IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 15TH DAY OF MARCH 2021

BEFORE

THE HON'BLE MR.JUSTICE N.S.SANJAY GOWDA

W.P.No. 105054/2017 (GM - KEB)

BETWEEN:

M/S SOUTHERN FERRO LTD.,
INDUSTRIAL ESTATE, GOKUL ROAD,
HUBLI REP. BY ITS EXECUTIVE DIRECTOR,
SHRI SANDEEP BIDASARIA,
S/O SRI MURARILAL BIDASARIA,
AGE:55 YEARS, RES:HUBBALLI. **... PETITIONER**

(BY SRI. GURUDAS KANNUR, SENIOR COUNSEL FOR
NARAYAN G. RASALKAR, ADV.)

AND:

1. THE STATE OF KARNATAKA,
REP. BY ITS SECRETARY TO
GOVERNMENT, DEPARTMENT OF ENERGY,
VIKAS SOUDHA,
DR. AMBEDKAR ROAD, BENGALURU – 560 001.

2. THE CHIEF ELECTRICAL INSPECTOR,
TO GOVERNMENT OF KARNATAKA,
NIRMAN BHAVAN, 2ND FLOOR,
RAJAJINAGAR, BENGALURU – 560 010.

3. THE MANAGING DIRECTOR,
HUBLI ELECTRICITY SUPPLY,
COMPANY LIMITED, CORPORATE OFFICE,
NAVANAGAR, P.B.ROAD, HUBBALLI – 580 025.

4. THE GENERAL MANAGER (TECHNICAL) HESCOM,
NAVANAGAR, P.B.ROAD,
HUBBALLI – 580 025.

5. THE DY. CHIEF ELECTRICAL INSPECTOR,
DHARWAD REGION,
SANMATHI MARG, DHARWAD.

6. THE EXECUTIVE ENGINEER (ELECTRICAL)
HESCOM, TABIB LAND, HUBBALLI.

7. THE ASSISTANT EXECUTIVE ENGINEER ELECTRICAL,
CITY SUB DIVISION 3,
HESCOM, INDUSTRIAL ESTATE,
HUBBALLI. **... RESPONDENTS**

(BY SMT. K. VIDYAWATI ADDITIONAL ADVOCATE GENERAL,
AND VINAYAK S. KULKARNI AGA FOR R-1,2 AND 5;
SRI. B.S. KAMATE, ADV.)

THIS PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASH THE IMPUGNED DEMAND NOTE DATED:24.04.2017 PASSED BY THE RESPONDENT NO.7 THE ASSISTANT EXECUTIVE ENGINEER (ELECTRICAL), CITY SUB DIVISION-3, HESCOM, INDUSTRIAL AREA, HUBBALLI, AS PER ANNEXURE-A AS BEING WITHOUT JURISDICTION AUTHORITY AND IS UNCONSTITUTIONAL, ETC.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:

ORDER

1. A demand to pay a sum of ₹94,47,534/- being a demand for payment of tax on electricity consumed by the petitioner is a subject matter of this writ petition.

2. Petitioner contends that apart from electricity supplied by the licensee i.e., Hubli Electricity Supply Company Limited (hereinafter referred to as 'HESCOM', for short), it is also supplying energy from the energy exchange every month which is called as purchase of electricity from Open Access Source. Petitioner contends that the price paid for purchase of electricity through Open Access Source is different than the price paid by it for the electricity sold to it by the licensee – HESCOM. Petitioner admits that it is liable to pay tax on the electricity consumed by it whether it is purchased from the HESCOM or purchased from Open Access Source. Petitioner, however, contends that the electricity tax i.e., to be paid should be levied on the

price at which it purchases, be it from the licensee or from the Open Access Source.

3. It is stated that for the electricity purchased from HESCOM, it is liable to pay tax at the rate of 6% on the procurement price. It is stated that similarly in respect of electricity purchased from Open Access Source, electricity tax would have to be levied at the rate of 6% on the price at which the electricity was procured from the Open Access Source. But, however, HESCOM had issued a demand calling upon the petitioner to pay tax on electricity consumed at the rate of 6% on the charges that HESCOM had fixed for the sale of the units. It is submitted that since the petitioner had procured electricity at a lower rate from the Open Access Source, HESCOM could not demand tax at the rates at which it supplied. Petitioner, therefore, contends that the demand made by computing tax for electricity consumed at the rates prescribed by HESCOM would be illegal and would be liable to be quashed.

4. Learned Additional Advocate General Smt.K.Vidyawati firstly submitted that the present writ petition is not maintainable since the petitioner had admittedly submitted a representation to the State Government requesting grant of 24 monthly installments for payment of arrears of tax on electricity and having made such a request, it was impermissible for the petitioner to file a writ petition. On merits, she contended that it is now a settled law that irrespective of source of electricity, every consumer is liable to pay tax on the electricity consumed within the State and since, admittedly, petitioner had consumed the electricity within the State of Karnataka, it was bound to pay electricity tax on the rates at which electricity had been supplied by HESCOM. She also placed reliance on the fact that the statute made it clear that whenever a consumer consumed electricity at a concessional rate or free of charge, the consumer would, nevertheless, be liable to pay electricity tax on the charges of electricity

levied by the licensee to other consumers. This, according to her, indicated that for the purpose of calculating electricity tax, the rate at which the electricity supplied by the licensee should be taken into consideration and not at the rate at which the consumer had purchased electricity from the Open Access Source. She submitted that since the demand was made by considering the rate at which electricity was supplied by the licensee, there was no illegality warranting interference under Article 226 of the Constitution of India.

5. Having heard the respective submissions of both sides, the question that arises for consideration in this writ petition is:

> *Whether the consumer is liable to pay electricity tax on the electricity procured by him through Open Access Source at the rate of 6% on the rate at which he purchased from the Open Access Source or at the rate*

at which the licensee was selling electricity to him?

6. In order to answer this question, a brief overview of the statute which bounds the electricity tax would be necessary.

7. The Karnataka Electricity (Taxation on Consumption or Sale) Act, 1959 (hereinafter referred to as 'the Act') was enacted to provide for levy of tax on consumption of electricity energy in the State of Karnataka in the year 1959 for sale of electrical energy in the State of Karnataka.

8. The charging Section i.e., Section 3 of the Act reads as follows:

> "3. **Levy of tax on electricity charges etc.-** (1) Subject to the provisions of this Act, there shall be levied and paid to the State Government electricity tax on advolorem basis at six percent on the charges payable on electricity sold to or consumed by, any consumers (excluding arrears)

when electricity is supplied by licensee or non-licensee through licensee or otherwise;

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

except,-

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

(ii) Bhagya Jyothi and kutira jyothi categories upto the extent of free consumption allowed by the State Government from time to time;

(iii) the consumers covered under sub-section.

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

(a) electricity tax not exceeding 50 paise per

unit on captive consumption;

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

9. As could be seen from Section 3 of the Act, electricity tax is levied on advolorem basis at 6% on the charges payable on electricity sold to or consumed by any consumers when electricity supplied by licensee or a non-licensee through a licensee or otherwise. Thus, whenever electricity is sold to a consumer or it is consumed by a consumer, electricity tax is attracted. The intent of the said Section is clear that whenever electricity is consumed by a consumer within the State of Karnataka, the consumer is bound to pay electricity tax on that on advolorem basis at the rate of 6% on the charges payable on the electricity sold or consumed.

10. A careful reading of Section 3 of the Act indicates that the tax of 6% is to be calculated on the charges

payable on the electricity sold or charges payable on electricity consumed by the consumers.

11. It is to be borne in mind that the Legislature was conscious of the fact that after the electricity reforms ushered in, it was open for a consumer of electricity to either purchase electricity from a licensee such as HESCOM or from the Open Access Source. It, therefore, categorically stated in Section 3 that the tax had to be paid at 6% on the charges payable on the electricity sold or the electricity charges payable on the electricity consumed.

12. This deliberate use of the expression 'charges payable on electricity sold to or consumed by any consumers' would indicate that the charges for the electricity sold and for the electricity consumed could be different.

13. The Legislature was conscious that electricity sold by the licensee could be at a lower rate and the

electricity consumed by the consumer for the electricity supplied through the licensee could be at a higher rate or vice versa. In case, the electricity procured by the licensee from Open Access Source is costlier than the electricity supplied through the licensee, obviously, higher revenue would yield to the State. The corollary of this would also have to be given effect to. In other words, if a consumer is to pay electricity tax on charges higher than the one supplied by the licensee, necessarily, whenever, the licensee procures through Open Access Source, electricity at a lower rate, the charges would have to be calculated on the rate at which the consumer had purchased the electricity.

14. If it was the intent of the State that irrespective of the rate at which the electricity was purchased by the consumer, the rate of tax would be on the charges payable by the consumer to the licensee, then the charging Section would have clearly stated so. In other words, the charging Section would have simply stated

that there would be levied and paid to the State Government the electricity tax on advolorem basis at 6% on the charges payable on electricity sold to by the licensee. The fact that there is a clear distinction made between the electricity sold to and consumed by the consumers leads to an inescapable conclusion that the rate at which the electricity was purchased would be the basis for calculating the tax.

15. This is made further clear from the proviso to Section 3 of the Act, which reads as under:

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

16. As could be seen from the proviso, if the consumer consumed electricity at a concessional rate or for that matter, free of charge, then the consumer was bound to pay on the rate of charges of electricity levied by the

licensee to other consumers. This indicates that if electricity is sold at a concessional rate, the consumer cannot take advantage of a lower rate and he would have to pay electricity tax at the rate at which the electricity is sold by the licensee to other consumers in the normal course.

17. Sub-section (2) of Section 3 of the Act also gives a clear indication that the source of electricity consumed by consumers would be the yardstick for determination of the electricity charges on the basis of which an advolorem rate have to be calculated. Sub-section (2) of Section 3 of the Act states that electricity tax at 50 paise per unit is payable by the non-licensee at a sum not exceeding 50 paise per unit on captive consumption and at the rate of 25 paise per unit on auxiliary consumption. In other words, if electricity is generated by the licensee by way of captive consumption of the electricity generated by captive generating plant or electricity is consumed by any electrical apparatus situated within the

generating station for generating electricity, a tax at the rates not exceeding 50 paise and 25 paise per unit would have to be paid. It is to be noticed here that in case of either captive consumption or auxiliary consumption, the electricity would be generated by the consumer himself and in such an event, notwithstanding the fact that the electricity was not generated and supplied by the licensee, the consumer would still have to pay tax on consumption.

18. The principal requirement for the electricity tax, therefore, would be consumption of electricity. In other words, whenever electricity was consumed by a consumer, the consumer would become liable to pay electricity tax. The question that would follow from this is as to whether the State can tax consumption of electricity at the rate at which the consumer had not purchased the electricity.

19. Section 4 of the Act reads as under:

"**4. Payment of electricity tax.-** (1) Every licensee shall collect and pay to the State Government at the time and in the manner prescribed, the electricity tax payable under this Act,-

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

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

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

(2) A licensee may be granted a rebate of such amount, as may from time to time be determined by the State Government regard being had to the cost of collection of the electricity tax incurred by such licensee:

Provided that the amount of rebate shall not exceed two per cent of the electricity tax collected by the licensee.

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

(4) When any consumer fails or neglects to pay at the time and in the manner prescribed, the amount of electricity tax due from him, the licensee or, as the case may be, the person supplying energy, may without prejudice to the right of the State Government to recover the amount under section 7, after giving not less than seven clear days' notice in writing to such person, cut off supply of energy to such person; and he may, for that purpose, exercise the power conferred on a licensee by sub-section (1) of section 56 of the Electricity Act, 2003 (Central Act 36 of 2003), for the recovery of any charge or sum due in respect of energy supplied by him.

(5) Nothing in this section shall apply,-

(i) to any person who generates energy for the purpose of supplying it for the use of vehicles or vessels;

(ii) to the consumption of energy generated by means of generators not exceeding ten kilowatts in capacity."

20. As could be seen from Clause (a) of Sub-section (1) of Section 4 of the Act, licensee is required to collect and pay to the State Government the electricity tax payable under the Act on the electricity charges included in the bill issued by him to the consumers. Thus, Clause (a) of Sub-section (1) of Section 4 of the Act would be applicable in respect of electricity sold by the license.

21. Clause (b) of Sub-section (1) of Section 4 of the Act clearly states that the licensee shall collect and pay to the State Government the electricity tax payable on the units of electricity supplied to consumer by a non-licensee through a licensee. Thus, in respect of electricity supplied to consumers by a non-licensee

through a licensee, a clear distinction is made on the manner in which the electricity tax is to be paid.

22. In respect of electricity supplied to the consumers by a non-licensee through a licensee, the electricity tax payable is on the units of the electricity supplied. Obviously, the unit of electricity supplied is the indicator of the quantum of electricity consumed and since the electricity was procured through Open Access Source, electricity tax can be calculated only on the rates at which the electricity was procured from the Open Access Source.

23. It is not in dispute that electricity that is purchased through Open Access Source is not a purchase which is shrouded in mystery. In fact, it is the admitted case of both parties that electricity is purchased through an electricity exchange where the consumer makes a purchase on the previous day at the rate prevailing in the exchange and at the end of the month, the units of electricity sold by the consumers is intimated to the

State Load Dispatching Centre. It can, therefore, be easily gathered as to the quantum of electricity purchased by the consumer and the rate at which the consumer had purchased the electricity. It is quite obvious that electricity tax would have to be levied and collected at a particular rate at which the consumers had purchased the electricity from the electricity exchange.

24. If the argument of the State is accepted that electricity tax is payable at the rate at which the licensee sell the electricity to consumers, it would fundamentally defeat the very purpose for which the electricity reforms were initiated which enabled the consumers to procure electricity from private purchasers and through Open Access Source. It is to be borne in mind that the person who sells the electricity would necessarily pay the wheeling and access charges to the licensee and the seller of electricity would be basically using the infrastructure of the licensee and paying for the

distribution. The licensee, therefore, would have no preferential right.

25. Learned Additional Advocate General vehemently contended that the validity of Sections 3 and 4 of the Act had been upheld in W.P.No.14434/2016 and connected matters disposed of on 04.10.2016 and therefore, the petitioner could not challenge the demand notice.

26. It is to be stated here that the petitioner admits that it is liable to pay tax under Section 3 of the Act and since, the liability of the petitioner to pay tax is admitted, reliance placed by learned Additional Advocate General on the judgment which upheld the validity of Section 3 of the Act would not be of any sustenance.

27. I am, therefore, of the view that the demand made by HESCOM by computing the tax at the rate at which it was selling electricity to its consumers cannot be the basis for levying and collecting the electricity tax. Annexure-A is, therefore, quashed. HESCOM shall now

calculate the electricity tax at the rate at which the petitioner had purchased the electricity from Open Access Source and issue a revised demand within a period of two weeks from the date of receipt of a certified copy of this order.

28. The amounts, if any, deposited by the petitioner pursuant to the interim orders granted by this Court shall be adjusted and if there is any sum in excess, the same may be refunded to the petitioner. If, on the other hand, further sums to be paid by the petitioner, petitioner shall pay the same within a period of two weeks from the date of demand.

Writ Petition is accordingly allowed.

SD/-
JUDGE

PKS