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WP.No.3472 of 2013

In the High Court of Judicature at Madras

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| Reserved on 10.6.2025 | Delivered on : 12.6.2025 |
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Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Writ Petition No.3472 of 2013WMP.No.1677 of 2018

Hi-Tech Carbon (a unit of Aditya Birla Nuvo Ltd.), K/16 Phse II, SIPCOT Industrial Complex P.O., Gummidipoondi District, Tiruvallur-601201 rep.by its Vice President (Finance & Commercial) Y.K.Goyal

...Petitioner

Vs

- 1.The State of Tamil Nadu, rep.by the Secretary to Government, Energy Department, Secretariat, Fort St.George, Chennai-9.
- 2.The Tamil Nadu Generation & Distribution Corporation Ltd., rep. by its Managing Director, 800, Anna Salai, Chennai-2.
- 3.The Chief Electricity Officer, Thiru Vi Ka Industrial Estate, Guindy, Chennai-32.



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4.The Electrical Inspector,
Kancheepuram North Division,
Thiru Vi Ka Industrial Estate,
Guindy, Chennai-32.

...Respondents

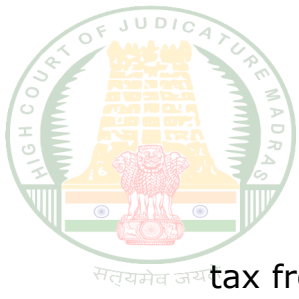
PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records relating to the impugned demand notice dated 23.8.2012 bearing reference Letter No.676/E1/KPM/(N)/2010 issued by the 4th respondent, quash the same as illegal and forbear the respondents from levying and/or collecting electricity tax from the petitioner for its captive consumption of electricity on the basis that such captive consumption of electricity on the basis that such captive consumption should not be less than 51% of the aggregate electricity generated as per Rule 3 of the Electricity Rules, 2005.

For Petitioner : Mr.Krishna Srinivasan, SC for
M/s.S.Ramasubramaniam

For Respondents : Mr.Haja Nazirudeen, AAG
assisted by
Ms.P.Aishwarya, GA

ORDER

In this writ petition, the petitioner assails the demand notice dated 23.8.2012 issued by the fourth respondent and further seeks to forbear the respondents from levying and/or collecting the electricity



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tax from them for their captive consumption of electricity as per Rule 3 of the Electricity Rules, 2005 (for short, the Central Rules).

2. Heard the learned Senior Counsel appearing on behalf of the petitioner and the learned Additional Advocate General assisted by the learned Government Advocate appearing for the respondents.

3. The case of the petitioner is as follows :

(i) They are engaged in the manufacture of carbon black. The steam generated from a specially designed boiler is used for generation of power through turbo generator sets. The electricity generated by the petitioner out of the turbo generator sets is metered in units. A part of the power generated from such captive power plant is used by the petitioner for their own purposes. That apart, the petitioner also consumes a part of the generated electricity for the operation of the captive generating plant. The surplus power is sold to the Tamil Nadu Electricity Board (now the Tamil Nadu Generation and Distribution Corporation Limited - TANGEDCO).

(ii) Vide letter dated 23.3.2011, the fourth respondent directed the petitioner to pay a sum of Rs.19,16,709/- towards short payment



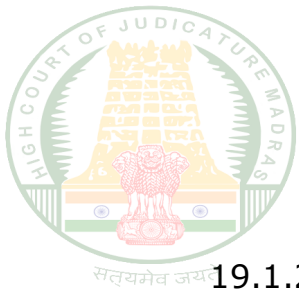
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of electricity tax for the period from 2005 to 2006. Such a demand was made on the ground that the petitioner failed to adhere to the provisions of Rule 3 of the Central Rules. On receipt of the said notice, the petitioner submitted a reply dated 22.4.2011 stating that the demand raised by the fourth respondent on the basis of Rule 3 of the Central Rules is not applicable since the said Rule was framed under the Central Legislation namely the Electricity Act, 2003 (for short, the Central Act) and that in so far as the State of Tamil Nadu is concerned, the imposition of tax is made under the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 (for brevity, the State Act) read with the Tamil Nadu Tax on Consumption or Sale of Electricity Rules, 2003 (hereinafter referred to as the State Rules).

(iii) Even after receipt of the said reply sent by the petitioner, the fourth respondent issued the impugned communication dated 23.8.2012 calling upon the petitioner to remit the shortfall of Rs.19,16,709/-. This is put to challenge in this writ petition.

4. When the matter came up for admission on 12.2.2013, this Court granted an order of interim stay, which was subsequently extended on 18.2.2013 in M.P.No.2 of 2013. Pursuant to that, on



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19.1.2018, WMP.No.1677 of 2018 came to be filed by respondents 1, 3 and 4 seeking to vacate the interim stay granted on 12.2.2013 in M.P.No.2 of 2013 by filing a counter dated 01.3.2017. It is worthwhile to make a mention here that on 05.7.2018, M.P.No.2 of 2013 was allowed while making absolute the interim order already granted.

5. In the initial counter dated 01.3.2017 filed in WMP.No.1677 of 2018, respondents 1, 3 and 4 took the following stand :

It was admitted that the Central Rules were framed only for the purpose of carrying out the provisions of the Central Act and they could not be interpreted or extended to impose an obligation for payment of the electricity tax under the State Act, which did not stipulate such a requirement for captive generating plants. However, as per G.O.Ms.No.48 Energy (A1) Department dated 22.4.1998, the Government of Tamil Nadu approved the policy on the captive generating plant and fixed the rate of power to be purchased by the TANGEDCO from the captive generating plants. Subsequently, the petitioner company became entitled to the captive power plant status as per the said Government Order. Hence, the captive power generating plant status already availed by the petitioner could not be



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withdrawn in view of the subsequent Central Amendment under the Central Act through the Central Rules, which relate to the power vested with the Central Government under Section 176 of the Central Act for the purpose of carrying out the provisions of the Central Act.

6. On 15.6.2023, the fourth respondent filed an additional counter for himself and also on behalf of respondents 1 and 3 wherein they took the following stand :

(i) The Parliament enacted the Central Act taking legislative source under Entry 38 of List III of the Concurrent List. The Parliament has got exclusive powers to make laws in respect of any matter enumerated in List I under Article 246(1) of The Constitution of India (CoI) and for any part of the territory of India included in the State. They also have legislative powers to make laws in List III of the 7th Schedule, which is referred in The CoI as the Concurrent List. The Central Act was enacted under Entry 38 of List III and the same was occupied by the Central Legislature.

(ii) The Central Rules have been framed by the Central Government. Rule 3 of the Central Rules stipulates a condition, by which, a captive generating plant should captively consume not less



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than 51% of the aggregate electricity so generated, meaning thereby in case of non consumption, it goes without saying under the Central Act that the same has not been consumed. When a law approved by one Legislature is contested or bypassed by another Legislature, the doctrine of pith and substance would be applied. The said doctrine states that while assessing a certain law, which applies to specific issues, the content of the thing, which falls within the three lists, should be taken into consideration and the encroachment by law does not render it illegal. If the substance of the legislation falls within the lawful power of the Legislature, it does not become contrary to law because it impacts on issue beyond its area of authority.

(iii) According to the respondents, the demand has been raised well within the ambit of jurisdiction and as such, there is no infraction of the Fundamental Right or violation of Article 14 of The CoI. The demand has been raised by the Department on the basis of the Central Act.

(iv) The term 'captive generating plant' defined under the State Act and Rule 3 of the Central Rules is one and the same and there is no encroachment. In pith and substance, the State Act falls under Entry 53 of List II. There is no conflict with Rule 3 of the Central Rules,



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which relates to Entry 38 of List III even if there has been any incidental encroachment by the State Law into the subject covered by the law enacted by the Parliament.

7. This Court has carefully considered the submissions of the learned counsel on either side and perused the materials available on record and more particularly the impugned demand.

8. The only issue that arises for consideration in this writ petition is as to whether the respondents lacked power and jurisdiction to levy the shortfall towards electricity tax by invoking Rule 3 of the Central Rules on the ground that the captive generating plants fall short of 51% of the total generation.

9. In order to decide the power and jurisdiction of the respondents to levy the electricity tax, it will be apposite to take note of both the Central and the State Acts and the relevant Rules framed thereunder.



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10. The Central Act namely the Electricity Act, 2003 defines the term '**captive generating plant**' under Section 2(8), which reads as hereunder :

"captive generating plant means a power plant set up by any person to generate electricity primarily for his own use and includes a power plant set up by any cooperative society or association of persons for generating electricity primarily for use of members of such cooperative society or association."

11. The Central Government has been given the rule making power under Section 176 of the Central Act and in exercise of such power conferred on the Central Government, the Central Rules namely the Electricity Rules, 2005 came into force on 08.6.2005. Rule 3 of the Central Rules is extracted as hereunder :

"Requirements of captive generating plant : (1) No power plant shall qualify as a 'captive generating plant' under Section 9 read with Clause (8) of Section 2 of the Act unless :

(a) in case of a power plant :

(i) not less than twenty six per cent of the ownership is held by the captive user(s); and

(ii) not less than fifty one per cent of the



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aggregate electricity generated in such plant, determined on an annual basis, is consumed for captive use :

Provided that in case of power plant set up by registered cooperative society, the conditions mentioned under paragraphs at (i) and (ii) above shall be satisfied collectively by the members of the cooperative society:

Provided further that in case of association of persons, the captive user(s) shall hold not less than twenty six percent of the ownership of the plant in aggregate and such captive user(s) shall consume not less than fifty one percent of the electricity generated, determined on an annual basis, in proportion to their shares in ownership of the power plant within a variation not exceeding ten percent;

(b) in case of a generating station owned by a company formed as special purpose vehicle for such generating station, a unit or units of such generating station identified for captive use and not the entire generating station satisfy(ies) the conditions contained in paragraphs (i) and (ii) of Sub-Clause (a) above including -

Explanation :- The electricity required to be consumed by captive users shall be determined with reference to such generating unit or units in aggregate identified for captive use and not with



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reference to generating station as a whole; and

(2) The equity shares to be held by the captive user(s) in the generating station shall not be less than twenty six per cent of the proportionate of the equity of the company related to the generating unit or units identified as the captive generating plant.

Explanation.- (1) For the purpose of this rule.-

a. "Annual Basis" shall be determined based on a financial year;

b. "Captive User" shall mean the end user of the electricity generated in a Captive Generating Plant and the term "Captive Use" shall be construed accordingly;

c. "Ownership" in relation to a generating station or power plant set up by a company or any other body corporate shall mean the equity share capital with voting rights. In other cases ownership shall mean proprietary interest and control over the generating station or power plant;

d. "Special Purpose Vehicle" shall mean a legal entity owning, operating and maintaining a generating station and with no other business or activity to be engaged in by the legal entity."



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12. On a combined reading of the Central Act and the Central Rules, it is quite evident that a captive generating plant is a power plant set up by any person to generate electricity primarily for his own use. Rule 3 of the Central Rules provides for the requirement of a captive generating plant and states that in case of a power plant, not less than 51% of the aggregate electricity generated in such plant, determined on an annual basis, should be consumed for captive use.

13. In both the State Act as well as the State Rules, the requirement of not less than 51% of the aggregate electricity generated in such plant being consumed for captive use is absent.

14. The communication dated 23.3.2011 of the fourth respondent to the petitioner makes a specific mention of Rule 3 of the Central Rules and the short payment of electricity tax has been ascertained only on the ground that the quantum of captive consumption fell short of 51% of the total generation. Thus, the demand was made by placing reliance upon the Central Rules.



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15. It is relevant to take note of the stand that was taken by respondents 1, 3 and 4 while filing the initial counter affidavit in support of WMP.No.1677 of 2018. The relevant portions have already been extracted supra. They took a stand that the Central Rules have been framed only for the purpose of carrying out the provisions of the Central Act and that they were not intended to be extended to impose an obligation for payment of electricity tax under the State Act, which does not stipulate such a requirement for captive generating plants.

16. The Government of Tamil Nadu approved a policy on the captive generating plant and fixed the rate of power to be purchased by the TANGEDCO from the captive generating plants and the petitioner company would be entitled to the captive generating plant status as per the relevant Government Order. As a consequence, such a status given to the petitioner cannot be withdrawn in view of the subsequent amendment under the Central Act through the Central Rules, which relate to the power vested with the Central Government under Section 176 of the Central Act. The above stand taken by respondents 1, 3 and 4 virtually supported the stand taken by the petitioner.



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17. Later, the additional counter affidavit came to be filed by respondents 1, 3 and 4, in which, they had completely given up the stand taken earlier in the initial counter filed in support of WMP.No. 1677 of 2018 and come up with a new theory by applying the doctrine of pith and substance.

18. The power to enact the State Act is traceable to Entry 53 of List II, which deals with taxes on consumption or sale of electricity. In so far as the Central Act is concerned, it is traceable to Entry 38 of List III (Concurrent List). Hence, it is quite evident that the exclusive power available to the State cannot be effaced or watered down by a Central Enactment under the Concurrent List.

19. The scope of the laws made by the Parliament and the Legislations of the State is dealt with under Article 246 of The CoI. In fact, Article 246(3) makes it clear that the State has the exclusive power to make laws for such a State or any part thereof with respect to any of the matters enumerated in List II in the 7th Schedule. This is subject to Article 246(1), which deals with the exclusive power of the Parliament to make laws with respect to matters enumerated in List I



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of the 7th Schedule and its power to make laws with respect to any of the matters enumerated in List III of the 7th Schedule. Hence, as per the Constitutional Scheme, the power of the State to enact the State Act and the State Rules is the exclusive domain of the State and it cannot be overridden by the Central Enactment and the Rules framed thereunder, which have been enacted under List III of the 7th Schedule.

20. The doctrine of pith and substance will arise for determining as to whether a particular law relates to a particular subject mentioned in one list or another. Thus, if the substance falls within the Union List, then the incidental encroachment by the law of the State does not make it invalid. Thus, the doctrine of pith and substance will be applied only if there is a conflict between two lists. That is not even the stand taken by respondents 1, 3 and 4 and for reasons best known to them, they raised the doctrine of pith and substance in the additional counter affidavit without any substance.

21. The law enacted by the State Government in terms of the State Act and the Rules framed thereunder does not contain any



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provision for 51% captive consumption by a captive generating plant.

This requirement is found only in the Central Rules namely the Electricity Rules, 2005, which are enacted by the Central Government. Therefore, to apply Rule 3 of the Central Rules and impose tax on the petitioner, is illegal and beyond the power and jurisdiction of the respondents. That is the reason as to why respondents 1, 3 and 4, while filing the initial counter affidavit in WMP.No.1677 of 2018, have come up with such a stand, which virtually supported the case of the petitioner. In the light of the above discussions, this Court holds that the impugned demand notice issued by the fourth respondent is illegal and unsustainable and it requires the interference of this Court.

22. Accordingly, the writ petition is allowed and the impugned demand notice dated 23.8.2012 issued by the fourth respondent is set aside. If at all any such power is available to the respondents under the State Act and the State Rules, it is left open to them to proceed further subject to the limitation period enumerated under the State Act. No costs. Consequently, the connected WMP is closed.

12.6.2025



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Index : Yes

Neutral Citation : Yes

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