NHPC Ltd. Vs. Principal Commissioner, CGST and Ors.

CWP No. 10471 of 2024

20.09.2024

Present: Mr. B.L. Narasimhan, Advocate (through video conferencing) Ms. Shreya Khunteta, Mr. Amrinder Singh, Ms. Shradha Karol and Mr. Vaibhav Chauhan, Advocates, for the petitioner.

Mr. Sunish Bindlish, Advocate with Ms. Ridhi Bansal Ms. Sidhi Bansal, (through video conferencing), Mr. Vishal Singh Thakur and Ms. Lalita Sharma, Advocates, for respondent no.4.

CWP No. 10471/2024 & CMP No. 17439 /2024

Notice be issued to respondents no. 1 to 3 and 5 to 8, returnable for **18.11.2024**, on taking steps within one week. Mr. Vishal Singh Thakur, Advocate, accepts notice on behalf of respondent no.4.

2) In this Writ petition, petitioner has questioned the impugned order dt. 14.06.2024(Annexure P-1) passed by 2nd respondent confirming the demand of CGST and SGST/UTGST under Section 74(9) of the CGST Act, 2017 read with corresponding Section 74(9) of the SGST Acts, 2017 and Section 21 of the UTGST Act, 2017, alongwith penalty equivalent to tax imposed against the petitioner.

3) The petitioner has it's registered office in the State of Himachal Pradesh and in the impugned order, the liability qua the power stations run by the petitioner in the State of Himachal Pradesh , which is more than Rs.100 crores is imposed; and the total liability in respect of the power stations run by the petitioner in the other States including the State of Himachal Pradesh imposed is in excess of Rs. 1000 crores.

4) The petitioner is engaged in the activity of power generation and is registered with various States GST Authorities including the State of Himachal Pradesh, vide different GSTINs. It had entered into agreements with various State Governments including the State of Himachal Pradesh, for establishing and running power generation projects in the State. Under such agreements, as compensation towards causing distress to the environment and people involved due to the setting up of the power projects, the petitioner provides 12% of the power generated, free of cost to the State Governments and 1% free power to the Local Area Development Fund. Details of the agreements and the relevant clauses are set out in para-8 of the Writ petition.

5) This is in accordance with the power sharing letter issued on 01.11.1990 (Annexure P-4) by the then Department of Power, Ministry of Energy, Government of India, and also as per the Hydropower Policy, 1998 (Annexure P-5).

6) Para 9.2 of the Hydropower Policy, 2008, while dealing with the Resettlement and Rehabilitation (R and R) issues, states that the National Policy of Rehabilitation and Resettlement, 2007 would be applicable to all kinds of projects and lays down the minimum R and R package, but there is a need to go beyond this in case of hydro projects. It is further observed that just as host State Governments have been turned into stake-holders by stipulating that 12% of the power is given to them free of cost as a *royalty*, there is a need to turn the project affected areas and persons also into stake holders with a continuing stake not only in the completion but also in the continued operation of the projects.

7) In view of the use of word '*royalty*' in the said clause, the issue has arisen both under the Finance Tax Act, 1994 providing for levy of service tax as also under the GST Act (referred to supra) as to *whether supply of free power @ 12% as compensation to the respective states where distress is caused by setting up the hydro power projects , can be subjected to Service Tax or GST*.

8) In the impugned order it has been held that supply of free power is nothing but “consideration” towards licensing services rendered by the State Governments. The correctness of this view is assailed in the Writ Petition. We shall deal with this issue at a later point of this order.

9) The Regulations framed by the Central Electricity Regulatory Commission for the period 01.04.2014 to 31.03.2014 titled CERC (Terms and Conditions of Tariff) Regulations, 2014 (Annexure P-7) provide for regulating the tariff of a power generating company. In Regulation 42,they provide for payment of capacity and energy charges by the beneficiaries in proportion to their saleable capacity, and the saleable capacity has to be determined under those regulations after deducting the capacity corresponding to free power to home state which is fixed at 13% or actual, whichever is less vide Note 2 to Regulation 42.

10) This is also reiterated in guidelines contained in Annexure I to the proceeding No.22/11/2024- OM 271377 dt.31.7.2024 for allocation of power from Central Sector Generating stations by the Ministry of Power while dealing with the “hydropower plants”.

11) We shall now refer to the Service Tax proceedings under the Finance Act, 1994. This is the Annexure P-9 order

dt.19.6.2024 passed by the Additional Director General (Adjudication) of the Adjudication cell of the Directorate General of the GST Intelligence.

Basing on intelligence developed by the Directorate General of Goods and Service Tax Intelligence, Chandigarh Zonal Unit, the said department had alleged that the petitioner has not paid the service tax under the reverse charge mechanism during the period between April 2016 to June 2017 (prior to the GST regime which came from 1.7.2017) on the amount of royalty paid to the State Government in the form of free power of 12% in lieu of license provided by the State Governments to the petitioner to use the natural resources.

A show cause notice was issued on 05.10.2021 to 13 GSTINs of the petitioner across the country demanding service tax amounting to more than Rs. 72 crores alongwith interest and penalty after invoking the extended period of limitation under Section 73(1) of Finance Act, 1994.

The Additional Director General(Adjudication) adjudicated the show cause notice dt. 05.10.2021 vide his order dt. 19.06.2024 and dropped the demand of service tax proposed against the petitioner on the ground that the supply of 12% free power is in form of “compensation” in view of the

power sharing letter dt.1.11.1990 and the arrangement between the State Governments and the petitioner for sharing of benefits.

Para-13.9.3 and para-13.9.5 of the said order provide as under:

"13.9.3. I find that the agreement made between Government of Himachal Pradesh and the Noticee, M/s NHPCL for execution of Chamera-II hydro electric project provides sharing of benefits. The para 11 of the said agreement specifies Sharing of Benefits which clearly states that 12% of the energy generated from the project shall be given free of cost to the Government at the inter connection point of the Power station with the PGCIL system after excluding auxiliary consumption and transformation losses. From Memorandum of Understanding between. Ministry of Power, Govt. of India and Govt. of Jammu & Kashmi, I find that in para 2 of said Memorandum of Understanding also specify that The J & K Govt. will get 12% power free of cost. I further find that Ministry of Energy, Department of Power, Government of India vide letter No. 16/46/86-DO(NHPC)(Vol.II) dated 1 November, 1990 has issued clarification regarding formula for sharing of benefits from Central Sector HE projects. I find that the said letter dated 1.11.1990 of Deputy Secretary to the Govt. of India, interalia, speaks that 12% of power from the energy generated by the power station would be supplied free of cost to those states of the region (including the state where the hydro-electric project is located) where distressed is caused by setting up the project at the specific site, like submergence, dislocation of population, the allocation being made in proportion to the extent of such distress. This letter/ Memorandum of Ministry of Energy, Department of Power, Govt. of India clearly provides that the energy generated figures for the purpose would be calculated at after discounting auxiliary consumption but without taking into account the transmission line losses and the extent of distress caused would be assessed for purpose of allocation of 12% free power by the Central Electricity Authority in consultation with the concerned states.

13.9.4 ....

13.9.5. From the above discussions, I find that the Noticee/M/s NHPCL have supplied free power @ 12% to respective states in terms of Hydro Power Policy, 2008, Central Electricity Regulatory Commission's Regulations 2014 and letter/Notification dated 1 November, 1990 issued by Government of India, Ministry of Energy, Department of Power under No. 16/46/86-DO(NHPC) (Vol.II) as compensation where distress is caused by setting up the hydro-electric project, therefore the same can not be treated as royalty. Accordingly, I hold that Service Tax demanded in the impugned SCN dated 05.10.2021 on free power @12% supplied to the respective state/home states as compensation for distress caused due to setting up the hydro-electric projects. 1 place reliance on the decision of Hon'ble CESTAT, New Delhi (Principal Bench) in Service Tax Appeal No. 54988 of 2023 in the case ***South Eastern Coalfields Lvd. Vs. Principal Commissioner, CGST & Central Excise, Indore*** *wherein Hon'ble Tribunal has hold that compensation is not considered as consideration for provision of any service. While delivering this decision, Hon'ble Tribunal also considered the decision of Hon'ble CESTAT, Kolkata in Service Tax Appeal No. 75432 of 2022 in matter of* ***M/s Mahanadi Coalfield Ltd. (Orient Area Vs. Commissioner of CGST & Central Excise, Rourkela*** *wherein Hon'ble CESTAT, Kolkata held that:*

"8. We observe that the payment of NPV to the CAMPA Fund has been made by operation of law and the Appellant has no choice whatsoever. Thus, the amounts paid cannot be called as 'consideration' by any stretch of imagination, for the alleged 'service'. Furthermore, the Government is duty bound by the Constitutional Mandate (Article 48 of the Constitution of India) and by the Parliament (The CAMPA Act, 2016, Forest Conservation Act 1980) to collect the charges for granting diversion of forest land for non-forest purposes like mining to preserve, conserve and regeneration of lost ecological balance.

8.1 When a patch of forest is diverted for non-forestry purposes, its implications are felt at various spatial and temporal scales on account of possible loss of natural resources of the country. While developmental activities are essential for economic growth of the country, at the same time it is necessary to ensure that this development does not come at the cost of India's invaluable natural capital, particularly the forests. Therefore, a payment in the form of Net Present Value, Compensatory Afforestation Charges and other such site specific charges are required to be paid to make good the damage caused by such user agency. In the process, application for non-forestry use of forest land is made by the user agency to Ministry of Environment & Forest, Govt. of India, and final approval for such non-forestry use of such forest land is given by Ministry of Environment & Forest, Govt. of India, on payment of specified charges as mentioned above and after receiving recommendation of the concerned State Government.""
(emphasis supplied)

12) Thus, it was concluded by the Department that the 12% free power supplied by the petitioner to the respective States is akin to *compensation* because distress is caused by setting up the hydroelectric project and the same cannot be treated as *royalty*. In the said order reliance was placed on previous decisions of CESTAT Benches as set out above.

13) Petitioner places strong reliance on this order and contends that since the *respondents* dealing in GST are also under the same Ministry of Finance like the erstwhile Central Excise Department, which deals with service tax issues , it is not open to the respondents to take a different stand when it comes to levy of GST.

14) Learned counsel for both the respondents, however, pointed out that this decision Annexure P-9 relating to service tax is being considered by a Committee of Commissioners for the purpose of deciding whether or not to challenge it in appeal.

15) Be that as it may, the situation is akin to a situation where if a decision is taken by a particular Bench of a High Court, such decision is normally binding on all other Coordinate Benches unless an appeal is filed challenging it, and the same decision is reversed and a different view is taken. But till such an event happens, the decision already rendered by a Bench would normally be binding on another Bench of the High Court. Therefore, we *prima facie* find considerable force in the contention of the counsel for the petitioner in this regard.

16) In the impugned order dt. 14.06.2024 (Annexure P-1) passed by 2nd respondent, admittedly a view was taken by 2nd respondent diametrically opposite to the view taken qua service tax expressed in Annexure P-9 order dt. 19.06.2024.

17) Whichever view is correct is a matter to be certainly examined by this Court.

18) In addition to this, it is also the contention of the counsel for the petitioner that the impugned order dt. 14.06.2024(Annexure P-1) is passed without jurisdiction and

there is colorable exercise of power by seeking to tax an otherwise exempt supply by treating it as a "consideration", when in fact it is in the nature of "compensation" to the damage caused to the environment.

19) The petitioner asserts that this Court would have jurisdiction to entertain the Writ petition since the demand is against the 7 GSTINs of the petitioner, one of them being the unit situated in the State.

20) Learned counsel for the 4th respondent, however, contends that because the issue relates to various States, this Court may not exercise discretion by applying the principle of *forum conveniens*.

21) Prima facie, in our view this High Court would have jurisdiction to entertain the Writ Petition if any part of the cause of action arises within the territorial limits of it's jurisdiction even though the seat of the respondent no.2 is not within the said territory. (See ***Navinchandra N. Majithia v. State of Maharashtra***[1]**.**

22) As already mentioned in para 3 supra the petitioner has a registered office in the State of Himachal Pradesh and in the impugned order , a liability qua the power stations run by the petitioner in the State of Himachal Pradesh , which is more than

[1] (2000) 7 SCC 640

Rs.100 crores, is imposed. So part cause of action undoubtedly arises within the territorial jurisdiction of this Court.

23) Of course this issue also requires a detailed examination in the Writ petition after the pleadings are complete.

24) However, *prima facie,* we find force in the contentions of the petitioner that GST is levied on supply of goods and services in lieu of "consideration"; that there a serious doubt as to whether the supply of free electricity is in the nature of " consideration" at all in order to subject it to GST or it is a "compensation" for distress caused by setting up of the Hydro electric Project ; and that the respondents cannot impose GST on free electricity provided by the petitioner by treating the same as "consideration" towards the alleged services provided by the State Government as a supplier.

25) Also taking into account the fact that the petitioner is a Government Company and huge liability is imposed on it by the respondents, though another department i.e., Central Excise Department of the Government, has taken a diametrical opposite view as mentioned above, pending further orders, there shall be interim stay of all further proceedings pursuant to Annexure P-1, dt. 14.06.2024.

List on **18.11.2024.**

Reply, if any, be filed in the meanwhile.

(M.S. Ramachandra Rao)
Chief Justice

(Satyen Vaidya)
Judge

20th September, 2024
(sushma)