

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**I.A. No. 39/2017
in
Petition No. 112/MP/2015**

**Coram:
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K.Iyer, Member**

Date of Order: 8th of January, 2018

In the matter of

Application for directions on behalf of the Petitioner.

And

In the matter of

1. GMR-Kamalanga Energy Limited
New Shakti Bhawan,
Building No. 302- New Uddan Bawan,
Opposite Terminal- 3,
Indira Gandhi International Airport,
New Delhi- 110037

2. GMR Energy Ltd.
New Shakti Bhawan,
Building No. 302- New Uddan Bawan,
Opposite Terminal- 3,
Indira Gandhi International Airport,
New Delhi- 110037

..... Applicant

Versus

1. Bihar State Power (Holding) Company Limited
1st Floor, Vidyut Bhawan,
Bailey Road, Patna 800001

2. Prayas Energy Limited
Unit III A & B, Devgiri
Kothrud Industrial area
Kothrud, Pune 411038

2. Prayas Energy Limited
Unit III A & B, Devgiri

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The following were present:

Shri Amit Kapoor, Advocate, GMR
Shri Vishrov Mukherjee, Advocate, GMR

ORDER

The Applicants, GMR-Kamalanga Energy Limited and GMR Energy Ltd. have filed this Interlocutory Application pursuant to the liberty granted in the order dated 7.4.2017 in Petition No. 112/MP/2015 and has sought approval of the Commission to include base price, crushing/sizing charges, royalty, National Mineral Exploration Trust, District Mineral Foundation, stowing excise duty, surface transportation charges, assessable value of Central Excise duty and Central Excise duty for the purpose of arriving at assessable value in calculating excise duty on coal.

2. The brief background of the case is that the Applicants filed Petition No. 112/MP/2015 seeking compensation of the cost incurred by it due to change in law events during the operating period. The Commission, after considering the submissions of the parties, vide order dated 7.4.2017 in Petition No. 112/MP/2015 observed that while assuming the determined price of coal for the purpose of Central Excise Duty, royalty, stowing excise duty, transportation charges, sizing charges and other charges shall not be included and excise duty shall be reimbursable on the base price of coal. With regard to inclusion of royalty and stowing excise duty and other charges for determining excisable value of coal, the Commission directed the Applicants 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:

“36.....As regards the inclusion of royalty and stowing excise duty and other charges for determining excisable value of coal, the Petitioners are 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 Petitioners may approach the Commission for appropriate directions.”

3. The Applicants have submitted that pursuant to the Commission`s direction dated 7.4.2017, it approached the Central Excise and Service Tax Department, Hirakud, Odisha, for seeking clarification regarding the components to be included in the assessable value of coal for computation of Excise Duty. In response, the Central Excise and Service Tax Department, Hirakud, Odisha vide its letter dated 22.5.2017 clarified that Value of Coal, Royalty, Stowing Excise Duty, National Mineral Exploration Trust, District Mineral Foundation, Sizing Charge and Surface Transportation Charge shall be added for arriving at the assessable value of coal for payment of excise duty and same elements are being added in the assessable value of coal for payment of Excise Duty/Central Excise Duty. Based on the clarification of Central Excise and Service Tax Department, the Applicants have prayed that Base Price, Crushing/Sizing Charges, Royalty, National Mineral Exploration Trust, District Mineral Foundation, Stowing Excise Duty, Surface Transportation Charges, assessable value of Central Excise Duty and Central Excise Duty be considered for the purpose of arriving at excisable value for calculating excise duty on coal. The Applicants have submitted that failure to include the amounts pertaining to the above components in assessable value of coal would lead to imposition of interest and penalty as per the Central Excise Duty Act, 1944.

4. Notices were issued to the respondents to file their replies. No reply has been filed by the respondents.

Analysis and Decision:

5. We have considered the submissions of the Applicants and perused the documents on record. Pursuant to the Commission`s direction, the Applicants approached the Office of the Superintendent, Central Excise, Customs and Service Tax, Hiraikud Range, Hiraikud seeking clarification with regard to the components to be included in the assessable value of coal for computation of Excise Duty. The Superintendent, Central Excise, Customs and Service Tax, Hiraikud Range, Hiraikud vide its letter dated 22.5.2017 has given the following clarification:

“Please refer to your letter No. Nil dated 2.5.2017 seeking clarification wherein whether royalty and Stowing Excise Duty elements are to be added or not in the assessable value of coal.

In this connection, it is to inform that as per Section 4 of Central Excise Act, 1944, following elements shall be added for arriving the assessable of coal for payment of Excise Duty and the same elements are being added in the assessable value of coal for payment of CE/CEX duty as intimated by e-mail on 22.5.2017 by M/s MCL, Burla. Details are as under:

1. Value of Coal
2. Royalty
3. Stowing Excise Duty
4. National Mineral Exploration Trust (NMET)
5. District Mineral foundation (DMT)
6. Sizing charge
7. Surface transportation charge.

Further, it is to inform you that M/s Mahanadi Coalfields Limited, At/P.O.: Jagruti Vihar, Burla, Dst. Sambhalpur, has obtained Centralised Registration No. AABCM5188PEM012 under Rule 9 of Central Excise Rules, 2002 for production and clearance goods ‘Coal’ falling under Chapter Heading No. 27011920 of Central Excise Tariff Act, 1985 and as per Section 4 of Central Excise Act, 1944 is paying Central Excise Duty and Clean Energy Cess under Clean Energy Cess Rules, 2010.”

6. The Superintendent, Central Excise, Customs and Service Tax, Hirakud Range, Hirakud, Sambalpur has relied on Section 4 of the Central Excise Act, 1944 in support of the decision for inclusion of the various elements in the assessable value of coal. 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.”

7. 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.

8. All components indicated by SECL for computation of assessable value of coal such as the value of coal, stowing excise duty, contribution to National Mineral Exploration Trust and District Mineral Foundation, Sizing charges and Surface transportation charges (except Royalty) are in the nature of "Price-cum-duty" and shall be considered as part of the assessable value of coal for the purpose of computation of Excise Duty. The Commission has not allowed the Sizing Charges and Surface Transportation Charges under Change in Law. However, these charges have been allowed to be included in the assessable value of coal for the purpose of computation of Excise Duty and shall not be construed as allowing Sizing Charges and Surface Transportation Charges under Change in Law. As regards Royalty, it is noted that the issue 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?"

Therefore, Royalty shall be included in the assessable value of coal subject to the decision of the Hon`ble Supreme Court.

9. Accordingly, we allow all the charges given in the letter dated 22.5.2017 of the Superintendent, Central Excise, Customs and Service Tax, Hirakud Range, Hirakud for the purpose of inclusion in the assessable value of coal for computation of Excise Duty, subject to the condition with regard to Royalty. It is clarified that the Petitioner shall be entitled to recover the Excise Duty in proportion to the actual coal consumed corresponding to the scheduled or actual generation, whichever is less, for supply of electricity to BSPCL.

10. I.A. No. 39/2017 in Petition No. 112/MP/2015 is disposed of in terms of the above.

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

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member