

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**I.A. No. 55/2016
in
Review Petition No. 19/RP/2016
in
Petition No. 153/MP/2015**

**Coram:
Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K.Iyer, Member**

Date of Order: 22nd June, 2017

In the matter of

Review of order dated 19.2.2016 passed in Petition No.153/MP/2015.

And

In the matter of

Sasan Power Limited
Reliance Power Ltd.
3rd Floor, Reliance Energy Centre,
Santa Cruz East, Mumbai

..... Applicant

Versus

1. MP Power Management Company Limited
Shakti Bhawan, Jabalpur-482008,
2. Paschimanchal Vidyut Vitran Nigam Ltd.
Victoria Park, Meerut-250 001.
3. Purvanchal Vidyut Vitran Nigam Ltd.
Hydel Colony, Bhikaripur, Post-DLW,
Varanasi-221 004.
4. Madhyanchal Vidyut Vitran Nigam Ltd.
4A-Gokhale Marg, Lucknow-226 001,
Uttar Pradesh.
5. Dakshinanchal Vidyut Vitran Nigam Ltd.
220kV, Vidyut Sub-Station,

Mathura Agra By-Pass Road, Sikandra,
Agra-282 007, Uttar Pradesh.

6. Ajmer Vidyut Vitran Nigam Ltd.
Hathi Bhata, City Power House,
Ajmer-305001, Rajasthan.
7. Jaipur Vidyut Vitran Nigam Ltd.
Vidyut Bhawan, Jaipur-302005
Rajasthan
8. Jodhpur Vidyut Vitran Nigam Ltd.,
New Power House, Industrial Area,
Jodhpur-342003, Rajasthan.
9. Tata Power Delhi Distribution Ltd.,
Grid Sub-Station Building, Hudson Lines,
Kingsway camp, New Delhi-110 009.
10. BSES Rajdhani Power Ltd.,
BSES Bhawan, Nehru Place,
New Delhi-110 019.
11. BSES Yamuna Power Ltd.,
Shakti Kiran Building, Karkardooma,
Delhi-110 092.
12. Punjab State Power Corporation Ltd.,
The Mall, Patiala-147 001.
13. Haryana Power Purchase Centre,
Shakti Bhawan, Sector-6,
Panchkula (Haryana)-134 109.
14. Uttarakhand Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Dehradun-248 001, Uttarakhand.

.....Respondents

The following were present:

Shri Vishrov Mukherjee, Advocate, SPL
Ms. Raveena Dhamija, Advocate, SPL
Shri G. Umopathy, Advocate, MPPMCL

Shri Abhijeet Rastogi, Advocate, BRPL and BYPL
Shri M.G. Ramachandran, Advocate, Rajasthan and HPPCL.
Shri Shubham Arya, Advocate, Rajasthan and HPPCL

ORDER

The Applicant, Sasan Power Limited (SPL), has filed this Interlocutory Application pursuant to the liberty granted in the order dated 22.9.2016 in Petition No. 19/RP/2016 and has sought approval of the Commission to include royalty, stowing excise duty, transit fee and MPGATSVVA for the purpose of arriving at assessable value in calculating excise duty on coal.

2. The brief background of the case is that the Applicant, Sasan Power Limited, filed Petition No. 6/MP/2013 for compensation of the cost incurred by it due to change in law events during the operating period. The Commission vide order dated 30.3.2015 in Petition No. 6/MP/2013 directed the petitioner to submit the information with regard to impact of cost increase due to revision in water charges, imposition of royalty, clean energy cess and excise duty on coal. Accordingly, the Applicant filed the Petition No. 153/MP/2015 submitting the required information. The Commission by order dated 19.2.2016 allowed compensation on imposition of royalty on coal, clean energy cess and excise duty on coal. The Applicant filed Review Petition No. 19/RP/2016 seeking review of the compensation granted for excise duty on coal on the ground that in the computation of excisable value on coal, the elements such as royalty and stowing excise duty on coal have not been considered. The Commission after considering the submissions of the Applicant vide order dated 22.9.2016 in Petition No. 19/RP/2016, directed the Applicant to approach Central Excise Department for clarification as to whether royalty and stowing excise duty are

included in the excisable value of the coal for the purpose of calculating of excise duty on coal and approach the Commission for appropriate directions. Relevant portion of the said order is extracted as under:

“16. We have considered the submissions of the petitioner and the respondents. Based on the available material on record, the Commission had calculated the excise duty based on the base value of coal. The petitioner had not submitted in the Petition No. 6/MP/2013 and 153/MP/2015 that its claim for excise duty on coal was based on the excisable value of coal which included royalty and stowing excise duty in addition to the base price of coal. For the first time, the review petitioner, in the review petition is bringing this new fact to the notice of the Commission. Therefore, there is no error apparent on the face of record in the impugned order. The petitioner has relied upon on internal circular of CIL dated 5.3.2013. On perusal of the said circular, it is revealed that CIL has included royalty and stowing excise duty on the basis of their understanding while deposing before the Designated Officer of Excise Duty. The petitioner has not placed on record any notification of the Ministry of Finance/ Central Board of Indirect Taxes which provides that the excisable value of coal for the purpose of computation of excise duty on coal includes the base price of coal, royalty and stowing excise duty. There appears to be no statutory basis for inclusion of royalty and stowing excise duty for calculation of excisable value of coal for the purpose of calculation of excise duty. In our view, the petitioner should have taken up the case with the Central Excise Department for clarification as to whether excisable value of coal would include royalty and stowing excise duty and if so, the statutory basis for such calculation.

17. In our view, there is no basis to review the impugned order to allow the petitioner to include royalty and stowing excise duty under the excisable value for the purpose of calculating the excise duty on coal. The petitioner is directed to approach the Appropriate Authority in the Central Excise Department for clarification and if it is confirmed that royalty and stowing excise duty are included in the excisable value of the coal for the purpose of calculating of excise duty on coal, the petitioner may approach the Commission for appropriate directions.”

3. The Applicant has submitted that pursuant to the Commission`s direction dated 22.9.2016, it approached the Central Excise and Service Tax Department, Singrauli, Madhya Pradesh for seeking a clarification whether royalty and stowing excise duty are to be included in the base price of coal in arriving at excisable value of coal. In response, the Central Excise and Service Tax Department, Singrauli, Madhya Pradesh vide its letter dated 26.9.2016 clarified that royalty, stowing excise duty, transit fee and MPGATSWA were to be added for arriving at the assessable value of coal for payment of excise duty and failure to include these amounts in

assessable value of coal would lead to imposition of interest and penalty as per the Central Excise Act, 1944. Based on the clarification of Central Excise and Service Tax Department, the Applicant has prayed that royalty, stowing excise duty, transit fee and MPGATSVAs be considered for the purpose of arriving at excisable value for calculating excise duty on coal.

5. Notices were issued to the respondents to file their replies. Reply to the IA has been filed by Haryana Power Purchase Centre (HPPC) and Rajasthan Discoms.

6. HPPC and Rajasthan Discoms in their replies have submitted as under:

(a) The letter dated 26.9.2016 issued by the Office of the Superintendent, Central Excise, Singrauli clarifying that royalty, stowing excise duty, transit fee and MPGATSVAs shall be added for arriving the assessable value of coal for payment of excise duty, is not law and if the same is contradictory to the Central Excise Act, Rules framed thereunder or well settled principles of law, the same cannot be relied upon by the Applicant to claim relief from the Procurers.

(b) There has to be a statutory basis for inclusion of Royalty, Stowing excise duty, Transit fee and MPGATSVAs in the excisable value of coal for the Applicant to claim relief thereof. It is a well settled principle that there cannot be any tax on a tax.

(c) As the royalty, stowing excise duty, transit fees and MPGATSVAs are taxes or compulsory exactions/levy, the same cannot be considered for computation of excise duty. Even if the above are not taxes, the same have to be related to value of coal. Therefore, taxes cannot be considered as part of the assessable value of coal.

(d) Royalty and Stowing Excise duty are compulsory exactions or levies and therefore, are taxes within the meaning of Section 4 of Central Excise Act, 1944 as it is a levy by a statutory authority. However, the Applicant has not submitted specific statutory provision under which the stowing excise duty is imposed. Transit fee is a tax within the meaning of Section 4 of Central Excise Act and therefore, does not form part of the assessable value of coal. Since, the imposition under Section 3 of MPGATSVA is clearly a tax, it cannot be included in calculation of assessable value of coal. Further, the constitutionality of MPGATSVA is under challenge before the Hon`ble Supreme Court.

(e) Forest Transit fees imposed for coal produced from forest land has been set aside by the Hon`ble High Court of Madhya Pradesh. However, the Hon`ble Supreme Court has stayed the order of High Court of Madhya Pradesh and the issue is still pending before the Supreme Court. The Applicant has not provided any details of the value of MPGATSVA claimed by it or provisions of law under which this falls. In the absence of the same, it cannot consider whether the same may be considered as part of assessable value.

(f) The quantum of coal to be considered is actual coal consumed or the coal requirement as per normative parameters of auxiliary consumption and Station Heat rate, whichever is lower. The Applicant is required to act in a prudent manner to examine the applicability of the excise Duty and also merits of the claim made by the appropriate authority for payment of Excise Duty and take appropriate action in accordance with law.

(g) In support of its contentions, HPPC has placed reliance upon the judgments of the Hon'ble Supreme Court, namely (i) India Cement Ltd. V. State of Tamil Nadu [(1990) 1 SCC 12], (ii) State of West Bengal v. Kesoram Industries Ltd. And Others, [(2004)10 SCC201]; (iii) Mineral Area Development Authority Vs. Steel Authority of India,[(2011) 4 SCC 450]; (iv) Arpa Fuel Private Limited and others v. Coal India Limited and others [(2014) 2 HCC (Cal) 483]; and (v) Commissioner of Central Excise, Meerut v. M/s Kisansahkari Chinn Mills Ltd. [(2001) 6 SCC 697].

7. The Applicant in its rejoinder dated 9.2.2017 has submitted that it has sought compensation based on actual expenditure on excise duty of coal being incurred in accordance with the law. No benefit is accruing to the Applicant in relation to the excise duty of coal as petitioner is including the statutory levies as part of excisable value of coal. This practice is being followed by Coal India Limited as well. Any failure by the petitioner in meeting its obligation towards excise duty on coal may lead to penal consequences under Section 9AA of the Central Excise Act, 1944. The Applicant has also submitted audited accounts certifying the total amount being incurred by it. The Applicant has further submitted that if the procurers are aggrieved by the demand made by statutory authorities, they may challenge the same in a court of law and indemnify the petitioner against any penal consequences arising out of non-compliance/ non-payment.

Analysis and Decision:

8. We have considered the submissions of the Applicant and the respondents and perused the documents on record. Pursuant to the Commission`s direction, the Applicant approached the Office of the Superintendent, Central Excise, Range-II,

Waidhan seeking clarification whether Royalty and Stowing Excise Duty are to be added or not in the excisable value of coal for the purpose of computation of excise duty. The Superintendent, Central Excise, Range-II, Waidhan vide its letter dated 26.9.2016 clarified that royalty, stowing excise duty, forest transit fee and MPGATSVAs were to be added for arriving at the excisable value of coal for payment of excise duty and that the failure to include these amounts in excisable value of coal would lead to imposition of interest and penalty as per the Central Excise Act, 1944.

9. The Office of Superintendent, Central Excise, Range-II, Waidhan, Madhya Pradesh vide its letter dated 26.9.2016 has clarified as under:

“Please refer to your letter dated 26.9.2016 seeking clarification whether royalty and Stowing Excise Duty elements are to be added or not in the assessable value of coal.

2. In this regard, we would like to clarify that as per Section 4 of Central Excise Act, 1944, following elements shall be added for arriving the assessable value of coal for payment of Excise Duty-

1. Royalty
2. Stowing Excise Duty
3. Transit Fee [Madhya Pradesh Transit (Forest Produce) Rules, 2000]
4. MPGATSVAs : (Madhya Pradesh Gramin Avsanrachna Tatha Sadak Vikas Adhinyam, 2005).

3. Thus, you are advised to consider elements of Transit Fee and MPGATSVAs also for arriving assessable value of coal, for payment of Excise Duty to avoid interest, penalty as per Central Excise Act, 1944 and rules made thereunder.”

10. The Superintendent, Central Excise, Range-II, Waidhan, Madhya Pradesh as relied on Section 4 of the Central Excise Act, 1944 in support of his contention that Royalty, Stowing Excise Duty, Transit fee imposed under Madhya Pradesh Transit (Forest Produce) Rules, 2000 and MPGATSVAs are required to be added for arriving

the excisable value of coal for payment of excise duty. Section 4 of the Central Excise Act, 1994 provides as under:

“Section 4. Valuation of excisable goods for purposes of charging of duty of excise.

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

Explanation. - For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

(2) *The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.*

(3) *For the purpose of this section,-*

(a) *"assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;*

(b) *persons shall be deemed to be "related" if -*

(i) *they are inter-connected undertakings;*

(ii) *they are relatives;*

(iii) *amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or*

(iv) *they are so associated that they have interest, directly or indirectly, in the business of each other.”*

11. As per the above provisions of the Central Excise Act, 1944, the price-cum-duty of excisable goods sold by an assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the

sale of such goods. Such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.

12. HPPC has contended that there has to be a statutory basis for inclusion of Royalty, Stowage duty, Transit fee and MPGATSVAs in the excisable value of coal for the Applicant to claim relief thereof. HPPC has submitted that it is well settled principle that there cannot be any tax on a tax and this is clear from the provision of Section 4 of the Central Excise Act 1994. As the royalty, stowing excise duty, transit fee and MPGATSVAs are taxes or compulsory exactions/levy, the same cannot be considered for computation of excise duty. Even if the above are not taxes, the same have to be related to value of coal. Therefore, taxes cannot be considered as part of the assessable value of coal. HPPC has submitted that the Applicant is not entitled to claim any relief which is not otherwise provided in the PPA. The Applicant is required to prove the claim for impact on Change in Law.

13. The question for consideration is whether the royalty, stowing excise duty, transit fee and MPGATSVAs shall be considered as taxes which have been excluded from the excisable value of coal. HPPC has relied on four judgments wherein it has been stated that royalty is in nature of tax. It is, however, noted that the issue regarding whether royalty determined under Section 9/15(3) of the Mines and Minerals (Development and Regulations) Act, 1957 is in the nature of tax is pending for consideration of a Nine Judges Bench of the Hon'ble Supreme court on a reference by Five Judges Bench of the Hon'ble Supreme Court in Mineral Area Development Authority and Others Vs. Steel Authority of India and Others (2011 SCC 450). The specific reference is as under:

“(a) Whether “royalty determined under Sections 9/15 (3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?”

14. The issue whether stowing excise duty would be considered as a tax or not in terms of Section 4 of the Central Excise Act, 1944 does not appear to have been challenged before any court of law. The constitutional validity of forest transit fees imposed by the Government of Madhya Pradesh has been under challenge before the Hon'ble Supreme court and subject to final decision in the matter, the transit fee has been permitted to be levied. Considering the said fact, the Commission has allowed vide order dated 17.2.2017 in Petition No. 16/MP/2017 recovery of transit fee paid by the Applicant from the beneficiaries subject to final outcome of the appeals before the Supreme Court. MPGATSVAs have been upheld by the Hon'ble High court of Madhya Pradesh and is presently under challenge before the Hon'ble Supreme Court. Thus, the constitutional validity of the royalty, transit fee and MPGATSVAs has been challenged before the Hon'ble Supreme Court. Further, the Commission is not the appropriate forum to decide whether the royalty or duty or fees are in the nature of tax or not. Central Excise Department has clarified that in terms of Section 4 of the Central Excise Act, they are included in the excisable value of the coal. Based on the clarification of the Central Excise Department, we allow royalty, stowing excise duty, transit fee and MPGATSVAs to be considered in excisable value of coal subject to the outcome of the proceedings before the Hon'ble Supreme Court. If it is decided that royalty, transit fee and MPGATSVAs are in the nature of taxes and therefore, cannot be included in the excisable value of coal, the Applicant shall take appropriate action to seek refund along with interest due as per law from the Central Excise Department and reimburse the same to the procurers along with interest, if it is received from the Central Excise Department.

15. I.A. No. 55/2016 in Review Petition No. 19/RP/2016 is disposed of in terms of the above.

Sd/-
(Dr. M. K. Iyer)
Member

Sd/
(A. S. Bakshi)
Member

Sd/
(A.K. Singhal)
Member

Sd/
(Gireesh B. Pradhan)
Chairperson