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Andhra Pradesh High Court

Case No: Writ Petition No. 34680 of 2013

Krishnapatnam Port Company Ltd.	APPELLANT
Vs	
The Govt. of A.P.	RESPONDENT

Date of Decision: Dec. 3, 2014

Acts Referred:

- Andhra Pradesh Infrastructure Development Enabling Act, 2001 - Section 1(3), 2(h), 2(j), 2(rr), 2(s)
- Andhra Pradesh Value Added Tax Act, 2005 - Section 15, 15(1), 15(2), 15(3), 15(i)
- Income Tax Act, 1961 - Section 195, 195(1), 195(2)

Citation: (2014) 59 APSTJ 241 : (2015) 80 VST 26

Hon'ble Judges: Ramesh Ranganathan, J; M. Satyanarayana Murthy, J

Bench: Division Bench

Advocate: A.V. Krishna Koudinya, Learned Senior Counsel for Ancha Panduranga Rao, Advocate for the Appellant; P. Balaji Varma, Learned Special Standing Counsel, Advocate for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Ramesh Ranganathan, J.
The final order for recovery of tax dated 19.11.2013 issued by the 3rd respondent, whereby the petitioner-Krishnapatnam Port Company Ltd. ("KPCL" for short) was directed to remit the tax deducted at source of Rs. 92,98,03,154/-, along with interest in terms of Section 22(2) read with Section 22(4) of the Andhra Pradesh Value Added Tax Act, 2005, is under challenge in this Writ Petition as being contrary to law, in violation of principles of natural justice, and as without jurisdiction.

2. The petitioner herein, a public limited company, is engaged in the business of construction and development of the Krishnapatnam Deep Water Port in Nellore District, and in providing necessary infrastructural facilities for handling port

operations thereat. It is the petitioner''s case that they were identified as being the most qualified to undertake construction and infrastructure activities of the port for, and on behalf of, the State of Andhra Pradesh; consequent thereto, a state concession contract was entered into by the State of Andhra Pradesh represented by its Principal Secretary, Roads and Buildings Department, with them on 17.09.2004; the said agreement which was to subsist for a period of 50 years inter alia, amongst other terms and conditions, provided for necessary fiscal incentives to them in respect of various fiscal levies imposed by the State in connection with the construction and development of the port project; in view of the state concession contract, the relationship between the State of Andhra Pradesh and KPCL is that of a principal and an agent; Clause 3.16 of the said contract provided for exemption from sales tax (VAT from 2005 onwards) on all inputs and sales, if any, deemed; sales tax was totally exempt on all inputs, required for construction of the port, for the purpose of the project construction throughout; the concession agreement, in terms of Clause 1.1 thereof, reflects the understanding between the parties in regard to the port project; in view of the judgment of the Supreme Court in Vadilal Chemicals Ltd. Vs. The State of Andhra Pradesh and Others, , the Government of A.P. ("GoAP" for short) is bound by the concessionaire agreement, and no department can dispute its binding effect; G.O. Rt. No. 193 was issued approving the project report for construction and development of the port in Phase-II; the petitioner filed W.P. No. 31525 of 2013 seeking a direction to the Government for issuance of necessary clarifications/suitable directions as to the continuance of the grant of exemption from sales tax, entry tax etc as spelt out in clause 3.16 of the agreement; the said Writ Petition is still pending before this Court; for the purpose of execution of the works, required for the development of the port project, the petitioner had entrusted the work to M/s. Navayuga Engineering Company Limited ("NECL" for short) on engineering, procurement and construction (EPC) basis; NECL is the holding company of the petitioner; they have the necessary expertise in pile foundations and port construction; they agreed to complete the work entrusted to them on payment of the agreed amount; the 3rd respondent issued notice dated 12.09.2013 informing KPCL that they had deducted tax from the bills of NECL, and they should show-cause why Rs. 1,16,44,35,116/- should not be recovered from them; on receipt of the show-cause notice, KPCL submitted their explanation on 23.09.2013 contending that, by virtue of the conditions in the agreement, the GoAP undertook to forego revenue streams from the project, such as exemption from sales tax in all the inputs required for project construction; they did not recover any tax from the contractor; the records maintained by them establish that, while clearing the running account bills, no amount was deducted from NECL; they were ready and willing to co-operate by producing necessary material evidence; without considering their reply, and without verifying the records, the 3rd respondent, relying on the material available with him, had passed the order dated 19.11.2013 directing them to remit Rs. 92,98,03,154/-; their account books make it clear that, in fact, no taxes were deducted by them; even otherwise, as per the concessionaire

agreement dated 17.09.2004, the Government had exempted sales tax on all the inputs required for project construction; the petitioner is, therefore, not liable to deduct tax; the statutory auditors had clarified, by issuing certificates, that no deduction was made in respect of the EPC contract; only a provision, for works contract tax liability, was made in the accounts; this was disclosed as a statutory liability in the accounts; such disclosure is mandatory in order to meet the audit requirements, and cannot be construed as their having deducted tax; the 3rd respondent, in the impugned order, held that a limited review of their accounts revealed that they had deducted tax at source from September, 2007 to March, 2013; in their reply to the show-cause, KPCL had categorically stated that they were ready and willing to produce the material evidence required by the 3rd respondent; the impugned order was passed without considering the material on record, relying only upon the annual accounts; the 3rd respondent ignored accounting principles under which a provision is made to meet tax liability, and erroneously concluded that the petitioner had deducted tax; the 3rd respondent ought not to have passed the assessment order on a limited review of the accounts; the 3rd respondent erred in holding that the petitioner was duty bound to deduct tax, as it was contrary to the concession agreement; the said agreement was entered into under the provisions of the A.P. Infrastructure Development Enabling Act, 2001 (hereinafter called the "2001 Act"); before determining the petitioner''s liability, the 3rd respondent should have verified their records or that of their contractor, in order to decide the issue whether or not tax was deducted from the bills of the contractor; instead of verifying the complete records, the 3rd respondent had, on a limited review of the records, determined the tax liability against the petitioner; no finding has been recorded by the 3rd respondent that the petitioner had deducted tax from the contractor; in the absence of such a finding, the 3rd respondent lacks jurisdiction to pass the impugned order demanding tax from the petitioner; the 3rd respondent has no authority to audit the accounts; no authorization has been shown to the petitioner; the premise, on which the 3rd respondent held that the petitioner had enriched themselves by deducting tax, is contrary to the concession agreement whereunder the State had agreed to forego all revenue streams, including sales tax; as such the question of unjust enrichment, and evasion of tax does not arise; the 3rd respondent cannot act contrary to the concession agreement, and they are estopped from seeking tax from the concessionaire i.e., the petitioner; the 3rd respondent, without furnishing the material relied upon by them to the petitioner, has passed the impugned order; as the State Government had, by the concession agreement, granted exemption of sales tax on all inputs, the petitioner is not obligated to deduct tax; the order of the 3rd respondent is in violation of principles of natural justice, and is without jurisdiction; the concession agreement, entered into between the petitioner and the 2nd respondent, is binding on all the respondents; the agreement contemplates exemption of all input taxes; the 1st respondent issued G.O. Ms. No. 609 dated 29.05.2006 duly following the concession agreement, and directed the commercial tax department to refund the taxes paid by

the petitioner; the petitioner has not deducted tax as alleged by the 3rd respondent; if the 3rd respondent is allowed to enforce the demand against the petitioner, the same would hamper progress of the project; and it would consequently affect not only the petitioner''s interest, but also larger public interest.

3. In his counter-affidavit, the 1st respondent submits that the petitioner had filed the Writ Petition without exhausting the efficacious alternative remedy of an appeal under the AP VAT Act; the writ jurisdiction is not meant to short-circuit or circumvent the alternative remedies available under the Act; the petitioner has made false and incorrect statements on oath; in para 11 of their affidavit they stated that they did not recover any tax from the contractor, and the records maintained by them establish that, while clearing the running account (RA) bills, no amount was deducted from NECL; from the records submitted by the petitioner before him it was established that they had deducted amounts towards works contract tax in each of the running account (RA) bills; false statements have been made by the petitioner only to mislead this Court; he had relied on, and had referred to, the running account bills as reflected in the ledger accounts of the petitioner, and not on any books or material of NECL; the averment that only a provision was made to meet the tax liability is also misleading; the audit report, appended to the annual report, discloses that it is not a mere making of a provision, but a declaration of amounts being in arrears, and the arrears also being an undisputed amount; this is a clear and categorical admission; no mandamus would lie enabling a private individual to retain amounts not belonging to them, or to hold it after collecting it as state revenue; no mandamus can also be sought to restrain an authority from performing his statutory duty; the petitioner''s contention, that no amount was deducted towards TDS, is a question of fact and not of law; these questions can be properly agitated by way of an appeal provided under the statute; he had completed audit of the petitioner''s accounts based on the authorization issued by the Deputy Commissioner (CT); thereafter, in pursuance of the authorization given for assessment, he was in the process of completing the assessment; during the audit, it came to his notice that the petitioner had deducted amounts towards TDS from their contractor i.e NECL; Section 22(3) and (4) of the Act obligated the petitioner to deduct amounts from the running account bills of their contractor, and remit the same to the revenue; he had issued notice for recovery of the amounts deducted by the petitioner as TDS; the recovery notice relates to the years 2007-08 to 2011-12; Rs. 5.86 crores was included in the impugned notice, for the period 2012-13, as the petitioner had a statutory duty to deduct tax at source from the amount payable to the contractor as mandated under Section 22(3); there is no provision for granting exemption under the AP VAT Act; no dealer can be exempted from payment of tax or from the application of the statutory provisions; the concession agreement also refers only to "exemption from sales tax on all inputs required for project construction"; it does not speak of exemption from payment of all sales tax, or from the provisions of the A.P. VAT Act; the understanding of the petitioner, regarding

clause 3.16 of the concession agreement, is contrary to the provisions of the A.P. VAT Act; the State Government issued G.O. Ms. No. 609 dated 29.05.2006 in terms of Section 15(1) of the AP VAT Act; the said notification came into force with effect from March, 2006, and was to remain in force till April, 2010 or the completion of project whichever was earlier; the said GO stipulated that the taxes paid by the petitioner, or their contractors or sub-contractors, shall be refunded within 30 days from the date of submission of their claims; in notification-II, annexed to the said GO, it was stated that the tax paid under Section 4(7) of the Act, for execution of the works contract relating to the project work of the petitioner, would be refunded on production of proof of remittance of the tax deducted at source in accordance with Section 22(4) of the Act; the State Government has not granted any exemption to the petitioner under the said G.O; the G.O. only enabled the contractor, who paid the tax on execution of the works contract, to obtain refund from the Government including the tax paid on purchase material used for construction of the port; the subject matter of the G.O. does not relate to purchases made by the petitioner, but to the works contract undertaken by the contractor of the port; the petitioner is not the beneficiary of the G.O; on verification of the annual report, for the year 2011-12, he noticed that the petitioner had declared Rs. 61.01 crores as the arrears of works contract TDS payment; he had, therefore, issued notice dated 15.07.2013 calling for their objections; he had visited the premises of the petitioner on 17.08.2013; during scrutiny of the accounts, it was detected that the petitioner had deducted tax at source of Rs. 116.22 Crores, but had remitted only Rs. 7.07 crores; consequently, he had issued notice dated 12.09.2013 calling for the petitioner''s explanation regarding recovery of TDS amounts of Rs. 108.52 Crores; the petitioner filed their objections on 24.09.2013, 18.10.2013 and 08.11.2013 along with some extracts of the ledgers; in their objection letter dated 24.09.2013, the petitioner admitted deduction of Rs. 143 Crores, remittance of about Rs. 50.00 Crores, leaving a balance of Rs. 92.98 Crores; on the basis of the material on record i.e. the annual reports, works contract tax ledger accounts and the contractor''s ledger accounts, for the years 2009-10, 2010-11 and 2011-12, maintained by the petitioner, a final notice was issued for recovery of Rs. 92.98 crores held by the petitioner, representing deduction of tax at source from the payments made to the contractor; the recovery notice is based on the records maintained by the petitioner, and which was made available by them; even after receipt of the recovery notice, the petitioner did not produce any material to establish that the amounts were not deducted; a scrutiny of the ledger accounts revealed that the contractor, apart from the payments towards running account bills, had received advances/loans; the Chartered Accountant''s certificate, that no amounts were deducted, cannot be believed; the certificate was issued based on the figures mentioned in the table therein; the said certificate also stated that, for the year ending 31.03.2013, the amounts have been disclosed as disputed liability in view of the pending writ petitions; the disclosure in the auditors report, in so far as the years 2008-09 to 2011-12 are concerned, is of undisputed arrears towards TDS; Section 22(3) of the Act mandated the petitioner to deduct and

remit TDS from the amounts payable to the contractor for execution of the works contract; the petitioner is the contractee and has engaged NECL as the contractor for execution of the works contract of their port; the petitioner was, therefore, liable to deduct and remit amounts towards TDS; Section 22(4) mandates that, if the contractee does not deduct or deducts but does not remit TDS, such amounts are liable to be recovered from the contractee as unpaid tax; the petitioner is holding Rs. 92.98 Crores of government money deducted by them as TDS from the contractor; the petitioner cannot retain money due to the Government for its private purpose; and the Writ Petition is devoid of merits.

4. In the affidavit filed in reply thereto, the petitioner reiterated that they did not recover any tax from the contractor; the records maintained by them establish that, while clearing the running account (RA) bills, no amount was deducted from NECL; the records submitted by them to the 1st respondent would show that they did not deduct amounts towards TDS on works contract in each of the running account (RA) bills; they did not make any false and misleading statements before this Court; they had only made a provision to meet the tax liability; the concession agreement, between them and the Government, subsists for a period of 50 years; clause 3.16 thereof provides for exemption from sales tax on all inputs and deemed sales; it is for the purpose of extending some more fiscal incentives, other than those specified in clause (a), has it been clarified in clause (b) that, at the request of the concessionaire, necessary notifications or recommendatory letters shall be issued by the Government to any authority of the Government permitting tax concessions or some other benefits; they have filed W.P. No. 31525 of 2013 seeking a direction to the Government to issue necessary clarifications/suitable directions regarding continuance of, or grant of, exemption from sales tax on all inputs required for port construction as spelt out in Clause 3.16 of the state concession contract entered into between the Government and the petitioner; as the respondent has wrongfully exercised the discretion, conferred upon it by the statute, on irrelevant considerations ignoring relevant considerations, in such a manner as to frustrate the object for which the discretion has been conferred, a writ of mandamus would lie; they have neither collected any amount nor have they retained any amount after its collection; the question raised in this Writ Petition is a mixed question of law and fact, having far reaching legal implications, which cannot be decided in a statutory appeal; they have not deducted any amount from the running bills, which they are permitted to deduct under Section 22(3) and (4); as there is no deduction, the question of repaying the same to the revenue does not arise; they have been exempted from payment of sales tax on all inputs required for project construction; the Government directed the 3rd respondent on 24.11.2010 not to take any coercive action against KPCL regarding entry tax; they have not deducted tax at source of Rs. 116.12 crores, or remitted only Rs. 7.07 crores; they have not admitted deduction of Rs. 143 crores, or to have remitted only Rs. 50 crores withholding the remaining amount, and leaving a balance of Rs. 92.98 crores unpaid; these allegations are

made only to prejudice this Court; they did not withhold Rs. 92.98 crores of Government money as alleged; and they have built a modern port in the east coast of India investing huge amounts with the object of providing the country with a world class infrastructure project in the private - public partnership.

5. In the impugned proceedings dated 19.11.2013, the 1st respondent referred to his verification of the annual reports, his visit to Krishnapatnam port, to the non-payment of TDS under Section 22(4) by the petitioner, the notice of recovery dated 12.09.2013, and to the contents of the petitioner''s letter of objections dated 24.09.2013 and 08.11.2013, 30.11.2013 and 08.1.2013. The 1st respondent held that NECL could claim refund of the tax on the inputs used in the execution of works contract to KPCL; there was no express provision exempting the assessee from subjecting the payments, made to the contractor through R.A. bills, to TDS; the Commercial Tax Department was merely seeking remittance of the tax deducted at source as mirrored by the petitioner''s accounts, as it would otherwise amount to unjust enrichment; the contractor and the contractee are two separate assessable entities in the eye of law; as a contractee, the petitioner had rightly subjected the payments, made to the contractor, to TDS; the default was in non-payment; the petitioner company''s auditors had qualified their report stating that TDS payments have not been remitted; G.O. Ms. No. 609 dated 29.05.2006 refers only to refund, and does not permit retention of the sums collected; the moment any sum is deducted by the assessee, the deducted sum becomes the property of the government; any claim for refund can only be preferred, before the appropriate authority, later; the Act does not grant any right to the assessee to retain sums of money deducted as TDS, or to refrain from deposited it with the department; the assessee, being a public limited company, is obliged to deduct tax at source from out of the amounts payable to the contractor, and to pay it to the department within fifteen days from the date of recovery; a limited review of the accounts revealed that the petitioner had deducted tax at source from September, 2007 to March, 2013, but had failed to remit the same, resulting in violation of Section 22(3) of the Act; Section 22(4) of the Act casts an obligation on the petitioner to remit the works contract tax, deducted at source from the contractor, within fifteen days of recovery; failure to remit the same is in breach of Section 22(4) of the Act; the 1st respondent is, consequently, empowered to recover it from the contractee as if it is unpaid tax; a limited review of the ledger, pertaining to NECL which is the principal contractor, for the tax period September, 2007 to March, 2013, revealed that the petitioner had deducted tax at source under Section 22(3) of the Act, but had not paid it to the department, thereby violating the conditions prescribed under Section 22(4) of the Act; a reasonable opportunity was granted to the petitioner; and the petitioner is liable to remit TDS of Rs. 92,98,03,154/-, along with interest, as per the express provisions of Section 2(2) read with Section 22(4) of the Act, without prejudice to the final outcome of the audit, and to avoid unjust enrichment on their part.

6. Elaborate oral submissions were made by Sri A.V. Krishna Koudinya, Learned Senior Counsel appearing on behalf of the petitioners. Written arguments have also been submitted by Sri A. Panduranga Rao, Learned Counsel for the petitioner. Sri P. Balaji Varma, Learned Special Standing Counsel for Commercial Taxes appearing on behalf of the respondents, put forth his submissions, both oral and written, in support of the impugned order. It is convenient to examine the rival submissions under different heads.

I. IS KPCL UNDER A STATUTORY OBLIGATION TO DEDUCT TDS FROM THE RUNNING ACCOUNT BILLS OF NECL, WHEN THE CONCESSION AGREEMENT EXEMPTS THEM FROM PAYMENT OF SALES TAX?

7. Sri A.V. Krishna Koundinya, Learned Senior Counsel appearing on behalf of the petitioner, would submit that KPCL had entered into a revised concession agreement with the State of Andhra Pradesh on 17.09.2004 for construction of the Krishnapatnam Port on a Build, Own, Share and Transfer (BOST) basis; in terms thereof, they are not liable to pay sales tax on the inputs required for project construction; by clause 3.16 of the revised concession agreement, GoAP undertook to forego revenue streams in various forms as per the 2001 Act, more specifically exemption from sales tax on the inputs required for project construction; no restrictions were placed on such exemption; the counter-affidavit of the 3rd respondent merely supports his order, without dealing with the revised concession agreement dated 17.09.2004; for the period prior to April, 2010 (i.e., during September, 2007 to March, 2008, 2008-09 and 2009-10) KPCL had remitted Rs. 16,63,79,337/-, Rs. 11,06,35,978/-, and Rs. 8,30,63,846/- towards TDS; the balance TDS deductible was remitted to the works contractor as an advance; these deductions were made in view of G.O. Ms. No. 609 dated 29.05.2006, though there was no liability as per the agreement; these TDS amounts, remitted to the State Government by KPCL, were refunded to the works contractor i.e., NECL by the Commercial Taxes Department; and under these circumstances, having granted refund earlier, the 3rd respondent is not justified in claiming the balance TDS amount for this period i.e., even after acknowledging that there was no tax liability for these years; during the years 2010-11 and 2011-12, Rs. 7,39,03,600/- and Rs. 6,72,95,180/- respectively were remitted to the Commercial Tax Department; no payments were made subsequently, as there was no undertaking to make any refund; the 1st respondent, while adopting the counter-affidavit filed in W.P. No. 31525 of 2013, has confirmed the grant of exemption, and the grant of refund in Phase I; he contends that the request for extension of fiscal incentives for Phase II is under examination; clause 3.16 of the agreement does not place any such restriction but exempts, from sales tax, all inputs required for project construction; the bills pertaining to Phase II were raised before 31.03.2010; as G.O. Ms. No. 609 dated 29.05.2006 was subsisting, TDS was made and remitted to the Government on the bills raised by the works contractor; subsequently, refund of these payments were also granted by the Commercial Taxes Department; this establishes that the

averments, in the counter-affidavit in W.P. No. 31525 of 2013 filed by the Government of Andhra Pradesh to the effect that grant of exemption is still under consideration, is an afterthought, apart from being violative of the agreement dated 17.09.2004; and W.P. No. 31525 of 2013 was filed by KPCL aggrieved by the inaction of the Principal Secretary, O/o the Chief Minister, Government of Andhra Pradesh in not considering and disposing of the representation made by them on 18.08.2013 to the Chief Minister, Government of Andhra Pradesh regarding issuance of necessary and suitable orders for continuance of the fiscal exemption incentives in terms of the statutory contract entered into between KPCL and the State of Andhra Pradesh.

8. Sri P. Balaji Varma, Learned Special Standing Counsel for Commercial Taxes, would submit that the 2001 Act, and the Concession Agreement dated 17.09.2004, are both prior in time to the AP VAT Act, 2005; the A.P. VAT Act and the Rules made thereunder fall within the meaning of "change in Law" in clause 2.3 of the Concession agreement; the A.P. VAT Act does not provide for exemption as was provided under the APGST Act; clause 2.3 also provides for a remedy in circumstances of a "change in Law"; G.O. Ms. No. 609, by itself, falls within the meaning of changes in law; alternatively G.O. Ms. No. 609 can be construed as remedying the situation arising from the enactment of the AP VAT Act; under clause 2.3, the GoAP has insulated itself from liabilities arising from a change in the tax laws; the petitioner was required to comply with the obligations under the changed tax law; in the light of clause 2.3 of the agreement, on the enactment of the AP VAT Act and issuance of GO.Ms. No. 609, clause 3.16 stood replaced/overruled; Clause 2.3, 13.2 and 13.3 make clause 3.16 of the agreement subservient to the provisions of the new tax law - in this case the AP VAT Act; the contention, urged on behalf of the petitioner, that, if there is no tax liability, the revenue cannot claim that TDS should be paid first, and refund can be sought later, is not tenable; KPCL is under an obligation to comply with the provisions of the AP VAT Act and GO Ms. No. 609; and, as such, they are liable to deduct TDS from the amounts paid to NECL, and remit the same to the Government.

9. Sri P. Balaji Varma, Learned Special Standing Counsel, would further submit that reliance placed on behalf of KPCL on Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, ; and G.E. India Technology Centre Private Ltd. Vs. Commissioner of Income Tax and Another, , is misplaced; in both these cases exemption was granted under the provisions of the same Act; in Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, , though the charge was created under the Act by general provisions, the same Act also provided for relief from the said charge by way of exemption; such an exemption, under the same Act, would result in a situation of no charge under the Act; in the case on hand, no exemption has been granted under the provisions of the AP VAT Act, and KPCL has been extended the benefit of refund by way of G.O. Ms. No. 609 issued under Section 15 thereof; KPCL is not justified in contending that clause 3.16 alone is applicable, and not G.O. Ms. No. 609; in so far as G.E. India Technology Centre Private Ltd. Vs. Commissioner of Income Tax and

Another, is concerned, it dealt with whether TDS should be made from every payment or from payment "chargeable under the provisions of Act"; in the present case, the amounts paid by KPCL to their contractor i.e, NECL were, generally, chargeable to tax; no relief has been granted either to KPCL or NECL, under the provisions of the AP VAT Act, from being charged to tax under the Act; and KPCL is under an obligation to deduct TDS from the running account bills of the contractor i.e., NECL, and remit the same to the Government.

10. Section 9(1) of the APGST Act enabled the State Government, by notification in the A.P. Gazette, to make an exemption in respect of any tax or interest payable under the Act (i) on the sale or purchase of any specified class of goods, or (ii) by any specified class of persons in regard to the whole or any part of their turnover. Section 9(2)(b) stipulated that any exemption from tax may be subject to such restrictions and conditions as may be specified in the notification. The Andhra Pradesh Infrastructure Development Enabling Act, 2001 (hereinafter called the "2001 Act"), which came into force on 20.08.2001, was enacted during the APGST regime. The 2001 Act was made to provide for the rapid development of physical and social infrastructure in the State, and to attract private sector participation in the designing, financing, construction, operation and maintenance of infrastructure projects in the State, to provide a comprehensive legislation for reducing administrative and procedural delays, identifying generic project risks, detailing various incentives, detailing the project delivery process, and also to provide for other ancillary and incidental matters thereto, with a view to presenting bankable projects to the private sector, and to improve the level of infrastructure in the State of Andhra Pradesh. Section 1(3) of the 2001 Act made the Act applicable to all infrastructure projects implemented through a public private partnership in the sectors enumerated in Schedule III thereto, and to such other sectors as would be notified by the Government under the Act from time to time. Section 2(h) of the 2001 Act defines ''concession agreement'' to mean a contract of the nature specified in Schedule-I between the developer and the State Government relating to any infrastructure project, or such other contract as may be prescribed, from time to time, by the Government. Section 2(j) defines "construction" to mean any construction, reconstruction, rehabilitation, improvement, expansion, addition, alteration and related works and activities including supply of any equipment, materials, labour and services related to the building or rehabilitation of any infrastructure project comprising of physical structures or systems, or commodities or for utilization of resources or provision of services. Section 2(rr) defines ''State support'' to mean grant by the State of any administrative support, asset-based support, foregoing revenue benefits support, undertaking contingent liabilities by providing guarantees or financial support to the development as enumerated in Schedule V of the Act. Section 2(s) defines ''infrastructure project or project'' to mean a project in the sectors as notified under the Act by the Government.

11. Schedule-I to the 2001 Act details the concession agreement or arrangement, with their variations and combinations, that may be arrived at by the Government Agency for undertaking infrastructure projects. The various arrangements are indicated in Schedule-I, and the Government Agency is entitled to evolve and arrive at such concession agreement or arrangement incorporating any of the arrangements enumerated in Schedule-I or any other arrangements as may be found necessary or expedient for any specific project. The various arrangements referred to in Schedule I also include Build-and-Transfer (BT); Build-Lease-and-Transfer (BLT); Build-Operate-and-Transfer (BOT); Build-Own-and Operate (BOO); and Build-Own-Operate-Transfer (BOOT). It does not, however, specifically provide for a Build-Own-Share-Transfer (BOST) arrangement. Schedule V of the 2001 Act relates to State support and provides that the Government would consider grant of the various forms of State support, as referred to thereunder, ranked in its order of preference. Third, in the order of preference, is "foregoing revenue streams". Clause-III (i) of Schedule V enables the Government to forego revenue streams in the case of all Category-II projects. The Government is, however, entitled to forego revenue streams in case of Category-I projects only if the sector policy specifically provided for the same. Among the support, to be provided by the State Government, included exemption of sales tax on all inputs required for project construction.

12. Clause 3.16(a)(i) of the Revised Concession agreement, on which reliance is placed by Sri A.V. Krishna Koundinya, Learned Senior Counsel appearing on behalf of the petitioner, cannot be read in isolation and out of context, and should be read along with the other clauses of the agreement. It is a rule of construction, applicable to all written instruments, that the instrument must be construed as a whole in order to ascertain the true meaning of its several clauses, and the words of each clause must be so interpreted as to bring them in harmony with the other provisions of the instrument, if that interpretation does no violence to the meaning of which they are naturally susceptible. The best construction of deeds is to make one part of the deed expound the other, and so to make all the parts agree. Effect must, as far as possible, be given to every word and every clause. Just as a document cannot be interpreted by picking out only a few clauses ignoring the other relevant ones, in the same way the nature and meaning of a document cannot be determined by its end-result or one of the results or consequences which flow from it. The nomenclature and description is not determinative of the real nature of the document or of the transaction thereunder. These have to be determined from all the terms and clauses of the document and all the rights and results flowing therefrom, and not by picking and choosing certain clauses and the ultimate effect or result. State of Orissa and Others Vs. Titaghur Paper Mills Company Limited and Another, ; Halsbury''s Laws of England, ''Fourth Edition, Volume 12, paragraph 1469 at page 602).

13. The Revised Concession Agreement, for development of the Krishnapatnam Port, was entered into between the Government of Andhra Pradesh ("GoAP" for short) and KPCL on 17.09.2004 (before the AP VAT Act, 2005 came into force). Clause 1.2 [c] of the said agreement stipulated that, in case of ambiguities or discrepancies in the agreement and should any clause of the said agreement prove illegal or unenforceable, the parties to the agreement undertook to replace it by a valid clause that came closest to what the illegal or unenforceable intended to stipulate; and, if such replacement was not possible, then the rest of the agreement would survive and bind the parties to the agreement as if the illegal or unenforceable clause in question were not a part of the agreement. Clause 2.1 defined ''applicable law'' to mean all laws in force and effect as on the date of the agreement, and which may be promulgated or brought into force and effect thereafter. Clause 2.3 defined ''change in law'' to mean the occurrence or coming into force of any of the following, after the submission of the detailed proposal, (a) the enactment of any new Indian Law; and (b) the repeal, modification or re-enactment of any existing Indian Law. The said clause also provided that if, after the date of the agreement, there was a change in the Law, which substantially and adversely affected the rights of the concessionaire under the agreement, the concessionaire could, by written notice, request amendments to the terms of the agreement. The concessionaire was, however, not entitled to any compensation whatsoever from the GoAP as a result of a change in the law. It enabled GoAP to decide, after mutual discussion with the concessionaire, on amending the terms of the agreement including extension of the concession period. It also provided for changes in tax laws and regulations and specifically provided that the concessionaire was not entitled to any compensation for any increase in indirect and/or direct tax, which the Concessionaire was liable to pay in respect of the port project. Clause 2.5 defined ''commencement date'' to mean the date of execution of the agreement. Clause 2.6 defined ''commercial operations date'' to mean the date on which KPCL was entitled to commence deep water operation of the Port in accordance with the provisions of the agreement. Clause 2.7 defined ''concession'' to mean the exclusive right and authority granted by GoAP to KPCL for designing, financing, building, owning, maintaining, operating and transferring an all weather, deep water, multi-purpose port at Krishnapatnam together with a right to levy, collect and retain appropriate port dues and tariffs for port services rendered to port users during the concession period. Clause 2.8 defined ''concessionaire'' to mean KPCL; and Clause 2.9 defined ''concession period'' to mean the period of concession as specified in Clause 3.3. Clause 2.44 defined "Taxes and Duties" to mean and include all taxes and duties including stamp duties payable as per the law of the land in connection with all port related activities. Clause 3.3.1 stipulated that "concession period" shall mean the period commencing from the date of execution of the agreement, for development of the Krishnapatnam Port, dated 04.01.1997 and ending on the expiry of 30 years from the commercial operations date. The concessionaire was entitled for extension by a further period of 20 years provided they developed the port assets as per the

detailed project report, and met the performance standards. Clause 3.16 related to fiscal incentives and, under sub-clause (a)(i) thereof, the GoAP undertook to forego revenue streams from the project, in the following forms, as per the 2001 Act including (i) exemption from sales tax on all inputs required for project construction. Clause 13.2 related to compliance with laws and, thereunder, KPCL was to be responsible, at all times, to comply with all applicable laws including future changes in any applicable law which should include legislation, rules, regulations, ordinances relating to ports, as well as general laws including taxation etc. The said clause enabled KPCL to challenge any law, in an appropriate forum, which prejudicially affected the implementation of the terms of the agreement or their rights. Clause 13.3 related to tax and duties and required KPCL to pay all taxes, duties etc., as defined earlier in the agreement which, at any time, may be levied by any Government Authority upon KPCL''s interest in or activities covered by the agreement as well as upon the premises.

14. The power to exempt any dealer from payment of tax on the sale or purchase of any specified class of goods, under Section 9 of the APGST Act, was available to the State Government only during the APGST regime, and not thereafter. The AP VAT Act, 2005 came into force on 01.04.2005, and the APGST Act, 1957 was repealed. While the proviso to Section 80 of the AP VAT Act stipulated that such repeal would not affect the previous operation of the APGST Act or any right, title, obligation or liability already acquired, accrued or incurred thereunder, the AP VAT Act did not confer any power on the Government to exempt any dealer from payment of sales tax. It is because tax exemption is not contemplated under the A.P. VAT Act, does Section 69(1) thereof require industrial units, availing tax holiday or tax exemption on the date of commencement of the Act, to be treated as a unit availing tax deferment.

15. Section 15(1) of the AP VAT Act merely enables the State Government, if it is necessary to do so in the public interest and subject to such conditions as it may impose, by a notification, to provide for grant of refund, of the tax paid, to any person on the purchases effected by him and specified in the said notification. Section 15(2) enables the Government to issue any notification under Section 15(1) so as to be retrospective from any day not earlier than the appointed day, and such notification would take effect from the date of its publication in the Gazette or such other earlier or later date as may be mentioned therein. Under Section 15(3), applications for refunds are required to be made in duplicate to the Commissioner within a period of six months from the date of purchase, or as the Government may prescribe in the notification, and must be accompanied by the purchase invoice in original. The power conferred on the State Government, under the AP VAT Act, is only to grant refund of the tax paid by the dealer, on the purchases effected by them, and not to exempt them from payment of tax either on the purchase or the sale of goods.

16. Clause 2.3 of the revised concession agreement relates to "change in law, Relief under Change in law and changes in Tax Laws". It defines "change in law" to mean the occurrence or coming into force, after the submission of the detailed proposal, (a) the enactment of any new Indian law and (b) the repeal of any existing Indian law. The enactment of the A.P. VAT Act, and the repeal of the APGST Act, constitute "change in law" within the meaning of clause 2.3(a). Under the sub-head "Relief under change in law", clause 2.3 provides that if, after the date of the agreement, there is a change in the Law, which substantially and adversely affects the rights of the concessionaire under the agreement (KPCL), they could, by written notice, request amendments to the terms of the agreement. As Section 9(1) of the APGST Act provided for exemption from sales tax, and the AP VAT Act makes no provision for exemption and only provides for refund under Section 15(1), clause 2.3 enabled KPCL to seek amendment of the agreement, which remedy they chose not to exercise. Clause 3.16(a) of the revised concession agreement, whereby GoAP agreed to forego revenue streams from the project as per the 2001 Act including exemption from sales tax on all inputs required for project construction, necessitated amendment consequent upon the "change in law" as GoAP had no power, under the AP VAT Act, to exempt KPCL from sales tax on the inputs required for project construction. It is not in dispute that the terms of the revised concession agreement have not been amended after the A.P. VAT Act came into force. While providing for amendment of the agreement, clause 2.3 also made it clear that KPCL was not entitled to compensation from the GoAP as a result of the change in law (i.e, repeal of the APGST Act and the enactment of the A.P. VAT Act). Clause 2.3 also provided for "change in Tax Laws and Regulations" and expressly stipulates that KPCL was not entitled to compensation for increase in indirect tax which they were liable to pay in respect of the port project. As clause 3.16 became unenforceable, consequent upon the repeal of the APGST Act and the enactment of the AP VAT Act, KPCL could have, in terms of clause 1.2(c), replaced it by a valid clause and, if such replacement was not possible, then the remaining part of the agreement would survive as if the unenforceable clause (i.e., clause 3.16) was not a part of the agreement. Clause 13.2 of the revised concession agreement, under the head "compliance with law" required KPCL not only to comply with the existing laws but also future changes, if any, in the applicable laws, including taxation laws. KPCL was, therefore, obligated, in terms of clause 13.2 of the agreement, to comply with the provisions of the AP VAT Act including Section 22(3) thereof, and deduct works contract tax at source from the running bills of the contractor i.e., NECL. Further clause 13.3, under the head "Taxes and Duties" required KPCL to pay all taxes as defined earlier in the Agreement which, at any time, may be levied by any Government authority upon KPCL''s interest in or activities covered by the Agreement. Reliance placed on behalf of KPCL, on clause 3.16 of the revised concession agreement, to contend that they are entitled for exemption from payment of value added tax till completion of the project, even after AP VAT Act came into force, is therefore misplaced.

17. As shall be referred to in detail hereinafter, even during the period when G.O. Ms. No. 609 dated 29.05.2006 was in force, KPCL did not remit the tax, deducted by them from the running account bills of NECL, to the Government in its entirety. The contention that they did not make payment subsequently, as there was no undertaking to make any refund, is merely an afterthought, and has been urged only for the purposes of this Writ Petition. Even otherwise absence of any notification, under Section 15(1) of the A.P. VAT Act, does not absolve KPCL of their statutory obligation to deduct tax at source from the running account bills of NECL, and to remit the deducted tax to the Government in its entirety. It would not be proper for this Court to examine, whether or not GoAP is obligated to issue a notification under Section 15(1) of the A.P. VAT Act for grant of refund, in the present writ proceedings as this is the subject matter of examination in W.P. No. 31525 of 2013 filed by KPCL. Suffice it to hold that KPCL is statutorily obligated to deduct tax at source from the running account bills of NECL and to remit the amount, representing the deducted tax at source, to the government, whether or not a notification is issued by GoAP under Section 15(1) of the Act. The only distinction is that, if a notification is issued under Section 15(1) of the Act, NECL would be able to seek refund of the tax deducted at source by KPCL and paid to the Government, otherwise not.

18. Let us now examine the judgments cited by Sri A.V. Krishna Koundinya, Learned Senior Counsel appearing on behalf of the petitioner. While considering the scope of Section 195(2) of the Income-tax Act the Supreme Court, in G.E. India Technology Centre Private Ltd. Vs. Commissioner of Income Tax and Another, , held that the tax, which is required to be deducted at source, is deductible only out of the chargeable sum; this is the underlying principle of Section 195; Section 195 imposes a statutory obligation on any person responsible for paying, to a non-resident, any sum "chargeable under the provisions of the Act" which expression does not find place in the other Sections of Chapter XVII; the Income-tax Act constitutes one single integral inseparable Code; hence, the provisions relating to TDS applies only to those sums which are chargeable to tax under the Income-tax Act; the interpretation of the Department not only required the words "chargeable under the provisions of the Act" to be omitted, it also lead to absurd consequences; it resulted in a situation where even when the income had no territorial nexus with India, or was not chargeable in India, the Government would nonetheless collect tax; Section 195(2) provided a remedy by which a person may seek a determination of the "appropriate proportion of such sum so chargeable" where a proportion of the sum so chargeable was liable to tax; the expression, "sum chargeable under the provisions of the Act" in Section 195(1), must be given weightage; further Section 195 used the word `payer'', and not the word "assessee"; the payer was not an assessee; the payer became an assessee-in-default only when he failed to fulfill the statutory obligation under Section 195(1); and if the payment did not contain the element of income, the payer cannot be made liable.

19. The statutory obligation imposed by Section 22(3) of the A.P. VAT Act on KPCL, (a company registered under the Companies Act, 1956), is to deduct, from out of the amounts payable by them to NECL, in respect of the works contract executed for them, an amount calculated at the prescribed rate, and to remit such amount to the Government. It is not even the case of KPCL that the deemed sale of goods, involved in the execution of the works contract, by NECL is not liable to tax under the A.P. VAT Act. Their justification for not deducting tax at source from the running bills of NECL and in not remitting such tax, deducted at source from the bills of NECL, to the Government is that they are exempt from tax not under the A.P. VAT Act but under clause 3.16 of the revised concession agreement entered into with the GoAP. Reliance placed on behalf of the petitioners on G.E. India Technology Centre Private Ltd. Vs. Commissioner of Income Tax and Another, , wherein the statutory obligation to deduct tax at source was only on payment of the "sum chargeable to tax under the provisions of the Income Tax" and not otherwise, is, therefore, misplaced.

20. In Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, the Supreme Court held that, if the Act makes it mandatory that the tax can be collected only at one stage, it is not enough for the State to say that a person, who is not liable to pay tax, must, nevertheless, pay it in the first instance, and then claim refund at a later stage; if a person is not liable for payment of tax at all at any time, the collection of tax from him, with a possible contingency of refund at a later stage, will not make the original levy valid because, if particular sales or purchases are exempt from taxation altogether, they can never be taken into account, at any stage, for the purpose of calculating or arriving at the taxable turnover and for levying tax; and the provisions contained in a statute, with respect to exemption of tax or refund or rebate on the one hand, must be distinguished from the total non-liability or non-imposition of tax, on the other.

21. Unlike in Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, , NECL is liable to be subjected to tax under the AP VAT Act on the deemed sale of goods involved in the execution of the works contract for KPCL. The law declared by the Supreme Court, in Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, , would apply to cases where there is no liability to pay tax under the provisions of a statutory enactment, and not to cases where, though there is liability to pay tax under the legislative provision, exemption from payment of tax is claimed in terms of a clause in a contract. In this context it is necessary to bear in mind that the three stages in the imposition of tax are the declaration of liability, assessment, and recovery. If there is a liability to tax, imposed under the terms of the taxing statute, then follow the provisions in regard to the assessment of such liability. If there is no liability to tax there cannot be any assessment either. Sales or purchases, in respect of which the statute does not impose any liability to tax, cannot be included in the calculation of turnover for the purpose of assessment, and the exact sum which the dealer is liable to pay must be ascertained without any reference thereto. There is a broad distinction between the provisions contained in the statute in regard to

exemptions from tax or refund or rebate of tax on the one hand, and the non-liability to tax or non-imposition of tax on the other. In the former, but for the provisions as regards exemption or refund or rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are, prima facie, liable to tax and the only thing which the dealer is entitled to, in respect thereof, is the deduction from the gross turnover in order to arrive at the net turnover on which tax can be imposed. In the latter, the sales or purchases are exempt from taxation altogether. If they are thus not liable to tax, no tax can be levied or imposed on them, and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from calculation of the gross turnover, as well as the net turnover, on which sales tax can be levied or imposed. Bhawani Cotton Mills Ltd. Vs. State of Punjab and Another, ; A.V. Fernandez Vs. The State of Kerala, ; and Chatturam Horilram Ltd. Vs. Commissioner of Income Tax, Bihar and Orissa, .

22. In cases of non-liability to tax under the A.P. VAT Act, a dealer need not disclose the turnover in their returns. However, in cases where the dealer is granted exemption in the exercise of the powers conferred under a statute, the sales would have to be included in the gross turnover, and the dealer would only be entitled to deduct therefrom, the exempted turnover, for arriving at the net turnover. As there is a deemed sale of goods involved in the execution of a works contract, and the value of the goods at the stage of its incorporation in the works constitutes the measure for imposition of tax, NECL was liable to pay VAT under the AP VAT Act and as the A.P. VAT Act, unlike the APGST Act, does not confer any power on the Government to grant exemption, KPCL was statutorily obligated to deduct TDS from the running account bills of NECL.

II. DO THE BOOKS OF ACCOUNTS OF KPCL SHOW THAT THEY HAD DEDUCTED TAX AT SOURCE FROM THE RUNNING ACCOUNT BILLS OF NECL?

23. Sri A.V. Krishna Koundinya, Learned Senior Counsel, would submit that for the period, subsequent to 2010-11, journal entries were passed in the books of KPCL debiting the capital works in progress (CWIP) account and crediting the Income Tax TDS, Works Contract Tax TDS and NECL A/c respectively; the amounts paid were shown by debiting NECL A/c, advance to NECL A/c (being the Works Contract Tax TDS) and the Income Tax TDS A/c, and crediting the bank account; these entries were incorrectly construed by the 3rd respondent as actual deduction of TDS for the works contract; and, for the period subsequent to 2010-11, no TDS was made except showing it as a provision as required by the audit and accounting standards, and as explained in the above referred journal entries.

24. Sri P. Balaji Varma, Learned Special Standing Counsel for Commercial Taxes, would submit that the statement filed by KPCL, along with their letter of objections dated 23.09.2013, (filed in reply to the show cause notice dated 12.09.2013), shows the "TDS amount", "amount paid" and "balance"; this statement establishes that

KPCL has deducted TDS amounts; enclosed to the Annual report for the year 2009-10 is the Auditors report and, from clause ix(a) thereof, it is evident that (i) TDS of AP works contract Tax for Rs. 1794.93 lakhs is in arrears, (ii) the said amount in arrears is the crystallised liability, and as such is undisputed; similarly the Annual Report, for the years 2010-11, shows the amount in arrears as Rs. 4056.20 lakhs; the Annual Report for the year 2011-12 discloses TDS arrears as Rs. 6101.04 lakhs; the ledger of NECL, in the books of KPCL, for the years 2009-10, 2010-2011 and 2011-2012 show that KPCL had, in fact, deducted tax at source; and the Statements, for the years 2009-2010, 2010-11 and 2011-12, contain the following information (a) Date of running bill, (b) Value of the work, (c) Amount deducted and credited to Works Contract Account, (d) Amount credited to Income Tax TDS account, (e) balance credited to NECL, (f) the total amount of works contract tax deducted, remitted to the Government, and the balance tax payable, (g) the balance tax payable being carried forward, and (h) amounts shown in the Annual Report as undisputed (crystallised) arrears.

25. Section 22(3) of the A.P. VAT Act requires a company, registered under the Companies Act, 1956, to pay, from out of the amounts payable by them to a dealer in respect of the works contract executed for them, an amount calculated at such rate as may be prescribed; and for the company (contractee), deducting tax at source, to remit such amount in the manner prescribed. Section 22(4) requires any authority or person, deducting any sum in accordance with Section 22(3), to pay, within the prescribed time, the sum so deducted, to the credit of the State Government. Section 22(4) also provides that if the authority or the person does not deduct, or after deducting fails to pay, tax as required by Section 22, he shall be deemed to have not paid the tax within the time prescribed under the provisions of the Act; and, in such a case, all the provisions of the Act, including the provisions relating to interest, shall apply mutatis mutandis to such unpaid tax.

26. Rule 17(1)(f) of the AP VAT Rules, 2005 (hereinafter called the "Rules") stipulates that, where tax has been deducted at source, the contractor - VAT Dealer shall obtain Form 501A with unique ID from the Assistant Commissioner/Commercial Tax Officer concerned, and supply the same to the contractee. The contractee is required to complete Form 501A with the required information, and supply the same to the contractor within 15 days after the end of the month in which the deduction is made. The Contractor-VAT dealer is required to submit Form 501A along with the tax return. Rule 18 relates to tax deduction at source and, under sub-rule (1)(a) thereof, the tax deducted at source shall be, in general, at the rate of either 4% or 2%/5% or 2.5% as prescribed in sub-clause (i) or (ii) respectively of clause (b). Rule 18(1)(bc) stipulates that the VAT dealer shall obtain Form 501A, with unique ID, from the Assistant Commissioner/Commercial Tax Officer concerned, and supply the same to the contractee. T he contractee is required to complete Form 501A, supplied by the contractor, indicating the TIN of the contractor, the amount of tax deducted at source, and the details of the related contract; and supply the same

to the contractor within fifteen days from the date of each payment. Rule 18(1)(bd) requires the contractor to submit Form VAT 501A, duly certified by the contractee, together with Form VAT 200, by the 20th of the month, following the month in which the payment was received. Rule 18(2) stipulates that any amount or any sum, deducted in accordance with the provisions of Section 22(3) and paid to the State Government, shall be treated as a payment of tax on behalf of the dealer executing the works contract; and credit shall be given to the said dealer, for the period for which the amount was so deducted, on production of the certificate furnished by the contractee. Rule 18(4) stipulates that, where the contractee fails to remit such tax deducted at source within 15 days of the date of payment to the contractor, the person, authorised to make payment and to deduct tax, shall be liable to pay interest, for the delayed payment, as may be applicable under the Act.

27. In reply to the show cause notice issued by the 3rd respondent dated 12.09.2013, for the tax period from September, 2007 to March, 2013, the petitioner stated, in their letter dated 23.09.2013, that the records maintained by them categorically established that no amount was recovered while clearing the R.A. bills. Along with the said reply the petitioner filed two statements, the first is the statement of the works contract tax and TDS details as per their books, and the second statement is as per the show cause notice dated 12.09.2013, which shall be referred to in detail later in this order. Along with their reply dated 23.09.2013, the petitioner also enclosed a certificate of their Chartered Accountant dated 28.11.2013 wherein details of the EPC work done bills, and payments made to the EPC contractor, were furnished in a tabular statement. The Chartered Accountant certified that, in their opinion and from the data given in the tabular statement, it was evident that the petitioner had made payment of EPC work done bills to the contractor in full without retaining/withholding any amount for Works contract tax; the concessionaire did not withhold/deduct works contract TDS in a physical form, from the payments against EPC work done bills, in view of the fiscal benefits (including sales tax) granted to them vide Clause No. 3.16 of the concession agreement, and its pending application with the GoAP for issue of a suitable G.O. extending the fiscal benefits; however provision, for works contract tax liability, was made in the accounts as required by the accounting and auditing standards, and the same was disclosed as a statutory liability in the annual accounts; the said provision was disclosed as disputed liability in the annual accounts, for the year ending 31.03.2013, in view of the pending writ petitions; and in the event of a G.O. being issued by the GoAP, extending fiscal benefits like works contract tax, which, in the opinion of the management of KPCL and the legal opinion, was highly likely, the entire works contract tax liability would be transferred/adjusted against the advances/dues of the EPC contractor.

28. The contention of KPCL that they did not deduct tax at source, from the running account bills of NECL (representing the amounts payable for execution of works contract for construction of the Krishnapatnam Port), is not borne out from the

records placed for our perusal. Along with his counter-affidavit, the first respondent has filed the relevant extracts of the ledger account of NECL in the books of accounts of KPCL. By way of illustration a few of the entries, relating to the period 01.04.2009 to 31.03.2010, are extracted hereunder:

28. Similar journal entries were passed in the books of accounts of KPCL for the years 2010-11 and 2011-12 also. It is wholly unnecessary for us to burden this judgment with all the other entries. Suffice it to hold that the ledger account of NECL, in books of accounts of KPCL, itself shows that works contract tax was deducted from the RA bills of NECL. From out of the capital work in progress KPCL has deducted, among others, works contract tax and has given NECL credit only for the balance amount. It is only the net amount which, on their account being credited, is shown as payable to NECL by KPCL. It is evident therefore that, while KPCL had deducted tax at source from the RA bills of NECL, they have not remitted the TDS amount to the Government. This is also evident from the auditors report for the three years 2009-10 to 2011-12 which form part of the annual report of KPCL for the said three years. The Annual Report for the year 2009-10, (a copy of which is enclosed along with the Writ Petition), contains the Auditors Report for the said year. Clause IX (a) of the Annexure to the Auditors Report reads as under:

"(a) According to the records of the company and information and explanations given to us the company has been generally regular (except the items reported hereunder) in depositing undisputed statutory dues including Income-tax, Sales tax, VAT, Wealth tax, Service tax, Customs duty, cess and other statutory dues with the appropriate authorities during the year. According to the information and explanations given to us, no undisputed amounts payable in respect of above were in arrears, as at 31st March, 2010 for a period of more than six months from the date on which they became payable except an amount of Rs. 1794.93 lakhs in respect of TDS of AP Work contract Tax.)"

(emphasis supplied).

29. It is evident therefrom that KPCL is in arrears of Rs. 1794.93 lakhs in respect of TDS of AP Work contract tax. A similar objection is to be found in the Auditors Report for the year 2010-11 wherein the amount in arrears is shown as Rs. 4056.30 lakhs, and the Auditors Report for the year 2011-12 wherein the amount in arrears is shown as Rs. 6101.04 lakhs. Along with their counter-affidavit, the respondents have furnished a tabular statement of the ledger account of NECL, in the books of KPCL, for the years 2009-10, 2010-11, 2011-12 and 2012-13, wherein details of the running bills of NECL are furnished including (a) the date of the running bill; (b) the value of the work as per accounts; (c) amount credited to works contract tax (WCT) account; (d) amount credited to income tax TDS account; (e) balance amount credited to NECL; (f) the total amount of works contract tax due as shown in the annual report; and (g) the amount, shown in the statement filed by the petitioner along with their reply to the show-cause notice, in the remarks column. The figures in the tabular

statement tally with the figures in the Auditors reports enclosed as part of the Annual reports of KPCL, and supports the submission of the respondents that KPCL had deducted tax at source towards works contract tax, and did not remit such tax deducted at source, in its entirety, to the Government.

30. Along with their Writ Petition, KPCL has enclosed a comparative statement (filed by them along with their letter dated 23.09.2013 submitted in reply to the show cause dated 12.09.2013). The first statement relates to WCT/TDS details as admitted by KPCL, and the second statement is as shown in the show cause notice issued by the first respondent on 12.09.2013. It is useful to extract both these statements.

"Statement of WCT - TDS details as per KPCL

Tax period	Sept, 07 to Mar,08	2008-09	2009-10	2010-11	2011-12	2012-13	Total
TDS Amount	166,379,337	290,129,018	270,513,797	240,955,280	404,445,693	58,657,970	1,431,081,0
Amount paid	166,379,337	110,635,978	83,063,846	73,903,600	67,295,180		501,277.941
Balance		179,494,040	187,449,951	167,051,680	337,150,513	58,657,970	929,803,154

Rupees Ninety Two Crores Ninety Eight lakhs Three thousand one hundred and fifty four only.

As per show cause notice dated 12.09.2013

Tax period	Sept, 07 to Mar, 08	2008-09	2009-10	2010-11	2011-12	2012-13	Total
TDS Amount	167,173,373	76,423,818	273,436,394	240,955,280	404,145,693	79,188,260	1,241,422,8
Amount Paid	--	--	31,121,972	--	45,865,680	--	76,987,652
Balance	167,173,373	76,423,818	242,314,422	240,955,280	358,380,013	79,188,260	1,164,435,1

Rupees One hundred sixteen crores forty four lakhs thirty five thousand one hundred and sixty six only.

31. Even from their own statement enclosed with their reply letter dated 23.09.2013, filed in reply to the show cause notice dated 12.09.2013, it is clear that KPCL had deducted tax at source from the running account bills of NECL, but did not pay the entire amount, representing the tax deducted at source, to the Government. While KPCL had deducted TDS, and claim to have paid the entire deducted tax to the Government for the period from September, 2007 to March, 2008, even, on their own admission, they had deducted TDS for the subsequent years 2008-09 to 2011-12, but had only paid a part thereof to the Government. While TDS, for Rs. 5,86,57,970/-, was admittedly deducted for the year 2012-13, KPCL failed to pay even a single rupee to the Government for the said year.

III. ARE THE RESPONDENTS JUSTIFIED IN CONTENDING THAT TAX SHOULD BE PAID FIRST AND REFUND CLAIMED LATER?

32. Sri A.V. Krishna Koundinya, Learned Senior Counsel appearing on behalf of KPCL, would submit that the State should speak with one voice; the agreement entered into by the State of Andhra Pradesh cannot be ignored by the respondents; and, if there is no tax liability, it cannot be said that TDS should be paid first, and refund can be claimed later.

33. It is no doubt true that the State, which is represented by different departments, should speak in one voice. Vadilal Chemicals Ltd. Vs. The State of Andhra Pradesh and Others, . While GoAP had, under clause 3.16(a)(i) of the revised concession agreement, exempted KPCL from sales tax on all inputs required for project construction during the APGST regime and prior to the repeal of the APGST Act, they were disabled from continuing to grant KPCL such exemption after the AP VAT Act came into force. As Section 15(i) of the Act enabled them to issue a notification providing for grant of refund, GoAP, having found it necessary to do so in the public interest, issued G.O. Ms. No. 609 Revenue (CT-II) Department dated 29.05.2006, directing that the tax paid:--

a). By M/s. Krishnapatnam Port Company Ltd. to their sellers on the purchase of all inputs for construction of Krishnapatnam Port;

b). By the contractors and sub-contractors, if any, engaged by or for Krishnapatnam Port Ltd. on their purchases of all inputs used for construction of M/s. Krishnapatnam Port under the provisions of the said Act;

shall be refunded to the respective purchasers subject to the following conditions:

(1). The goods purchased by M/s. Krishnapatnam Port Company Ltd. or its contractors or sub-contractors must be for or use or consumption in the execution of the project work of Krishnapatnam Port.

(2). M/s. Krishnapatnam Port Company Ltd. shall furnish a separate declaration duly signed by the competent authority to the effect that the goods purchased by it are for use or consumption in the exemption of project work of Krishnapatnam Port Ltd. for each tax invoice in respect of which refund of tax paid is claimed.

(3). Where the said contractors or sub-contractors make claim for refund of the said tax paid in addition to the tax invoices or invoices received from their sellers they shall furnish the said declaration in respect of each such invoice duly signed by the said person on behalf of Krishnapatnam Port Company Limited."

34. The Notification was deemed to have come into force with effect from the month of March, 2006 and to be in force till April, 2010 or the completion of the said project whichever was earlier. The refund of taxes paid by KPCL or its contractors or subcontractors, was be made within (30) days from the date of the submission of the claims.

35. A refund can be claimed only for the tax paid and consequently NECL, as the contractor for the construction of the Krishnapatnam Port Project, was liable to pay tax on the deemed sale of inputs used in the execution of the contract of construction of the Krishnapatnam Port. It is for the tax paid in this regard, did G.O. Ms. No. 609 dated 29.05.2006 enable refund to be claimed by them. During the course of arguments this Court was informed by Sri S. Ravi, Learned Senior Counsel appearing on behalf of NECL, that NECL had sought for, and was granted, refund of the tax deducted at source by KPCL from their running account bills and remitted to the Government for the tax periods 2007-08 to 2009-2010. The very fact that KPCL had deducted TDS, albeit in part, for the aforementioned tax periods, and NECL had obtained refund of these amounts from the Government, goes to show that both KPCL and NECL were well aware that they were not entitled to claim exemption from tax under the AP VAT regime, and could only claim refund of the tax paid, that too only if a notification was issued by GoAP under Section 15(1) of the AP VAT Act, and the conditions stipulated therein had been complied with. To avail the benefits of a notification, the conditions prescribed therein should be interpreted in terms of its wording, and must be strictly complied with. State of Punjab and Others Vs. Punjab Fibres Ltd. and Others, . The submission of Sri A.V. Krishna Koundinya, Learned Senior Counsel, that the tax deducted at source, after 2010-11, was paid to NECL as advance, has been urged for the first time in the written arguments filed after hearing of the Writ Petition had concluded, and is neither reflected in the affidavit filed by KPCL in support of the writ petition, nor in the affidavit filed by them in reply to the counter-affidavit filed on behalf of the respondents. No material has been placed before us to support this contention. In any event, having deducted TDS from the running account bills of NECL, KPCL was statutorily obligated to remit the said amount to the Government, and not pay it as advance to NECL.

36. As NECL was liable to pay tax under the AP VAT Act, for execution of the works contract of construction of the Krishnapatnam Port, KPCL was statutorily obligated,

under Section 22(3) of the AP VAT Act, to deduct tax at source from the running account bills of NECL, and remit the deducted tax amount to the Government. The fact that NECL could seek refund of the tax paid, in view of G.O. Ms. No. 609 dated 29.05.2006, did not absolve KPCL of their statutory obligation to deduct tax at source. Even on a notification being issued under Section 15(1) of the AP VAT Act, the contractee is statutorily obligated, under Section 22(3) thereof, to deduct tax at source from the running account bills of the contractor, and the contractor is entitled, thereafter, to claim refund. If a statute has conferred a power to do an act, and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than the one prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. Dipak Babaria and Another Vs. State of Gujarat and Others, ; Taylor v. Taylor (1875) 1 Ch D 426; AIR 1936 253 (Privy Council); Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, ; State of Uttar Pradesh Vs. Singhara Singh and Others, ; Chandra Kishore Jha Vs. Mahavir Prasad and Others, ; Dhananjaya Reddy etc. Vs. State of Karnataka, ; and Gujarat Urja Vikash Nigam Ltd. Vs. Essar Power Ltd., .

37. As noted hereinabove G.O. Ms. No. 609 dated 29.05.2006 was in force from March, 2006 till April, 2010 or completion of the project whichever was earlier. While KPCL was required to deduct tax at source from the running account bills of NECL from March, 2006 onwards, NECL was entitled to claim refund of the deducted tax only till G.O. Ms. No. 609 dated 29.05.2006 was in force, and not thereafter. For the tax period 2007-08 to 2009-10 and April, 2010 KPCL is liable to remit the balance TDS, deducted from the running account bills of NECL, to the Government (i.e., the difference between the tax deducted at source and the TDS amount already remitted to the Government), and NECL would be entitled to claim refund thereof in accordance with G.O. Ms. No. 609 dated 29.05.2006. However for the period subsequent to April, 2010, while KPCL is bound to remit the tax deducted at source from the running account bills of NECL to the Government, NECL would not be entitled to claim refund in the absence of a notification being issued by the Government under Section 15(1) of the A.P. VAT Act.

IV. DOCTRINE OF PROMISSORY ESTOPPEL AND LEGITIMATE EXPECTATION:

38. Sri A.V. Krishna Koundinya, Learned Senior Counsel appearing for KPCL, would submit that the GoAP had, by way of the revised concession agreement, made to KPCL an unequivocal promise to exempt them from payment of sales tax; this agreement is intended to effect a legal relationship; and KPCL had acted upon the said promise and had complied with its obligations under the concession agreement. Learned Senior Counsel would also invoke the doctrine of legitimate expectation to contend that KPCL had a legitimate expectation to be exempted from payment of sales tax till completion of the Krishnapatnam Port Project.

39. There can be no estoppel against the Government in the exercise of its legislative, sovereign or executive powers. Kasinka Trading and another, etc. etc. Vs. Union of India and another, ; Excise Commissioner, Uttar Pradesh, Allahabad and Others Vs. Ram Kumar and Others, . While the doctrine of promissory estoppel is applicable against the Government also, particularly where it is necessary to prevent fraud or manifest injustice, the doctrine cannot be pressed into aid to compel the Government or the public authority "to carry out a representation or promise which is contrary to law or which is outside the authority or power of the officer of the Government or of the public authority to make". The doctrine of promissory estoppel cannot be invoked in the abstract, and Courts are bound to consider all aspects including the results sought to be achieved and the public good at large. The fundamental principles of equity must ever be present in the mind of the Court while considering the applicability of the said doctrine. If it can be shown, having regard to the facts and circumstances of the case, that it would be inequitable to hold the Government or the public authority to its promise, assurance or representation, the doctrine must yield. Kasinka Trading and another, etc. etc. Vs. Union of India and another, ; Union of India (UOI) and Others Vs. Godfrey Philips India Ltd., . The doctrine of promissory estoppel would not apply in the teeth of an obligation or liability imposed by law, and there can be no promissory estoppel against the exercise of legislative power. Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, ; Kasinka Trading and another, etc. etc. Vs. Union of India and another, . As the APGST Act, which conferred power on the Government to exempt a dealer from payment of sales tax, has been repealed, and the AP VAT Act does not empower the Government to grant exemption but only enables it to grant refund, the doctrine of promissory estoppel cannot be invoked to compel the GoAP to carry out a promise contrary to the provisions of the A.P. VAT Act.

40. Likewise KPCL/NECL cannot claim a legitimate expectation to be continued to be exempt from payment of sales tax, as the revised concession agreement itself provides for a change of law, and the steps required to be taken by the parties to the agreement in this regard. As grant of exemption is contrary to law (ie the A.P. VAT Act), KPCL cannot claim to have a legitimate expectation that GoAP would continue to grant it exemption. If a denial of legitimate expectation, in a given case, amounts to denial of a right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 but a claim based on mere legitimate expectation, without anything more, cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider but the court must lift the veil and see whether the decision is violative of these principles warranting interference. (Attorney General for New South Wales v. Quin (1990) 64 Aust LJR 327; National Buildings Construction Corporation Vs. S. Raghunathan and Others, . To strike down the exercise of administrative power, solely on the ground of avoiding the disappointment of the legitimate expectations

of a person, would be to set the Court adrift on a featureless sea of pragmatism. Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form a basis for invalidating the exercise of a power when its exercise otherwise accords with law. Union of India and others Vs. Hindustan Development Corpn. and others, ; Attorney General for New South Wales (1990) 64 Aust LJR 327; National Buildings Construction Corporation Vs. S. Raghunathan and Others, . As has been referred to hereinabove, the revised concession agreement provides for a situation where there is a change in law. It requires the agreement to be suitably amended to bring it in conformity with the change in law. Having failed to do so, it is not now open to KPCL to contend that exemption from payment of sales tax should be continued, notwithstanding that it would then fall foul of the provisions of the A.P. VAT Act, on the application of the doctrine of legitimate expectation. The contention that the doctrine of legitimate expectation and promissory estoppel are attracted does not, therefore, merit acceptance.

V. HAS KPCL MADE FALSE STATEMENTS ON OATH IN THE WRIT AFFIDAVIT AND THE REPLY AFFIDAVIT?

41. Sri P. Balaji Varma, Learned Special Standing Counsel, would submit that the petitioner has made false and untrue statements, and have filed and relied on false documents to substantiate their untrue and false statements in the writ petition; and they have not only approached the court with unclean hands, but have also played fraud on the Court.

42. False averment of facts is a serious problem faced by Courts. Once discovered, it is the duty of the Court to take appropriate steps to ensure that no one derives any benefit or advantage by abusing the legal process. Fraudulent and dishonest litigants must be discouraged. (A. Shanmugam v. Ariya Kshatriya Rajakula Vamsathu Madalaya Nand Havana Paripalanai Sangam Represented by its President A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam Represented by Its President etc., . Every person invoking the jurisdiction of the Court must state the truth, be it in the pleadings, affidavits or evidence. The pleadings must set-forth sufficient factual details which inspire confidence and credibility. If false averments, evasive and false denials, are introduced and the Court discovers falsehood, concealment and distortion in the pleadings and the documents, it should, in addition to full restitution, impose appropriate costs. It is the bounden obligation of the Court to neutralize any unjust and/or undeserved benefit or advantage obtained by abusing the judicial process. A. Shanmugam Vs. Ariya Kshatriya Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam Represented by Its President etc., .

43. Dishonesty should not be permitted to bear fruit and confer benefit to the person who has made a misrepresentation. District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi, ; Union of India and others Vs. M. Bhaskaran, G.

Radhakrishnan and C. Devan, ; Vice Chairman, Kendriya Vidyalaya Sangathan. v. Girdharilal Yadav (2004) 6 SCC 325; State of Maharashtra and Others Vs. Ravi Prakash Babulalsing Parmar and Another, ; Himadri Chemicals Industries Ltd. Vs. Coal Tar Refining Company, ; Md. Ibrahim and Others Vs. State of Bihar and Another, ; and Meghmala and Others Vs. G. Narasimha Reddy and Others, . One who comes to the Court, must come with clean hands. A person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, .

44. Para 11 of the affidavit, filed in support of the Writ Petition, refers to the reply submitted by KPCL to the show cause notice issued by 3rd respondent, wherein KPCL had stated that they had not recovered any tax from the contractor, and the records maintained by them establish that, while clearing the running account bills, no amount was deducted from NECL. In para 12 of the writ affidavit it is stated that the account books of KPCL categorically make it clear that, in fact, no taxes were deducted by the petitioner and only a provision for works contract tax liability was made in the accounts. Again in para 16 of the writ affidavit it is reiterated that KPCL had not deducted tax as alleged by the 3rd respondent. In para 3 of their counter affidavit the 3rd respondent, while referring to the averments in the writ petition, stated that KPCL has made incorrect and false statements, and the writ petition is liable to be dismissed on that ground. In reply thereto KPCL, at para 3 of their reply affidavit, while denying that they had made false statements in the writ affidavit, stated:--

"...when there is no deduction from the contractor, the allegation of deduction in the running account (RA) bills and its reflection in the ledger account is just a figment of imagination."

45. Likewise, at para 6 of the reply affidavit, it stated:--

"auditor''s report appended to the annual report is not a declaration of the amount being in arrears also being an undisputed amount. It is just a provision made to meet the tax liability. It is not a categorical admission and a statement intended to mislead as alleged by the petitioner."

46. Para 13 and 15 of the reply affidavit is a reiteration of the same statements.

47. The petitioner has not only suppressed relevant facts regarding their having deducted tax at source from the running account bills of NECL, they have made false statements on oath before this Court that there is no deduction of tax at source from NECL. They have, by resort to such dishonest means, secured interim stay of all further proceedings, (order in W.P.M.P. No. 43132 of 2013 in W.P. No. 34680 of 2013 dated 02.12.2013) and have thereby avoided remitting the tax deducted at source, from the running account bills of NECL, to the Government. The undeserved benefit and advantage obtained by KPCL, by abusing the judicial process, must be

neutralized.

VI. CONCLUSION:

48. The Writ Petition fails and is, accordingly, dismissed. As they have suppressed facts, made false statements on oath, and have thereby abused the process of Court, KPCL shall pay exemplary costs of Rs. 75,000/- to the Commissioner, Commercial Taxes within three weeks from the date of receipt of a copy of this Order, failing which it shall be open to the Commissioner, Commercial Taxes to recover the said amount from them in accordance with law. The miscellaneous petitions pending, if any, shall also stand automatically dismissed.