of the Constitution of India.

23. Sri Challa Gunaranjan placed reliance upon the Division Bench judgment of Chhattisgarh High Court in the case of ***Lafarge India Private Limited vs. State of Chattisgarh***[8]***.***

24. Sri V. R. N. Prashanth, learned counsel for M/s. Indus Law Firm, submitted that in the tariff order dated 30.03.2022, the electricity duty aspect was also considered. His submission is also the same that once the Electricity Duty @ 0.06 paise per unit was considered by APERC, now the same cannot be enhanced to Re.1/- per unit, after the passing of the tariff order. He submitted that upon an application under Right to Information Act, dated 18.05.2022 by the petitioners under his representation, to furnish the entire note file pertaining to G.O.Ms.No.7, dated 08.04.2022 along with all the documents/records relied on by the Government, information was not provided and "The information" was rejected.

25. Sri Alladi Ravinder, learned senior counsel in W.P.No.7163 of 2023, raised the same objections with respect to the challenge to the G.O.Ms.No.7 i.e., colourable exercise of power and arbitrariness being violative of Article 14 of the Constitution of India on the ground of differentiation between two categories of electrical consumers and the rate of duty being unreasonable. He placed reliance in ***National Thermal Power Corporation Ltd. v. State of***

[8] W.P.No.1554 of 2006

A.P[9] and ***Delhi Cloth & General Mills Co.Ltd. v. Municipal Corporation of Delhi***[10] as also in ***Ajay Hasia v. Khalid Mujib Sehravardi***[11].

26. Sri O. Manohar Reddy, learned Senior Advocate in W.P.Nos.2601, 2610, 2922, 3067, 3557 and 4124 of 2023 submitted additionally that the ferro alloy industry is a separate category in the tariff order and though they also fall in industrial consumers category, but in the tariff order the tariff for such industrial consumer being different, their cases should have been considered separately while imposing the duty on Ferro Alloy Industry and some exercise should have been done with respect to them in imposition of the duty @ Re.1/-. He has placed reliance in the case of ***Indian Aluminium Company vs. State of Kerala and others***[12] in support of his contention.

27. Sri Nimmala Satyanarayana, learned counsel in W.P.No.33988 of 2022 submitted that under the G.O.Ms.No.7, the agricultural consumers are exempted from levy of any such duty. The petitioners' cold storage are helpful in safeguarding the agricultural produce and to preserve the storage of products by the farmers. The petitioners are not the manufactures of any product or any byproducts of the commodities. They allow the farmers to keep their agricultural produce into the cold storage on cooly basis for a period of ten or 12 months per year. Based thereon the contention is that their categories amount to one of agricultural consumer. It is connected with agriculture and there is no processing bringing into existence a different substance.

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[9] 1990 SCC OnLine AP 245
[10] 1992 SCC OnLine Del 495
[11] (1981) 1 SCC 722
[12] AIR 1996 SC 1431

Consequently, they also stand exempted from levy of duty under the category of agricultural consumers. Learned counsel referred to the Andhra Pradesh (Agricultural Produce and Livestock) Markets Act, 1966 (Act 16 of 1966), G.O.Ms.No.333, dated 14.11.2003, which will be referred later on.

28. Sri Nimmala Satyanarayana placed reliance in the following cases:

(1) ***M/s. Kalyan Roller Flour Mills Pvt., Ltd and others vs. Central Power Distribution Company of A.P. Ltds., Hyd and others***[13]***.***

(2) ***Madhava Hi-Tech Cold Storage (P) Limited v. Assistant Commercial Tax Officer***[14]***.***

(3) ***Chowgule & Company Private Limited*** **v.** ***Union of India***[15]

(4) ***Delhi Cold Storage Private Limited*** **v.** ***Commissioner of Income Tax, New Delhi***[16]

(5) ***Central Bank of India v. Guru Nanak Cold Storage and Ice Factory***[17]

(6) ***Krishna Poultry Farm v. State of Orissa***[18]

(7) ***Tuljabhavani Cold Storage Pvt. Ltd. v. Superintending Engineer***[19]

(8) ***M/s. Odisha Cold Storage Association v. CEO, TPCODL***[20]***.***

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[13] 2010(1) U.P.L.J. 182 (HC)
[14] 2022 SCC OnLine AP 2574 (DB)
[15] (1981) 1 SCC 653
[16] (1991) 4 SCC 239
[17] 1997 SCC OnLine DRAT 50
[18] 2015 SCC OnLine Ori 301
[19] Case No.05/2017, decided on 06.04.2017 by Consumer Grievance Redressal Forum, Baramati
[20] Case No.03/2021, decided on 29.02.2022 Of Odisha Electricity Regulator Commission, Bhubaneswar

29. Other learned counsels for the petitioners adopted the aforesaid arguments advanced.

Submissions of learned counsels for the Respondents:

30. Sri P. Shreyas Reddy, learned GP submitted that the tariff determination by the Commission is referable to Part VII and Section 86 of the Electricity Act, 2003 which emanates from Entry 38 of List III of Schedule VII of the Constitution of India. The electricity duty is referable to the A.P.E.D Act which emanates from Entry 53 of List II of Schedule VII. The tariff and duty operates in separate legislative fields, serving distinct legislative purpose. The APERC acknowledged it in its common tariff order. He submitted that the G.O.Ms.No.7 does not interfere with the exclusive statutory power and function of APERC under the Electricity Act. He submitted that without there being a challenge to the statutory amendments which enabled the implementation of the duty, the plea of colourable exercise of power cannot stand. Further, there is no colourable exercise of power in issuing G.O.Ms.No.7, the source of power is under Section 3 of the APED Act. Electricity Duty, the State has the power to impose, on sale of the electricity. It is an exercise independent of determination of tariff by APERC under the Electricity Act 2003. He further submitted that the tariff for industrial and commercial consumers was not enhanced vide the APERC's tariff order dated 30.03.2022, when compared with the order issued for the year 2021. Consequently, their claim about the tariff increasements and the effect thereof is unfounded. There is no question of an

additional burden while increase of electricity duty. They are statutorily required to pay the duty under the APERC Act in addition to the tariff.

31. Sri P. Shreyas Reddy, learned GP submitted that the reasons for enhancement of the electricity duty have been adequately and elaborately given in G.O.Ms.No.7. It cannot be considered a hostile discrimination against industrial and commercial consumers. Availing of electricity supply by these electricity consumers stands at different levels when compared to agricultural/domestic consumers. It was on consideration of the detailed study of the duty rates levied and enhanced across the years in various States, where even currently, the electricity duty levy vary to Rs.1.44 and Rs.1.80 energy per unit. There was no revision of electricity duty for about 18 long years i.e. since 1993-22 in the State of Andhra Pradesh. He submitted that in view of the reasons assigned, the time gap of 18 years since the last revision of duty, and when compared to the rate of duty in different States, the current rate of electricity duty @Rs.1.00 by the impugned G.O.Ms.No.7 cannot be termed as arbitrary or unreasonable.

32. Sri Shreyas Reddy submitted that the category of domestic consumers for which category the APERC had in fact increased the tariff, the electricity duty was decided to be levied at the previously existing rate of Rs. 0.06 paise per energy unit and the agricultural consumers category were to be exempted from payment of the duty. Such exemption from payment of electricity duty was also available vide G.O.Ms.No.82 (Energy Power-III) Department dated 07.07.2003. He submitted that such exemption is given inter

alia across the State of Chhattisgarh, Haryana, Gujarath, Karnataka, Tamilnadu, Madhya Pradesh, Sikkim, Nagaland, Punjab, West Bengal, Arunachal Pradesh, Puducherry and Sikkim. The petitioners cannot compare their needs of electricity consumption and electricity duty paying, to those of agricultural and domestic consumers. Consequently, the challenge on the ground of hostile discrimination and unreasonableness or violation of Article 14 of the Constitution of India cannot be sustained.

33. Sri Shreyas Reddy submitted that the National Tariff Policy and the APERC tariff order both are referable only to the Electricity Act, 2003 in the specific context of tariff determination and cannot be brought to bear upon the application to determine duty under the APED Act.

34. Sri Shreyas Reddy, learned GP, further submitted that State can reasonably decide to pick any commodity, good or subject for taxation and there is no obligation to impose uniform tax/duty. The legislature enjoys wide range of freedom to make classification in tax/duty law and the burden is on the person/complainant to prove that equals are treated as unequals.

35. Sri Shreyas Reddy further submitted that the burden of subsidy given to the agriculture class does not fall on industrial class and the argument that it falls on industrial class and therefore the cross subsidy is misconceived. He submitted that even if a tax falls heavily on some in one category that by itself would not be a ground to render the law invalid. He submitted that a reasonable classification is one which includes of persons who are similarly situated with respect to the purpose of the law. Judicial defference must be

given to the legislature in the field of economic regulation. Laws relating to economic activities must be viewed with greater latitude, than laws touching civil rights. He submitted that in the matter of economic policy, the Courts are reluctant to interfere with the conclusion reached by the experts unless the Court is satisfied that there is illegality in the decision itself, which he submitted, is not in the present case.

36. Sri Shreyas Reddy, with respect to Ferro Alloys Industries and Cold Storages, submitted that in the exercise of powers under Section 3 (e) in granting exemption, the government considered it appropriate to grant exemption to the domestic consumers to some extent and to the agricultural consumers to full extent. Consequently, the case of exemption was considered to whom the government considered and to grant exemption, exemption was granted and to others it was not granted. The industrial and commercial consumers were not granted exemption. Each and every industry with respect to different items cannot claim independent consideration. They are the same class falling within the same category of consumers and consequently each industry cannot claim independent consideration.

37. Sri Shreyas Reddy placed reliance on the following judgments in support of his contentions:

(1) ***Gujarat Urja Vikas Nigam Ltd. v. Solar Semiconductor Power Company (India) Pvt. Ltd.***[21]

(2) ***East India Tobacco Co. v. State of Andhra Pradesh***[22]

[21] AIR 2017 SC 5372

(3) ***The Twyford Tea Co. Ltd. and Ors. v. State of kerala and Ors.***[23]

(4) ***Siel Ltd. v. State of Punjab***[24]

(5) ***Income Tax Officer, Shillong and Ors. v. R. Takin Roy Rymbai and Ors.***[25]

(6) ***Parivar Seva Sanstha v. Ahmedabad Municipal Corporation***[26]

(7) ***Federation of Indian Hotel & Restaurant Association of India v. Union of India and Ors.,***[27]

(8) ***Rane Engineering Valves Ltd. v. State of A.P. and Ors.***[28]

(9) ***BALCO Employees Union v. Union of India and Ors.***[29]

38. Sri V. R. Reddy Kovvuri, learned Standing Counsel for the Central Power Distribution Corporation of Andhra Pradesh Limited (APCPDCL) for the respondent No.2, along with Sri Abhay Jain, submitted that tariff and duty are separate, distinct and independent aspects from each other. They are for different purposes and operate in separate legislative fields. The tariff determination is made by APERC based on average cost of supply or rate of billing. The National Tariff Policy and the steps undertaken to bear the subsidy burden for determination of tariff cannot be mixed with the duty so as to contend the colourable exercise of power. Such references and the contentions based on tariff, to impugn G.O.Ms.No.7 are baseless. He submitted that the

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[22] (1963) 1 SCR 404
[23] AIR 1970 SC 1133
[24] AIR 2010 P & H 121
[25] AIR 1976 SC 670
[26] 2022 SCC OnLine SC 1622
[27] (1989) 3 SCC 634
[28] W.P.No.6095/2004, decided on 19.05.2016 Erstwhile High Court of A.P
[29] (2002) 2 SCC 333

National Tariff Policy or otherwise providing for the tariff determination to be within a particular percentage, parameter, scope of the average cost of supply is not relevant for challenging the impugned G.O on the point of duty.

39. Sri V. R. Reddy Kovvuri submitted that as regards subsidy, the APCPDCL vide letter ENE01-APCC/1/2021, dated 24.03.2022 had written to APERC to provide the subsidy amounts determined by the APERC under Section 65 of the Electricity Act, 2003. He submitted that the tables as referred by the petitioners' counsel from the tariff order and the observation made in the tariff order cannot be made the basis to challenge the duty, as those are for the sole purpose of determination of tariff and not the electricity duty. It was further submitted that even going by the petitioners' self-serving table in para-10 of the W.P.No.25165 of 2022, the APERC fixed the tariff for 33KV Voltage which is still within the 120% range of the cost of service. Therefore, their contention that the permissible limits have been exceeded is not correct.

40. Sri V. R. Reddy Kovvuri, further submitted that vide G.O.Ms.No.277, Energy Department, dated 09.12.1994, sanction was accorded by the Government under Section 7 (1) of the A.P.E.D. Act, 1939 to the Andhra Pradesh State Electricity Board to recover the electricity duty from consumer or class of consumers to whom energy is sold at a price of more than 0.12 paise per unit, falling under different categories.

41. It is submitted that the Andhra Pradesh Electricity Reforms Act, 1998 was saved from total repeal and its provisions not inconsistent with the Electricity Act, 2003 were saved.

42. The Andhra Pradesh Electricity Regulatory Commission, (Electricity Supply Code) Regulation No.5 of 2004, was made by the Andhra Pradesh Electricity Regulatory Commission, in exercise of power conferred by clause (x) of sub section (2) of Section 181 read with Section 50 of the Electricity Act, 2003. Regulation 3.4 of the Regulations 2004 clearly provides that the consumer shall also pay all the amounts chargeable by the Government by way of tax/duty etc to the appropriate authority as specified by the Government.

43. The general terms and conditions of supply of distribution and retail supply licensee in Andhra Pradesh by the Andhra Pradesh Electricity Regulatory Commission vide proceedings No. Secy/01--, dated 06.01.2006 under clause 5.3.5 charges for electricity consumption in sub-clause 5.3.5.3, clearly provides that the consumers shall pay in addition to the latest statute in the tariff order or schedule of rates prescribed by the Commission, the amounts leviable by the Government or any other authority by way of taxes, electricity, duty, Octroi or any other duties in respect of supply of electricity to the consumers unless there is a specific mention in the tariff order that the rates are inclusive of such taxes, duty or Octroi etc.

44. He submitted that the Appendix IIA, is an agreement of supply of electricity high tension, annexed to the counter affidavit and making a reference to the same, particularly, condition No.4, it was submitted that as per the agreement entered for supply of power the consumer had undertaken to comply with all the requirements of the Electricity Act, 2003, the rules and regulations framed there under, provisions of the tariffs, the scope of

miscellaneous and the general charges and the general terms and conditions of supply prescribed by the company with approval of the APERC from time to time and not to dispute the same.

45. He further referred to the terms and conditions from the tariff order in respect of the three (03) distributor licensees in the State of Andhra Pradesh, to submit that it clearly provided that the tariffs determined in Para-A and Para-B are subject to the mentioned general conditions. It is mentioned therein that the tariffs are exclusive of electricity duty payable as per the provisions of the Andhra Pradesh Electricity Duty Act. Consequently, the petitioners are liable for payment of electricity duty and the demand made from them in the bills is perfectly justified.

46. Sri V. R. Reddy Kovvuri, placed reliance in the following judgments:

(1) ***Southern Petrochemical Industries Co.Ltd. v. Electricity Inspector & ETIO***[30]

(2) ***BSES Ltd., v. TATA Power Co. Ltd.***[31]

(3) ***State of A.P. v. National Thermal Power Corpn. ltd.***[32]

47. Sri Metta Chandrasekhara Rao, learned Standing Counsel submitted that the duty was imposed for augmentation of revenue for the benefit of the weaker section, farmers etc. and the same would go to the State exchequer. He submitted that the thing used in the legislative entries in the Constitution must be interpreted in a way so as to give the wider latitude of the power to

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[30] (2007) 5 SCC 447
[31] (2004) 1 SCC 195
[32] (2002) 5 SCC 203

the legislature to legislate and not in a narrow and pedantic sense. He submitted that the duty under the A.P.Electricity Duty Act, 1939 is framed under Entry 53 of List-II of the Constitution. Consequently, the power is derived from the APED Act 1939. The contention of the petitioner's counsel that it is colorable exercise of power is not sustainable because the power is there with the State conferred by Section 3, as amended, under the Act, 1939 enacted by the State legislature within its legislative competence.

48. Sri Metta Chandrasekhar Rao, further submitted that the primary purpose of the G.O. is to raise the revenue for the development work in public interest. He submitted that the rise of the electricity duty is not a matter for investigation of Court. In the present case, he submitted that the rise of the electricity duty was due to various factors and such rise was being made for the first time after about 18 years.

49. Sri Metta Chandrasekhar Rao, placed reliance in the following judgments in support of his contentions:

(1) ***Jiyajeerao Cotton Mills Ltd., Birlanagar v. Gwalior***[33]

(2) ***State of Uttar Pradesh and others v. Renusagar Power Co. and others***[34]

(3) ***Indian Aluminium Company v. State of Kerala and others***[35]

50. I have considered the submissions of the learned counsels for the parties and perused the material on record.

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[33] AIR 1963 SC 414
[34] AIR 1988 SC 1737
[35] AIR 1996 SC 1431

Points for consideration:

51. The following points arise for consideration and determination:-

A. Whether the G.O.Ms.No.7, Energy (Power-III) Department, dated 08.04.2022 deserves to be quashed on the grounds of

(1) colourable exercise of power;

(2) violating Article 14 of the Constitution of India by imposing duty on industrial and commercial consumers of electricity, but granting exemption to agricultural consumers as also for the rate of duty being unreasonable and excessive;

B. Whether the licensees can recover the duty imposed on them, from the petitioners / consumers, under Section 7 of the APED Act?

C. Whether the petitioners / Alloy Industries have to pay the same duty?

D. Whether the petitioners / cold storage industries are agriculture consumers and exempted from payment of duty?

52. Before proceeding further, it is to be brought on record that,

i) There is no challenge to the Andhra Pradesh Electricity Duty (Amendment) Act, 2020 (Act No.10 of 2021) in the writ petitions.

ii) There is also no challenge to the provision of Section 3 of the APED Act 1939 amended or unamended or to any of its other provisions.

iii) The challenge is only to the G.O.Ms.No.7, dated 08.04.2022, and that too, to the limited extent with respect to imposition of duty @Re.1 per unit on the commercial and industrial consumers category and on its rate @Re.1.

iv) There is no challenge to the classification of the electrical energy consumers, viz., industrial, commercial, domestic and agricultural.

v) There is also no dispute that the petitioners (including Alloy Industries and the Cold storages) were making the payment of the duty at the rate of six paise per unit of energy in respect of all sales of energy, in terms of Section 3 of the APED Act 1939, to their licensees which were included in their electricity bills.

Determination of Point-A (1)
(Tariff)

53. There is no dispute with respect to the determination of the tariff, by the tariff order by the Andhra Pradesh Electricity Regulatory Commission, nor the same is the subject matter of this writ petition. But a reference to the provisions for determination of tariff is being made to consider the submissions, advanced to challenge the G.O.Ms.No.7, dated 08.04.2022, by which duty has been imposed at the rate of Re.1 per unit of sale, on the ground that the matter of subsidy is to be considered by APERC while determining tariff, whereas the G.O.Ms.No.7 has been issued for one of the reasons of grant of subsidy to the agriculture consumers, as assigned in the G.O.Ms.No.7 itself.

54. The submission of the learned counsels for the petitioners centres round the grant of subsidy to agricultural consumers by State in determination

of tariff by APERC, but imposing duty vide G.O.Ms.No.7 on industrial and commercial consumers, due to grant of such subsidy, which in their submission enhances the burden on Industrial and Commercial consumers through the APERC did not enhance tariff on them to avoid burdening them for reasons in the tariff order, as already mentioned above.

55. The Electricity Act 2003, in Part-II, Section 3 provides for the National Electricity Policy and Plan. According to Section 3 (1) the Central Government shall from time to time prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilization of resources, such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy. Under sub-section (2), the Central Government shall publish the National Electricity Policy and tariff policy from time to time, which, under sub-section (3), in consultation with the State Governments and the Authority may be reviewed or revised from time to time by the Central Government. Under Sub-section (4), the Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years, provided that the Authority while preparing National Electricity Plan shall publish, the draft National Electricity Plan and invite suggestions and objections thereon from licensees, generating companies and the public within such time, as may be prescribed, provided further that, the Authority shall, (a) notify the plan after obtaining the approval of the Central Government, (b) revise the plan incorporating the directions, if any, given by the Central Government while

granting approval under clause (a). Sub-Section (5) provides that the Authority may review or revise the National Electricity Plan in accordance with the National Electricity Policy.

56. The 'Authority' as defined under Section 2 (6) of the Electricity Act 2003, means the Central Electricity Authority referred to in sub-section (1) of Section 70, which provides for constitution of 'Central Electricity Authority' etc.

57. Part-VII of the Electricity Act, 2003, from Sections 61 to 66 is on the subject of 'tariff'. Section 61 provides that the appropriate Commission shall, subject to the provisions of the Electricity Act 2003, specify the terms and conditions for the determination of tariff, and in doing so, it shall be guided by the considerations as mentioned under Clauses (a) to (i). One of the considerations, is, the National Electricity Policy and tariff policy. Section 62 provides for determination of tariff, which is to be determined by the Appropriate Commission in accordance with the provisions of the Act, "(a) for supply of electricity by a generating company to a distribution licensee", "(b) transmission of electricity", "(c) wheeling of electricity", and "(d) retail sale of electricity".

58. The 'Appropriate Commission' as defined under Section 2 (4), means the Central Regulatory Commission referred to in sub-section (1) of Section 76 or the State Regulatory Commission referred to in Section 82 or the Joint Commission referred to in Section 83, as the case may be. The 'Appropriate Government' as defined under Section 2 (5) means, "(a) the Central Government; (i) in respect of a generating company wholly or partly owned by

it"; (ii) in relation to any inter-State generation, transmission, trading or supply of electricity and with respect to any mines, oil-fields, railways, national highways, airports, telegraphs, broadcasting stations and any works of defence, dockyard, nuclear power installations; "(iii) in respect of the National Load Dispatch Centre and Regional Load Dispatch Centre"; (iv) in relation to any works or electric installation belonging to it or under its control; and "(b) in any other case, the State Government having jurisdiction under the Act 2003".

59. Section 64 provides for procedure for tariff order. As per the procedure prescribed for tariff order, an application for determination of tariff under Section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations. Every applicant shall publish the application, in such abridged form and manner, as may be specified by the Appropriate Commission. The Appropriate Commission shall, within 120 days from receipt of an application under sub-section (1) and after considering all suggestions and objections received from the public, (a) issue a tariff order accepting the application with such modifications or such conditions as may be specified in that order; (b) reject the application for reasons to be recorded in writing if such application is not in accordance with the provisions of the Act and the rules and regulations made thereunder or the provisions of any other law for the time being in force, with the proviso, that the applicant shall be given a reasonable opportunity of being heard before rejecting the application for determination of the tariff. The Appropriate Commission, then within 7 days of making the order, shall send a

copy of the order to the Appropriate Government, the Authority and the concerned licensees and to the person concerned. A tariff order unless amended or revoked, continues to be in force for the period, as may be specified in the tariff order.

60. Section 65 of the Electricity Act 2003 provides for making provision of subsidy by the State Government. According to Section 65, if the State Government requires the grant of any subsidy to any consumer or class of consumers in the tariff determined by the State commission under Section 62, the State Government shall, notwithstanding any direction which may be given under Section 108, pay in advance and in such manner as may be specified, the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licence or any other person concerned to implement the subsidy provided for by the State Government. As per the proviso to Section 65, such direction of the State Government shall not be operative if the payment is not made in accordance with the provisions contained in Section 65 and the tariff fixed by the State Commission shall be applicable from the date of issue of orders by the Commission in that regard.

61. Section 108 of the Electricity Act 2003 provides for the directions by the State Government. It provides that in discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing and if any question arises as to whether any such direction relates to a matter of policy

involving public interest, the decision of the State Government thereon shall be final.

62. Section 82 of the Electricity Act 2003 provides for Constitution of State Commission and Section 86 provides for Functions of State Commission. As per Sub-section (4) of Section 86, in discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under Section 3. The Ministry of Power published the National Tariff Policy in the Gazette of India, Extraordinary Part-I Section-1, No.39, dated 28.01.2016, under Section 3 of the Electricity Act, 2003.

63. The Andhra Pradesh Electricity Regulatory Commission (in short 'APERC') passed common order on tariff for retail sale of electricity during financial year 2022-23, dated 30.03.2022. The APERC in issuing the tariff order *inter alia* observed that the Commission has come to the conclusion that the Distribution Companies (in short 'DISCOMs') are no longer in a position to sustain their operations unless the tariffs for retail supply are increased.

64. The APERC observed that the Commission has examined the possibility of increasing tariffs for other categories of consumers such as industrial and commercial etc., by sparing the poor and middleclass domestic consumers, and noticed that these categories of consumers are already saddled with high tariffs. Any further increase in tariffs for these categories is highly unsustainable for them. For example, if the tariffs to the industrial category become so unsustainable, it will lead to the closure of the industries which will

affect the livelihood of millions of people and the economy of the State as a whole. The Commission did not enhance tariff on industrial and commercial consumers.

65. As regards the agricultural category, the APERC observed that the Government of Andhra Pradesh is bearing the entire burden of agricultural consumption at the cost of service rate for this category. Further, the Commission has to comply with the mandate of National Tariff Policy, 2016 and the orders of the Appellate Tribunal for Electricity (for short 'APTEL') not to increase the tariffs of subsidizing categories beyond 120% of their Cost of Service. Moreover, as per the National Tariff Policy, 2016, the tariff for consumers below the poverty line shall be at least 50% of the average cost of supply. The Commission observed that, for the said reasons, the Commission has been left with no option other than to increase the tariffs for domestic consumers across all the slabs, depending on the scale of their consumption. However, keeping in view the less paying capacity of the poor and middleclass consumers, the Commission affected only modest increases to the tariffs of these consumers. Even after the above increase, the tariffs for the consumption up to 75 units are still much below 50% of the average cost of supply.

(ii) <u>Duty:</u>

66. Now with respect to 'duty', the Andhra Pradesh Electricity Duty Act, 1939 is an Act for the levy of a duty on certain sales and consumption of electrical energy by 'licensees'.

67. Section 3 of the APED Act 1939 which read as under, prior to its amendment vide Andhra Pradesh Electricity Duty (Amendment) Act (in short 'Act No.10/2021') provided for levy of a duty on certain sales of electrical energy.

"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].

68. Section 3 (1) of the APED Act, as it stood, prior to its amendment, levied duty 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. However, no duty was payable on and in respect of sale of energy effected; (a) by the Andhra Pradesh State Electricity Board to any other licensee; and (b) by the National Thermal Power Corporation (in short 'NTPC') to the Andhra

Pradesh State Electricity Board. Payment of duty on licensee was subject to the otherwise provision in sub-section (2) of Section 3.

69. Act 10 of 2021 amended the APED Act [Act No.19 of 1939].

70. Act 10 of 2021 reads as under:

AN ACT FURTHER TO AMEND THE ANDHRA PRADESH ELECTRICITY DUTY ACT, 1939

"Be it enacted by the Legislature of the State of Andhra Pradesh in the Seventy Second year of the Republic of India as follows:-

1. (1) This Act may be called the Andhra Pradesh Electricity Duty (Amendment) Act, 2020. [short title and commencement]

(2) It shall come into force on such date as the State Government may, by notification, appoint.

2. In the Andhra Pradesh Electricity Duty Act, 1939 (hereinafter referred to as the **Principal Act**), in section 2, for sub-clause (i) of clause (b), the following shall be substituted, namely, [Amendment of Section 2. Act No.5 of 1939. Central Act No.36 of 2003]

"(i) a person who has been granted a license under section 14 of the Electricity Act, 2003."

3. [Amendment of Section 3]

"3. In Section 3 of the Principal Act, in sub-section (1), for the words "a duty calculated at the rate of six paise per unit of energy", the words "a duty calculated at the rate notified by the State Government from time to time for different consumer categories", shall be substituted."

71. Section 3 of the APED Act 1939 was amended to the effect that in sub-section (1) for the words "a duty calculated at the rate of six paise per unit of energy", the words "a duty calculated at the rate notified by the State Government from time to time for different consumer categories" was substituted.

72. The effect of such amendment in Section 3 is that whereas under the unamended APED Act 1939, the statute prescribed a duty calculated at the rate

of six paise per unit of energy, it was now substituted by a duty calculated at the rate notified by the State Government from time to time, for different consumer categories. In other words, Section 3 of the Act 1939, prior to its amendment by Act 10/2021 itself provided for the specified rate of six paise per unit of energy. But, now, the rate of the duty was to be notified by the State Government and from time to time for different category of consumers.

73. Section 3A of the APED Act 1939, provides for the exemption to a licensee, from the payment of the whole or part of the duty payable under Section 3, by the government, by notification setting out the grounds, therefor, either permanently or temporarily or for a specified period, subject to such terms and conditions, as may be specified in the notification.

74. Section 3.A of APED Act 1939 also provided as under:

> [**3-A. 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]."

75. G.O.Ms.No.7, dated 08.04.2022 has been issued in the exercise of the powers conferred by sub-section (1) of Section 3 of APED Act, 1939.

76. G.O.Ms.No.7, dated 08.04.2022 is reproduced as under:-

"GOVERNMENT OF ANDHRA PRADESH
ABSTRACT

Andhra Pradesh Electricity Duty Act, 1939 – Levy of duty on certain sales of energy under Section 3 (1) of the A.P. Electricity Duty Act, 1939 – Notification – Issued.

ENERGY (POWER-III) DEPARTMENT

G.O.Ms.No.7 Dated: 08/04/2022

Read the following:-

1. Andhra Pradesh Electricity Duty (Amendment) Act, 2003 (A.P.Act No.14 of 2003)
2. The Electricity Act, 2003
3. Act 10 of 2021, Andhra Pradesh Electricity Duty (Amendment) Act, 2020.

*****

ORDER:-

Whereas State Government levied electricity duty @6 paise per unit on all the sales of electrical energy from the year 1994, except to the exempted categories; and whereas, sub section (1) of Section 3 of Electricity Duty Act 1939 as amended by Act 10 of 2021, empowered the State Government to notify the rate of electricity duty from time to time to be paid by different consumer categories Consumers on energy sales.

2. Whereas, in other States like Maharashtra, Madhya Pradesh, Karnataka, Odisha, Tamil Nadu, West Bengal, Gujarat and Kerala the electricity duty is as a percentage of consumption charges. Precisely, in the States of Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Himachal Pradesh, Kerala, Manipur, Punjab, West Bengal and Jammu & Kashmir the rate of duty is from 14 paise to 180 paise per unit sale of energy, whereas in the State of Andhra Pradesh, electricity duty is being levied @ 6 paise per unit only on all the sales of electrical energy from the year 1994 except the exempted categories.

3. Whereas, Post bifurcation of the erstwhile State of Andhra Pradesh, the successor State remained a predominantly agrarian one, with the agriculture sector contributing to 35.47% as per the advance estimates of GVA for the financial year 2021-22. Owing to the requirement of providing the necessary support to the agriculture sector, the State exchequer is having to endure a huge burden, in the form of agriculture subsidy to the State Distribution Utilities.

4. Whereas, the gap between the ARR (Average Revenue Realization)and ACOS (Average Cost of Supply) has widened significantly over the years, increasing the subsidy requirement from Rs.2,607 crores in financial year 2014-15 to Rs.11,123 crores in financial year 2022-23. The Average Cost of Supplying power approved by the Andhra Pradesh Electricity Regulatory Commission, has increased by 29.26% over the last seven years. A key reason that has primarily contributed to this increase in cost of service is the substantial increase in debt of the State public sector undertakings in power sector, over the period 2014-19. Inadequate release of subsidy during the period 2014-19 has also resulted in the Distribution utilities and AP GENCO availing huge working capital liabilities to sustain operations. Cost associated with servicing of this debt was partly allowed by APERC while determining the tariff and this has contributed to an increase in the subsidy component. If the disallowed portion is also taken into consideration, the subsidy requirement from the Government is higher.

5. Whereas, the economic recovery from the Covid – 19 pandemic led disruptions has resulted in a steep rise in the demand for power and the coal production in the Country is not adequate to meet the higher requirements of the thermal power plants, leading to increase in cost of power available in power exchanges. Added to this, the geopolitical tensions have resulted in an unprecedented surge in the costs of import coal and also the crude oil prices, indirectly impacting the mining costs of coal. Owing to these reasons, the subsidy burden on the Government is likely to be higher than what is anticipated. In view of the above, there is imperative need for the State Government to augment revenue by tapping all available sources.

6. Whereas, due to the above compelling reasons, State Government have felt the inevitable need to enhance the electricity duty.

7. Now, therefore, the Government have decided to revise electricity duty on energy sales for different categories of Consumers in exercise of the powers conferred by Sub-Section (1) of Section 3 of the Andhra Pradesh Electricity Duty Act, 1939.

8. Accordingly, the following notification will be published in the extraordinary issue of Andhra Pradesh Gazette:

NOTIFICATION

In exercise of the powers conferred by sub-section (1) Section 3 of the Andhra Pradesh Electricity Duty Act, 1939, the Government of Andhra Pradesh hereby levy an electricity duty of 1 (one) rupee per kWh (unit) on energy sales for the Commercial & Industrial Consumers as indicated in the relevant yearly Retail Supply Tariff Order issued by Hon'ble APERC. For Domestic Consumers, the existing electricity duty of 6 paise per kWh (unit) shall continue to be levied, while Agriculture consumers shall be exempted from levy of any such duty.

9. The notification shall come into force with immediate effect.

(BY ORDER AND IN THE NAME OF THE GOVERNOR OF ANDHRA PRADESH)

Sd/-B. SREEDHAR
Secretary to Government"

77. The State Government notified the rate of duty as Re.1 per unit for the commercial and industrial category consumers, but continuing with the exemption on for the agriculture consumers category as also continuing with six paise duty per unit for the domestic consumers category.

78. Thus, the tariff determination is by the APERC under the Electricity Act, 2003 which legislation is referable to Entry 38 of List-III of Schedule VII. In ***Gujarat Urja Vikas Nigam Limited v. Solar Semiconductor Power Company (India) Private Limited and others***[36]**,** the Hon'ble Apex Court held that in exercise of its statutory duty under Section 62 of the Electricity Act the Commission has fixed the tariff rate. The word 'tariff' means a Schedule of a standard/prices or charges provided to the category or categories for procurement by licensing from generating company, wholesome or bulk or retail/various categories of consumers. After taking into consideration the factors in Section 61 (1) (a) to (i), the State Commission determines the tariff rate for various categories and the same is applied uniformly throughout the State.

79. In ***BSES Ltd. v. TATA Power Co.Ltd.***[37] the Hon'ble Apex Court observed that the word "tariff" has not been defined in the Act. "Tariff" is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff.

80. In **Paschimanchal *Vidyut Vitran Nigam Ltd & others vs. M/s. Adarsh Textiles & another***[38] the Apex Court held that it is apparent from a bare reading of the provisions of the Electricity Act, and the Reforms Act, 1999, that in discharge of its functions the State Commission shall be bound by such

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[36] AIR 2017 SC 5372
[37] (2004) 1 SCC 195
[38] (2014) 16 SCC 212

directions in the matters of policy involving public interest as the State Government may give it in writing. Such decisions/direction of the State Government in the matter of policy, subsidy and public interest shall be final. Under Section 65, it is prerogative of the State Government to grant any subsidy to any consumer or class of consumers in the tariff determined by the Commission under Section 62. It is apparent from the provisions contained in Section 65 and 108 of the Act 2003 Act that to grant subsidy to any consumer or class of consumers is the prerogative of the State Government.

81. Imposition of electricity duty is under APED Act which is referable to Entry 53 of List II of Seventh Schedule. It is on consumption or sale of electricity.

(iii) <u>Difference between Tariff & Duty:</u>

82. There is difference between tariff and duty on sale. In ***Southern Petrochemical Industries Co.Ltd. v. Electricity Inspector & ETIO***[39] the Hon'ble Apex Court held that the tariff as framed by the State Electricity Boards under Sections 46 and 49 of the then Electricity Act 1948, they may have different considerations for imposition of tariffs. It was further held that a tax on tariff and a tax on consumption or sale of electrical energy operate in different fields. If it is to be held that the power of the Electricity Regulatory Commission to fix tariff does not include a power to impose tax, axiomatically, the same principle would also apply when a tax is sought to be levied on

[39] (2007) 5 SCC 447

consumption or sale of electrical energy and not on tariff. Power of taxation operates differently from power to impose tariff.

83. Paragraphs 138 and 139 of ***Southern Petrochemical Industries Co.Ltd.*** (supra) read as under:

> "**138.** We have noticed hereinbefore that the legislative fields carved out by reason of Entry 53 of List II and Entry 38 of List III of the Seventh Schedule of the Constitution of India operate in different fields. The 1948 Act was enacted to provide for the rationalisation of the production and supply of electricity, and generally for taking measures conducive to electrical development.
>
> **139.** Tariff is framed by the State Electricity Boards under Sections 46 and 49 of the 1948 Act. They may have different considerations for imposition of tariffs. We have noticed hereinbefore, the definition of "tariff" in *BSES Ltd.* [(2004) 1 SCC 195] whereupon Mr Andhyarujina himself relied upon. A tax on tariff and a tax on consumption or sale of electrical energy, thus, operate in different fields. If it is to be held that the power of the Electricity Regulatory Commission to fix tariff does not include a power to impose tax, axiomatically, the same principle would apply also when a tax is sought to be levied on consumption or sale of electrical energy and not on tariff. Power of taxation, as noticed hereinbefore, operates differently from power to impose tariff. A tariff validly framed by the licensee, in exercise of its statutory power, may lay down a higher rate on the sale of power to various types of consumers having regard to the necessity to maintain infrastructure. A maximum demand charge, when levied, does not contemplate a sale or consumption of electrical energy. Maximum tariff is provided for various reasons. It has been noticed by this Court in *IPI Steel Ltd.* [(1995) 4 SCC 320] in the following terms : (SCC pp. 327-28, paras 10-11)……."

84. Thus, both operate in different field. Both are to be imposed under different Statutes emanating from different Lists of the Seventh Schedule. Grant of subsidy to any consumer or class of consumers in the tariff

determination is the prerogative of the State for which it has to pay in advance under Section 65 of the Electricity Act. Duty is in the nature of tax. In ***Indian Aluminium Company (supra),*** it was held that levy of duty goes into the public revenue. It is an imposed, a compulsory exaction for the benefit to the coupers of the public exchequer and therefore it is a tax.

(iv) <u>Colourable exercise of power:</u>

85. The court proceeds to consider the submission of the learned counsels for the petitioners on colourable exercise of power in issuing G.O.Ms.No.7.

86. In ***K. C. Gajapati Narayan Deo*** (supra), the Hon'ble Apex Court held 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 always a question of power. It was further held that if the constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the

limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression 'colourable legislation' has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise.

87. In paragraph-18 of the judgment in ***K. C. Gajapati Narayan Deo*** (supra) upon which much reliance was placed it was held that the whole doctrine of 'colourable legislation' is based upon the maxim that you cannot do indirectly what you cannot do directly. It was further held that if a legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner, cannot make the Act invalid.

88. It is apt to refer paragraphs 9 and 18 of ***K. C. Gajapati Narayan Deo*** (supra), relied upon by the learned counsel for the petitioners, 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** [Vide *Cooley's Constitutional Limitations*, Vol 1 p 379] . A distinction, however, exists between a legislature which is legally omnipotent like the

British Parliament and the laws promulgated by it which could not be challenged on the ground of incompetence, and a legislature which enjoys only a limited or a qualified jurisdiction. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. **Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretence or disguise.** As was said by Duff, J. in *Attorney-General for Ontario* v. *Reciprocal Insurers* [1924 AC 328 at 337] :

> "Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

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 [Vide *Attorney-General for Ontario* v. *Reciprocal Insurers*, 1924 AC

328 at 337] . 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 [Vide *Attorney-General for Alberta* v. *Attorney-General for Canada*, 1939 AC 117 at 130] . 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. It is said by Lefroy in his well known work on Canadian Constitution that even if the legislature avows on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction; yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered ultra vires [See *Lefroy on Canadian Constitution*, page 75] .

18. The contention of Mr Narasaraju really is that though apparently it purported to be a taxation statute coming under Entry 46 of List II, really and in substance it was not so. It was introduced under the guise of a taxation statute with a view to accomplish an ulterior purpose, namely, to inflate the deductions for the purpose of valuing an estate so that the compensation payable in respect of it might be as small as possible. **Assuming that it is so, still it cannot be regarded as a colourable legislation in accordance with the principles indicated above, unless the ulterior purpose which it is intended to serve is something which lies beyond the powers of the legislature to legislate upon. The whole doctrine of colourable legislation is based upon the maxim that you cannot do indirectly what you cannot do directly. If a legislature is competent to do a thing directly, then the mere fact that it attempted to do it in an indirect or disguised manner, cannot make the Act invalid.** Under Entry 42 of List III which is a mere head of legislative power the legislature can adopt any principle of compensation in respect to properties compulsorily acquired. Whether the deductions are large or small, inflated or deflated they do not affect the constitutionality of a legislation under this entry. The only restrictions on this power, as has been explained by this Court in the earlier cases, are those mentioned in Article 31(2) of the Constitution and if in the circumstances of a particular case the provision of Article 31(4) is attracted to a

> legislation, no objection as to the amount or adequacy of the compensation can at all be raised. The fact that the deductions are unjust, exorbitant or improper does not make the legislation invalid, unless it is shown to be based on something which is unrelated to facts. As we have already stated, the question of motive does not really arise in such cases and one of the learned Judges of the High Court in our opinion pursued a wrong line of enquiry in trying to find out what actually the motives were which impelled the legislature to act in this manner. **It may appear on scrutiny that the real purpose of a legislation is different from what appears on the face of it, but it would be a colourable legislation only if it is shown that the real object is not attainable to it by reason of any constitutional limitation or that it lies within the exclusive field of another legislature.** The result is that in our opinion the Orissa Agricultural Income Tax (Amendment) Act, 1950 could not be held to be a piece of colourable legislation, and as such invalid. The first point raised on behalf of the appellants must therefore fail."

89. In ***K. C. Gajapati Narayan Deo*** (supra), it has been clearly held that the question of motive does not really arise in such cases. It may appear on scrutiny that the real purpose of a legislation is different from what appears on the face of it, but it would be a colourable legislation only if it is shown that the real object is not attainable to it by reason of any constitutional limitation or that it lies within the exclusive field of another legislature.

90. In ***Attorney-General for Ontario v. Reciprocal Insurers*** **[1924 AC 328 at 337]** it was held that "Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing." 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. It was further held in *Attorney-General for Ontario* (supra) that for the purpose of the investigation the Court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. 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.

91. Even applying the principle as aforesaid, the G.O.Ms.No.7 is on the subject of duty on sale of electricity and the object is augmentation of revenue.

92. In ***Bailey*** (supra) known as Child Labour Tax case, upon which reliance was placed by the learned counsel for the petitioners, the constitutional validity of Child Labour Tax Law was in question, it was held that where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial. But this is not so when one sovereign can impose a tax only, and the power of regulation rests in another.

93. The submission of Sri K. Gopal Chowdary is that for production of revenue, the duty cannot be imposed/enhanced as the power to impose a tax i.e., the duty, is with the State, but the power of regulation of electricity rests in the Union. Relying on the said judgment he submitted that the taxes are occasionally imposed in the discretion of the legislature on proper subjects with

the primary motive of obtaining revenue from them and with the incidental motive of discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment.

94. In ***Bailey*** (supra) the Constitutional validity of the Child Labour Law enacted by the Congress was in issue, on the ground that such law was in the nature of regulation which was within the power of the State. The Child Labour Tax Law was entitled "An act to provide revenue and for other purposes". It was found that the so called tax lost its character as such and was a mere penalty, with the characteristics of regulation and punishment. It was held that if such law was held valid, all that Congress would need to do, thereafter, to take over control in any one of the great number of subjects of public interest, jurisdiction of the States and reserve to them would be to enact a detailed measure of complete regulation of the subject and enforce it by a so called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitations of the powers of congress and completely wipe out the sovereignty of the States.

95. In ***Attorney General-Alberta*** (supra), on which also much emphasis was laid, it was held that it is not competent either for the Dominion or a Province under the guise or the pretence or in the form of an exercise of

its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other.

96. The principle as in ***Attorney General-Alberta*** (supra) that it is not competent either for the Dominion or Province under the guise or the pretence or in the form of exercise of its own powers to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other, is settled and recognized under our Constitution as well. The State and the Union derive their legislative powers from Articles in Part-IX of the Constitution, and the subject of legislative field is provided by the respective lists. The Seventh Schedule provides for the lists. The items in the First List are the exclusive Dominion of the Union. They have not to transgress the exclusive powers of the others.

97. So far as the present case is concerned, the Electricity Duty is the State List, Item-53, and consequently, the State has the power to enact the law, to charge the duty on sale of electricity.

98. One of the reasons, the State to burden the subsidy, may be for imposition of the duty on sale of electricity, but because of that reason, it cannot be said that the State cannot augment its revenue by imposing duty on the sale of the electricity to the consumers of Industrial and Commercial category.

99. Reliance was also placed in the case of ***The Lord Krishna Sugar Mills Ltd.*** (supra) to contend that in judging the reasonableness of a restriction, the surrounding circumstances can be looked into. ***Attorney***

General – Alberta (supra) case was also referred in ***The Lord Krishna Sugar Mills Ltd.*** (supra). It was observed by the Hon'ble Apex Court that in judging the reasonableness of 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. The Courts can take judicial notice of it in determining the effect of legislation.

100. In the case of ***Kesoram Industries*** (supra) it was held that the power to levy tax and fee is available to the State so long it does not interfere with the regulation – the power assumed and occupied by the Union. In view of ***Kesoram Industries*** (supra), there is difference between "power to regulate and develop" and "power to tax". The primary purpose of taxation is to collect revenue. The State legislation levying a tax in such manner or of such magnitude as can be demonstrated to be tampering or intermeddling with the Centre's regulation and control of an industry is the exception to the rule that the power to tax of augmenting revenue shall continue to be exercisable by the State Legislation in spite of regulation or control having been assumed by the Union.

101. It is apt to reproduce paragraph-129 in ***Kesoram Industries*** (supra) 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.

(*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.

(*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. If there is no conflict, an occasion for deriving assistance from non obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

One — Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?

Two — In which entry the impugned legislation falls by finding out the pith and substance of the legislation?

and

Three — Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

(*6*) "Land", the term as occurring in Entry 49 of List II, has a wide connotation. Land remains land though it may be subjected to different user. The nature of user of the land would not enable a piece of land being taken out of the meaning of land itself. Different uses to which the land is subjected or is capable of being subjected provide the basis for classifying land into different identifiable groups for the purpose of taxation. The nature of user of one piece of land would enable that piece of land being classified separately from another piece of land which is being subjected to another kind of user, though the two pieces of land are identically situated except for the difference in nature of user. The tax would remain a tax on land and would not become a tax on the nature of its user.

(*7*) To be a tax on land, the levy must have some direct and definite relationship with the land. So long as the tax is a tax on land by bearing such relationship with the land, it is open for the legislature for the purpose of levying tax to adopt any one of the well-known modes of determining the value of the land such as annual or capital value of the land or its productivity. The

methodology adopted, having an indirect relationship with the land, would not alter the nature of the tax as being one on land.

(*8*) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as *quid pro quo* but **without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods.** Entry 23 in List II speaks of regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union. Entries 52 and 54 of List I are both qualified by the expression "declared by Parliament by law to be expedient in the public interest". A reading *in juxtaposition* shows that the declaration by Parliament must be for the "control of industries" in Entry 52 and "for regulation of mines or for mineral development" in Entry 54. Such control, regulation or development must be "expedient in the public interest". Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming the subject-matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. **The legislative power to tax by reference to entries in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by the State with the object of augmenting its finances and in reasonable limits does not *ipso facto* trench upon**

regulation, development or control of the subject. It is different if the tax or fee sought to be levied by the State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

(9) The heads of taxation are clearly enumerated in Entries 83 to 92-B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248(2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It follows that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights, a subject in Entry 50 of List II, can also not be levied by the Union though as stated in Entry 50 itself the Union may impose *limitations* on the power of the State and such limitations, if any, imposed by Parliament by law relating to mineral development to that extent shall circumscribe the States' power to legislate. Power to tax mineral rights is with the States; the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, as the case may be, is with the Union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional."

102. The Hon'ble Apex Court in ***Kesoram Industries*** (supra) held that the primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the

commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as *quid pro quo* but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of "regulation and control" belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods.

103. The Hon'ble Apex Court in ***Kesoram Industries*** (supra) further held that the legislative power to tax by reference to entries in List II is plenary unless the entry itself makes the field "subject to" any other entry or abstracts the field by any limitations imposable and permissible. A tax or fee levied by the State with the object of augmenting its finances and in reasonable limits does not *ipso facto* trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied by the State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

104. The Hon'ble Apex Court in ***Kesoram Industries*** (supra) held that so long as a tax or fee on mineral rights (it was a case of minerals) remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional.

105. It is not the submission of any of the learned counsels appearing for the petitioners that the duty in the nature of the tax is not for augmentation of revenue or augmentation of revenue is the secondary or incidental consequence. It is also not their submission that the duty in the nature of tax on sale levied by the State can itself be called regulatory or controlling the subject of duty, i.e., Electricity. Their submission is that because of imposition and increase in duty the result would be the burden on the industrial and commercial consumers' category. This may be the consequence. The ultimate or incidental results or consequences are to be distinguished from the primary object which is augmentation of revenue to meet the financial burden on the State Exchequer for various reasons as disclosed in the notification itself, one of which is the grant of subsidy to agricultural consumers.

106. The argument of colourable exercise of power is with respect to the exercise of power by the Executive in issuing the notification. There being no challenge to the legislation, the argument of colourable exercise of power by the Executive is not open or available, as the power to impose duty is derived from the APED Act, which in turn is referable to Entry-53 in List-II. The notification has been issued in exercise of power conferred by Section 3 of the Electricity Duty Act. So, the competence for such imposition of duty is with the State. The power to impose duty on sale of electricity is with the State Government. There is no challenge to such power and competence of the State Government to fix the rate of duty and also to grant exemption to certain category of electricity consumers. There appears to be no transgression of

powers or the lack of competence in the State. The power has been exercised only on the subject of duty, on sale or consumption of electricity within the legislative power under List II Entry 53 for which APED Act is enacted. The purpose is augmentation of income. Imposition of tax/duty could not be argued as regulatory, with the primary object to regulate or control, the subject electricity and the augmentation being secondary or incidental. The Court does not find force in the submission of the learned counsels appearing for the petitioners that the issuance of the notification suffers from the vice of colourable exercise of power on the grounds of challenge.

107. Here it is apt to make reference to the judgment in ***Automobile Transport (Rajasthan) Ltd.*** (supra) which was considered in ***Kesoram Industries*** (supra).

108. In ***Automobile Transport (Rajasthan) Ltd.*** (supra), the Hon'ble Apex Court held that the States must also have revenue to carry out their administration and there are several items relating to the imposition of taxes in List II. The Constitution-makers must have intended that under those items the States will be entitled to raise revenue for their own purposes. If the widest view is accepted, then there would be for all practical purposes, an end of State autonomy even within the fields allotted to them under the distribution of powers envisaged by our Constitution. An examination of the entries in the lists of the Seventh Schedule to the Constitution would show that there are a large number of entries in the State List (List II) and the Concurrent List (List III) under which a State Legislature has power to make laws. Under some of these

entries the State Legislature may impose different kinds of taxes and duties, such as property tax, profession tax, sales tax, excise duty etc. and legislation in respect of any one of these items may have an indirect effect on trade and commerce. Even laws other than taxation laws, made under different entries in the lists referred to above, may indirectly or remotely affect trade and commerce. If it be held that every law made by the legislature of a State which has a repercussion on tariffs, licensing, marketing regulations, price control etc. must have the previous sanction of the President, then the Constitution insofar as it gives plenary power to the States and State Legislatures in the fields allocated to them would be meaningless.

109. It is apt to refer para-13 of ***Automobile Transport (Rajasthan) Ltd.*** (supra) as under:

> "**13.** It would appear from what we have stated above that this interpretation consists of two main parts : one part is that taxation simpliciter is not within the terms of Article 301 and the second part is that Article 301 must take colour from the provisions of Article 303 which, it is said, is restricted to legislation with respect to entries relating to trade and commerce in any of the lists in the Seventh Schedule. In *Atiabari Tea Co. case* [(1961) 1 SCR 809] this Court dealt with the correctness or otherwise of this narrow interpretation and by the majority decision held against it. The majority judgment in the *Atiabari Tea Co. case* [(1961) 1 SCR 809] deals with the arguments advanced in support of the interpretation in detail and as we are substantially in agreement with the reasons given in that judgment, we do not think that any useful purpose would be served by repeating them. It is enough to point out that though the power of levying tax is essentially for the very existence of government, its exercise may be controlled by constitutional provisions made in that behalf. It cannot be laid down as a general proposition that the power to tax is outside the purview of any constitutional limitations. We have carefully examined the provisions in

> Part XII of the Constitution and are unable to agree that those provisions exhaust all the limitations on the power to impose a tax. The effect of Article 265 was considered in the majority decision and it was pointed out that the power of taxation under our Constitution was subject to the condition that no tax shall be levied or collected except by authority of law. Article 245 which deals with the extent of laws made by Parliament and by the Legislatures of States expressly states that the power of Parliament and of the State Legislatures to make laws is "subject to the provisions of this Constitution". The expression "subject to the provisions of this Constitution" is surely wide enough to take in the provisions of both Part XII and Part XIII. In view of the provisions of Article 245, we find it difficult to accept the argument that the restrictions in Part XIII of the Constitution do not apply to taxation laws. As to the argument that Article 301 must take colour from Article 303, we are unable to accept as correct the argument that the provisions of Article 303 must delimit the general terms of Article 301. It seems to us that so far as Parliament is concerned, Article 303(1) carves out an exception from the relaxation given in favour of Parliament by Article 302; the relaxation given by Article 302 is itself in the nature of an exception to the general terms of Article 301. It would be against the ordinary canons of construction to treat an exception or proviso as having such a repercussion on the interpretation of the main enactment so as to exclude from it by implication what clearly falls within its express terms."

110. The Hon'ble Apex Court in ***Kesoram Industries*** (supra) further held that a reasonable tax or fee levied by the State Legislation cannot be construed as trenching upon the Union's power and freedom to regulate and control mines and minerals.

111. In ***Indian Aluminium Company*** *(supra)*, the primary question was whether the legislature trespassed and trenched into the preserve of the basic feature of the judicial review. It was observed that the principle of power of validation vested in the legislature is no longer *res integra*. The Apex Court

in ***Patel Gordhandas Hargovindas v. Municipal Corporation***[40], observed and held that if the legislature has the power over the subject matter and competence to make a valid law, it can at any time make such valid law and make it retrospectively also so as to bind even past transactions. The validity of a law therefore depends upon whether the legislature possess the competence which it claims over the subject matter and whether in making the validation it removes the defects which the Courts had found in the existing law and makes adequate provisions in the validity law for a valid imposition of the tax.

112. In ***National Thermal Power Corporation Ltd.*** (supra), upon which Sri Alladi Ravinder, learned Senior Counsel placed reliance, the Andhra Pradesh High Court held that interstate sale of electrical energy cannot be taxed by the State legislature. In the said case, it is clearly held that the applicability of A.P.Electricity Duty Act should only be confined to sales other than inter-state sales. The present is not a case of inter-state sale and consequently, the reliance placed on ***National Thermal Power Corporation Ltd.*** (supra) is of no help.

113. The aforesaid judgment was challenged in the Hon'ble Apex Court. In ***State of A.P. v. National Thermal Power Corpn.Ltd.***[41] the Hon'ble Apex Court held that the prohibition which is imposed by Article 286(1) of the Constitution is independent of the legislative entries in the Seventh Schedule. The bans imposed by Articles 286 and 269 on the taxation powers of the State are independent and separate and must be got over before a State Legislature

[40] 1963 AIR SC 1742
[41] (2002) 5 SCC 203

can impose tax on transactions of sale or purchase of goods. Such ban would operate by its own force and irrespective of the language in which an entry in List II of the Seventh Schedule has been couched. The dimension given to the field of legislation by the language of an entry in List II of the Seventh Schedule shall always remain subject to the limits of constitutional empowerment to legislate and can never afford to spill over the barriers created by the Constitution. The power of the State Legislature to enact law to levy tax by reference to List II of the Seventh Schedule has two limitations, one, arising out of the entry itself, and the other, flowing from the restriction embodied in the Constitution. It was further held that the field of taxation on sale or purchase taking place in the course of inter-State trade or commerce has been excluded from the competence of the State Legislature. The situs of the sale or purchase is wholly immaterial as regards the inter-State trade or commerce.

114. The judgment in ***National Thermal Power Corpn.Ltd.*** (supra) is not applicable as in the present cases the question involved is not of interstate trade or commerce. So far as, the two limitations on the power of the State legislature to enact law to levy tax by reference to List II of Seventh Schedule, one, arising out of the entry itself and the other, flowing from the restrictions embodied in the Constitution are concerned, firstly there is no challenge to State Act 1939 and secondly so far as the G.O.Ms.No.7 is concerned, it could not be argued that the said G.O.Ms.No.7 is beyond the power of the State Executive under Sections 3 & 3A of the APED Act. Challenge on the ground of

violation of Article 14 of the Constitution of India, the Court will consider shortly.

115. In ***Lafarge India Private Limited*** (supra) which was relied upon by Sri Challa Gunaranjan to submit that the taxation law is no exception to the doctrine of equal protection. Referring to Para-30 of the judgment he contended that the State Commission under Section 86 (4) of the Electricity Act, shall be guided by the National Electricity Policy and National Tariff Policy which are published under Section 3 of the Electricity Act. The imposition of a discriminatory and substantial cess on captive power plants alone, will certainly have impact on the investments in electricity industry. It will impact the promotion of competition, efficiency and economy in activities of electricity industry and matters concerning with the generation of electricity. The State Electricity Regulatory Commission is also supposed to determine tariff under Section 62 of the Act and for this also it is to be guided by the National Electricity Policy and the National Tariff Policy. The discriminatory cess imposed under the impugned provision on captive power producers was totally contrary to the provisions of the several national and state policies referred therein.

116. There is no dispute on the proposition of law that the National Electricity Policy and the National Tariff Policy is binding in determination of tariff. In the case of ***Energy Watchdog*** (supra) it is held that the tariff policy is a statutory document being issued under Section 3 of the Electricity Act and has force of law, there is no dispute on such proposition.

117. A careful reading of the judgment in ***Lafarge India Private Limited (supra)***, shows that the legislative power of Chhattisgarh State Legislature to levy tax on consumption or sale of electricity, was not doubted, in terms of Entry 53 of List-II of the 7th Schedule of the Constitution. Section 3(1-a) of the concerned Act, as challenged therein, levied the cess on the electrical energy "sold or supplied" and there was no reference to the generation or production of electrical energy. The cess was levied under Section 3(1-a) only on sale or supply and not on generation or production of electrical energy. It was held that sub-section (1-a) in Section 3 was not without legislative competence. The contention as raised in the said case was that the provision was a "piece of colourable legislation". The Chhattisgarh High Court held that essentially the question of constitutionality is always a question of power. The whole doctrine of 'colourable legislation' revolves itself into the questions of competency of a particular Legislature to enact a particular law. The contention of a colourable exercise of power as raised therein was not accepted as competence to enact such law was there with the State legislature.

118. In ***Lafarge India Private Limited*** (supra), the facts were that under Section 3 (1) of the Act as involved therein, a distributor was charged energy development cess @ 5 paise per unit, a captive power producer was charged @ 10 paise per unit. While the capital power producer was charged @ 10 paise per unit, any other producer who was neither a distributor nor a capital power producer was not charged any other energy development cess on

any power produced by him whether it was sold by him to the State Electricity Board, consumed by him or his employees or sold by him to a third party.

119. In ***Lafarge India Private Limited*** (supra), the High Court of Chhattisgarh, giving the examples and illustrations, to show the hostile treatment meted out to the captive power producers, *qua* independent power producers who were not charged any cess with respect to the electricity supply, held the same to be discriminatory. The different treatment was between two (02) categories of public producers, (i) the capital power producers who were charged with 10 paise per unit and (ii) the independent power producers who were not charged with any cess. The justification given by the State was that the independent power producers were not charged any cess when such energy was supplied to the State Electricity Board to engage establishment of independent power producers for supplying electrical energy to the Board. This was not accepted by the High Court, by observing that a captive power producer need not consume its entire power produced. Thus, where surplus electricity was supplied by a captive power producer to the State Electricity Board, it fulfills exactly the same objective i.e. establishment of power projects from where electricity could be supplied to the State Electricity Board. Further there, the impugned levy was found not merely on electrical energy consumed by a captive producer, but also on electrical energy supplied by them to others including the State Electricity Board. It was found that there was absolutely no rational basis for discriminating captive power producers against the independent power producers. From Para 26 of the judgment, it is also evident

that the National Tariff Policy specifically disapproved the imposition of the duties, taxes, cess etc. on consumption of electricity by linking it to generation like captive generation on a non-uniform basis.

120. ***Lafarge India Private Limited*** (supra) is of no help to the petitioners to support their contention of discrimination or violation of Article 14 of the Constitution in the present case. There, both captive power producer and independent power producers were fulfilling exactly the same objective, but one was charged with cess and the other was not, for which there was no rational basis. The same analogy cannot be applied in the present case.

121. In ***Jiyajeerao Cotton Mills (supra)***, relied upon by Sri Metta Chandrasekhar Rao, the Act involved was the Central Provinces and Berar Electricity Act, 1949 as amended by the Madhya Pradesh Taxation Laws Amendment Act, 1956. The said Act was enacted under Entry 48-B of List II of the Government of India Act, 1935 which was to the same effect as Entry 53 of List-II in the 7th schedule of the Constitution of India. The point as raised therein was that the good consumption of electricity would mean consumption by persons other than producers and as in that case the consumption was by the producer the imposition of the levy of duty upon consumption by the same producer/generator of electricity was not covered under Entry 48-B / 53 of List-II.

122. The Hon'ble Apex Court held that the language used in the legislative entries in the constitution must be interpreted in broad way so as to give the widest amplitude of power to the Legislature to legislate and not in a

narrow and pedantic sense. In the present case it is nobody's case that the G.O.Ms.No.98 is not covered by the legislative field of Entry 53 in List-II upon which APED Act is enacted. So, the question of giving widest amplitude of power to bring within the legislative field does not arise.

123. The submission of the learned counsels for the petitioners of cross-subsidy is also without substance. The subsidy granted to agricultural consumers in determination of tariff, the amount therefore is paid by the Government. It is not a burden fastened on the Industrial and Commercial consumers.

124. In ***SIEL limited vs. State of Punjab***[42], the contention that the petitioners therein shall bear the burden of subsidy found no merit. It was held that even if the State Government was required to pay the subsidy, it was to be paid to the supplier of Electricity i.e. the Board. It was held to be misconceived argument that consumers like the petitioner therein share the burden of subsidy given, which in fact the Government pays to the Board as per the requirements of Section 65 of the Electricity Act, 2003.

Determination of Point A (2):

Violation of Article 14 of the Constitution of India:

125. Now the Court proceeds to consider the submissions on the point of G.O.Ms.No.7 being arbitrary and violative of Article 14 of the Constitution of India.

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[42] AIR 2010 P&H 121

126. The submission by the learned counsels for the petitioners is that the duty imposed on two categories only leaving the other two categories of consumers is arbitrary and violates the equality clause. Further submission, as raised by Sri Challa Gunaranjan, is that the increase of duty from 6 paisa to Re.1/- is excessive, unreasonable and for such determination no procedure has been prescribed. They submitted that the taxation law is no exception to the doctrine of equal treatment.

127. Contrary to the aforesaid, the submission of the learned counsels for the respondents, Sri Shreyas Reddy, Sri V. R. Reddy Kovvuri, Sri Abhay Jain and Sri Metta Chandrashekhar Reddy is that there is no discrimination in imposing the duty within category and the rate of Re.1/- is also not unreasonable considering that such rise was made after 18 years and comparatively to other States, it is not so high. Sri Shreyas Reddy submitted that the State does not have to tax everything in order to tax something. It is allowed to pick and choose reasonably the objects, persons and even rates for taxation. The Courts are reluctant in the matters of economic policy to interference.

128. In ***Ajay Hasia*** (supra), upon which Sri Alladi Ravinder, learned senior counsel relied, the Hon'ble Apex Court held that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality. If the classification is not

reasonable and does not satisfy the two conditions, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that the differentia has a rational relation to the object sought to be achieved by the impugned legislature or executive action, then the impugned legislative or executive action would be arbitrary and the guarantee of equality under Article 14 would be breached. It was further held that wherever, there is arbitrariness in State action, whether it be of the legislature or of the executive or of an 'authority' under Article 12 of the Constitution of India,, Article 14 immediately springs into action and strikes down such State action.

129. In ***U.P. Power Corpn. Ltd. v. Ayodhya Prasad Mishra***[43] the Hon'ble Apex Court reiterated that it is well settled that Article 14 is designed to prevent discrimination. It seeks to prohibit a person or class of persons from being singled out from others similarly situated or circumstanced for the purpose of being specially subjected to discrimination by hostile legislation. It, however, does not prohibit classification, if such classification is based on legal and relevant considerations. The Hon'ble Apex Court further held that equals cannot be treated unequally. But it is equally well settled that unequals cannot be treated equally. Treating of unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution of India.

130. It is apt to refer paragraphs-36, 37 and 40 of ***U.P. Power Corpn. Ltd.*** (supra) as under:

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[43] (2008) 10 SCC 139

"**36.** It is well settled that Article 14 is designed to prevent discrimination. It seeks to prohibit a person or class of persons from being singled out from others similarly situated or circumstanced for the purpose of being specially subjected to discrimination by hostile legislation. It, however, does not prohibit classification, if such classification is based on legal and relevant considerations.

37. Every classification, to be legal, valid and permissible, must fulfil the twin test, namely,:

(*i*) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and

(*ii*) such differentia must have a rational relation to the object sought to be achieved by the statute or legislation in question.

40. It is well settled that equals cannot be treated unequally. But it is equally well settled that unequals cannot be treated equally. Treating of unequals as equals would as well offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution. The High Court was, therefore, right in holding that Executive Engineers placed in Category I must get priority and preference for promotion to the post of Superintendent Engineer over Executive Engineers found in Category II."

131. In ***Parivar Seva Sanstha vs. Ahmedabad Municipal Corporation***[44], the Hon'ble Apex Court held that Article 14 comes upon what constitutes hostile discrimination, but does not bar classification which is reasonable. To answer whether a classification is reasonable, one must look beyond the classification to the purpose of law. A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of law. The purpose of law may be either elimination of public mischief or achievement of some positive public good. Generally, the two-fold

[44] 2022 SCC OnLine SC 1622

test applied by the Courts is (i) the classification must be founded on an *intelligible differentia* and (ii) the *differentia* must have a rational relation with the object sought to be achieved by the legislature in question. If the object itself is not discriminatory, it should be held that there is a reasonable classification because it has rational relation to the object sought to be achieved.

132. Paragraphs 12 & 16 of ***Parivar Seva Sanstha*** (supra) are being reproduced as under:-

> "12. Recently, this Court in **Manish Kumar v. Union of India and Others** {(2021) 5 SCC 1}, has exhaustively referred to the case law on the subject of reasonable classification under **Article 14 of the Constitution of India vide paragraphs 210 to 230 to observe that Article 14 frowns upon what constitutes hostile discrimination but does not bar** classification which is reasonable. To answer whether a classification is reasonable, one must look beyond the classification to the purpose of law. **A reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of law. The purpose of law may be either elimination of public mischief or achievement of some positive public good. Reference in this regard was made** to the decision in **State of Gujarat and Another v. Shri Ambica Mills Ltd., Ahmedabad and Another**, {12 (1974) 4 SCC 656} which elucidates and explains the distinction between under-inclusive and over-inclusive classification. A classification is under-inclusive when the State benefits or burdens persons in a manner that furthers a legitimate purpose but does not confer the same benefit or place the same burden on others who are similarly situated. An over-inclusive classification is one, where it imposes a burden on a wider range of individuals who are included in that class of those attended with mischief at which the law

aims. Piecemeal approach to the general problem is permitted in under-inclusive classification on the ground that legislative dealing with problems of classification is usually an experimental matter. It is impossible to tell how successful a particular approach may be, what dislocations might occur, what evasions might develop, and what new evils might be generated in the attempt. **Administrative expedients must be forged and tested. This decision also propounds that laws regulating economic activity should be viewed differently from the laws which touch or concern freedom of speech or religion, voting, procreation, rights with respect to criminal procedure, etc. Judicial deference should be given to legislature in the field of economic regulation viz. the constitutional requirement and need to vigorously enforce equal protection clause to strike down legislative action in the area of fundamental human rights.** Equally, this Court in **State of Jammu and Kashmir v. Shri Triloki Nath Kosa and Others** {(1974) 1 SCC 19}, has **held that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon the person who attacks it to show that there has been a clear transgression of constitutional principles.** A provision cannot be struck down as discriminatory on any a priori reasoning. The question of classification is primarily for legislative judgment. Power to classify being extremely broad and based upon consideration of executive pragmatism, the judicature cannot rush in where the legislature varily treads. Generally, the two-fold test applied by the courts is (i) the classification must be founded on an intelligible differentia, and (ii) the differentia must have a rational relation with the object sought to be achieved by the legislature in question. If the object itself is not discriminatory, it should be held that there is a reasonable classification because it has a rational relation to the object sought to be achieved.

16. This Court in **State of Bihar and Others v. Sachchidanand Kishore Prasad Sinha and Others** {(1995) 3 SCC 86}, had set aside the judgment of the Patna High Court striking down the assessment rules as

being violative of Article 14 of the Constitution of India by relying upon the earlier decision in **Twyford Tea Co. Ltd. and Another v. The State of Kerala and Another**, {(1970) 1 SCC 189} wherein the Constitutional Bench by majority had **held that the legislature must have a wide range of selection and freedom in appraisal not only in the objects of taxation, and the manner of taxation, but also in the determination of the rate or rates applicable. A person, to succeed on the ground of discrimination, must show hostile unequal treatment.** This is more so when uniform taxes are levied. In this connection it was stressed:

> "15….This indicates a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable.
>
> 16.…The burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. … The burden is on a person complaining of discrimination. The burden is proving not possible 'inequality' but hostile 'unequal' treatment. This is more so when uniform taxes are levied."

This judgment in **Sachchidanand Kishore Prasad Sinha** (supra) also refers to the earlier decision in **R.K. Garg v. Union of India and Others** {(1981) 4 SCC 675}, **that the laws relating to economic activities should be viewed with greater latitude than laws touching civil rights. The economic mechanism is highly sensitive and complex, laws are not abstract propositions, do not relate to abstract units, are not to be measured by abstract symmetry and exact wisdom and nice adaption of remedy are not always possible.** Every legislation, especially in economic matters, is essentially empiric, and it is based on experimentation or what one may call the trial and error method. It may not provide for all possible situations or anticipate all possible abuses. There can be crudities or inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid……."

133. On doctrine of 'Equality', recently, in ***Janhit Abhiyan v. Union of India***[45] the Hon'ble Apex Court held as under in paragraphs-82 to 88 as under:

> ***"Expanding Doctrine of "Equality"***
>
> 82. It would be apt to begin this discussion with the following words of H.M. Seervai, a jurist of great repute, as regards fundamentals of the concepts of Liberty and Equality:
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> "Liberty and equality are words of passion and power. They were the watchwords of the French Revolution; they inspired the unforgettable words of Abraham Lincoln's Gettysburg Address; and the US Congress gave them practical effect in the 13th Amendment, which abolished slavery, and in the 14th Amendment, which provided that "the State shall not deny to any person within its jurisdiction … the equal protection of the laws". Conscious of this history, our Founding Fathers not only put Liberty and Equality in the Preamble to our Constitution but gave them practical effect in Article 17 which abolished "Untouchability", and in Article 14 which provides that "the State shall not deny to any person equality before the law and the equal protection of the laws in the territory of India" [H.M. Seervai, "*Constitutional Law of India, A Critical Commentary*", 4th Edn., (1991-reprinted 1999) at p. 435.] , [The echoing words of Abraham Lincoln's Gettysburg Address, as reproduced by H.M. Seervai read as follows:"*Four score and seven years ago our fathers brought forth on this continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal. We are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure.*"] .
>
> 83. Articles 14 to 18 of the Constitution are to ensure the right to equality. The makers of our Constitution noticed the widespread social and economic inequalities in the society that obtained ever since a long past, often sanctioned by public policies, religion and other social norms and practices. Therefore, they enacted elaborate provisions for eradication of inequalities and for establishing an egalitarian society. The first expression "*equality before the law*" of Article 14 is taken from the all-time wisdom as also from English Common Law, implying absence of any special privilege in any individual [In fact, total equality has been fundamental to the concept of *Dharma*, leaving no scope for discrimination on any ground. These aspects have been succinctly explained by the acclaimed jurist M. Rama Jois in his classic work *Legal and Constitutional History of India* (N.M. Tripathi Pvt. Ltd. 1984 — Vol. I, at p. 582) in the following amongst other expressions while reproducing from *Rig Veda*:"…The very expression *Dharma* is opposed to and inconsistent with any such social inequality. The relevant provisions of the *Shruti* (Vedas) leave no room for doubt that discrimination on the ground of birth or otherwise had no Vedic sanction; on the other hand such discrimination was plainly opposed to Vedic injunction. Discrimination of any kind is, therefore, contrary to *Dharma*. It is really *Adharma*.Charter of equality (*Samanata*) is found incorporated in

[45] (2023) 5 SCC 1

the *Rigveda*, the most ancient of the *Vedas*, and also in the *Atharvaveda.Rigveda — Mandala 5, Sukta 60, Mantra 5*:***Ajyestaso akanishtasa eteSam bhrataro va vridhuhu sowbhagaya*.No one is superior (*ajyestasaha*) or inferior (*akanishtasaha*). All are brothers (*ete bhrataraha)*. All should strive for the interest of all and should progress collectively (*sowbhagaya sam va vridhuhu*).”] ; and the other expression “*the equal protection of the laws*”, referable to the 14th Amendment to the US Constitution, is a constitutional pledge of protection or guarantee of equal laws. Both these expressions occur in Article 7 of the Universal Declaration of Human Rights, 1948.

84. In a nutshell, the principle of equality can be stated thus : *equals must be treated equally while unequals need to be treated differently*, inasmuch as for the application of this principle in real life, we have to differentiate between those who being equal, are grouped together, and those who being different, are left out from the group. This is expressed as *reasonable classification*. Now, a classification to be valid must necessarily satisfy two tests : first, the distinguishing rationale should be based on a just objective and secondly, the choice of differentiating one set of persons from another should have a reasonable nexus to the object sought to be achieved. However, a valid classification does not require mathematical niceties and perfect equality; nor does it require identity of treatment. [“From the fact that people are very different, it follows that, if we treat them equally, the result must be inequality in their actual position, and that the only way to place them in an equal position would be to treat them differently …”, said an Austrian economist Friedrich A. Hayek (1899-1992) in *The Constitution of Liberty*, 1960, the University of Chicago, p. 87.] If there is similarity or uniformity within a group, the law will not be condemned as discriminatory, even though due to some fortuitous circumstances arising out of a particular situation, some included in the class get an advantage over others left out, so long as they are not singled out for special treatment. In spite of certain indefiniteness in the expression “equality”, when the same is sought to be applied to a particular case or class of cases in the complex conditions of a modern society, there is no denying the fact that the general principle of “equality” forms the basis of a Democratic Government. [Dr Alladi Krishnaswami Aiyar, *The Constitution and Fundamental Rights*, The Srinivasa Sastri Institute of Politics, Mylapore, Madras (1955), at p. 28.]

85. Since the early 1970s, equality in Article 14 being a dynamic concept, has acquired new dimensions. In *E.P. Royappa* [*E.P. Royappa* v. *State of T.N.*, (1974) 4 SCC 3 : 1974 SCC (L&S) 165] , a new approach to this doctrine was propounded in the following words : (SCC p. 38, para 85)

“*85. … Equality is a dynamic concept with many aspects and dimensions and it cannot be “cribbed, cabined and confined” within traditional and doctrinaire limits*. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14,…”

(emphasis supplied)

86. In *Maganlal Chhaganlal (P) Ltd.* v. *Municipal Corpn. of Greater Bombay* [*Maganlal Chhaganlal (P) Ltd.* v. *Municipal Corpn. of Greater Bombay*, (1974) 2 SCC 402] , it was observed : (SCC pp. 435-36, para 33)

"*33*. … Article 14 enunciates a vital principle which lies at the core of our republicanism and shines like a beacon light pointing towards the goal of classless egalitarian socio-economic order which we promised to build for ourselves when we made a tryst with destiny on that fateful day when we adopted our Constitution. If we have to choose between fanatical devotion to this great principle of equality and feeble allegiance to it, we would unhesitatingly prefer to err on the side of the former as against the latter."

87. Indian constitutional jurisprudence has consistently held the guarantee of equality to be substantive and not a mere formalistic requirement. Equality is at the nucleus of the unified goals of social and economic justice. In *Minerva Mills* [*Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625] it was observed : (SCC p. 709, para 111)

"*111. … the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice*. The dynamic principle of egalitarianism fertilises the concept of social and economic justice; it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian principle."

(emphasis supplied)

88. Thus, equality is a feature fundamental to our Constitution but, in true sense of terms, equality envisaged by our Constitution as a component of social, economic and political justice is real and substantive equality, which is to organically and dynamically operate against all forms of inequalities. This process of striking at inequalities, by its very nature, calls for reasonable classifications so that equals are treated equally while unequals are treated differently and as per their requirements."

134. In ***East India Tobacco Company v. State of Andhra Pradesh***[46], the Hon'ble Apex Court held that the taxation laws must also pass the test of Article 14. But in deciding whether a taxation law is discriminatory or not it is necessary to bear in mind that the state has a wide discretion in selecting the persons or objects it will tax, and that a statute is not open to attack on the ground that it taxes some persons or objects and not others. It is

[46] (1963) 1 SCR 404

only when within the range of its selection, the law operates unequally, and that cannot be justified on the basis of any valid classification, it would be violative of Article 14. The Hon'ble Apex Court referred to the statement of the law in Willis on "Constitutional Law" Page 587, observing that, that would correctly represent the position with reference to taxation statutes under the Constitution.

> "A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably ….. The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation".

135. In ***East India Tobacco Company*** (supra) the Hon'ble Apex Court held that if a State can validly pick and chose one commodity for taxation and that is not open to attack under Article 14, the same results must follow when the State picks out one category of goods and subject it to taxation.

136. In ***the Twyford Tea Company Limited and others v. the State of Kerala and others***[47], where the constitutionality of the Kerala Plantation (Additional Tax) Act, 1960 (Act XVII of 1960) and the Kerala Plantation (Additional Tax) Amendment Act, 1967 (Act XIX of 1967) was challenged, the Hon'ble Apex Court held that one of the principles, when the question of the application of Article 14 arises, on which the courts have always acted is nowhere better stated then by Willis in his "Constitutional Law". "A State does not have to tax everything in order to tax something. It is allowed to

[47] AIR 1970 SC 1133

pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably ….." It was observed that, this was approved by the Hon'ble Apex Court in ***East India Tobacco Company (supra)*** that, "if a State can validly pick and choose one commodity for taxation and that is not open to attack under Article 14, the same result must follow when the State picks out one category of goods and subjects it to taxation." After referring to the aforesaid, the Hon'ble Apex Court in ***Twyford Tea Company Limited*** (supra) held that "a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation, but also in the determination of the rate or rates applicable". The Hon'ble Apex Court further held that the next principle is that the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. The burden is on a person complaining of discrimination. The burden is proving not possible 'inequality' but hostile 'unequal' treatment. It was further held that simply stated, the law is this; "Differences in treatment must be capable of being reasonably explained in the light of the object for which the particular legislation is undertaken. This must be based on some reasonable distinction between the cases differentially treated. When differential treatment is not reasonably explained and justified the treatment is discriminatory. If different subjects are equally treated there must be some basis on which the differences have been equalized otherwise discrimination will be found. To be able to succeed in the charge of discrimination, a person must establish conclusively

that persons equally circumstanced have been treated unequally and vice versa".

137. It is apt to refer paragraphs 15 to 18 of the ***Twyford Tea Company Limited and others*** (supra) as under:-

"15. We may now state the principles on which the present case must be decided. These principles have been stated earlier but are often ignored when the question of the application of Article 14 arises. One principle on which our Courts (as indeed the Supreme Court in the United States) have always acted, is nowhere better stated then by Willis in his "Constitutional Law" page 587. This is how he put it:

> "A State does not have to tax everything in order to tax something. It is allowed to pick and choose districts, objects, persons, methods and even rates for taxation if it does so reasonably..... The Supreme Court has been practical and has permitted a very wide latitude in classification for taxation."

This principle was approved by this Court in East Indian Tobacco Co. v. State of Andhra Pradesh MANU/SC/0064/1962 : [1963] 1SCR404. Applying it, the Court observed:

> "If a State can validly pick and choose one commodity for taxation and that is not open to attack under Article 14, the same result must follow when the State picks out one category of goods and subjects it to taxation."

This indicates a wide range of selection and freedom in appraisal not only in the objects of taxation and the manner of taxation but also in the determination of the rate or rates applicable. If production must always be taken into account there will have to be a settlement for every year and the tax would become a kind of income-tax.

16. The next principle is that the burden of proving discrimination is always heavy and heavier still when a taxing statute is under attack. This was also observed in the same case of this Court at page 411 approving the

dictum of the Supreme Court of the United States in Madden v. Kentucky (1940) 309 U.S. 83 :

> "In taxation even more than in other fields, Legislatures possess the greatest freedom in classification. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

As Rottschaefer said in his Constitutional Law at p. 668:

"A statute providing for the assessment of one type of intangible at its actual value while other intangibles are assessed at their face value does not deny equal protection even when both are subject to the same rate of tax. The decisions of the Supreme Court in this field have permitted a State Legislature to exercise an extremely wide discretion in classifying property for tax purposes so long as it refrained from clear and hostile discrimination against particular persons or classes.

The burden is on a person complaining of discrimination. The burden is proving not possible 'inequality' but hostile "unequal" treatment. This is more so when uniform taxes are levied. It is not proved to us how the different plantations can be said to be 'hostilely or unequally' treated. A uniform wheel tax on cars does not take into account the value of the car, the mileage it runs, or in the case of taxis, the profits it makes and the miles per gallon it delivers. An Ambassador taxi and a Fiat taxi give different out turns in terms of money and mileage. Cinemas pay the same show fee. We do not take a doctrinaire view of equality. The Legislature has obviously thought of equalising the tax through a method which is inherent in the tax scheme. Nothing has been said 'to show that there is inequality much less 'hostile treatment'. All that is said is that the state must demonstrate equality. That is not the approach. At this rate nothing can ever be proved to be equal to another.

17. There is no basis even for counting one tree as equal to another. Even in a thirty years' settlement, the picture may change the very next year for some reason but the tax as laid, continues. Siwai income is brought to land revenue on the basis of number of trees but not on the basis of the

produce. This is worked out on an average income per tree and not on the basis of the yield of any particular tree or trees.

18. What is meant by the power to classify without unreasonably discriminating between persons similarly situated, has been stated in several other cases of this Court. The same applies when the legislature reasonably applies a uniform rate after equalising matters between diversely situated persons. Simply stated the law is this: Differences in treatment must be, capable of being reasonably explained in the light of the object for which the particular legislation is undertaken. This must be based on some reasonable distinction between the cases differentially treated. When differential treatment is not reasonably explained and justified the treatment is discriminatory. If different subjects are equally treated there must be some basis on which the differences have been equalised otherwise discrimination will be found. To be able to succeed in the charge of discrimination, a person must establish conclusively that persons equally circumstanced have been treated unequally and vice versa. However, in Khandige Sham Bhat and others v. The Agricultural Income Tax Officer MANU/SC/0189/1962 : [1963] 3SCR809 it was observed :

> "If there is equality and uniformity within each group, the law will not be condemned as discriminative though due to some fortuitous circumstance arising-out of a peculiar situation some included in a class get an advantage over others, so long as they are not singled out for special treatment. Taxation law is not an exception to this doctrine: vide Purshottam Govindji Halai v. Shree B. N. Desai, Additional Collector of Bombay MANU/SC/0017/1955 : 1956CriLJ129 and Kunnathat Thatunni Moopil Nair v. State of Kerala MANU/SC/0042/1960 : [1961] 3SCR77. But in the application of the principles, the courts, in view of the inherent complexity of fiscal adjustment of diverse elements, permit a larger discretion to the Legislature in the matter of classification, so long it adheres to the fundamental principles under lying the said doctrine. The power of the Legislature to classify is of

> "wide range and flexibility" so that it can adjust its system of taxation in all proper and reasonable ways."

138. In ***Income Tax Officer, Shillong and others v. R. Takin Roy Rymbai & others***[48], the Hon'ble Apex Court held that while it is true that a taxation law cannot claim immunity from the quality clause in Article 14 of the Constitution, and has to pass, like any other law, the equality test of that Article, it roust remembered that the State has in view of the intrinsic complexity of fiscal adjustments of divorce elements, in considerably wide discretion in the matter of classification for taxation purpose given legislative competence, the legislature has ample freedom to select and classify persons districts, goods, proprieties, income and objects which it would tax, and which it would not tax. So long as the classification made within this wide and flexible range, a taxing statute does not transgress the fundamental principles underlying the doctrine of equality, it is not vulnerable on the ground of discrimination merely because a taxes or exempts from tax some incomes or objects and not others. Nor, the mere fact that a tax falls more heavily on some in the same category, is by itself a ground to render the law invalid.

139. It is apt to refer para-27 of ***Income Tax Officer, Shillong and others*** (supra) as under:

> "**27.** While it is true that a taxation law, cannot claim immunity from the equality clause in Article 14 of the Constitution, and has to pass like any other law, the equality test of that article, it must be remembered that the State has, in view of the intrinsic complexity of fiscal adjustments of diverse elements, a considerably wide discretion in the matter of classification for taxation

[48] AIR 1976 SC 670

> purposes. Given legislative competence, the legislature has ample freedom to select and classify persons, districts, goods, properties, incomes and objects which it would tax, and which it would not tax. So long as the classification made within this wide and flexible range by a taxing statute does not transgress the fundamental principles underlying the doctrine of equality, it is not vulnerable on the ground of discrimination merely because it taxes or exempts from tax some incomes or objects and not others. Nor the mere fact that a tax falls more heavily on some in the same category, is by itself a ground to render the law invalid. It is only when within the range of its selection, the law operates unequally and cannot be justified on the basis of a valid classification, that there would be a violation of Article 14. (See *East India Tobacco Co.* v. *State of Andhra Pradesh* [AIR 1962 SC 1733 : (1963) 1 SCR 404 : 13 STC 529] ; *Vivian Joseph Ferriera* v. *Municipal Corporation of Greater Bombay* [(1972) 1 SCC 70] ; *Jaipur Hosiery Mills* v. *State of Rajasthan* [(1970) 2 SCC 26])"

140. In ***Balco Employees Union vs. Union of India and others***[49], also the Hon'ble Apex Court held that in the case of a policy decision on economic matters, the Courts should be very circumspect in conducting any enquiry or investigation and must be most reluctant to impugn the judgment of experts who may have arrived at a conclusion unless the Court is satisfied that there is a illegality in the decision itself. The Apex Court held that wisdom and advisability of economic policies are ordinarily not amenable to judicial review unless it can be demonstrated that the policy is contrary to any statutory provision or the Constitution. In other words, it is not for the courts to consider relative merits of different economic policies and consider whether a wiser or better one can be evolved.

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[49] (2002) 2 SCC 333

141. True, the taxation law is no exception to the doctrine of equal protection and it has to stand the test of reasonable classification, but in the present case, it is not that, the duty is being levied on some industrial/commercial consumers and not on the other consumers falling in the same category of industrial / commercial. It is also not the case that, the imposition of duty is of different rates on different consumers but falling within the same category of industrial or commercial category. The consumers of the industrial and commercial category are claiming the equal treatment with the consumers of the agriculture category. This Court find that there is a classification made between these two (02) kinds of categories. Even in the tariff order such distinction is made between these categories. The tariff determination is made for different categories. The classification of these categories, is not under challenge. A classification of category of consumers between Commercial, Industrial, Domestic and Agriculture could not be shown to be arbitrary or unreasonable classification. The consumers of the commercial and industrial category, unless they show that they stand equal to other category of consumers of electricity, cannot claim equality or equal treatment in the matter of imposition of tax on sale of electricity or with respect to the rate of tax with the other category consumers, domestic or agricultural.

142. This Court find that the classification between the industrial and commercial consumers, the domestic consumers and the agriculture consumers is well recognized by the APERC, in the tariff order as well. The different rates of tariff are fixed for these different categories of electricity consumers. It

could also not be argued, as to how all these kinds of electricity consumers stand on equal footing, *inter alia,* with respect to consumption, sale of electricity, their paying capacity, the object of sale to the industrial and commercial consumers, and sale to domestic and agriculture consumers. In other words, when the petitioners are claiming equal treatment with the agricultural consumers or the domestic consumers of electricity, they will have to establish that they stand on the equal footings with those consumers of electricity i.e., agriculture, domestic, to whom the sale is made by the Licensee. But that has not been established. The classification made between different kinds of consumers, based on differentia is permissible.

143. The principle of equality under Article 14 is that the persons similarly situated are to be treated similarly. Equals are to be treated equally. Unequals, if treated equally, that would also be negation of rule of law and violative of right to equality under Article 14. The unequals cannot be treated equally. The persons dissimilarly circumstanced cannot be treated similarly. The intelligible differentia, may be based on the financial capacity to pay. It may be considering the nature of the activity, for which, they use electricity. Some category of consumers may require State help / assistance, for which they are extended subsidy as well. So, the petitioners not having established that they stand equal to the agriculture consumers or domestic consumers, cannot claim equal treatment in imposition of electricity duty or with respect to the rate of duty levied.

144. Here it is apt to refer ***Janhit Abhiyan*** (supra), the Constitution Bench of the Hon'ble Supreme Court in the context of economically weaker sections of citizens and reservation in their favour laid down that economic criteria, as the sole basis for affirmative action, does not violate the basic structure of the Constitution. It was observed that our jurisprudence supports making of a provision for tackling the disadvantages arising because of adverse economic conditions. Article 38 of the Constitution, *inter alia*, provides for securing economic justice and for striving to minimize the inequalities in income amongst individuals and groups of people. The equality clause in the Constitution does not speak of mere formal equality but embodies the concept of real and substantive equality, which strikes at inequalities arising on account of vast social and economic differentials; and that the dynamic principle of egalitarianism furthers the concept of social and economic justice. In giving effect to the rule of equality enshrined in Article 14, the Courts have also been guided by the jurisprudence evolved by the US Supreme Court in the light of the amendments made to their Constitution, which were founded on economic considerations. Any civilized jurisdiction differentiates between haves and have-nots, in several walks of life and more particularly, for the purpose of differential treatment by way of affirmative action.

145. In ***Janhit Abhiyan*** (supra), the Hon'ble Apex Court, reiterated that equality is a feature fundamental to our Constitution but, in true sense of terms, equality envisaged by our Constitution as a component of social, economic and political justice is real and substantive equality, which is to

organically and dynamically operate against all forms of inequalities. This process of striking at inequalities, by its very nature, calls for reasonable classifications so that equals are treated equally while unequals are treated differently and as per their requirements.

146. Even if some category of consumers is granted exemption from payment or lesser duty as compared to the petitioners, is imposed, the government is vested with the power to grant exemption under Section 3-A of the APED Act. The validity of such provision, Section 3-A, on the ground of being violative of Article 14 or on any other ground is also not under challenge. The State Government therefore, derives power to grant exemption, under Section 3-A of the APED Act. Consequently, the contention that G.O.Ms.No.7 is violative of Article 14 of the Constitution of India on such different treatment in the matter of imposition of duty cannot be legally sustained.

147. It is, if, within the category of consumers, duty is being imposed on some of them, leaving the others or the imposition of duty is at different rates, for which there is no reasonable classification amongst the consumers falling within the same category, as there can be classification within classification, fulfilling the twin test, then only it can be said that the equals are being treated unequally. When there is categorization of electricity consumers and different rates are being levied on different categories, or even exemption is granted to some category, there would be no violation of Article 14 of the Constitution of India. It would not offend the equality clause.

148. So far as the submission with respect to rise rate of duty @ Re.1 kWh is concerned , the G.O.Ms.No.7 assigns various reasons for such increase. It was made after 18 years. In other States it ranges from 14 paisa to 180 paisa. There is reorganization of Andhra Pradesh and post bifurcation it is predominantly agrarian one. The gap between Average Revenue Realization (ARR) and Average Cost of Supply (ACoS) has widened over the years. Covid 19 pandemic led disruptions, surge of costs of import of coal and also the crude oil prices etc., have been the reasons assigned in the G.O.Ms.No.7 itself. The determination of rate of duty therefore appears to be for well assigned reasons and a conscious decision. The petitioners have not been able as to how such increase is arbitrary or unreasonable. This Court in the exercise of writ jurisdiction would not enter into such arena of what should be the increase, as it is in the field of experts on the subject, and lies on the domain of policy decision, which could not be shown to be arbitrary or violative of such provisions on which this Court may interfere in the exercise of judicial review.

149. In ***Renusagar Power Co. and*** others (supra), the Hon'ble Apex court held as under in paras-74 & 75:

> "74. The High Court in the instant case reiterated the necessity of cheap electricity and if cheap electricity was not made available, the cost of indigenous aluminium would go up. It would necessitate import of aluminium causing drain on the foreign exchange of the country. On the other hand, the learned Additional Advocate General for the State of U.P. contended and **in our opinion rightly that primary purpose of the Act as stated in the preamble was to raise the revenue for the development projects. Whether in a particular situation, rural electrification and development of agriculture should be given priority or electricity or**

development of aluminium industry should be given priority or which is in public interest, in our opinion, are value judgments and the legislature is the best judge. The High Court in its impugned judgment referred to the order of the Government. The said order read as follows:
(1985 All LJ 250 at p. 257)

> "The Corporation has also emphasized that the Government of India is spending a huge sum of money in foreign exchange to meet the requirements of aluminium in India, with a view to increasing the aluminium production by Hindalco Electricity should be made available at cheap rate and exemption should be granted to the Corporation from payment of electricity duty. In this connection it may again be pointed out that the imposition of electricity duty will not affect the productivity of aluminium by M/s Hindalco as electricity duty is negligible as clearly made out in the earlier paragraphs. Accordingly, the electricity duty is not likely to have any adverse effect on foreign exchange of the country."

75. Referring to the aforesaid observations of the State Government, the High Court was of the view that the said observations of the State Government clearly showed that the State Government did not address itself to the need of promoting aluminum industry for increasing production of aluminum which would in the long run save foreign exchange. We are unable to agree. What was paramount before introduction of the development programme and how the funds should be allocated and how far the Government considers a negligible increase and rise in the cost of aluminum for the purpose of raising monies for other development activities are matters of policy to be decided by the Government. It is true as the High Court has pointed out that the question regarding public interest and need to promote indigenous industrial production was related with the question of exemption of duty. **But what the High Court missed, in our opinion with respect, was that a matter of policy which should be left to the Government**. Reading the order of the Government, it appears to us that the Government had adverted itself to all the aspects of sub-section (4) of section

3 of the Act. It is true that certain amount of encouragement was given to Hidalgo to start the industry in a backward area. **After considerable point of time the very low rate of duty was charged. But if we need other sectors of growth and development for example, food, shelter, water, rural electrification, the need for encouragement to aluminium industry had to be subordinated by little high cost because that is a matter on which the Government as representing the will of the people is the deciding factor. Price fixation, in our opinion, which is ultimately the basis of rise in cost because of the rise of the electricity duty is not a matter for investigation of Court….."**

150. In ***Delhi cloth & General Mills Co.Ltd.*** (supra), upon which also reliance was placed by learned senior counsel Sri Alladi Ravinder, it was found that the Municipal Corporation of Delhi (MCD) was taxing the consumers of electricity generated by themselves at the rate of 5 paise KWHR after increasing from 1 paise, whereas those consumers who were getting energy from MCD were being taxed @3 paise KWHR after increase from 1 paise. It was observed that the MCD was taxing the consumers of electricity generated by themselves, for its failure to perform its statutory duties. The levy was held unreasonable and arbitrary on that ground. It was held that it was not the function of the Court to say that the levy at the rate of 3 paise per KWHR would be reasonable and not arbitrary for the consumers of electricity generated by themselves. The M.C.D. is the body enjoined under the law to fix a reasonable amount of levy and it was no part of Court's duty. The impugned resolution of the M.C.D. enhancing the levy of tax on the consumption of electricity generated by the consumers themselves from one paisa to five paise per KWHR was therefore set aside.

151. The present is not a case of duty/tax on consumers of electricity, one purchasing the electricity and the other generating for consumption for themselves, at different rates. Within the same category of consumers, the duty is being affected at the same rate. So, this Court do not find the applicability of ***Delhi Cloth & General Mills Co.Ltd.*** (supra), in the facts of the present case.

152. In ***Rane Engineering Valves Ltd.*** (supra), the validity of Section 3B of Andhra Pradesh Electricity Duty Act, 1939, as introduced vide amendment Act No.14 of 2003, by which the power was vested in the Government to impose duty at the rate of 0.25 paise per unit on consumption of electricity was conferred was under challenge. Section 3B(1) of the APED Act vested power in the State to levy duty on electricity consumed for its own purpose by the captive generating unit. Section 3A and Section 3B(3) of the Act enabled the Government to exempt any such unit permanently or for a specified period to levy duty. In exercise of said power, G.O.Ms.No.25, dated 23.05.2013 was issued granting exemption from levying of duty on electricity consumed by captive generating units if they consume entire power generated by them for its 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, and they sought extension of such exemption retrospectively from 16.07.2003.

153. In the said case, the Division Bench of this Court, on consideration of various cases, including ***K.C.Gajapati Narayana Deo v. State of Orissa*** {AIR 1953 SC 375 (1)}, ***Lord Krishna Sugar Mills Ltd. v. the Union of***

India {AIR 1959 SC 1124}, ***Attorney General – Alberta v. Attorney General-Canada*** { Privy Council – (1939) AC 117}, ***State of Andhra Pradesh v. National Thermal Power Corporation Ltd.*** { (2002) 5 SCC 203}, and ***State of West Bengal v. Kesoram Industries Ltd.*** { (2004) 10 SCC 201), upon which reliance is placed in the present case as well, held that "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."

154. The Division Bench further held in paragraph-27.16 that 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 of class of consumers are treated as separate group and higher duty is levied cannot be a ground to strike down such provision.

155. The Division Bench in ***Rane Engineering Valves Ltd.*** (supra) further observed and held in paragraph – 27.17 that 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.

156. It is apt to reproduce paragraphs-25.1, 27.12, 27.13, 27.16, 27.15 and 27.17 as under:

> "**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)

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.

27.15. 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."

Determination of Point No.B:

157. The duty was thus levied by the statute i.e., APED Act 1939 @Re.0.06 (6) paisa per unit and was payable by the licensee. It was fixed by the statute itself. Now it is @ Re.1 kWh on the licensees. There is no dispute that the respondent – DISCOMS are the licensees.

158. Section 7 (1) of APED Act 1939 provides that any licensee may with the previous sanction of the State Government and subject to such conditions as they may impose, recover from any person or class of persons to whom enrgy is sold at a price of more than twelve paise per unit, the duty which falls to be paid by the licensee in respect of the energy so sold or any part of it, as may be determined by the State Government. Sub-Section (2) of Section 7 provides that the licensee may, for the purpose of sub-section (1), exercise the power conferred on a licensee by sub-section (1) of Section 24 of the Indian Electricity Act, 1910, for the recovery of any charge or sum due in respect of energy supplied by him.

159. Section 7 of the APED Act 1939 reads as under:

"**Section 7-** Licensee to reimburse himself from consumer in certain cases:

Any licensee may with the previous sanction of the State Government and subject to such conditions as they may impose, recover from any person or

class of persons to whom energy is sold at a price of more than twelve paise per unit, the duty which falls to be paid by the licensee in respect of the energy so sold or any part of it, as may be determined by the State Government.

Explanation :-

(1) Save as provided in sub-section (4) of Section 3, the duty recoverable from any person under this sub-section shall not be deemed to be part of the price charged for the energy by the licensee. (2) The licensee may, for the purpose of sub-section (1), exercise the power conferred on a licensee by sub-section (1) of Section 24 of the Indian Electricity Act, 1910, for the recovery of any charge or sum due in respect of energy supplied by him."

160. Thus, Section 7 of APED Act 1939 provides for the licensee to recover from any person or class of persons to whom the energy was sold at a price of more than twelve paise per unit with the previous sanction of the State Government, either as a whole or any part thereof, as might be determined by the State Government. This duty is that which falls to be paid by the licensee under Section 3 of the APED Act.

161. With respect to the previous sanction of the State Government to recover the duty from the consumers by the licensee, reliance is placed upon G.O.Ms.No.277, dated 09.12.1994.

162. G.O.Ms.No.277, dated 09.12.1994 is reproduced as under:-

"GOVERNMENT OF ANDHRA PRADESH
ABSTRACT

ELECTRICITY DUTY PAYABLE TO GOVERNMENT – Enhancement of Electricity Duty from PS / Unit to 6 Ps Unit with effect from……12.1993 – Additional burden on the A.P. State Electricity Board – Proposal to recover the Electricity Duty from the Consumers of chargeable categories – Orders – Issued.

ENERGY 7 FORESTS (PR.I (I) DEPARTMENT

G.O.Ms.No.277 Dated: 09.12.1994

From the Chairman, APSE Board, Hyderabad, D.O.Lr.No.CE (Coml.)/PO2/ED/169/94, Dt.14.07.94.

ORDER:

The Chairman, Andhra Pradesh State Electricity Board has informed that, the levy of Electricity Duty, as enhancement from 4 Ps./Unit to 6 Ps. Unit with effect from 01.12.1993 has become an additional burden on the Andhra Pradesh State Electricity Board and is cutting into the revenue, thereby depleting the net surpluses amounting, in fact, to reduction to tariff for all categories and proposed to recover the Electricity Duty of 6 Ps./Unit from the consumers with retrospective effect from 01.12.1993. The Chairman, has also informed that unless the Electricity Duty is passed on to the consumers, the revenue the A.P.State Electricity Board drastically gets reduced for the years 1993-94 and would adversely effect the performance as well as the not surplus. This would also affect the revenues in 1994-95. Therefore, the Chairman, A.P.State Electricity Board has requested the Government, in his letter read above to accord permission to Andhra Pradesh State Electricity Board under sub-section (1) of Section 7 of Andhra Pradesh Electricity Duty Act, 1939 to enable the Board to recover the Electricity Duty of 6 Ps./unit from 1992-93 from the consumers, to whom energy is supplied at a price of more than 12 Ps./Unit.

2. **After careful examination of the above issue and in exercise of the powers under sub-section (1) of Section 7 of the Andhra Pradesh Electricity Duty Act, 1939, as amended from time to time the Government hereby accord permission to Andhra Pradesh State Electricity Board to recover the Electricity Duty from any consumer or class of consumers, to whom energy is sold at a price of more than 12 paise per unit and who fall under the durable categories, except consumers using Low Tension Electrical energy for agricultural purposes, at an effective tariff rate, presently below twelve paise per unit the duty, which falls to be paid the Board with effect from 01.12.1993, at the rate of six paise per unit on the energy sold, subject to the following conditions**:-

a) The electricity duty recoverable from such consumer or class of consumers shall not be a part of the price charged for the energy sold by the Board.
b) The duty recoverable from a consumer or class of consumers shall be a first charge on the amounts recoverable by the Board for the energy supplied by the Board and shall be a debt due by the Board to the State Government.

Provided that, where the Board has been enabled to recover the amounts due from the consumer for the energy supplied by it, the Board shall not be liable to pay the duty in respect of the energy so supplied.
c) The Andhra Pradesh State Electricity Board shall show separately the Electricity duty amount recoverable from a consumer or class of consumers in the bills sent by Board to the consumers for collection of C.C.Charges, provided that in respect of supply to the licences, the Board shall not show any Electricity duty amount recoverable from them.

d) The Board shall exercise the powers under sub-section (1) of Section 24 of Indian Electricity Act of 1910, if any consumer defaults to pay the electricity duty as permitted by Government in this order.

e) Any sum due from the consumers on account of electricity duty, if not paid within the due date and in the manner prescribed, shall be deemed to be in arrears and there upon, interest at 24% per annum shall be payable on such sum, and the sum, together with any interference thereon, shall be recoverable either through Civil Court or as an arrear of land revenue at the option of the Government. However, in respect of the duty recoverable for the period from 01.12.93, no interest shall be leviable from 01.12.93 upto the due date of demand as per the bill to be served.

f) In case of dispute regarding the electricity duty recoverable from any consumer or class of consumers, the matter shall be referred to the Chief Electricity Inspector to Government for a decision.

This order issues with the concurrence of Finance & Planning (Finance Wing Expenditure (E&F) Department vide their U.O.No.2228/AFS(B)/94, Dt.04.11.94.

(By order and in the name of the Governor of Andhra Pradesh)

Sd/-xxx,
S.RAY,
Principal Secretary to Government"

163. The aforesaid G.O.Ms.No.277 granted sanction to Andhra Pradesh State Electricity Board to recover @ 6 paise only. At that time, that was the duty imposed by the APED Act. There is no dispute that under the Andhra Pradesh Electricity Reform Act, 1998 and the scheme of transfers, now the DISCOMs are the licensees in place of Andhra Pradesh State Electricity Board. Consequently, the G.O.Ms.No.277 applies to the present DISCOMs. It is undisputed that till now the petitioners have been paying the duty @ 6 paise to the respondents-licensees. There is no other order of sanction under Section 7 of the APED Act. The G.O.Ms.No.7, has been issued under Section 3 of APED Act only. It is not under Section 7 (1). The contents of the G.O.Ms.No.7 also do not show that the State has granted any sanction to the licensees to recover, from the consumers petitioners, the amount of duty as now enhanced or in excess of 6 paisa for which there is sanction under G.O.Ms.No.277.

164. Consequently, after the enhancement of duty @ Re.1, unless the licensees are granted sanction by the State Government to recover the same either full, or part thereof, the licensees cannot recover any amount of duty, in excess of 6 paise from the petitioners.

165. Sri V. R. Reddy Kovvuri placed reliance on Regulation 3 of the Regulations, 2005 and the terms of conditions of the Agreement, to contend that the petitioners are bound to pay duty to the licensees as imposed under G.O.Ms.No.7.

166. Regulation 3 of the Regulations 2005 reads as under:-

"**3. Recovery of Electricity Charges from consumers**

3.1 The distribution licensee shall recover the electricity charges for the electricity supplied to the consumer as per the tariff determined by the Commission from time to time in accordance with the provisions of Electricity Act 2003:

Provided that where there are more than one Licensee in the same distribution area the Licensees may be allowed by the Commission to recover the charges at such tariffs as the licensee may consider appropriate subject to the maximum ceiling of tariff fixed by the Commission.

3.2 Unless otherwise specified, all HT and LT rates refer to one point of supply and each separate establishment will be given separate point of supply.

3.3 The consumer shall pay to the distribution licensee within the time specified for the purpose under clause 4 every month/billing period at the appropriate office of the distribution licensee or any other place allowed by the distribution licensee,charges for the electrical energy supplied to the consumer during the preceding billing period at the tariff in force from time to time.

3.4 The consumer shall pay, in addition to the charges fixed in the Tariff determined by the Commission, all surcharges, additional charges if any and any other charges payable relating to the supply of energy to the consumer as per the tariff conditions in force from time to time. The consumer shall also pay all the amounts chargeable by the Government by way of tax/duty etc, to the appropriate authority as specified by the Government.

3.5 When supply to a new consumer is commenced in the middle of a billing period, the demand charges, or any other similar fixed charges shall be levied pro rata for the number of days for which supply is given during the billing period. In the case of energy, pro rata minimum charge or the charges at appropriate tariff for the energy actually consumed, whichever is higher shall be payable by the consumer."

167. Appendix IIA, condition No.4 is reproduced as under:-

"4. Obligation to comply with Requirements of Act, and General Terms and Conditions of Supply:

I/We further undertake to comply with all the requirements of the Electricity Act, 2003, the Rules and Regulations framed thereunder, provisions of the tariffs scale of Miscellaneous and General Charges and the General Terms and Conditions of Supply prescribed by the Company with approval of the AP Electricity Regulatory Commission herein after called as Commission from time to time and agree not to dispute the same."

168. From the aforesaid only, it is evident that the tariff determination is exclusively of the electricity duty. Consequently, though the petitnioers are to pay the duty in addition to tariff, but, in the absence of sanction from the State Government, they cannot be asked to pay more than 6 paisa. Regulation No.3 clearly provides "shall also pay all the amounts chargeable by the Government by way of tax / duty etc., to the appropriate authority **as specified by the Government**". What has been specified by the Government is 6 paise kWh vide G.O.Ms.No.277.

169. The submission to the contrary by the learned standing counsel for DISCOMs is unsustainable and is rejected.

Determination of Point No.C:

170. In view of the aforesaid consideration, the petitioners / Alloy Industries have to pay the same duty as aforesaid, unless there is exemption in their favour by the State Government under the statutory provisions.

Determination of Point No.D:

171. The petitioners of WP No.33988 of 2022 are engaged in the business of Cold Storage of agricultural produce. They have filed writ petition being aggrieved from the demand made by the respondents to pay the electricity duty @ Rs.1/- per unit increasing the same from Rs.0.06 per unit, from April, 2022 and True Up Charges pursuant to the G.O.Ms.No.7 Energy Power-III Department dated 08.04.2022, and for the direction to refund the amount already collected at the enhanced rate from April, 2022 onwards. There is no challenge to the G.O.Ms.No.7, dated 08.04.2022.

172. Sri Nimmala Satyanarayana, learned counsel for the petitioners, submitted that in the State of Andhra Pradesh, the cold storages are governed under the statute namely the A.P Agricultural Produce and Live Stock Markets Act, 1966 (in short 'Act 1966') and license is also obtained as an ancillary to the agricultural industry. Referring to the definition of the agricultural produce under Section 2(i) of the Act 1966, it was submitted that the "Agricultural produce" means anything produced from land in the course of agriculture or horticulture and includes forest produce or any produce of like nature either processed or un-processed and declared by the Government by the notification to be agricultural produce for the purposes of the Act 1966. It was submitted that the agricultural produce is kept in the cold storage to be used at future dates and as no process is undertaken and the nature of the produce will also not change, the exemption clause of the notification is applicable to the cold storages as well, and the petitioners cannot be asked to pay any electricity

duty. Learned counsel for the petitioners-Cold Storages, submitted that the State of Andhra Pradesh issued G.O.Ms.No.333 dated 14.11.2003 and classified the cold storage as food processing units which were allowed concessional rate of Rs.1.75 ps per unit which still holds good. Therefore all food processing industry fall under the agricultural category. Placing reliance on the said G.O.Ms.No.333, they submitted that the cold storage unit is ancillary to and connected with agriculture. The Government itself in its wisdom to save agricultural and allied products granted exemption to all food processing units including food grain milling and processing.

173. The G.O.Ms.No.333, dated 14.11.2003 is being reproduced as under:

> "G.O.Ms.No.179 Industries & Commerce (FP) Department dated 22.6.2005.
> 1. G.O.Ms.No.333 Industries & Commerce (C&EP) Department dated 14.11.2003.
> 2. G.O.Ms.No.55 Industries & Commerce (C&EP) Department, dated 5.3.2004.
> 3. From the Commissioner of Industries, Andhra Pradesh, Hyderabad Single FileNo.30/3/2005/0565 dated 20.6.2005.
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> ORDER:
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> In the GO first read above, orders were issued on Food Processing Policy of Andhra Pradesh State and extending various incentives and concessions to the Food Processing Industries in the State. In the G.O. second read above operational guidelines were also issued for implementation of the Food Processing Policy in the State.
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> 2. The Commissioner of Industries, Andhra Pradesh, in the single file third read above has reported that some of the Food Processing Industries in the State have approached the High Court of Andhra Pradesh. Keeping in view of the all consequences in view, the Commissioner of Industries, has requested the Government to consider the earlier policy and issue necessary orders on the Food Processing Policy of the Andhra Pradesh.
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> 3. Government, after careful examination of the matter in detail, have decided to evolve a food processing policy of Andhra Pradesh State by superseding the orders issued in the G.O. first read above and the operational guidelines issued in the GO second read above.
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> 4. Accordingly, in supersession of the orders issued in GO first read above and

consequent operational guidelines issued in GO second read above,approved the fresh State policy on "Food Processing Industries" as detailed below.

Coverage:

The policy will cover the following activities and areas: HORTICULTURE:
Fruit & Vegetable processing
Fruit based ready to serve beverages.
Tissue culture Laborators/Green houses/Green house nurseries/Mushroom Laboratories/Seed production units based on modern scientific methods to meetindustry standards.
Wine making.
AGRICULTURE:
Food grain milling/processing.
Using modern technology and equipment (except Rice Mills)Alcohol for blendingwith fuels.
ANIMAL HUSBANDRY.
Dairy products.
Processing of poultry, eggs, meat and meat products.
FISHERIES:
Fish processing including shrimps.
AGRO FOOD PROCESSING INDUSTRIES:
Bread, Oilseed meals (edible), breakfast, foods, biscuits, confectionery, including cocos processing and chocolate, oil expellers and refining, malt extract, protein isolates, high protein foods, weaning foods, extruded/other ready to eat food products and all other processed foods (excluding non-packed fooditems served in Hotels and Restaurants of all categories)
ALLIED INDUSTRIES:
Cold Storage unit.
Refrigerated Transport vehicles containers; (excluding second hand Refurbishedvehicles/contains)
Units manufacturing food grade packaging materials for food processing industry.
Units engaged in packaging, canning and bottling of process foods.
Units manufacturing additives/preservatives/colors/fragrances for the processed food industry.
Biotechnology industries.

2. INCENTIVES AND CONCESSIONS:

Reimbursement of cost of power for all eligible units shall be allowed @ Re.1.00 per unitas against Re.0.75 per unit as provided for the other eligible industries under IIPP.

5. The Fresh Food Processing Policy will come into effect from 1.4.2005. The reimbursement of cost of power shall be extended for a period of five years from the date 1.4.2005. The Food Processing units of those, which have gone into commercial production after 14.11.2003, shall be eligible for reimbursement of cost of power.

6. The Commissioner of Industries shall be the Nodal Agency to implement the fresh policy.

7. The State Level Committee of the Industries Department shall decide and finalise all cases relating to the incentives/benefits to the Food Processing Industries in the State.

8. The Commissioner of Industries, Hyderabad shall evolve a separate coding (Bar Coding) procedure for Food Processing Industries in the State.

9. Operational guidelines for the implementation of the fresh Food Processing Policy shall be issued separately".

174. So far as the G.O.Ms.No.333 is concerned, thereby the State Government extended certain concessions and incentives for the members of food processing industry and a special provision was also made for food processing industry. Clause 3(8) of the said G.O. provided that all concessions except capital subsidy provided under the said policy on food processing unit, shall be extended to the existing unit treating them as new units. The food process industries as covered under the said policy, included *inter alia* the agriculture and 'allied industries'. Under the category allied industries the cold storage unit was mentioned. The incentive or the concession, provided for the reimbursement of cost of power for all eligible units was allowed at the rate of Rs.1.00/- per unit, as against Rs.0.75 per unit as was provided for the other eligible industries.

175. I find that the said G.O.Ms.No.333 is on a different subject, i.e., that is the grant of concession in the rate of tariff as fixed by the Electricity Regulatory Commission. The State Government granted a concession to different eligible industries at the rate of Rs.0.75 per unit but in respect of the food processing industries under the policy, under the allied industries, which covered cold storage unit, those were allowed reimbursement of costs of bill at the rate of Rs.1.00 per unit. The said G.O.Ms.No.333 is neither on the subject of duty nor any exemption or concession from the payment of duty is granted. Based on the said G.O.Ms.No.333, the submission that the cold storage unit was covered under the allied industries, and therefore it should also be granted exemption from duty, or based thereon it should also be considered as allied industries and allowed exemption in Electricity duty also, considering 'as agriculture consumers', cannot be accepted. Firstly, because in the said G.O. the food process industries coverage policy, categorized the agriculture and allied industries, differently. It was under the allied industries that the cold storage unit was included and not under the agriculture. Further, such classification is for a specific purpose for which G.O.Ms.No.333 was issued. It cannot be universally applied, of its own to the subject of duty and its payment by different category of consumers or for grant of exemption from Electricity duty. It is for the State imposing duty on licensee, to choose from whom the licensee can recover the same duty or part thereof and upon whom it is not to be levied. It is for the State to grant the exemption to the category of consumers. It is a policy decision. Section 3-A of the Electricity Duty Act

provides for the power to grant exemption. But unless such power is exercised in favour of 'Cold Storages' they cannot claim exemption from payment of duty based on G.O.Ms.No.333. The petitioners as such cannot claim any benefit based on G.O.Ms.No.333, for seeking exemption from payment of duty nor for claiming that they fall under the category of agricultural consumers or allied industries, for the payment of duty.

176. In ***M/s. Kalyan Roller Flour Mills Pvt.Ltd.*** (supra) upon which Sri Nimmala Satyanarayana placed reliance, the petitioners therein had challenged the letter of the Central Power Distribution Company of A.P Limited dated 16.09.2005, cancelling the eligibility certificate issued to the petitioners therein, for availing power tariff concession/market cess exemption, being arbitrary and violative of Article 14 of the Constitution. Subsequent to G.O.Ms.No.333, another G.O.Ms.No.179 dated 22.06.2005 was issued. The question which arose for consideration was whether G.O.Ms.No.179 dated 22.06.2005 superseded G.O.Ms.No.333 dated 14.11.2003 with retrospective effect and any benefits extended in favour of the petitioners therein under G.O.Ms.No.333 got cancelled. It was held that G.O.Ms.No.179 dated 22.06.2005 had no retrospective effect. It could not be said that already extended benefits under G.O.Ms.No.333 stood cancelled or invalidated.

177. It is apt to refer paragraphs 14, 15 and 16 of ***M/s.Kalyan Roller Flour Mills Pvt. Ltd.*** (supra) as under:

"14. When a similar question arose before this Court in G.S. Oils Ltd., Adilabad v. GM, District Industries Centre, Adilabad {2006 (6) ALD 442}, this Court held:

> "It is no doubt true that in the light of the clause referred to supra in G.O.Ms.No.55, the learned Judge came to the conclusion that giving eligibility certificate as required under G.O.Ms.No.333 dated 14.11.2003 is essential for getting the incentives. The writ petitioners made applications on 29.5.2004, 24.4.2004 and 6.5.2004 respectively. It is not the case of the respondents that the policy decision promulgated under G.O.Ms.No.179 superseding the prior G.Os would have any retrospective operation. Even otherwise, the applications were made as per G.Os., the petitioners were under the fond hope and expectation that they would be entitled to these incentives and nothing was heard from the side of the respondents sideas specified in the respective affidavits filed in support of the writ petitions. In the light of the view expressed by the Apex Court in Commissioner of Central Excise v.
> M.P.V. & Engineering Industries (2003 (5) SCC 333) and also in the light of the view expressed by the learned Judge of this Court in Writ Petition No.1954 of 2005 dated 30.6.2006 (Sukhjit Starch Mills Limited's case), which is latter in point of time wherein reliance was placed on the decision of the Division Bench of this Court in P.P.R. Industries v. Commissioner of Industries (1993 APSTJ Volume 17 P.91), this Court is of the considered opinion that the petitioners are entitled to the incentives or benefits as per G.O.Ms.No.333 dated 14.11.2003 and G.O.Ms.No.55 dated 5.3.2004 till the date of issuance of G.O.Ms.No.179 from the respective dates of the applications dated 29.5.2004, 24.4.2004 and 6.5.2004 respectively".

Further, in another reported decision in *P.P.P. Industries v. Commissioner of Industries and another* {Vol.92 STC 110}, it was held:

> "The petitioners are entitled to "sales tax holiday" for a period of five years subject to a ceiling of Rs.35,00,000 on sales tax during the entire holiday period. We further hold that restriction or reduction of such eligibility to the sum of 100 per cent of the capital investment under clause 6B (ii) of the Manual of Instructions or the eligibility fixed by the District Committee or the orders of assessment are illegal and unenforceable. There will be a consequential direction that the respondents shall give full effect to the eligibility of the petitioners in terms of clause 3 of G.O.No. 498 to the extent mentioned above for the period provided not exceeding five years and that the respondents shall not demand or collect sales tax from the petitioners except after granting the benefits of tax holiday in the amount and within the period as mentioned above".

From the above, it is seen that firstly G.O.Ms.No. 179 dated 22.6.2005 has no retrospective effect and the incentives extended earlier under G.O.Ms.No.333 dated 14.11.2003 do not stand cancelled or become invalidated. Secondly, the tariff, something like tax holiday, which was already extended for the sustenance of the existing food processing units, cannot be said to have been taken away under G.O.Ms.No.179. Further, no invidious discrimination could have been made between the existing and the fresh food processing units in so far as availing the concessions of tariff at the rate of Rs.1.75ps. per unit. In fact, the very concept of extending incentives and concessions was for the sustenance of the industry already existing. The very G.O.Ms.No.333 dated 14.11.2003 was issued after

making a study of the existing industries and their plight in facing difficulties in their sustenance and growth as food processing industries. Therefore, it cannot be said that the existing units are not entitled for the incentives and concessions made inG.O.Ms.No.333 dated 14.11.2003 or that the incentives and concessions already extended in favour of the petitioner stand either cancelled orinvalidated.

15. Learned standing counsel appearing for respondents 2 and 3 strenuously contended that whether any concession is extended as to the tariff rate to the Food Processing Industry or an eligibility certificate has been issued by the Industries Department, it is not binding on respondents 2 and 3 and respondents 2 and 3 are bound by the orders issued by the Electricity Regulatory Commission and unless and until the said G.O.Ms.No.333 has been approved by the Electricity Regulatory Commission, the petitioners are not entitled for any such concession etc. under Section 65 of the Electricity Act, 2003. This aspect need not be gone into in a writ petition like this. All the instructions issued by the Government are binding on respondents 2 and 3 and it is for therespondents 2 and 3 to go and seek ratification or permission from the Electricity Regulatory Authority in this regard, if necessary.

16. For all the above reasons, the impugned proceedings dated 16.9.2005 are liable to be set aside as arbitrary and illegal and they are accordingly set aside. The writ petition is allowed. No order as tocosts."

178. Learned counsel for the petitioners placed reliance in ***Madhava Hi-Tech Cold Storage (P) Limited*** (supra) to contend that when there was no manufacturing process in cold storage unit, it cannot be termed as industry.

179. In ***Madhava Hi-Tech Cold Storage (P) Limited*** (supra) the order of penalty was passed under Section 10-A of the Central Sales Tax Act, 1956 (in short 'the CST Act') by the Assistant Commercial Tax Officer in respect of machinery brought for installation of cold storage from other States by furnishing declarations in form 'C' which were incorporated in the Certificate of Registration under the CST Act and the same was challenged. The point that arose for consideration was, whether the authority was right in imposing the penalty on the petitioners therein. The further question was whether purchase of machinery by using the 'C' forms would amount to false representation and whether there was any processing of items stored in cold storage. Section 8 (3) (1) (b) of the CST Act provided that the goods referred to in sub-section (1) (b) are goods of the class or classes specified in the certificate of registration of the registered dealer purchasing the goods as being intended for resale by him or subject to any rules made by the Central Government in that behalf for use by him in the manufacture or processing of goods for sale or in the tele-communications network or in mining or in the generation or distribution of electricity or any other form of power. Section 10 of the CST Act provided for penalty if any person, after purchasing any goods for any of the purposes specified in clause (b) or clause (c) or clause (d) of sub-section (3) or subsection (6) of section 8 fails, without reasonable excuse, to make use of the

goods for any such purpose. In that case it was argued that since an element of processing of goods was involved due to storage of products referred to in 'C' forms, the action of the authorities in imposing penalty was not proper, as there was no false representation. The Division Bench of this Court, placing reliance on the judgment of the Hon'ble Apex Court in ***Chowgule*** (supra) did not accept the contention that the storage of item in a cold storage undergoes processing and as such, the petitioner therein was held not entitled for exemptions/benefits. It was further held that the same shall not make the assessee eligible for utilization of 'C' forms, and hence use of 'C' forms knowing that there was no manufacturing process in cold storage unit, the order of penalty did not warrant interference.

180. Reliance was placed on the judgment in ***Madhava Hi-Tech Cold Storage (P) Limited*** (supra) to contend that, there is no processing in cold storage of the items stored. What I find is that, that was a case in the context of Section 8 (3) and Section 10 (d) of the CST Act, which provisions are not attracted to the present case. Evne if it be taken that there is no processing as this term was considered in ***Madhava Hi-Tech Cold Storage (P) Limited*** (supra), it cannot be held here that for the purpose of the Electricity Duty Act and the notification / G.O.Ms.No.7, they would become agricultural consumers, and exempted from payment of electricity duty.

181. Reliance placed on the judgment of the ***Delhi Cold Storage Private Limited*** (supra) is also misconceived. This is also in the context of Section 2 (7) (c) of the Finance Act, 1973, as to whether the assessee company

running a cold storage can be held to be an industrial company. In the said case, it was held that the word 'processing ' was understood as an action that brings forth some change or alteration of the goods or material which was subjected to the act of processing. The processing involves bringing into existence a different substance from what the material was at the commencement of the process. The interpretation of the word 'processing' was to find out if the cold storages were covered or not covered under the provisions of the Finance Act and the CST Act. In the present case, nothing has been placed before this Court that for categorization of the cold storage as commercial / industrial / agriculture there should be processing of goods. The processing of goods is not the criteria brought to the notice of this Court for making the categorization of industrial and commercial category on one hand and the domestic and agriculture units on the other hand for the purposes of electricity duty. The duty is imposed on all kinds of category of consumers, but exemption is granted for payment on certain category of consumers. In the absence of any such criteria pointed out, that unless there is processing, the category of cold storage would fall within the category of agriculture, the contention based on the aforesaid judgment cannot be accepted.

182. Learned counsel for the petitioners placed reliance in ***Central Bank of India*** (supra) the judgment of the Debts Recovery Appellate Tribunal, Mumbai, to contend that there it was held that the definition of 'Agriculture' and 'Agricultural purposes', in Punjab Agricultural Credit Operations and Miscellaneous Provisions (Banks) Act, 1978, shall include the storage of food

products and also the transport and the acquisition of implements and machinery in connection with any such activity.

183. In the present case, any such definition of 'agriculture' and agricultural purposes' to include the storage of food products and also the transport and acquisition of implements and machinery in connection with such activity could not be shown neither under the Electricity Act nor the Electricity Duty Act to contend that the cold storage would no fall under the category of 'agricultural consumers'. Consequently, the reliance placed in the judgment of ***Guru Nanak Cold Storage and Ice Factory*** (supra) is misconceived.

184. Learned counsel for the petitioners further placed reliance in the case of ***Krishna Poultry Farm*** (supra) to contend that the cold storage are allied agro industrial activities, but the Court finds that there regulation 80 (5) (1) of O.E.R.C Distribution (Condition of Supply) Code, 2004, while categorizing the Agro Industrial Consumers, included therein, the category relating to supply of power for Pisciculture, Horticulture, Floriculture, Sericulture and other allied agricultural activities including animal husbandry, poultry and cold storage, i.e., temperature controlled storage where flowers, fruits, vegetables, meat, fish and food etc., can be kept fresh or frozen until it was needed. That was basically a case, where the petitioner farm was reclassified as 'commercial' category instead of 'agro industrial category', which was questioned with further direction to revise the assessed amount without any notice regarding reclassification, as per Regulation 82 of the Code 2004. The petitioner's farm therein was an agricultural unit actively associated with poultry farming. The

said judgment is also not applicable, for the reason that the supply of power to the cold storage, was included specifically under Regulation 80 (5) (i) of the Code in the category of 'agro industrial consumers', for which the petitioner therein had entered into an agreement under which the energy charges were fixed as applicable to the consumer under 'agro industrial' category. In the present case, it has not been shown that the cold storages are included under allied agro industrial activities for the purposes of duty under the Electricity Duty Act. The inclusion by G.O.Ms.No.333, dated 14.11.2003, for a specified period, was only for the purposes of grant of concession from tariff and that too, there, the cold storage unit was under allied industries and not under agriculture.

185. In ***Tuljabhavani Cold Storage Pvt. Ltd.*** (supra) upon which the learned counsel for the petitioners placed reliance to contend that the cold storages for agricultural products fall under the 'agricultural' category. There, for the purposes of tariff, the categorization of cold storage was made by the Regulatory Commission in the tariff order in two categories; (a) Cold Storages for Agriculture Products – processed or otherwise covered under the category Agriculture-others (excluding agriculture pump sets); and (b) Cold storages for all other purposes to be covered under Industrial category. In the present case, any such categories of cold storages in the tariff order of the APERC, could not be placed before this Court.

186. In ***M/s. Odisha Cold Storage Association*** (supra) on which learned counsel for the petitioners placed much reliance, the issue was whether

there was justification for covering the cold storage units in the category of Regulation 138 (f) of the OERC Distribution (Conditions of Supply) Code 2019. The Regulatory Commission held that it was empowered with the authority to make revision in the matter of classification of consumers under Regulation No.203 of the Code 2019. The prayer of the petitioner therein to categorize the cold storages under Regulation 138 (f) instead of 138 (g) of the Code 2019 was found to be devoid of merit and accordingly, was rejected with the clarification that the Commission will have no objection if any further subsidy/incentive is provided to the cold storages by the Government of Odisha. This cannot be of any help to the petitioners in this case to support the submission advanced.

187. Another order, upon which reliance was placed by the learned counsel for the petitioner is Tamil Nadu Electricity Regulatory Commission with respect to the tariff order issued by it and the same is also of no help to the petitioners inasmuch as it is for the Regulatory Commission to consider on what category of consumers what tariff was to be imposed.

Conclusions:

188. **To sum up**:

1. The tariff and the duty are different. The tariff is rate/cost. The tariff is schedule of standard prices or charges for specified services provided to the type or types of electricity consumers, as specified in the tariff order.

2. The tax which is charged on sale or consumption of electricity is the electricity duty. The tariff will not include the electricity duty/tax as its component. Both of them are different and independent.

3. The determination of tariff is different and imposition of duty is different. The electricity Act and the APED Act and the functions there under of APERC and the State respectively under the respective Acts are independent acts and they operate in different fields.

4. In determination of tariff, if subsidy is granted to the agriculture consumers, the Government pays the amount to the licensee on account of such subsidy, the burden is not placed upon the other category of consumers. The Government pays and compensates the licensee. It cannot be said that the burden of subsidy to agriculture consumers goes on to the industrial or commercial consumers. It cannot be termed as cross subsidy.

5. The State has the power to impose duty and fix its rate which it derives from Section 3 of APED Act, as amended, which Act itself is referable to Entry 53 in the Second List of Seventh Schedule of the Constitution of India.

6. The only limitations on the power of the State in levying tax for sale and consumption of electricity are to be found under Entry 53 of List-II and in the Constitution. So far as the notification is concerned, the only limitation on the State while determining the duty would be the limitation fixed by the APED Act and the constitutional provisions.

7. The State has also power to grant exemption under Section 3A of APED Act. Consequently, grant of exemption from duty to domestic consumers to a certain extent and exemption in full to the agriculture consumers is within its jurisdiction and power and there is no question of any arbitrary exercise on that count.

8. The impugned notification by the State is within the power conferred by the legislature; the APED Act and it also does not violate the legislative field, governed by APED Act, since imposition of duty is only on the sale and consumption of the electricity.

9. The classification of the consumers of electric energy into industrial, commercial, domestic and agriculture is not under challenge. The petitioners having not established that all the category of consumers stand on equal footing, the challenge on the ground of violation of Article 14 of the Constitution of India that the equals cannot be treated unequally, is unsustainable. Equal treatment in the matter of imposition of duty, equally on all or at equal rate would amount to violation of the equality clause, as unequals cannot be treated equally.

10. The consumers of the electricity have to pay the tariff as determined by APERC and in addition, they are also liable for payment of the duty on sale or consumption of the electricity, subject to grant of exemption under Section 3A of the APED Act, if there is sanction under Section 7 of the APED Act.

11. The object of the impugned notification is augmentation of revenue. Duty would go to the public exchequer for various purposes. The notification is not for realizing the subsidy amount from the industrial and commercial consumers, but the grant of subsidy has been cited as one of the reasons, amongst so many, due to which there is burden on the State Government and to meet the expenses to augment the revenue, the notification has been issued. The primary object is not to realize the subsidy amount granted while

determination of tariff, but is to augment the revenue for various reasons to meet the expenditures. It cannot be said to be a colourable exercise of power.

12. The burden on the industrial and commercial consumers may be there because of rise in the duty rate, compared to previously, when it was only 6 paise and now it is Re.1/-, but that is the consequence flowing from the exercise of the power by the State Government within its legislative and executive field flowing from APED Act which Act itself is under the Constitution within the legislative field. Merely because of such burden, it cannot be said that the imposition of duty or increase in the rate is either colourable exercise of power or it interferes with the field of regulation and control. In such matters, the motive becomes irrelevant, if the exercise of power is within the legislative and executive competence. There is source of power and there is no transgression of such power.

13. The rate of duty from 6 paisa kWh to Re.1/- lies in the domain of the Executive to fix. Such determination is made on consideration of various factors. In the present case, such enhancement has been made after 18 years, and considering the rates in different States, it can be said that the petitioners have not been able to substantiate their submission that the rate is unreasonable and excessive. It is not for this Court in exercise of the writ jurisdiction to interfere with such increase in the rate of duty being a policy decision, based on reasons.

14. The G.O.Ms.No.7, Energy (Power-III) Department, dated 08.04.2022, does not suffer from vices of colourable exercise of power nor from violation of Article 14 of the Constitution of India.

15. The petitioners-Ferro Alloys industries admittedly are the industrial and commercial consumers. Their claim for different rates for them is in effect and substance the claim for granting exemption under Section 3A of the APED Act. No such exemption having been granted by the Government in their favour, it cannot be claimed in these writ petitions that they are not liable for making the payment of the electricity duty at the rate fixed, for the industrial and commercial consumers category.

16. The petitioners of cold storages, in the absence of their classification as agriculture consumers, and as nothing has been brought on record to show that they fall within the category of agriculture consumers, they cannot be held entitled for exemption from payment of duty at par the agriculture consumers, as in their cases any exemption under Section 3A of the APED Act, in favour of the cold storages, petitioners, has also not been granted.

17. The demand made by the Licensees from the petitioners/consumers has the sanction of the State Government under Section 7 of the APED Act to the extent of 6 paise kWh in G.O.Ms.No.277, Energy 7 Forests (PR.I (I) Department, dated 09.12.21994.

18. Consequently, there is no other sanction order after G.O.Ms.No.7, dated 08.04.2022, permitting the licensees to recover from the consumers / petitioners in excess of 6 paisa. Any demand in excess of 6 paise kWh from the

petitioners by the 'licensees' being without previous sanction of the Government is without jurisdiction and unsustainable and to that extent, i.e., beyond 6 paisa kWh.

189. Accordingly, this Court holds as under:

(a) **Point No.A (1) and (2):**

The G.O.Ms.No.7, dated 08.04.2022, does not suffer from vice of colourable exercise of power, nor violative of Article 14 of the Constitution of India.

(b) **Point No.B:**

The licensees can recover duty from the petitioners / consumers only @ 6 paisa kWh under the sanction order under G.O.Ms.No.277, dated 09.12.1994, and not in excess thereof. There is no other previous sanction of the State Government for any amount of duty now imposed on licensees, in excess of 6 paisa kWh.

(c) **Point No.C:**

The petitioners / Alloy Industries have to pay the same duty as in Point No.B (supra), unless they are granted exemption under the statutory provisions.

(d) **Point No.D**:

The petitioners / Cold Storage industries failed to establish that they are agricultural consumers. Consequently, they are not exempted from payment of duty, in terms of Point B (supra).

190. In the result,

i) the challenge to the impugned G.O.Ms.No.7, Energy (Power-III) Department, dated 08.04.2022, fails. The Writ Petitions are dismissed to that effect.

ii) The demand notices by licensees to the petitioners in excess of @ 6 paise kWh, to the extent of excess, cannot be enforced.

iii) It is clarified that the petitioners shall have to pay duty @6 paise kWh, subject to any other previous sanction of State Government under Section 7 of APED Act for the rate of duty in excess of 6 paisa kWh.

iv) The petitioners / consumers are granted liberty to file applications before their respective licensees for refund or adjustment of the excess amount of the duty, if paid by them, in excess of 6 paisa kWh, upon which, the respective licensees shall proceed accordingly.

v) All the writ petitions are allowed in part in the aforesaid terms.

191. No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed in consequence.

RAVI NATH TILHARI, J

Date: 15.09.2023
Dsr

Note:
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