IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 9360 of 2025

Reserved on: 7.5.2026

Decided on: 07.8.2026

Uploaded on: 07.8.2026

M/s Ruchira Papers Ltd. …Petitioner.

Versus

HPSEBL & Another. …Respondents.

Corum

Hon'ble Mr. Justice Vivek Singh Thakur, Judge.

Hon'ble Mr. Justice Ranjan Sharma, Judge.

Whether approved for reporting?[1] Yes.

For the Petitioner. ***Mr.Manik Sethi and Ms.Shabnam, Advocates.***

For the Respondents: ***Ms.Sunita Sharma, Senior Advocate with Mr.Saurav Upadhyay, Advocate, vice Mr.Dhananjay Sharma, Advocate, for respondent No. 1.***

Mr.Anup Rattan, Advocate General with Ms.Swati Draik, Deputy advocate General and Mr.Shalabh Thakur, Assistant Advocate General, for respondent No. 2.

Vivek Singh Thakur, Judge

Petitioner has approached this Court seeking following substantive relief:-

"A. A writ in the nature of mandamus or any other appropriate writ to declare that Section 3(1) (xi) of the Electricity Duty Act 2009, to the extent that the same is allowing the charging the electricity duty

[1]***Whether the reporters of the local papers may be allowed to see the Judgment? Yes***

over diesel generating sets for own consumption and also, the notification dated 01.09.2023 to the extent of increasing the rate of electricity duty from 30 paisa per unit to 45 paisa per unit qua the electricity duty over diesel generating sets for own consumption is arbitrary and impermissible under the law."

2. Petitioner has approached this Court against levy of electricity duty in the case of electrical energy generated by diesel generating sets or by whatsoever mode, for use of construction of a power project or captive/standby for own consumption by the licensee or consumer, as provided under Section 3(1)(xi) of the Himachal Pradesh Electricity (Duty) Act, 2009 (for short '2009 Act).

3. It is the case of the petitioner that levying electricity duty on energy generated from a diesel generating set for self-consumption is arbitrary, as the same is exceeding the scope of sanction for levying the duty in terms of Section 3 of the 2009 Act.

4. It has also been contended on behalf of the petitioner that under Section 3 of the 2009 Act, electricity duty would be charged on the energy produced from any source which is consumed by (a) the Board, (b) any licensee, (c) electricity trader, or (d) generating company; OR supplied by (a) the Board, (b) such licensee, (c) such electricity trader, or (d) such generating company 'to the consumer' and, therefore, by invoking the provisions of this Section, electricity duty cannot be charged in case the energy/electricity is consumed by the consumer generated by any mode but not supplied by any one or more persons out of persons i.e. Board,

licensee, electricity trader or generating company referred in Section 3 of the 2009 Act.

5. It has been submitted that the provisions of Section 3(1)(xi) of the 2009 Act are beyond the scope of Section 3 of the 2009 Act, which is impermissible under law.

6. It has also been contended on behalf of petitioner that increase in rate of electricity duty from 30 paisa per unit to 45 paisa per unit qua the electricity duty over diesel generating sets for own consumption, vide notification dated 1.9.2023, is arbitrary and impermissible under law.

7. It has also been contended on behalf of petitioner that it is not that the petitioner, by its own will, is operating diesel generating sets for the generation of energy for captive use, but it is a compulsion because of power cuts by respondent No. 1-Board, which compels consumers to utilize the energy from diesel generating sets, because of which consumers are compelled to use energy from diesel generating sets despite the fact that it costs almost three times than the normal rate of electricity and for failure on the part of respondent No. 1-Board to supply the electricity to the consumer, the consumer cannot be penalized for generating energy through diesel generating sets for captive use.

8. It has been submitted that petitioner is not generating energy for supply of electricity to anybody else, but only for captive use during

power cuts so as to ensure the functioning of its industrial unit to avoid losses.

9. In response, it has been stated in the reply filed on behalf of respondent No. 1-Board that the increase in rates of electricity duty, vide Notification dated 1.9.2023 on diesel generating sets from 30 paisa to 45 paisa per unit is in consonance with the powers vested in the State under the Himachal Pradesh Electricity (Duty) Act, 2009 and other relevant provisions of law. It has been submitted that imposition of such duty is a fiscal policy matter of the State Government, which falls within the ambit of Legislative competence as envisaged under Entry 53 of List II (State List) of the Seventh Schedule of the Constitution of India.

10. It has been further submitted on behalf of respondent No. 1-Board that electricity duty on diesel generating sets aligns with the State's broader environmental goals and public policy initiatives aimed at promoting sustainable energy usage and discouraging the use of polluting non-renewable energy sources, because diesel generating sets contribute significantly to air pollution and environmental degradation and, therefore, by levying this duty, the Government seeks to promote cleaner and greener alternatives, in line with National and International environmental commitments.

11. It has been further submitted that there is a clear and rational nexus between the imposition of the duty and the objective of reducing the

reliance on diesel generating sets, which are harmful to the environment. It has been further submitted that duty is not punitive in nature but is a regulatory measure designed to encourage the adoption of alternative energy sources, which are more eco-friendly and sustainable.

12. It has been further submitted that imposition of electricity duty on diesel generating sets is necessary for the fiscal health of the State to generate essential revenue that can be directed for development of renewable energy infrastructure and other public welfare projects.

13. It has been also contended that it is within the legislative power of the State to raise revenue through reasonable taxes and duties.

14. It has been further submitted that impugned Notification is non-discriminatory, as it applies equally to all industries and consumers using diesel generating sets and does not create any unreasonable classification.

15. It has been contended that rate of 45 paise per unit is reasonable, which has been determined after considering various factors, including environmental costs and the need to promote energy conservation.

16. It has been submitted that imposition of this duty does not violate any fundamental rights guaranteed under the Constitution, including the right to carry on trade or business under Article 19 (1) (g) of the Constitution. Further that electricity duty does not create any unreasonable

restriction on industries or businesses, instead it serves a larger public interest and is a reasonable regulatory measure which is permissible under law.

17. It has been submitted that Section 3 of the Himachal Pradesh Electricity (Duty) Act, 2009 does not restrict the power of the Government to levy electricity duty only to supply by a licensee, but also allows it for self-generated electricity, as is the case with diesel generating sets. It has been contended on behalf of respondent-Board that imposition of electricity duty on diesel generating sets is based on sound policy considerations by the Government, as Section 3 of the 2009 Act does not limit the Government power of levy electricity duty only to conventional electricity supplied by the State Electricity Board and it explicitly includes all forms of electricity generation, including self-generation by any mode, such as by diesel generating sets.

18. Lastly, it has been contended that imposition of electricity duty is neither unconstitutional nor unreasonable, with further submission that use of diesel generating sets has an adverse impact on air quality and contributes to environmental degradation and electricity duty has been imposed to balance economic and environmental considerations and is in line with the Paris Climate Agreement and other commitments India has made to reduce carbon emissions.

19. In rejoinder stand of the petitioner has been re-iterated.

20. Respondent No. 2-State has also filed reply on the same line as has been filed by respondent No. 1-Board.

21. It has been stated that rejoinder filed to the reply of Board also serves the purpose of filing rejoinder to the reply filed on behalf of respondent No.2.

22. For adjudication of the issue raised in present petition, it would be relevant to refer certain definitions provided in Himachal Pradesh Electricity (Duty) Act, 2009, which read as under:-

> “2. **Definitions**.- In this Act, unless the context otherwise requires,-
>
> (a) "Board" means the Himachal Pradesh State Electricity Board constituted under sub-section (1) of section 5 of the repealed Electricity (Supply) Act, 1948 (Act No. 54 of 1948);
>
> (b) "consumer" means any person or establishment who uses or consumes energy and includes categories of consumers specified under section 3 of this Act;
>
> (c) “consumption” in relation to electricity means electrical consumption per Kilowatt/KVA recorded as KWh or KVAh. by a licensee or consumer;
>
> (d) “energy” means electric energy;
>
> (e)-(i) ….. ….. ….
>
> (j) “supply” in relation to electricity means the sale of electricity to a licensee or consumer; and
>
> (k) the words and expressions used in this Act, but not defined shall have the meanings as assigned to them in the Electricity Act, 2003 or the Indian Electricity Rules,1956.”

23. Definitions of certain words and terms referred in 2009 Act, but not defined under Section 2, provided in the Electricity Act, 2003, as envisaged under Section 2 (k) of 2009 Act, are as under:-

> "Definitions: --- In this Act, unless the context otherwise requires,--
>
> (1)-(6) …. …. …
>
> (7) "Board" means, a State Electricity Board, constituted before the commencement of this Act, under sub-section (1) of section 5 of the Electricity (Supply) Act, 1948;
>
> (8) "Captive generating plant" means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any co-operative society or association of persons for generating electricity primarily for use of members of such cooperative society or association;
>
> (9)-(12) …. ….. ….
>
> (13) "company" means a company formed and registered under the Companies Act, 1956 and includes any body corporate under a Central, State or Provincial Act;
>
> (14) …. ….. ….
>
> (15) "consumer" means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be;
>
> (16)-(22) ….. ….. …..
>
> (23) "electricity" means electrical energy-
>
> > (a) generated, transmitted, supplied or traded for any purpose; or

(b) used for any purpose except the transmission of a message;

(25) …… ….. …..

(26) "electricity trader" means a person who has been granted a licence to undertake trading in electricity under section 12;

(27) ……. ….. …..

(28) "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or artificial juridical person, which owns or operates or maintains a generating station;

(29) "generate" means to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given;

(30)-(37) …… ….. …..

(38) "licence" means a licence granted under section 14;

(39) "licensee" means a person who has been granted a licence under section 14;

(40)-(69) …. …. ….

(70) "supply", in relation to electricity, means the sale of electricity to a licensee or consumer;

(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly."

24. Section 3 of the Himachal Pradesh Electricity (Duty) Act, 2009, provisions whereof are directly in issue in present matter, reads as under:-

"3. Levy of electricity duty on consumption or supply of energy.-

(1) There shall be levied and paid to the State Government on the energy, generated from any source, consumed by the Board, any licensee, electricity trader or generating company or supplied by

the Board, such licensee, trader or company to the consumer, a duty to be called the electricity duty, in the following manner, namely:-

(i) domestic consumers	-@ 3%,
(ii) non domestic non-commercial consumers	-@ 3%,
(iii) agricultural/irrigation or allied activities supply consumers	-@ 10%,
iv) commercial consumers	-@ 8%
(v) industrial consumers,-	
(a) small industrial consumers	-@ 9%,
(b) medium industrial consumers	-@ 15%
(c) large industrial consumers (above 100 KW connected load)	-@ 20%]
(vi) water pumping supply consumers	-@ 10%,
(vii) bulk supply consumers	-@ 10%,
(viii) street lighting supply consumers	-@ 10%,
(ix) temporary metered supply consumers	-@ 4%,
(x) other category of consumers not covered under clauses (i) to (ix) above	-@ 10% and,
(xi) In case of electrical energy generated by diesel generating sets (or by what so ever mode) for use of construction of power projects or captive/ standby for own consumption by the licensee or consumer, electricity duty per unit:	-@ 30 paise:

Provided that the percentage mentioned against each categories shall be applicable on energy charges only (excluding meter rent, service charges etc.).

(2) Nothing in section 3 shall apply to the consumption or sale of electricity which is-

(a) consumed by the Government of India, State Government or sold to the Government of India or other Government(s) within the territories of Indian

Union for consumption or sale by that Government or other utilities engaged in power sector; or

(b) consumed in the construction, maintenance or operation of any railway by the Government of India or a railway company operating that railway, or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway; or

(c) consumed by a licensee or by consumer generating energy for their own consumption; provided the capacity of generator does not exceed 10 KW.

(3) For the purpose of computing the electricity duty, the consumption shown by the meter, starting after the first meter reading date, after the issuance of the notification under sub-section (1) of section 3 shall be taken into account."

25. Section 14 of the Electricity Act, 2003 reads as under:-

"14. Grant of licence.---The The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person -

(a) to transmit electricity as a transmission licensee; or

(b) to distribute electricity as a distribution licensee; or

(c) to undertake trading in electricity as an electricity trader, in any area as may be specified in the licence:"

26. Relevant entry contained in List I and II of 7th Schedule of the Constitution are as under:-

"List-I, entry 84 as was existing before 16.9.2016

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

(a) alcoholic liquors for human consumption;

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

Entry 84 as existing w.e.f. 16.9.2016

Duties of excise on the following goods manufactured or produced in India, namely:---

(a) petroleum crude;

(b) high speed diesel;

(c) motor spirit (commonly known as petrol);

(d) natural gas;

(e) aviation turbine fuel; and

(f) tobacco and tobacco products."

Entry 97 of List 1- Union List.

"97. Any other matter not enumerated in Lisdt II or List III including any tax not mentioned in either of those Lists."

List II-State List, Entry 53

"53. Taxes on the consumption or sale of electricity."

Entry 38 List III-Concurrent List.

"Electricity."

27. Section 3 of 2009 Act has two parts, which provides that electricity duty shall be leviable on the energy:

(a) generated from any source,

(b) consumed by the Board, any licensee, electricity trader or generating company;

OR

supplied by the Board, such licensee, trader or company to the consumer.

28. Firstly, there must be energy generated from any source and secondly either it should be consumed by Board, such licensee, trader or

company or it should be supplied by the Board, licensee, trader or company to the consumer.

29. The energy generated by diesel generating sets for use of consumption/stand by, for own consumption by the consumer, is not an energy generated by any source and consumed by the Board, licensee, trader or company or an energy generated from any source supplied 'to the consumer' by the Board, licensee, trader or company. Therefore, energy generated by diesel generating sets by consumer for its consumption/standby, for own consumption is not an energy generated from any source, liable to levy of electricity duty in terms of provisions of Section 3 of 2009 Act.

30. There are two separate essential ingredients for existence whereof energy generated from any source shall be liable to levy of electricity duty.

31. First is energy consumed by Board, licensee, electricity trader or company, and Second is energy supplied, by the Board, licensee, trader or company, to the consumer.

32. An energy generated by diesel generating sets and used by consumer for own consumption, is not a case of generation of energy which is consumed by Board, licensee, electricity trader or generating company nor it is a case of supply of energy by the Board, licensee, electricity trader or company to the consumer. Thus levy of electricity duty on electrical

energy generated by diesel generating sets for use of captive/stand by energy for own consumption by the consumer, is beyond the scope of substantive provisions of Section 3 of 2009 Act.

33. The Electricity Duty Act, 2009 was enacted to re-enact the law to provide levy of electricity duty on consumption or supply of electricity in the State of Himachal Pradesh or matters connected therewith or incidental thereto.

34. For the purpose of levying electricity duty Section 3 has been incorporated in 2009 Act.

35. As discussed supra provisions of charging Section, i.e. Section 3 of 2009 Act does not empower the respondents to levy electricity duty on energy generated by diesel generating sets by the consumers for use of captive/stand by for own consumption.

36. As evident from definitions referred supra, petitioner is neither board nor licensee or electricity trader or generating company which consumes energy generated from diesel generating sets. Petitioner is also not Board or licensee, trader or company supplying energy generated from diesel generating sets to consumer.

37. Petitioner itself is a consumer, who as per substantive provisions of charging Section 3 of 2009 Act, is not liable for electricity duty for generation of energy by diesel generating sets for its own consumption

as essential ingredients in case of petitioner mandatory for levy of electricity duty, are missing.

38. Learned Advocate General, to justify levy of electricity duty on consumer for consumption of electricity generated by diesel generating sets for own use by the consumer, has placed reliance on judgment of Apex Court in ***Jiyajeerao Cotton Mills Ltd., Birlanagar, Gwalior Vs. State of Madhya Pradesh, AIR 1963 SC 414,*** by referring following paragraphs:

> "(2). The appellant is a textile mill at Gwalior in Madhya Pradesh. It generates electricity for the purpose of running its mills and for other purpose connected therewith. It does not sell electrical energy to any person.
>
> (3). Under the provisions of the Central Provinces and Berar Electricity Duty Act, 1949 (No. 10 of 1949)as amended by the Madhya Pradesh Taxation Laws Amendment Act, 1956 (Act No. 7 of 1956) the Government of Madhya Pradesh levied upon the appellant electricity duty amounting to Rs. 2,78,417/- for a certain period. The appellant paid it under compulsion and thereafter preferred a writ petition to the High Court of Madhya Pradesh under Art. 226 of the Constitution in which it challenged the validity of the levy on two grounds. The first ground was that upon a proper construction of s. 3 of the C. P. & Berar Electricity Duty Act, 1949 as amended by the Madhya Pradesh Taxation Laws amendment Act, 1966 the appellant would not be liable to pay any duty at all. The second ground was that if the Act permitted the levy of duty on electricity consumed by the producer himself it was ultra vires the Constitution because in substance it would be a duty of excise which can be levied only by Parliament under Entry 84 of List I and that oven if it was not excise duty it was beyond the competence of the Madhya Pradesh legislature to levy it in the absence of any

appropriate entry in List II. The petition was summarily rejected by the High Court, but upon an application made by the appellant it granted to it certificate of fitness, as already stated.

(4). Mr. Viswanatha Sastri has reiterated before us the same grounds which were urged in the High Court.

(5). For the purpose of appreciating the first ground it would be useful to reproduce the terms of B. 3 of the Act. The section runs thus:

> "Levy of duty on sale or consumption of electrical energy- Subject to the exceptions specified in Section 3-A every distributor of electrical energy and every producer shall pay every month to the State Government at the prescribed time and in the prescribed manner a duty calculated at the rates specified in the Table below on the units of electrical energy sold or supplied to a consumer or consumed by himself or his employees during the preceding month.
>
> Rates of Duty
>
> | | |
> |---|---|
> | (i) Electrical energy supplied for consumption for lights, fans of any other appliances normally connected to a lighting circuit | 6 nP per unit of energy. |
> | (ii) Electrical energy supplied for purposes other than those specified in item (i) above. | 1 nP. per unit of energy." |

This is the charging section. It is not disputed by Mr. Sastri that under this provision a producer of electrical energy is made liable to pay duty for the units of electrical energy consumed by himself. He, however, contends that rates of duty have been prescribed in the Table below S. 3 only with respect to electrical energy "supplied for consumption" to others and that no rates have been prescribed with respect to electrical energy consumed by the producer himself. Section 2(a) of the Act defines "consumer". The definition, so far as relevant, runs thus:

> "`Consumer' means any person who consumes electrical energy sold or supplied by a distributor of electrical energy or a producer............…"

Producer' as defined S. 2(d-1) of the Act means "a person who generates electrical energy at a voltage exceeding hundred volts for his own consumption or for supplying to others". If we read the two definitions together, omitting the non-essentials, 'consumer' would include "'any person who consumes electrical energy supplied by a person who generates electrical energy for his own consumption". Under S. 3 a person who generates electrical energy over hundred volts for his own consumption is liable to pay duty on the units of electrical energy consumed by himself. A producer consuming the electrical energy generated by him is also a consumer, that is to say, he is a person who consumes electrical energy supplied by himself. The Table prescribes rates of duty payable with respect to electrical energy supplied for consumption and, therefore, the levy on the appellant falls squarely within the Table under S. 3 of the Act and M/s. Viswanatha Sastri's argument is devoid of substance.

(6). It is difficult to see how the levy of duty upon consumption of electrical energy can be regarded as duty of excise falling within Entry 84 of List I. Under that Entry what is permitted to Parliament is levy of duty of excise on manufacture or production of goods (other than those excepted expressly by that entry). The taxable event with respect to a duty of excise is "manufacture" or "production". Here the taxable event is not production or generation of electrical energy but its consumption. If producer generates electrical energy and stores it up, he would not be required to pay any duty under the Act. It is only when he sells, it or consumes it that he would be rendered liable to pay any duty prescribed by the Act. The Central Provinces and Berar Electricity Act was enacted under Entry 48B of List II of the Government of India act, 1935. The relevant portion of that Entry read thus:

"Taxes on the consumption or sale of electricity........."

Entry 53 of List II of the Constitution is to the same effect. The argument of Mr. Sastri is that the word "consumption" should be accorded the meaning which it had under the various Act, including the Indian Electricity Act, 1980. Under that Act and under the various Provincial and Act, consumption of electricity mean, according to him, consumption by persons other than producers and that both in the Government of India Act any under the Constitution the word 'consumption' must be deemed to have been used in the Fame sense. The Acts in question deal only with a certain aspect of the topic '"electricity", and not with all of them. Therefore, in those Acts the word "consumption" they have a limited meaning, as pointed out by learned counsel. But the word "consumption" has a wider meaning. It means also "use up" "spend" etc. The mere fact that a series of laws were concerned only with a certain kind of use of electricity, that is consumption of electricity by persons other than the producer cannot justify the conclusion that the British Parliament in using the word "consumption" in Entry 48B and the Constituent Assembly in Entry 53 of List he wanted to limit the meaning of "consumption" in the same way. The language used in the legislative entries in the Constitution must be interpreted in a broad way so as to give the widest amplitude of power to the legislature to legislate and not in a narrow and pedantic sense. we cannot, therefore, accept either of the two grounds urged by Mr. Viswanatha Sastri challenging the vires of the Act."

39. As apparent from the relevant Section 3 of the Act in reference in aforesaid judgment in *Jiyajeerao Cotton Mills* case, the levy of

duty was on sale or consumption, but making liable all to pay duty on the electrical energy sold or supplied to a consumer or 'consumed by himself by every producer', which includes the generation/produce of electricity by a consumer for own consumption. Whereas in present case in charging portion of section 3 of 2009 Act, electricity duty, for consumption, is leviable only to Board, any licensee, electricity trader or generating company which does not include every consumer or every person or every producer as provided in provisions of the Act in reference in *Jiyajeerao Cotton Mills* case. Therefore, this judgment is of no help to the State.

40. Learned Advocate General has also placed reliance upon three judges' Bench judgment passed by Apex Court in ***Swaroop Vegetables Products Vs. State of U.P. and others,*** reported in ***(1983) 4 SCC 24***. Relevant paragraphs are as under:-

> "3. Sections 3 (1) and Section 4(1) of the Act in so far as material read thus;-
>
> "3. *Levy of Electricity Duty*---(I) Subject to tho provisions herein after contained, there shall be levied for and paid to the State Government on the energy:
>
> (a) Sold to a consumer by a licensee, the Board, the State Government or the Central Government, or
>
> (b) Consumed by a licensee or the Board in or upon premises used for commercial or residential purposes, or in or upon any other premises except in the construction, maintenance or operation of his or its works; or

(c) Consumed by any other person from his own source of generation; a duty (hereinafter) referred to as 'electricity Duty') ....

* * *

* * *

4. *Payment of electricity duty and interest thereupon:-*

(1) The electricity duty shall be paid, in such manner and within such period as may be prescribed, to the State Government.

(a) Where the energy is supplied or consumed by a licensee, by the licensee:

(b) Where the energy is supplied by the State Government or the Central Government or is supplied or consumed by the Board, by the appointed authority; and

(c) Where the energy is consumed by any other person from his own source of generation by the person generating such energy."

4. The original writ Petitioners who canvass the view that electricity duty is not leviable or payable by a person consuming energy from his own source of generation under Section 3 (1) (c) read with Section 4 (l) (c) of the Act lay great stress on the expression 'another person' occurring in Section 3 (l) (c) and Section 4 (1) (c) of the Act. It is contended that in view of the user of this expression only those consumers who wholly fall outside the orbit of Sections 3 (1) (a) or 3 (l) (b) are eligible to electricity duty under Section 3(1) (c). In case a consumer fails 'both' under Sections 3 (1) (a) and 3 (1) (c) or Sections 3 (1) (b) and 3 (1) (c) (it is so argued such a person would not be exigible to electricity duty. The same argument is urged pro tanto in the context of clauses (a), (b) and (c) of Section 4(1). In our opinion this submission is altogether untenable and has been rightly repelled by the Pull Bench of the Allahabad High Court in its

well considered judgment. On a plain reading of Section 3 (1) (c) it is evident that duty has been levied on the energy consumed by a person from his own source of generation without anything more. There is no rider or qualification engrafted in Section 3 (1) (c) or Section 4 (1) (c). The fact that the user of electricity from his own source of generation purchases electricity from some other source as well, is an altogether irrelevant factor from the stand point of the liability imposed by the said provisions. Be it realized that duty is levied on the consumption of energy. The taxing event is the consumption of energy The source from which the electricity is acquired is altogether irrelevant. . A person having his own source of energy who also purchases energy from another source indicated in Section 3 (1) (a) will be covered by 3 (1) (a) to the extent he purchases electricity from such a source, and will be equally covered by Section 3 (1) (c), insofar as he consumes energy from his own source of generation. He will be covered by both the provisions read conjointly. The same reasoning applies in the context of clauses (a) (b) and (c) of Section 4 (1). There is no rational basis for exonerating a person from payment of duty merely because he has his own source of generation and he also purchases electricity from some other source. In fact it will be irrational to do so and it would give rise to an anachronism. Why make him pay *only* if he generates his own energy and why exempt him altogether merely because he *also* purchases from some other source? Duty is levied as a measure of taxation in order to raise additional revenue as is made abundantly clear by the prefactory note and the extract from the statement of objects and reasons published in U. P. Gazette Extraordinary dated September 1, 1952 which reads as under:

> "The minimum programme of development which this State must carry out within the next three or four years for the attainment of the objective of a welfare State is set out

in the Five Year Plan drawn up by the Planning Commission. This plan provides for an expenditure of 13.58 crores of rupees on power development projects. Such a huge expenditure cannot be met from our present resources. It is, however essential for the welfare of the people that the expenditure should be incurred and that noting should be allowed to stand in the way of the progress of the plan. Additional resources have therefore to be found, the bulk of which can be raised only by means of fresh taxation.

A tax on the consumption of electrical energy will impose a negligible burden on the consumer and is a fruitful source of additional revenue. The bill has been so prepared as to ensure that the tax payable by a person will be related to the quantity of electricity consumed by him. The bill is being introduced with the above object. Vide Statement of Objects and Reasons published in U. P. Gazette. Extra. dt. September 1, 1952."

5. How would this object be promoted or served by adopting such an irrational course? The taxing event being the consumption of energy, the source from which the electricity is acquired would become altogether irrelevant. Section 3 (1) as also Section 4 (1) has to be read as a whole and has to be interpreted in a harmonious and meaningful manner. To do otherwise would be to defeat the legislative intent which is abundantly clear, whilst at the same time exposing the provision to the charge of being irrational and arbitrary, by placing such an unwarranted construction thereon. The Full Bench of the Allahabad High Court, was, therefore, perfectly justified in taking the view that duty was chargeable in respect of energy consumed by a person from his own source of generation regardless of the fact that he 'also' purchased electricity from some other source indicated in Section

3 (1) (a) and Section 4 (1) (a). The appeal preferred by the State, being Appeal No. 1312/77 will therefore have to be allowed and the appeals preferred by the consumers of electricity challenging the correctness of the decision rendered by the Full Bench must therefore be dismissed.

6. The next question agitated in five out of the seven appeals comprised in the group (it does not arise in C.A. 1312/77 and C.A. 1146/79) arises thus:- The State of U.P. issued a notification dated March 17, 1973 whereby in exercise of powers under sub-section (4) of Section 3 of the Act a person consuming energy from his own source of generation installed 'after' January 2, 1973 was exempted from payment of electricity duty. The appellants in the appeals before us are persons who have their own source of generation of electricity. The generating machinery was however installed and commissioned by them 'before' January 2, 1973. It is their contention that exemption could not have been lawfully granted to a person installing his own source of generation 'after' January 2, 1973 unless exemption was also granted to the persons consuming electricity from their own source of generation installed 'prior' to January 2, 1973. In other words the argument is that exemption must be granted to all persons having their own source of electricity regardless of the date on which the source of generation is installed, in order to be able to successfully face the challenge from the platform of Article 14 of the Constitution of India. Exemption, (it is argued in effect), must be granted to all or to none irrespective of the date of installation of the equipment for generation of electricity to save the provision from the peril of being held as unconstitutional by reason of its being discriminatory and violative of Article 14 of the Constitution. This argument has been rightly negatived by the High Court for the very good reason that the Notification ex-facie made it abundantly clear that exemption was being granted "having regard to the need to promote industrial

production generally and to the prevailing acute power shortage in the State." It is evident that in view of the felt-need for augmenting the sources of supply of electrical energy an incentive needed to be provided by way of granting exemption to those who installed their own source of generation of energy. As acute shortage of power was being experienced there was a need to encourage the consumers to acquire their own source of energy with a view to reduce or lessen the burden on the existing sources of electricity generation. Obviously this purpose can be achieved only by granting the exemption prospectively to those consumers who install their own source of generation of energy pursuant to the concession being granted under the provision for exemption. Those who already had their own source of generation of energy need no such encouragement in respect of the source of generation already installed. If they wanted to further augment their own source of generation of energy they would also be entitled to exemption in respect of the *additional* source of generation installed 'after' the date specified in the notification. The classification is, therefore, rational, purposeful, as also meaningful, and it is calculated to effectively serve the real purpose of granting exemption. Article 14 cannot be invoked in a situation like this to successfully assail that part of the notification where by the date of installation has been made the precondition for qualifying for exemption.

7. State of *Uttar Pradesh v. Jageshwar (1983) 2 SCC 305* on which reliance is placed cannot buttress the view canvassed by the writ petitioners having regard to the fact that exemption was granted with a view to encouraging consumers of electricity to become self-sufficient hence-forth and with the end in view to lessen the burden on the other source of generation prospectively. As against this those who had already acquired their own source for generating electricity were in need of no retroactive encouragement by way of concession or exemption for doing what

> they had already done. There would have been no augmentation of the existing resources by extending the exemption to them. Under the circumstances we are of the opinion that the High Court was fully justified in repelling the plea urged by the writ petitioners in this behalf."

41. In aforesaid *Swaroop Vegetables'* case also the relevant provisions of Section 3 (1) (C) and 4 (1) (C) are the basis for upholding the levy of electricity duty on any person, including the consumers for electricity consumed by such person for his own use from own source of generation. Bare reading of provisions of Section 3 (1) (C) and 4 (1) (C) unambiguously indicates that the charging Section provides levy of electricity duty on the energy consumed by any person from his own source of generation. Similarly, Section 4 (1) (C) provides liability to pay electricity duty by a person, where energy is consumed by such person generating such energy from his own source of generation.

42. In present case under charging Section 3 of 2009 Act, as also observed supra, there is no provision for levying or paying electricity duty on a consumer or every person for consuming electricity after generating it from own source, including diesel generating sets. For consumption of energy generated from any source the duty is leviable on and payable by the Board, licensee, electricity trader or generating company, but not by every person who itself produces energy from any mode for his own consumption. The duty is leviable on consumer and payable by the

consumer only when it is supplied by the Board, licensee, trader or company to the consumer. Therefore, when there is no provision for charging tax in the charging portion of Section 3 of 2009 Act, the same cannot be levied in the manner prescribed for giving effect to the charging portion of Section 3 of 2009 Act and thus, judgment in *Swaroop Vegitables'* case is also of no help to the State.

43. Learned Advocate General has also placed reliance upon the judgment of the Apex Court in ***Southern Petrochemical Industries Co. Ltd. Vs. Electricity Inspector & ETIO and others,*** reported in ***(2007) 5 SCC 447***, to refer the findings returned by the Apex Court on the following issue:-

> "**Constitutional scheme and the vires issue**
>
> 53. Article 245 of the Constitution of India vests the Parliament with power of legislation on all matters enumerated in List I and also the matters enumerated in List III of the Seventh Schedule of the Constitution of India. The State Legislature, however, has the exclusive right to legislate matters specified in the Entries contained in List II.
>
> 54. Federal supremacy no doubt recognizes that the State's power to legislate with regard to any matters in List III would be subject to any Act of the Parliament; however, Clause (3) of Article 246 of the Constitution of India gives the legislature of the State an exclusive power with respect to any matters in List II, subject to restriction imposed in the entry itself, as for example, Entries 1, 2, 12, 13, 17, 22, 23, 24, 32 and 33. Entry 53 of List II does not contain any such restriction and has not been made subject to any of the entry made in List I or List III.

55. Various entries in the three Lists provide for the fields of legislation. They are, therefore, required to be given a liberal construction inspired by a broad and generalize spirit and not in a pedantic manner. A clear distinction is provided for in the scheme of the Lists of the Seventh Schedule between the general subjects of legislation and heads of taxation. They are separately enumerated. Taxation is treated as a distinct matter for purposes of legislative competence vis-a-vis the general entries. Clauses (1) and (2) of Article 248 of the Constitution of India also manifests the aforementioned nature of the entries of the List, and, thus, the matter relating to taxation has been separately set out. The power to impose tax ordinarily would not be deduced from a general entry as an ancillary power. In List II, entries 1 to 44 form one group providing for the legislative competence of the State on subjects specified therein, whereas entries 45 to 63 form another group dealing with taxation. We, however, do not mean to suggest that in regard to the validity of a taxation statute, the same, by itself, would be a determinative factor as in a case where the Parliament may legislate an enactment under several entries, one of them being a tax entry.

56. A bare perusal of Entry 53 of List II and Entry 38 of List III, however, clearly suggests that they are meant to operate in different fields.

57. In *State of A.P. Vs. National Thermal Power Corpn. Ltd. (2002) 5 SCC 203,* this Court has clearly held that: (SCC p. 225, para 26)

> "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."

Entry 53 does not contain any such restriction and, thus, clause (3) of Article 254 of the Constitution of India will have no application in the instant case.

58. Legislative competence of the State of Tamil Nadu to legislate the impugned Act is beyond any dispute. It cannot, therefore, be said that the State's action in enacting the Act suffers from colourable exercise of any power. Thus, it can be safely concluded that the State has not over-stepped its limits of power. (See *K.C. Gajapati Narayan Deo and Others vs. The State of Orissa, AIR 1953 SC 375 : 1954 SCR 1* and *R.S. Joshi vs. Ajit Mills Limited, (1977) 4 SCC 98*) : 1977 SCC (Tax) 536).

59. In the decision of this Court in *Raja Jagannath Baksh Singh vs. State of U.P.,* AIR 1962 SC 1563, it has been held: (AIR p. 1572, para 21).

> "21. .… Though the validity of a taxing statute cannot be challenged merely on the ground that it imposes an unreasonably high burden, it does not follow that a taxing statute cannot be challenged on the ground that it is a colourable piece of legistation and as such, is a fraud on the legislative power conferred on the legislature in question. If, in fact, it is shown that the Act which purports to be a taxing Act is a colourable exercise of the legislative power of the legislature, then that would be an independent ground on which the Act can be struck down. Colourable exercise of legislative power is not a legitimate exercise of the said power and as such, it may be open to challenge. But such a challenge can succeed not merely by showing that the tax levied is unreasonably high or excessive, but by proving other relevant circumstances which justify the conclusion that the statute is colourable and as such, amounts to a fraud."

60. Entry 53 of List II provides for a taxation entry; whereas Entry 38 of List III provides for a non-taxation entry dealing with general aspects of electricity excluding taxation. The 1998 Act empowers the Commission only to fix the electricity tariff or the charges for consumption of electricity. The legislation made by the State is independent of actual tariff of electricity charges. Tariff would mean a cartel of commerce and normally it is a book of rates. (BSES Ltd. Vs. Tata Power Co. Ltd. (2004) 1 SCC 195, SCC at p. 208).

61. Article 254 deals with methods of resolving conflict between the law made by the Parliament and law made by the State in respect of the matters enumerated in the concurrent list. In *M.P. Vidyut Karamchari Sangh vs. M.P. Electricity Board* (2004) 9 SCC 755, it was held: (SCC p. 767, para 28).

> "28. Recourse to the said principles, however, would be resorted to only when there exists direct conflict between two provisions and not otherwise. Once it is held that the law made by Parliament and the State Legislature occupy the same field, the subsequent legislation made by the State which had received the assent of the President of India indisputably would prevail over the parliamentary Act when there exists direct conflict between two enactments. Both the laws would ordinarily be allowed to have their play in their own respective fields. However, in the event there does not exist any conflict, the parliamentary Act or the State Act shall prevail over the other depending upon the fact as to whether the assent of the President has been obtained therefor or not. (See *Bharat Hydro Power Corpn. Ltd. vs. State of Assam (2004) 2 SCC 553*)"

62. The 2003 Act is, thus, not repugnant to the 1948 (*sic* 1998) Act."

44. With regard to the aforesaid settled exposition of law, there is no quarrel. However, in present case, it is of no help to the respondents as in charging portion of Section 3 of 2009 Act, there is no provision for levying duty on every person generating energy from any source, consuming himself/itself.

45. In ***Southern Petrochemical Industries'*** case, following paras are also relevant to be referred:-

> "2. Validity and/or application of Tamil Nadu Tax on Consumption or (Sale of Electricity Act, 2003 (for short "the 2003 Act") is in question in these appeals which arise out of a common judgment dated 13.07.2006 passed by a Division Bench of the High Court of Madras.
>
> 3-21. …. ….. ….
>
> 22. Validity of the provisions of the 2003 Act and/ or application thereof in respect of the generating companies as also the consumers of electrical energy being purchasers from the Tamil Nadu Electricity Board came to be questioned before the Madras High Court in a large number of writ petitions. The matter was heard by a Division Bench of the said High Court. By reason of a judgment and order dated 13.07.2006, the Division Bench dismissed the writ petition.
>
> *The High Court judgment*
>
> 23. The High Court noticed seven arguments raised before it. It decided all the issues against the writ petitioners. Before us, only argument Nos. 1, 3, 4, 5 and 7 have been pressed.
>
> 24. We may notice the same at the outset:
>
> > "(1) The Tamil Nadu Act 12 of 2003 levying tax on consumption or sale of electricity is invalid for want of assent of

the President of India, in view of Article 288(2) of the Constitution of India.

(2) * * *

(3) The impugned Act is repugnant to Section 29 of the Electricity Regulatory Commissions Act, 1998. The Central Act, 1996 provided for the fixation of tariff for electricity to vest with the Commission. The tariff so fixed should be held to include the entire price payable for the energy. Thus, the impugned State Act which imposes a tax on the sale or consumption of electricity is repugnant to the Central Law. Since the State Act had not received the assent of the President, it is not saved by Article 254(2) of the Constitution. Hence, it is invalid in law.

(4) Under the Tamil Nadu Electricity Taxation on Consumption Act, 1962, some of the appellants were exempted from payment of tax on consumption of self-generated energy. Even though this Act 1962 has been repealed by the present Act, in view of Section 20(2)(a) of the impugned Act, their rights are protected. Therefore, they are entitled to continue the exemption from payment of tax.

(5)-(6) * * *

(7) The tax on consumption should be actual consumption. It cannot include the maximum/sanctioned demand charges. As such, the tax on consumption cannot be levied on such electricity which is lost in transmission. The tax on consumption of electricity should be based on the electricity consumed and not on the electricity lost in transmission."

46. In aforesaid judgment after considering the provisions of the impugned Electricity Act and pronouncements of the Apex Court, it has been concluded by the Apex Court that levying tax on consumption or sale of electricity was not repugnant to the Central Act and was not invalid for

want of assent of President of India, in view of Constitutional provisions and competency of the State to levy duty/tax on consumption and sale of the electricity. However, appeals of the consumers were allowed at different points that tax must be on actual basis, whereas in the case in reference, it was not being charged on actual sale or consumption of electrical energy, but minimum demand which is evident from following paras:-

> “149. It may be that electricity has been considered to be 'goods' but the same has to be considered having regard to the definition of "goods" contained in Clause (12) of Article 366 of the Constitution of India. When this Court held electricity to be 'goods' for the purpose of application of sales tax laws and other tax laws, in our opinion, the same would have nothing to do with the construction of Entry 53 of List II of the Seventh Schedule of the Constitution of India.
>
> 150. Supply does not mean sale. A' fortiori it does not also mean consumption.
>
> 151. A 'goods' may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed.
>
> 152. Strong reliance has been placed by Mr. Andhyarujina on a decision of this Court in M/s. Northern India Iron & Steel Co. v. State of Haryana (1976) 2 SCC 877, wherein it has been held: (SCC p. 882, paras 10-11)
>
> “10. Coming to the question of duty, we have no hesitation in an outright rejection of the extreme contention put forward on behalf of the appellants that no duty is liviable at all on the demand charge. But it is clear, and this was fairly conceded to by the Solicitor

General appearing for the State of Haryana, that the amount of duty payable will be on the actual amount of demand charge realisable from the consumer after the proportionate reduction under clause 4(f) of the tariff.

11. Section 3 of the Duty Act says that there shall be levied and paid to the State Government on the energy supplied by the Board to a consumer a duty to be called the electricity duty, computed at the rates indicated in the various clauses of sub-section (1) of Section 3. The expression used in the various clauses is where the energy is supplied to a particular type of consumer, then the rate of duty will be as specified therein. On the basis of the said expression the argument put forward on behalf of the appellant was that the duty could be levied only on the energy charges for the actual amount of energy supplied. Such an argument is too obviously wrong to be accepted. Reading the clauses as a whole it would be seen that the duty is chargeable on the price of energy supplied in a month. The price of energy in a two-part tariff system would mean and include the energy charge as also the demand charge. This is made further clear by the manner of calculation provided in Rule 3 of the Punjab Electricity (Duty) Rules, 1958. Sub-rule (1) says:

> 'The duty under clauses (iii) and (iv) of sub-section (1) of Section 3 of the Act shall be calculated on the price of the energy recoverable at the net rate of the Board which will include the demand charge when the supply is governed by a two-part tariff.'"

In that case, no term like "net energy" existed.

153. We may notice that this Court in State of Mysore Vs. West Coast Papers Mills Ltd., (1975) 3 SCC 448, held that no tax can be invoked on transmission loss stating: (SCC p. 452, para 7)

> "7. We have set out the relevant provisions of the Act, and it would appear therefrom that electricity tax is payable on

the units of energy consumed. The one question with which we are concerned in this appeal is whether electricity tax is payable in respect of the electrical energy which is lost in transmission as a result of transmission loss or transformer loss. So far as this question is concerned, we are of the view that no tax is payable on the electricity so lost. The entire scheme of the Act is to tax the consumption of electrical energy. Where some energy is not consumed but lost before it reaches the point of consumption, the question of levy of tax on consumption of such energy would not in the very nature of things arise. The place of consumption of electrical energy is normally at some distance from the place where electrical energy is generated. Electrical energy has consequently to be transmitted through metal conductors to the place where it is consumed. Such transmission admittedly entails loss of some electrical energy and what is lost can plainly be not available for consumption and as such would not be consumed. If a person, for example, generates 100 units of electrical energy and loses 10 units in the process of transmission from the point of generation to the point of consumption, he would in the very nature of things be able to supply only 90 units of electrical energy to the consumers. The tax which would be payable on the electrical energy consumed in such a case would be only for 90 units and not 100 units. To hold otherwise and to realise tax on 100 units of electrical energy would be tantamount to levying tax on the generation or production of electrical energy and not on its consumption. Such a tax on the generation or production of electrical energy is plainly not permissible under the Act. The fact that the consumer happens in the present case to be the same

Company which generated the electrical energy would, in our opinion, make no material difference."

154. Our attention has been drawn to a simple bill, from a perusal whereof it appears that although permitted MD was 350 KVA, the recorded demand being 144 KVA, electricity tax was charged only on the basis of 144 KVA and not on the basis of 350 KVA. Keeping in view the fact that the maximum demand postulates something other than actual delivery of electricity, the question of imposition of any tax thereupon does not arise. The decision of this Court in Northern India Iron & Steel Co. Vs. State of Haryana, (1976) 2 SCC 877 did not assign any reason. The said decision did not take into consideration the provisions of Article 366 (12) of the Constitution of India or the effect of Entry 53 of List II of the Seventh Schedule of the Constitution of India. It has also not been taken into consideration that the State cannot impose tax only because the State Electricity Board would be entitled to levy tax on certain services. It would bear repetition to state that the concept of tariff and tax is different. Whereas tariff would include a list of charges, the tax must be on actual basis. It is also not the case nor can it be that imposition of tax on actual sale or consumption of electrical energy was impossible keeping in view of the particular fact situation. As noticed hereinbefore, two different meters are installed; one, for the purpose of actual consumption of electrical energy and another being a trivector, the same merely records the maximum demand.

155. A decision, as is well known, is an authority for what it decides and not what can logically be deduced therefrom. A decision is not an authority on a point which has not been considered.

156. For the reasons aforementioned, we are of the opinion that the impugned judgment cannot be sustained which is set aside

accordingly. The appeals are allowed to the extent mentioned hereinbefore. No costs."

47. In the given facts and circumstances and peculiar provisions of Section 3 of 2009 Act, aforesaid judgment in ***Southern Petrochemical Industries'*** case is also of no help to the State.

48. Learned counsel for the petitioner has placed reliance on judgment of the Apex Court in ***M.P. Cement Manufacturers' Association Vs. State of M.P. and others,*** reported in ***(2004) 2 SCC 249***, by referring following paras:-

"3. The constitutional validity of the amendment to the Madhya Pradesh Upkar Adhiniyam 1981 (the 1981 Adhiniyam) is the subject matter of challenge in these matters. The amendment was initially made by an ordinance promulgated on 29th June 2001 by the State Government and entitled the "Madhya Pradesh Upkar (Sanshodhan) Adhyadesh, 2001" (hereafter referred to as "the Ordinance"). By the amendment, a cess @ 20 paise per unit was imposed on the captive power producer on the total units of electrical energy produced. The Act which has subsequently replaced the Ordinance is known as the Madhya Pradesh Upkar (Sanshodhan) Adhiniyam, 2001 (hereinafter referred to as "the Amending Act"). The provisions of the 2001 Ordinance and Act are identical.

4-8. ……. …… …..

9. The two competing entries in the Seventh Schedule to the Constitution are Entry 84 of List-I and Entry 53 of List-II. They respectively read:

"List-I

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

(a) alcoholic liquors for human consumption.

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

* * *

List-II

53. Taxes on the consumption or sale of electricity".

10. Electricity is goods (See CST v. M.P. Electricity Board, (1969) 1 SCC 200, SCC at p. 204). Thus, the levy of excise duty on the production of electricity which falls within the phrase "other goods manufactured" in Entry 84 of List-I" is within the exclusive jurisdiction of Parliament and the State has the competence to levy tax only on the sale and consumption of electricity. This position is accepted by the respondents.

11-13. …. ….. ….

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

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

15-18. …. ….. …..

19. Although a dispute was sought to be raised by the appellants as to whether electricity can be stored or not, (this despite the decision to the contrary by the Constitution Bench of this Court in State of A.P. v. National Thermal Power Corpn. Ltd. (2002) 5 SCC 203, it is not necessary to enter into this controversy for the purpose of deciding this issue as it is the common case of the parties before us that between the generation and consumption of electricity there will be transmission loss and the amount of electricity generated need not necessarily be the amount of electricity consumed/sold. In any event, the practice which is actually followed in metering the generated electricity would not make the incidence of tax different.

> "The method of collection does not affect the essence of the duty, but only relates to the machinery of collection for administrative convenience. Whether in a particular case the tax ceases to be in essence an excise duty, and the rational connection between the duty and the person on whom it is imposed ceased to exist, is to be decided on a fair construction of the provisions of a particular Act." See R.C. Jall Parsi Vs. Union of India, AIR 1962 SC 1281 (AIR p. 1287, para 7).

Section 3 (2) of the amendment speaks of cess on electrical energy generated and that must be taken as conclusive of the object and nature of the levy.

20-26. ….. ….. ….

27. We are, therefore, of the opinion that the cess chargeable at all material times under Section 3 (2) is only on the production of electrical energy units as far as producers of electricity for captive consumption are concerned and the Explanation does not serve to change the character of the tax from an impermissible to a permissible levy."

49. In aforesaid case, it was held by the Apex Court that cess chargeable was only on production of electrical energy for units which was impermissible to be levied by the State in view of the scope of Entry 53 of List II read with Entry 84 of List 1.

50. In present case levy of duty is on consumption but not on generation and further as already referred supra charging portion of Section 3 of 2009 Act does not levy such duty upon a consumer producing energy from any mode including diesel generating sets for his own consumption and, therefore, levy of duty in such a situation on consumption is beyond the scope of Section 3 of 2009 Act.

51. Learned counsel for the petitioner has also referred pronouncement of Gauhati High Court, in case ***Bharti Airtel Ltd. Vs. State of Assam and others,*** reported in ***2016 SCC OnLine Gau 627: (2017) 1 Gau LR 526,*** decided on 16.9.2016,, whereby after referring Entry 53 of List II and Entry 84 of List I, it has been held that State has no

legislative competence to levy duty on generation of electricity. The aforesaid judgment is in consonance with law of land by pronounced by the Apex Court. However, it is also apt to record that aforesaid judgment is under challenge in SLP (C) No. 2908 of 2017, titled as *State of Assam & others Vs. Bharti Airtel Ltd.*, preferred by the State of Assam, which is pending adjudication before the Apex Court.

52. Learned counsel for the petitioner, referring paras 110, 117 and 119 of Co-ordinate Division Bench of this High Court in ***N.H.P.C. Ltd Vs. State of H.P. and others,*** reported in ***2024 SCC OnLine HP 533,*** has contended that electricity is goods and State has competence to levy duty/tax over the consumption or sale of electricity as provided in Entry 53 of List II, but not on production thereof because there is no corresponding entry existed in List II, whereas Entry 84 of List I, clearly mandates competence of Parliament only with respect to levying tax on all other goods not enumerated in List II or List III. According to him in absence of provisions for levying duty for own consumption by the consumer by producing it from own source, the levy of duty in present case amounts to levy of duty on production/generation of electricity by the consumer for his own use, which is beyond competence of the State.

53. Undisputedly, Entry 53 empowers the State to levy taxes on consumption and sale of electricity. Though in Concurrent List III in Entry 38, subject ‘electricity’ has been added conferring jurisdiction/power on the

Parliament as well as State Legislature but as held by the Apex Court, as also referred in judgment supra, Entry 38 does not deal with taxation or levy of duty related to electricity.

54. It is also relevant to record that after 16.9.2016 Entry 84 has been substituted by existing Entry 84. In Entry 84 as existed before 16.9.2016, there was reference of other goods manufactured or produced in India, but in existing Entry 84, it is not so and, therefore, now Entry 84 does not include other goods which are not enumerated either in List II or List III or in both. Further, it is relevant to refer Entry 97 of List I to see the competence of the Parliament only for imposition of tax on generation of electricity/energy. Entry 97 empowers the Parliament to levy tax in any matter nor enumerated in List II or List III. Therefore, substitution of Entry 84 after 16.9.2016 also does not make any shift or change in the exposition of law and as on date State has no competence to levy tax or duty on generation of electricity either under Entry 53 of List II or Entry 38 of List III or any other entry in these Lists, whereas in view of Entry 97, the Parliament alone has power to levy duty or tax on generation of energy/electricity.

55. In present case Act 2009 has been enacted to provide for levy of electricity duty on consumption or supply of electricity, and Section 3 of this Act also does not impose duty or tax on generation of energy, but on consumption of energy by the Board, licensee, electricity trader or

generating company and/or energy/electricity supplied by Board, licensee, electricity trader or generating company to the consumer.

56. The supply of energy by the Board, licensee, electricity trader or generating company to consumer, is definitely sale of electricity to the consumer by Board, licensee, electricity trader or generating company and thus provisions of Act are in consonance with Constitutional scheme conferring competence on the State to levy taxes on consumption and sale of electricity.

57. However, for want of provisions to levy electricity duty upon a consumer for self-consumption of electricity/energy generated by his own source including diesel generating sets, the levy of electricity duty upon such consumer for generation of electricity, through any mode including diesel generating sets, for own consumption is illegal.

58. It is evident that petitioner is neither Board, nor licensee or electricity trader or generating company, but is a consumer, which other than such type of consumers and, therefore, despite inclusion of electricity category in the definition of consumer under Section 2(b) of 2009 Act, the identity of the petitioner remains different to those consumers. The Board, any licensee, electricity trader or generating company, though have been defined as consumers in Section 2(b) of 2009 Act, however, they do not include all types of consumers or every person because Board, Licensee, trader or company have been specifically defined under Electricity Act or

Electricity Rules, and Section 2(k) of 2009 Act provides that words or expression used in this Act, but not defined, shall have the meaning as assignees to them in Electricity Act, 2003 or Indian Electricity Rules, 1956. Therefore, even for the purpose of Act 2009, these entities are included in the definitions of consumer, but that does not encompass every person falling in the definitions of consumer, who uses or consumes energy on supplied by the aforesaid entities or by generating himself from any source.

59. We consider it to appropriate to record here that we have not disputed the competency of the State to levy tax/duty on generation of electricity/energy from any source including diesel generating sets, but for absence of provision in charging portion of Section 3 of 2009 Act to impose/levy such duty or tax payable by consumer, including every person, other than Board, licensee, trader, or generating company, we have arrived at the conclusion that Section 3 does not empower the State to levy duty/tax on a consumer other than Board, licensee, trader or generating company and, therefore, manner prescribing imposition/levy of duty/tax on the consumer, which are not Board, licensee, trader or generating company in clause (xi) of Section 3(1) of 2009 Act, is illegal.

60. As the State is not having power under the charging portion of Section 3 of 2009 Act to levy electricity duty upon a consumer other than Board, licensee, trader or generating company, the rate of duty prescribed

for such category in clause (xi) is also not permissible to be chargeable upon the petitioner.

61. Accordingly, clause (xi) in the manner prescribing for levy of duty under Section 3 (1) in case of electrical energy generated by diesel generating sets or any mode for own consumption by the consumer, is not sustainable and accordingly quashed. Rest provision shall remain in force as it is.

The petition is allowed in the aforesaid terms, alongwith pending applications, if any.

(Vivek Singh Thakur),
Judge.

(Ranjan Sharma),
Judge.

07th August, 2026
(Keshav)