

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.391 OF 2017

Dated: 23.10.2024

Present: Hon`ble Mr. Sandesh Kumar Sharma, Technical Member
Hon`ble Mr. Virender Bhat, Judicial Member

In the matter of:

**MADHYA PRADESH POWER
MANAGEMENT COMPANY LIMITED**

Shakti Bhawan, Vidyut Nagar,
Jabalpur – 482008

*Represented by Dr. Navin Kohli,
Addl. General Manger*

... Appellant(s)

Versus

1. The Registrar,
CENTRAL ELECTRICITY REGULATORY COMMISSION
3rd & 4th Floor, Chanderlok Building,
36, Janpath, New Delhi - 110001
2. The Managing Director,
SASAN POWER LIMITED
C/o Reliance Power Ltd.
3rd Floor, Reliance Energy Centre,
Santa Cruz East, Mumbai – 400055
3. The Managing Director,
PASCHIMANCHAL VIDYUT VITRAN NIGAM LTD.
Victoria Park, Meerut - 250 001
4. The Managing Director,
PURVANCHAL VIDYUT VITRAN NIGAM LTD.
Hydel Colony, Bhikaripur, Post-DLW,

Varanasi - 221 004

5. The Managing Director,
MADHYANCHAL VIDYUT VITRAN NIGAM LTD.
4A-Gokhale Marg, Lucknow - 226 001
6. The Managing Director,
DAKSHINANCHAL VIDYUT VITRAN NIGAM LTD.
220kV, Vidyut Sub-Station,
Mathura Agra By-Pass Road,
Sikandra, Agra - 282 007
7. The Chairman & Managing Director,
AJMER VIDYUT VITRAN NIGAM LTD.
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur –
302005
8. The Chairman & Managing Director,
JAIPUR VIDYUT VITRAN NIGAM LTD.
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur -
302005
9. The Chairman & Managing Director,
JODHPUR VIDYUT VITRAN NIGAM LTD.,
400 kV GSS Building (Ground Floor),
Ajmer Road, Heerapura, Jaipur -
302005
10. The Managing Director,
TATA POWER DELHI DISTRIBUTION LTD.,
Grid Sub-Station Building,
Hudson Lines, Kingsway camp,
New Delhi-110 009
11. Chief Executive Officer,
BSES RAJDHANI POWER LTD.,
BSES Bhawan, Nehru Place, New Delhi-110 019

12. Chief Executive Officer,
BSES YAMUNA POWER LTD.,
Shakti Kiran Building,
Karkardooma, Delhi 110 092
13. The Chief Engineer/PPM,
PUNJAB STATE POWER CORPORATION LTD.,
The Mall, Patiala - 147001
14. The Chief Engineer/PPM,
HARYANA POWER PURCHASE CENTRE,
Shakti Bhawan, Sector-6,
Panchkula (Haryana) - 134109
15. The Chairman & Managing Director,
UTTARAKHAND POWER CORPORATION LTD.,
Urja Bhawan, Kanwali Road,
Dehradun – 248001
- ... Respondents

Counsel for the Appellant : G. Umopathy, Sr. Adv.
Aditya Singh

Counsel for the Respondents : Shri Venkatesh
Ashutosh Kumar Srivastava
Bharath Gangadharan
Jayant Bajaj
Nihal Bhardwaj
Siddharth Nigotia
Kartikay Trivedi
Shivam Kumar
Suhael Buttan
Siddharth Joshi
Abhishek Nangia
Simran Saluja
Vineet Kumar
V.M. Kannan
Jatin Ghuliani
Mohit Mansharamani
Rishabh Sehgal
Isnain Muzamil for Res. 2

Rajiv Srivastava for Res. 3 to 6

Ranjitha Ramachandran
Poorva Saigal
Anushree Bardhan
Shubham Arya
Arvind Kumar Dubey
for Res. 7 to 9

Anand K. Ganesan
Swapna Seshadri for Res. 13

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. Order dated 19.02.2016 passed by the 1st respondent Central Electricity Regulatory Commission (hereinafter referred to as “the Commission”) whereby it has held that royalty and stowing excise duty shall be considered in the excisable value of coal subject to outcome of proceedings before the apex court in Civil Appeal Nos.4056-4064 of 1999, has been impugned in this appeal.

2. Facts of the case, as are relevant for disposal of this appeal, are as follows.

3. The appellant is the holding company for all the distribution licensees in the State of Madhya Pradesh supplying electricity to the consumers in the State.

4. The 2nd respondent has set up a Super Critical Ultra Mega Power Project based on linked coal mine at Sasan, District Singhrauli, Madhya Pradesh. It has entered into a long-term Power Purchase Agreement (PPA) dated 07.08.2007 for supply of power with the appellant for supply of power to the appellant.

5. Ministry of Finance, Government of India issued a notification No.03 of 2010 dated 22.06.2010 levying clean energy cess with effect from 01.04.2010. Vide Finance Act, 2012, excise duty was imposed on coal with effect from 01.04.2012. The rate of royalty of coal was increased vide notification dated 10.05.2012 issued by Ministry of Coal, Government of India.

6. The 2nd respondent filed petition No.6/MP/2013 before the Commission seeking compensation with regards to certain expenditure incurred by it due to change in law events during the operating period as contemplated under Article 13 of the PPA. Vide order dated 30.03.2015, the Commission held that the increase in royalty of coal, imposition of clean energy cess on coal and imposition of excise duty on coal are covered under events of change in law in terms of the article 13 of the PPA and accordingly allowed

compensation to the 2nd respondent for the same. Further, the 2nd respondent was directed to submit the information with regards to financial impact of these change in law events.

7. Subsequently, in compliance with the directions issued vide order dated 30.03.2015, the 2nd respondent filed petition No.153/MP/2015 thereby furnishing the requisite information. The Commission, vide order dated 19.02.2016 passed in the said petition, computed a sum of Rs.347.67 crores as compensation payable to 2nd respondent on account of these change in law events.

8. The 2nd respondent filed a review petition No.19/RP/2016 before the Commission on 21/03/2016 seeking review of order dated 19.02.2016 on the ground that while computing the impact due to increase in excise duty, the Commission has only considered the notified price of coal by Coal India Limited without considering the royalty and stowing excise duty also as part of the excisable value of coal.

9. Vide order dated 22.09.2016, the Commission disposed off the review petition directing the 2nd respondent to approach Central Excise Department for clarification as to whether royalty and stowing excise duty are included in excisable value of coal for the purpose of calculating excise duty on coal.

Liberty was given to the 2nd respondent to approach the Commission again for appropriate direction in terms of the clarification to be given by the Central Excise Department. The relevant portion of the order is extracted hereinbelow: -

“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.”

(Emphasis supplied)

10. Accordingly, the 2nd respondent approached the Central Excise Department for said clarification. The Department, vide communication dated 29.09.2016 addressed to the 2nd respondent, clarified that as per Section 4 of Central Excise Act, 1944 royalty and stowing excise duty are to be included for arriving at excisable value of coal for payment of excise duty, and failure to do so would lead to imposition of interest as well as penalty as per the Act.

11. In pursuance to the said clarification received from Central Excise Department, the 2nd respondent filed an IA No.55/2016 in review petition No.19/RP/2016 praying therein that the royalty and stowing excise duty may be considered for the purpose of arriving at excisable value of coal for calculating excise duty on coal. Vide order dated 22.06.2017, the Commission allowed the application and allowed royalty and stowing excise duty to be considered in excisable value of coal. At the same time, the Commission also took note of the pendency of Civil Appeal Nos.4056-4064 of 1999 before the Hon'ble Supreme Court in which the issue as to whether the royalty determined under the Mines and Minerals (Development and

Regulations) Act, 1957 is in the nature of tax, was under consideration and accordingly directed that the order dated 22.06.2017 shall be subject to the outcome of those appeals.

12. It is the said order dated 22.06.2017 passed by the Commission, which has been assailed in this appeal.

13. We have heard learned senior counsel appearing for the appellant as well as learned counsels appearing for respondent Nos.2, 3-6, 7-9 and 13. We have also perused the impugned order as well as the written submissions filed on behalf of appellant and the 2nd respondent.

14. At the outset, we would note that a preliminary objection was raised on behalf of the 2nd respondent with regards to the maintainability of the instant appeal. It was argued by learned counsel for the 2nd respondent that since the appellant has not challenged the orders dated 30.03.2015 and 19.02.2016 passed by the Commission in petition Nos.6 of 2013 and 153 of 2015 respectively, which are the two main orders determining the right of 2nd respondent for compensation in respect of change in law events, the appeal against order dated 22.06.2017 passed in IA No.55/2016, which is only consequential in nature, is not maintainable. We do not find any force in the submissions made on behalf of the 2nd respondent. It is evident that the

appellant is not aggrieved by the orders dated 30.03.2015 of the Commission whereby the increase in royalty for coal, imposition of clean energy cess on coal and imposition of excise duty on coal were held to be change in law events in terms of article 13 of the PPA and the order dated 19.02.2016 whereby the financial impact resulting from these change in law events was computed. The appellant appears to be aggrieved by the order dated 22.06.2017 of the Commission whereby it, on the basis of clarification issued by the Central Excise Department, allowed royalty and stowing excise duty to be considered in excisable value of coal. Accordingly, the appellant has come in appeal to this Tribunal against the said order dated 22.06.2017. It cannot be disputed that the said order dated 22.06.2017 of the Commission is appealable under Section 111 of the Electricity Act, 2003.

15. Hence, we hold the appeal maintainable against the impugned order dated 22.06.2017.

16. On merits, it is vehemently argued by the learned senior counsel on behalf of the appellant that there is no statutory basis for inclusion of royalty and stowing excise duty in calculating the excisable value of coal for the purpose of calculation of excise duty. He argued that since the royalty and stowing excise duty are taxes or compulsory exactions / levy, same cannot be considered for computation of excise duty for the reason that there cannot

be any tax on tax. He would submit that by allowing consideration of royalty and stowing excise duty for computation of excise duty, the Commission has unjustly allowed benefit to the 2nd respondent to which it was not entitled otherwise. According to the learned counsel, the impugned order of the Commission is erroneous and cannot be sustained.

17. Learned counsels appearing for the contesting respondents supported the impugned order in its entirety and argued that it does not suffer from any illegality or perversity. It is submitted that the letter dated 26.09.2016 has been issued by the Office of the Superintendent, Central Excise, Range-II, Waidhan, Madhya Pradesh, under Section 4 of Central Excise Act, which is a government office and within the ambit of definition of “Indian Governmental Instrumentality” as per article 1.1 of the PPA and therefore the said letter has force of law and is covered by clause (ii) of article 13.1.1 of the PPA.

18. It is further argued that since the Nine Judge Bench of the Hon’ble Supreme Court has disposed off the Civil Appeal Nos.4056-4064 of 1999 by way of judgment dated 25.07.2024 holding that royalty cannot be treated as a tax, the argument raised on behalf of the appellant that there cannot be tax on tax vanishes in thin air.

19. We have already noted hereinabove that vide order dated 22.09.2016, while disposing off the review petition of 2nd respondent bearing No.19/RP/2016, the Commission directed the 2nd respondent to approach the Central Excise Department for seeking clarification with respect to the inclusion of royalty and stowing excise duty in excisable value of coal for the purpose of calculating excise duty on coal. The relevant portion of the order has already been quoted at Para No.9 above.

20. Thus, according to the Commission, the Central Excise Department was the appropriate authority to clarify whether royalty and stowing excise duty are to be included in the excisable value of coal for the purpose of calculating the excise duty on coal. It appears that the appellant felt in agreement with these views of the Commission and accordingly chose not to challenge the said order. In compliance with the said order, the 2nd respondent approached the Central Excise Department for the requisite clarification and vide letter dated 26.09.2016 issued by the Office of the Superintendent, Central Excise, Range-II, Waidhan, Madhya Pradesh, it was clarified that as per Section 4 of Central Excise Act, 1944, royalty and stowing excise duty are to be included in the base price of coal for arriving at the excisable value of coal.

21. The impugned order dated 22.06.2017 has been passed by the Commission on the basis of the said clarification issued by Central Excise Department vide said letter dated 26.09.2016.

22. The increase in rate of royalty on coal as well as imposition of stowing excise duty were held by the Commission to be change in law events covered under article 13 of the PPA vide order dated 30.03.2015, which has not been assailed by the appellant. Therefore, the same has become final. Even the computation of financial impact of these change in law events done by the Commission vide order dated 19.02.2016 has also not been challenged by the appellant. There appeared to be some confusion with regards to computation of excisable value of coal as it was not clear to the Commission whether or not should the royalty and stowing excise duty be included in the excisable value of the coal for the purpose of calculating excise duty on coal. The confusion was set at rest by the Central Excise Department by virtue of letter dated 26.09.2016. There is no dispute that the Office of Superintendent, Central Excise Department, from where the said letter has emanated is a Governmental Instrumentality as defined in article 1.1 of the PPA. It is also not in dispute that the said office is final authority under law for the interpretation which it has given vide letter dated

26.09.2016. In fact, it is nowhere the case of the appellant that the Office of the Superintendent, Central Excise Department is not a Governmental Instrumentality or that it was not competent / authorized to issue the requisite clarification vide letter dated 26.09.2016 or that the clarification so given vide said letter is not correct and acceptable. The only argument raised on behalf of the appellant is that by virtue of the impugned order, the Commission has permitted tax on tax to the benefit of the 2nd respondent, which is not permissible under any statute. This argument raised on behalf of the appellant do not hold any water in view of the judgment dated 25.07.2024 passed by Nine Judge Bench of Hon'ble Supreme Court in Civil Appeal Nos.4056-4064 of 1999 wherein it has been held that royalty cannot be treated as a tax.

23. Thus, in the light of the above discussion, we do not find any ground to interfere in the impugned order of the Commission. The appeal is devoid of any merit and is hereby dismissed.

Pronounced in the open court on this the 23rd day of October, 2024.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

√
REPORTABLE / ~~NON-REPORTABLE~~
tp