

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

Service Tax Appeal No. 53679 of 2023

(Arising out of Order-in-Original No.10/COMMR/ST/JBP/2022-23 dated 30.11.2022 passed by Commissioner, Central Excise, Central Goods & Services Tax, Jabalpur].

Sasan Power Limited

Ground Floor, Reliance Centre,
19, Waichand Hirachand Marg,
Ballard Estate, Mumbai-400001

...Appellant

VERSUS

**Commissioner, Central Excise &
Central Goods and Services Tax,**

Jabalpur, GST Bhavan, Napier Town,
Jabalpur-482001

...Respondent

APPEARANCE:

Shri Prakash Shah, Shri Mihir Mehta and Shri Mohit Raval, Advocates for the Appellant
Shri S.K. Meena, Authorised Representative for the Department

CORAM:

**HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

**Date of Hearing: 07.12.2023
Date of Decision: 30.04.2024**

FINAL ORDER No. 55672/2024

JUSTICE DILIP GUPTA:

Sasan Power Limited¹ has challenged the order dated 30.11.2022 passed by the Commissioner CGST and Central Excise, Headquarters, Jabalpur². The order seeks to confirm the demand of service tax not paid by the appellant during the period April 2016 to June 2017 with interest and penalty.

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1. the appellant
 2. the Commissioner

2. The appellant is inter alia, engaged in the business of generation of electricity. It established a 3960MW Ultra Mega Power Project in village Sidhikhurd, District Singrauli in the State of Madhya Pradesh. For this purpose, the appellant entered into an agreement dated 05.01.2013³ with the Water Resources Department of the Government of Madhya Pradesh⁴ for drawl of water from the Rihand Reservoir for use by the appellant in its power plant for 30 years. As per the Agreement, the appellant became entitled to draw a specified quantity of water from the Rihand Reservoir in lieu of water charges at rates fixed by the Water Department from time to time. At the time of execution of the Agreement, the charges were specified at Rs. 5.50/- per cubic meter. The appellant was required to make its own arrangements for civil works for the purpose of drawl of water and the Water Department was also required to give prior notice to the appellant in case of an anticipated shortage in the supply of water.

3. The appellant made payment of Rs. 60,19,94,250/- for the period of April 2016 to June 2017 to the Water Department for drawl of water.

4. According to the appellant, the water charges did not constitute consideration for any service and they were in the form of water tax and cess cess collected by the Water Department.

5. A show cause notice dated 20.10.2021 was issued to the appellant demanding service tax of Rs. 8,98,36,065.00/- for the period from April 2016 to June 2017 on the said charges paid by the appellant to the Water Department with interest and penalties.

3. the Agreement
4. the Water Department

6. The Commissioner, by the order dated 30.11.2022, confirmed the demand of service tax of Rs. 9,98,36,065/- with interest and imposed penalties on the appellant. The Commissioner noticed that the basic issue that arose was whether the Government of Madhya Pradesh had provided taxable service of assignment of the right to use natural resources i.e. water from the Rihand Reservoir to the appellant as per the Agreement or was it a supply of water by the Government to the appellant. The relevant findings recorded by the Commissioner in the impugned order are as follows:

"27.1 As regards the services provided by the government, I find that the scope of taxable services provided by the Government/Local Authority to the business entities has been expanded vide budget 2016-17. One of the key amendment introduced vide Union budget 2016-17 is that the service tax has been made applicable on "any service" provided by the Government (excluding specified services) which was earlier limited to "support services". This amendment was brought into force from 01.04.2016 vide Notification No. 6/2016 dated 18.02.2016. The CBEC has issued the clarification vide Circular No. 192/02/2016-Service Tax dated 13.04.2016 for bringing clarity on the expanse of the amendments in respect of services provided by the Government/Local Authority. Further the CBEC has also exempted certain services provided by the Government/Local Authority by amending Mega Exemption Notification No. 25/2012-ST, dated 20.06.2012, vide Notification No. 22/2016-ST dated 13.04.2016.

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27.4 It is observed that Notification No. 22/2016 - Service Tax dated 13.04.2016 provides specific exemption in respect of those assignment of rights to use any natural resources, which have been granted by the Government/Local Authority before April 01, 2016.

However, it is to be noted that such exemption is limited to one time charges (whether paid in full or in instalments) for assignment of right to use such natural resource. In other words, the periodic charges/payments made by the business entities, have been kept out of the exemption and thus, would be taxable.

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On this background, I find that as regards the use of natural resources, all rights are vested in the Government, which assigns the use of natural resources to the any person against payment of monetary consideration determined by the Government and agreed upon by the concerned person for a specific period. I find that this service provided by the Government has been specifically mentioned as taxable service for providing certain exemptions as discussed in para 27.3 above. **I also find that services by the government by way of assignment of right to use natural resources to an individual farmer for the purpose of agriculture have been exempted. However, I find that no such exemption have been given for assignment of right to use natural resources for individual one.**

27.7 Now coming to the facts of the present case, it is an admitted position that all rights in water of natural resources are vested in Government in terms of Section 26 of MP Irrigation Act.

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Since all the rights in water of natural resources are vested in the Governments, no person is permitted to have access to such water bodies, drawl of water and its use of such water for any purposes unless such persons are assigned the right to have access to such water bodies by the Government by way of permission for drawl of water for its use for specified purposes as per the terms and conditions imposed by the Government and the monetary consideration determined by the Government and agreed upon by such person.

In present case, the access to the natural water sources viz. Rihand Reservoir has been permitted by the Government of Madhya Pradesh to the Noticee and allowed drawl of specified quantity of water for non irrigation purpose for specified period for which the monetary consideration is charged in the form of water charges. The machinery and equipments required for drawl of water and arrangements like pipe lines etc for its conveyance up to their plant has been installed by the Noticee, which are open to inspection by the Government at any time and are under its control.

As such, the Government has performed the service of assignment of the right to use water by way of permission for drawl of water from the water from the water body for non irrigation use within their plant which is a taxable service. Accordingly, I find that present case is not of supply of water by the Government to the Noticee as contended by the Noticee, but it's a case of supply of water by the Noticee to themselves after the Government has assigned the right to use the water to the Noticee.

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28. Further I find that one of the main contention of the Noticee is that it is a case of supply of water by the Government to the Noticee which involve transaction of sale and purchase of water and the charges for supply of water are on the basis of volume of water supplied.

- (i) There is no supply of water by the Government to the Noticee as detailed in Para 27.7 and Para 27.08 above. The Government has merely permitted the Noticee the access to the water from water and drawl of specified quantity of water from the water body for a specified period for a specified purpose.**
- (ii) The machinery, equipments, pipe line and all other arrangements for**

conveyance of water from the source to the place of its use are made by the Noticee who is the supplier of water in this case, but they are supplying the water to themselves.

- (iii) **The water charges paid by the Noticee are the fees or consideration paid by the Noticee to the Government for permitting the drawl of the water from the water sources. It is not monetary consideration for purchase of water as contended by the Noticee as it is not sale of water by the Government to the Noticee as discussed in foregoing paras.**

29. **Another contention of the Noticee is that in this case there is transfer of right to use the water by the Government to the Noticee which is deemed sale in terms of Article 366(29A) of Constitution of India.** In this context I find that first the Noticee has claimed that it is sale of water by the Government to the Noticee as it involves transfer of property in goods. On the other hand the Noticee is claiming that it is deemed sale of water by way of transfer of right to use the water.

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It is settled legal position that the transfer of right to use goods involves transfer of effective control and possession of goods to the transferee who is totally free to deal with the goods as per his will. In such cases, there is transfer of right to use the goods like machinery, equipment, vehicles etc for a specified period in the agreement/contract and during this period such goods remain in effective control and possession of the transferee who can use it as per his convenience. The goods are returned to the transferor after the specified period in agreement is over. **In this case, most of the water gets consumed in the thermal power plant of the Noticee and remaining water is drained out. I also find that there is no such clause in the agreement that the water will be returned to the Government after specified**

period. Hence I find that there is no merit in the contention of the Noticee which is liable for rejection.

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31. The Noticee has also contended that even if the activity of drawl of water is a service, then also it is exempted under Notification No. 25/2012-ST, dated 20.06.2012as amended vide Notification No. 22/2016-ST, dated 13.04.2016 in terms of Sr. No. 39 which is reproduced as under;

"39. Services by Government, a local authority or a governmental authority by way of any activity in relation to any function entrusted to a municipality under Article 243 W of the Constitution."

The contention of the Noticee is that "water supply for domestic, industrial and commercial purposes" is one of the functions entrusted to the municipality under Article 243 W. Since the Government has provided the service of supply of water to the Noticee, it is exempted from payment of service tax in terms of Sr. no. 39 of Notification No. 25/2012-ST, dated 20.06.2012 as amended by Notification No. 22/2016-ST, dated 13.04.2016.

31.1 Here I find that the Government has not provided the service of supply of water as discussed in earlier paras. The service provided by the Government to the Noticee is the assignment of right to use natural resources, which is a taxable service w.e.f. 01.04.2016. Therefore, I find no merit in above contention of the Noticee which is liable for rejection."

(emphasis supplied)

7. Shri Prakash Shah, learned counsel for the appellant assisted by Shri Mihir Mehta and Shri Mohit Raval, made the following submissions:

- (i) The Agreement dated 05.01.2013 is for supply of water and not for assignment of right to use natural resources by the department to the appellant. The said intention is clear from the clauses of the Agreement;
- (ii) Service tax is not applicable on the water charges paid by the appellant to the department in lieu of supply of water under the Agreement dated 05.01.2013;
- (iii) Without prejudice to the submissions of the appellant that the Agreement dated 05.01.2013 does not assign the right to use natural resources and no service tax is payable on charges paid for supply of water, even going by the case of the department the alleged services in relation to assignment of right to use natural resources from State of Madhya Pradesh was received by the appellant by virtue of the Agreement dated 05.01.2013. The alleged provision of services will govern by the provisions, as were in force prior to 01.04.2016 and there can be no tax implication on the appellant. Admittedly, prior to 01.04.2016, the services of assignment of right to use natural resources were not excluded from negative list and as such no service tax can be levied for drawl of water even after 01.04.2016, and payment of water charges will not be subject to service tax. In this connection reliance has been placed on the decision of the Tribunal in **M/s. The Madhya Pradesh State Mining Corporation Limited vs. Pr. Commissioner, CGST & Central**

Excise, Bhopal (M.P.)⁵ and Commissioner of CGST & Excise, Patna-I vs. M/s. Broad Son Commodities Private Limited⁶, wherein the Tribunal held that services on assignment of right to use natural resources is provided on the date of agreement and it is not concerned with terms of payment. The payment made after 01.04.2016 is not of relevance;

- (iv)** In any event, supply of water cannot be subjected to service tax as it does not amount to supply of services but it is in fact supply goods defined under section 65B(25) of the Finance Act, 1994⁷;
- (v)** The activity carried out by the department under the Agreement constitutes a transfer of right to use the water and is, therefore, a deemed sale in terms of article 366(29A) of the Constitution;
- (vi)** The invocation of extended period of five years in the present case is erroneous and untenable in law; and
- (vii)** Penalty cannot be imposed on the appellant on the ground of alleged non-disclosure of the correct value of taxable services under section 77 and 78 of the Finance Act.

8. Shri S.K. Meena, learned authorised representative appearing for the department, however, supported the impugned order and made the following submissions:

- (i)** The access to the natural water source namely Rihan Reservoir has been permitted by the Government of

5. **2023 (4) TMI 1075 – CESTAT New Delhi**
 6. **2023 (3) TMI 17 – CESTAT Kolkata**
 7. **the Finance Act**

Madhya Pradesh to the appellant and drawl of specified quantity of water has been allowed for non-irrigation purpose for specified period for which monetary consideration is charged in the form of water charges. The machinery and equipments required for drawl of water and arrangements like pipe line for its conveyance up to their plant has been installed by the appellant. Hence, it is not supply of water by the Government to the appellant, but is a case of supply of water by the appellant to themselves after the Government has assigned the right to use the water to the appellant;

- (ii)** The claim of the appellant for exemption under the Exemption Notification is not correct. The Government has not provided the service of supply of water. The service provided by the Government to the appellant is the assignment of right to use natural water resources, which is a taxable service w.e.f. 01.04.2016;
- (iii)** It is settled legal position that the transfer of right to use goods involves transfer of effective control and possession of goods to the transferee who is totally free to deal with the goods as per his will. The goods are returned to the transferor after the specified period in the agreement is over. In the present case, most of water gets consumed in the thermal power plant of the appellant and the remaining water is drained out. There is no clause in the Agreement that the water will be returned to the Government after the specified period; and

- (iv)** The appellant was aware of tax liability on the said service but with the intent to evade service tax they suppressed it. Therefore, extended period of limitation and penalty under section 78 is invokable.

9. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department have been considered.

10. The reasons assigned by the Commissioner in the impugned order for not accepting the contentions of the appellant are:

- (i)** The contention of the appellant that it is a case of supply of water to the appellant involving transaction of sale and purchase of water for which charges are paid on the basis of volume of water supplied is not correct as it is not a case of supply of water by the government, but a case where mere permission has been granted to the appellant to have access to drawl of specified quantity of water from the reservoir for a specified period. The water charges paid by the appellant are consideration paid by the appellant;
- (ii)** All rights regarding use of natural resources vest in the Government, which may be assigned to any person against payment of monetary consideration. The exemption contained in the Notification dated 13.04.2016 is limited to one time charges for assignment of right to use such natural resources only;
- (iii)** The contention of the appellant that it is a case where there is a transfer of right to use the water by

the Government to the appellant, which would be deemed sale in terms of article 366 (29A) of the Constitution cannot be accepted for the reason that most of water gets consumed in the thermal power plant and only the remaining water is drained out. Thus, it would not be a case involving transfer of effective control and possession of the goods since in the present case some of the goods are not returned after the specified period is over.

11. To appreciate the contentions that have been advanced by the learned counsel for the appellant and the learned authorised representative appearing for the department, it would be appropriate to reproduce the relevant portions of the Agreement dated 05.10.2013 executed between the appellant and the Water Department and the same are reproduced below:

**"Agreement Form for Supply of Water to
Industrial Power Plant
Form-7A
(See Rule 71-A)**

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Whereas the company has applied to the Government for permission to draw 0.14 MAF/172.71 MCM (Zero point one four M.A.F./one hundred seventy two point seventy one MCM) of water from the Rihand reservoir (hereinafter referred to as the said Government water source) **for the use by the Company's 3960 MW Sasan Mega Power Project,** located in Singrauli District (herein after referred to as "the said plant") and laying underground and surface pipes and drains for discharge of the factory effluent).

And whereas the Government has agreed to grant the aforesaid permission to the Company to use water from the said Government source at

their own cost on the terms and conditions hereafter appearing.

Now this agreement witnesseth as under:-

- (1) **In consideration of the company duly making payment to the Government** as herein after specified and duly observing and performing the covenants and conditions, both herein contained **Government hereby give permission to the company to draw water as per para 24.1 of this agreement from the government water source to the company's said plant for term of 30 years commencing from the 5 day of January 2013 on terms and condition herein contained. The permission hereby granted shall be subject to the provision of Madhya Pradesh Irrigation Act. 1931 (3 of 1931) amendments thereof and M.P. Irrigation Rules 1974** amended there off and further any executive orders issued in this behalf by the Government from time to time and for the time being in force.
- (2) **The Company shall pay to the Government water rates for water drawn by it from said Government water source at the rates fixed by Water Resources Department No. 18-1/91/Madhyam/31/436, Bhopal Dated 21-04-2010 which is Rs. 5.50 (Rs. Five and paise fifty) per Cum as on 1.1.2013.**

Note:- xxxxxxxxxxxx

- (3) **The company shall make its own arrangements at its own cost to use water either by construction of any civil engineering work which may include construction of pick up weir, barrage, dam, dug well tube well ect. xxxxxxxxxxxx.**

- (4) xxxxxxxxxxxx

(5) **Subject to the terms and conditions of this agreement nothing herein contained shall be deemed to imply any guarantee on the part of the Government the uninterruptability in the supply of water during an event of Force Majeure. The Government shall also not responsible for such non supply or inadequate supply of water as result of any** event of Force Majeure or for damages or losses due to any event of Force Majeure or for damages or losses due to any event of Force Majeure.

(6 to 9) xxxxxxxxx

(10) **The arrangements for measurements of water drawn by the company from the said water source shall be made by the company in such a manner** as may be directed by the Government or Executive Engineer, Water Resources Division No.-2, Singrauli (M.P.) (hereinafter referred to as the Executive Engineer). xxxxxxxxx.

(11) In the event of there being a shortage of water in the said Government water source, the Executive Engineer shall serve a notice on the company explaining the possibility of the anticipated shortage. The company shall in such circumstances reduce the consumption of water and will furnish to the Executive Engineer, a weekly return showing the actual quantum of water drawn by it.

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25.1 The agreed programme for water drawl from Rihand Reservoir shall be as follow:-

S.No.	Effective dated of water drawl	Programme for Commissioning of Power Unit		Quantity of water drawl per month
		Unit Commissioned	Total units under operation	
1.	1.1.2013	1 unit of 660 MW	660 MW	2.375 MCM

2.	1.5.2013	1 unit of 660 MW	1320 MW	4.833 MCM
3.	1.9.2013	1 unit of 660 MW	1980 MW	7.208 MCM
4.	1.1.2014	1 unit of 660 MW	2640 MW	9.583 MCM
5.	1.5.2014	1 unit of 660 MW	3300 MW	11.042 MCM
6.	1.9.2014	1 unit of 660 MW	3960 MW	14.3925 MCM

24.2 **The water charges and local fund charges or other taxes as fixed by Government of Madhya Pradesh shall be payable as per agreed dates as shown in column (2), for the quantity water shown in column (5), or the dates of Commissioning of power generation units whichever is earlier."**

12. A perusal of the aforesaid Agreement executed between the government of Madhya Pradesh and the appellant would indicate that the appellant had applied to the government for permission to draw water from the Rihand Reservoir for use in the power project and the government had agreed to grant the said permission on certain terms and conditions in consideration of the appellant making payment to the government. The said permission was granted for a term of 30 years subject to the provisions of the Madhya Pradesh Irrigation Act 1931 and the Madhya Pradesh Irrigation Rules 1974 as is clear from clause 1 of the Agreement.

13. Section 40 of the Madhya Pradesh Irrigation Act 1931 is reproduced below:

"40. Supply of water for industrial, urban or other purposes.- The conditions for the supply of water for industrial, urban or other purposes not connected with agriculture. And the charges there for, shall be as agreed upon between the State Government and the company, firm, private person or local body concerned and fixed in accordance with rules made under this act."

14. The permission was also subject to the provision of the Madhya Pradesh Irrigation Rules 1974. Rule 71A of the said Rules is reproduced below:

"71A. (1) Water may be supplied with the prior permission of the State Government for any industrial purpose to the Private/Government Organisation at the rates not less than the rates specified in Column (3) of the table below:-

(1)	(2)	(3)
(1)	From Government Sources	Rs. 1.00 per Cum.
(2)	From Natural/Created own source	30 paise per source
(3)	Regained of Water after use from Government source (e.g. Hydel Unit (KWH) Power Project)	07 paise per generated
(4)	Regained of Water after use from Natural/ Created own source Unit (KWH) (e.g. Hydel Power Project) generated]	02 Paise per Unit

15. The Agreement is also in Form 7A and refers to rule 71A. Form 7A is prescribed in rule 71A.

16. Section 40 of the Madhya Pradesh Irrigation Act, as noticed above, deals with supply of water for industrial, urban or other purposes and it provides that the charges shall be as agreed upon between the State government and the company and fixed in accordance with the rules made under the Act. Rule 71A also provides that water may be supplied with the prior permission of the State government for any industrial purpose to a private person at the rates not less than the rates specified in Column (3) of the Table.

17. The Title of the Agreement also shows that it was for supply of water to the industrial power plant. The appellant was required to pay water charges to the government for the water drawn by it from the

government water source at the rates fixed by the Water Department which would be Rs. 5.50/- per cubic meter. In addition, the appellant was also required to pay local fund cess or any other tax as may be fixed by the government. The appellant was required to make its own arrangement at its own cost for drawl of water from the water resource of the government to the plant. The Agreement also specifically provided that the government has not given any guarantee for the uninterrupted supply of water during and the government also would not be responsible for non supply or inadequate supply of water as a result of any event of Force Majeure. The appellant has to pay water rates/water charges depending on the quantity of water drawn by the appellant. The Agreement also deals with a situation where there can be reduction or shortage in the water supply. This clearly means that the Agreement is for supply of water and not mere access to water source.

18. It is, therefore, more than apparent that the Agreement is for supply of water by the government to the appellant and is not for assignment of any right to the appellant to use the natural resources of the government.

19. The appellant is, therefore, justified in asserting that the Agreement executed between the appellant and the government is for supply of water for which charges are paid by the appellant on the basis of volume of water drawn and it is not a case of assignment of right to use natural resources of the government.

20. In this view of the matter no service was provided by the government to the appellant. The impugned order, therefore, deserves to be set aside on this ground alone.

21. It would, therefore, not be necessary to deal with the remaining submissions advanced for learned counsel for the appellant for setting aside the impugned order.

22. The order dated 30.11.2022 passed by the Commissioner is, accordingly, set aside and the appeal is allowed.

(Order pronounced on **30.04.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Jyoti, Shreya