

**HIGH COURT OF TRIPURA
AGARTALA**

WP(C) No.545 of 2024

The Tripura State Electricity Corporation Limited, a Government of Tripura Enterprise having its registered office at Bidyut Bhawan, Banamalipur, Agartala, Tripura West-799001 represented by its Managing Director.

.....Petitioner(s);

Versus

1. The State of Tripura, represented by the Secretary, Department of Finance, Civil Secretariat, New Capital Complex, P.O. Secretariat, Agartala, Tripura-799010
2. The Commissioner of Electricity Duty, Gorkhabasti, Agartala, Tripura-799010
3. The Superintendent of Electricity Duty, Charge-I, Kar Bhawan, Agartala, Tripura-799001

.....Respondent(s).

For Petitioner(s) : Ms. M. Hazarika, Sr. Advocate,
Mr. D. Khan, Advocate.

For Respondent(s) : Mr. S.S. Dey, Advocate General,
Ms. A. Chakraborty, Advocate.

**HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH
HON'BLE MR. JUSTICE S.D. PURKAYASTHA**

Order

20/08/2024

Heard Ms. M. Hazarika, learned senior counsel assisted by Mr. D. Khan, learned counsel for the petitioner and Mr. S.S. Dey, learned Advocate General assisted by Ms. A. Chakraborty, learned counsel for the respondents-State.

2. Petitioner is a Government of Tripura enterprise and a body corporate engaged in generation, transmission and distribution of electricity and also rural electrification. It is a licensee within the meaning of the Electricity Act, 2003 and the Tripura Electricity Duty Act, 2019. An assessment proceeding under the Tripura Electricity Duty Act, 2019 ['Act of 2019', *for short*] brought into effect from 01.10.2019 was initiated against the petitioner

for levy of duty on inter-State sale of electricity (including Bangladesh), intra-State sale of electricity (Domestic Consumer) and intra-State sale of electricity (other than Domestic Consumer) in terms of notice bearing No.F.1/TR/CH-I/2019/01/633 dated 20.07.2020 for the financial year 2019-20 under the Act of 2019. Petitioner had failed to submit the annual return in Form TED-06 despite notices dated 27.05.2020, 20.07.2020 and 11.09.2020. Petitioner-licensee had sought time by letter dated 31.08.2020 and 21.10.2020 to allow it reasonable opportunity for preparation and production of the books of account in that regard. Again a show cause notice was issued in favour of the licensee on 21.08.2020 asking it to appear and state reasons as to why demand for amount of Rs.86.547 crore will not be raised against the financial year 2019-20 and why penal action under Section 11(1) of the Act of 2019 be not taken upon it. Letter dated 09.10.2020 was further issued asking the licensee to appear and state reasons as to why no action should be taken against them in that regard, but no reply was received. Thereafter, the Superintendent of Electricity Duty, Charge-I, Agartala proceeded to assess the liability of the petitioner under the Act of 2019. The assessment was made on the basis of the data provided by the licensee to the Assessing Officer bearing letter No.F.14(91)/TSECL/FIN/2020/17748-54 dated 26.06.2020 as the petitioner had failed to submit annual return in Form TED-06. The electricity duty was computed in terms of the notification dated 03.10.2019 issued by the office of the Commissioner of Electricity Duty, Government of Tripura published as an extraordinary issue in the Tripura Gazette on the same date [Annexure-1]. The electricity duty payable by the licensee was ascertained in the following manner:

Sl. No.	Nature of Sale	Amount (in Crores)	Rate	Electricity Duty (in Crores)
1	Inter-state (including Bangladesh)	841.70	@6%	50.502
2	Intra-state Sale (Domestic Consumer)	277.345	@5%	13.867
3	Intra-state Sale (Other than Domestic Consumer)	277.345	@7.5%	20.801
Total				85.17
Electricity Duty Deposited in 2019-20				4.891
Balance				80.279
Interest @ 18% p.a.				14.450
Penalty				0.001
Total Electricity Duty Due				94.73

This has been made subject of challenge in the present writ petition *inter alia* on a number of grounds.

3. Petitioner has also made a prayer to declare the provisions of Section 4(1), (2)(a), 4(3) and Section 4(a), (b) & (d) as ultra vires the Constitution of India. According to the petitioner, the Act of 2019 has come into effect from 01.10.2019, but the impugned assessment order has computed the electricity duty from the beginning of the financial year i.e. 01.04.2019 ending with 31.03.2020 which is not proper in the eye of law. Electricity duty has also been imposed on inter-State sale and export of electricity outside India even though the Constitution of India clearly debarred the State Government to impose tax on inter-State trade and sales. Reliance is placed upon the judgment dated 31.03.2021 passed by this Court in WP(C) No.14/2021 in the case of **ONGC Tripura Power Company Ltd. v. State of Tripura and another** wherein the provisions of Section 4(4)(d) of the Act of 2019 was held as ultra vires the Constitution being beyond the competence of the State legislature. The intra-State cess duty has also been levied mechanically ignoring the category of consumers and exemptions granted by the various notifications of Government of Tripura as per Annexure-20. Petitioner has also alleged that contrary to the

provisions of Section 10 of the Act of 2019, interest has been charged @18% for the full year instead of 1.5% per month on the unpaid duty. The assessing authority has also failed to appreciate the reasons for delay in furnishing the audited accounts due to COVID-19. The electricity duty has been imposed not only on the electrical energy consumed, but also on the fixed charge which is illegal and arbitrary. Petitioner also contended that the annual return for the financial year 2019-20 was submitted in the prescribed Form TED-06 on 31.03.2021, but the assessment order had been passed before that. Petitioner has cited COVID delays and also the order passed by the Tripura Electricity Regulatory Commission ('TERC', *for short*) dated 04.04.2020 [Annexure-32]. Petitioner in its annual return has shown payment of electricity duty to the tune of Rs.4,94,97,880/- [Annexure-22]. Despite detailed representation made to the Superintendent of Electricity Duty citing glaring defects in the impugned assessment order and praying for a reassessment, no heed was paid to it. Thereafter, petitioner had approached the Commissioner of Electricity Duty-respondent No.2 vide letter dated 20.09.2023 outlining the basic contention raised by the petitioner against the impugned assessment order. Since the petitioner is also a State Government entity, it also submitted an e-Office note before the Secretary, Power Department, Government of Tripura. The Commissioner in turn forwarded the office notice to TERC who called the parties for hearing vide Annexure-25. However, after detailed consideration, the TERC vide order dated 03.07.2024 [Annexure-28] disposed of the petition without any specific direction as the Act provides the statutory remedy of appeal and revision which the petitioner had not invoked, whereas the

Commission did not have any statutory power to interfere in the assessment order. Thereafter, the petitioner has approached this Court with the following prayers:

“In the premises aforesaid, the humble Petitioner prays to your Lordships to be graciously pleased to call for the records of the case and issue a Rule calling upon the Respondents to show cause Why a Writ in the nature of Certiorari should not be issued setting aside and quashing the impugned assessment order dated 30.11.2020 issued by the Respondent No.3 and why a writ in the nature of Mandamus should not be issued declaring sections 4 (1), (2) (a), Section 4 (3) and section (4 (a), (b) and (d) unconstitutional and ultra vires the Constitution of India and why the Respondent Authorities should not be directed to refrain from taking any action, be it coercive or otherwise, for realizing the demand made by the impugned Assessment order directing the respondents and upon perusal of the records and hearing the parties be pleased to make the Rule absolute and/or pass such further or other order or orders as your Lordships may deem fit and proper.

And or pass such further Order/Orders as this Hon'ble Court may deem fit and proper.

-And-

Pending the final disposal of this petition this Hon'ble Court may be pleased to stay all further proceedings pursuant to the impugned Assessment order dated 30.11.2020 (Annexure-14) direct the Respondent Authorities not to take any coercive steps against the Petitioner for realizing any amount pursuant to the Assessment order the pendency of the case.”

4. Ms. M. Hazarika, learned senior counsel for the petitioner, submits that since the assessing authority has also imposed electricity duty on inter-State sales and inter-country sales which is contrary to the constitutional scheme, the impugned order is without jurisdiction. The vires of Section 4(4)(d) of the Act of 2019 has been struck down by a Coordinate Bench of this Court in WP(C) No.14/2021 vide judgment dated 31.03.2021 as being beyond the competence of the State legislature. Section 4(4)(d) provided for levy of electricity duty on electricity sold outside the State on sold energy charges. A major component of the liability imposed upon the petitioner under Section 4(4)(d) towards inter-State sale and inter-country sales totalling Rs.50.502 crore is wholly without jurisdiction. The impugned order is, therefore, amenable to writ jurisdiction of this Court under Article 226 of the Constitution of India. Petitioner has, therefore, approached this Court instead of availing the statutory

remedy of appeal and revision under the Act of 2019. Learned senior counsel for the petitioner prays that though other issues of levy of electricity duty on fixed charges has been raised and the vires of Section 4(1), (2)(a), 4(3) and Section 4(a), (b) & (d) have been challenged but leaving those issues open for the present, the matter may be remanded to the assessing authority to pass a fresh assessment order, in accordance with law, taking into account the judgment rendered by this Court in WP(C) No.14/2021 whereby the levy of electricity duty on inter-State sale of electricity and inter-country sale of electricity, has been held ultra vires. The levy of electricity duty on inter-State sale and export of electricity outside India is wholly beyond the jurisdiction of the State legislature in terms of the CGST Act, IGST Act, Article 286 of the Constitution of India and also under Article 246A read with the relevant entries of the Seventh Schedule list-II i.e. Entry 53 and 54 in its amended form and Entry 92A of list-I, the impugned assessment order is unsustainable in law. The learned Division Bench of this Court in the case of **ONGC Tripura Power Company Ltd.** (supra) has squarely dealt with all these contentions on the question of virus of Section 4(4)(d) of the Act of 2019. The said judgment has attained finality. Therefore, the matter may be remanded to the Assessing Authority for passing a fresh assessment order in accordance with law giving opportunity to the petitioner to produce its relevant records including the annual return in Form TED-06 for the financial year 2019-20. Petitioner may be allowed to agitate other grounds before the assessing authority leaving the question of vires of the relevant provisions of the Act of 2019 open for consideration at an appropriate stage.

5. Mr. S.S. Dey, learned Advocate General appearing for the respondents-State, at the outset submits that this Court in the case of **ONGC Tripura Power Company Ltd.** (supra) judgment dated 31.03.2021 in WP(C) 14/2021, has held that Section 4(4)(d) of the Act of 2019 is ultra vires the Constitution of India being beyond the competence of the State legislature. Therefore, no levy of electricity duty on inter-State sale and export of electricity outside India would be levied by the Assessing Officer. He does not dispute the plea raised by the petitioner that the impugned assessment order suffers from jurisdictional error. He submits that in such circumstances, since the impugned assessment order suffers from serious jurisdictional error, at this stage instead of getting into the question of vires of the other provisions of the Act of 2019, it would be proper that the matter is remanded to the assessing authority to pass a fresh assessment order in accordance with law. Petitioner may submit its detailed records and annual return before the assessing authority in the reassessment proceeding. The assessing authority may be directed to pass a fresh assessment order within a reasonable period as the assessment relates to the financial year 2019-20.

6. The relevant facts which have been placed from record have been noted in the foregoing part of this order.

It appears that after coming into force of the Act of 2019 with effect from 01.10.2019, the first assessment exercise for the financial year 2019-20 has been undertaken by the respondent No.3-Superintendent of Electricity Duty, Charge-I, Agartala vide show cause notice dated 21.08.2020

[Annexure-9] issued upon the petitioner asking him to explain as to why electricity duty be not imposed upon inter-State sale of electricity (including Bangladesh) to the tune of Rs.50.502 crore; intra-State sale to the tune of Rs.27.734 crore totalling Rs.78.236 crore minus the amount of electricity duty deposited totalling Rs.4.891 crore i.e. the balance of Rs.73.345 crore with interest @18% per annum. Since the petitioner did not submit its annual return in Form TED-06 within time, the assessment has been made vide impugned assessment order dated 30.11.2020 on the basis of the data provided by the petitioner-licensee vide letter bearing No.F.14(91)/TSECL/FIN/2020/17748-54 dated 26.06.2020. The impugned assessment order has levied electricity duty to the tune of Rs.50.502 crore on inter-State (including Bangladesh sale) and also on intra-State sale (Domestic Consumer) for Rs.13.867 crore and intra-State sale (other than Domestic Consumer) to the tune of Rs.20.801 crore totalling Rs.85.17 crore minus the electricity duty deposited i.e. the balance outstanding being 80.279 crore with interest @18% per annum. The total electricity duty due upon the petitioner was assessed as Rs.94.73 crore. It appears that petitioner had taken the plea of COVID delays in submission of its annual return relying upon the decision of the TERC vide order dated 04.04.2020. Petitioner however was pursuing the matter with the State Government on the understanding that it being a State instrumentality, the matter would be resolved without further litigation. Thereafter, it has approached the TERC which has refused to interfere as the statute does not provide any remedy before the Regulatory Commission. Petitioner has, therefore, approached this Court in

writ jurisdiction *inter alia* on a number of grounds which have been referred to hereinbefore.

7. However, during course of submission learned senior counsel for the petitioner has confined her prayer for the present to the levy of electricity duty on inter-State sale of electricity and export outside India which forms a major component of the total liability assessed upon the petitioner i.e. 50.502 crore on the ground that the same is wholly beyond jurisdiction in view of the lack of competence of the State legislature to levy tax or duty on inter-State sale or export outside India under the Constitution of India and the judgment dated 31.03.2021 rendered by this Court in WP(C) No.14/2021 whereby the provisions of Section 4(4)(d) of the Act of 2019 was held to be ultra vires as being beyond the competence of the State legislature.

8. Learned Advocate General has fairly submitted that the impugned assessment order, so far as it levies electricity duty on inter-State and inter-country sale i.e. export outside India is beyond jurisdiction as held by this Court in the case of **ONGC Tripura Power Company Ltd.** (supra). However, he submits that since the impugned assessment order suffers from an illegality and jurisdictional error, it would be appropriate that the matter is remanded for the assessing authority to pass a fresh assessment order in accordance with law. In order to deal with the issue it is pertinent to refer to the charging provision under Section 4, specifically sub-section 4 of the Tripura Electricity Duty Act, 2019.

“4. Levy of electricity duty:

(1) There shall be levied and paid to the State Government a duty, to be called the “electricity duty”, at the rate as prescribed by the Commissioner with the approval of

the State Government by Notification from time to time in the official gazette on the aggregate value of energy charges and fixed charges.

(2) Levy of electricity duty on sales of energy by licensees:

(a) every licensee in the State of Tripura shall pay in the prescribed manner at the rate as notified under sub-section (1) on the aggregate value of energy charges and fixed charges within and outside the State;

(b) when a licensee has more than one licences duty shall be calculated and levied under this section separately in respect of each license;

(3) Levy of electricity duty on consumers-

Every consumer belonging to any of the classes, shall pay a duty every month to the Government in the prescribed manner at the rate as notified under sub-section (1) on the aggregate value of energy charges and fixed charges of energy consumed on the basis of consumption measured (meter reading) as mentioned in sub-section (5) or energy sold based on scheduled energy as per CERC/TERC norms;

Provided, it shall be competent for the Government either to reduce the rate at which duty is leviable on such consumer or to exempt such consumer from payment of duty subject to such terms & conditions that may be imposed in lieu of public interest.

(4) Duty shall also be levied on-

(a) electricity consumed by or sold to the Government of India for consumption by that Government; or

(b) consumed in the construction, maintenance or operation of any railway by that Government of India or a railway company operating that railway or sold to that Government or any such railway company for consumption in the construction, maintenance or operation of any railway; or

(c) electricity generated and sold through non-conventional mode of energy generation (viz. solar units, windmill, etc.), in case the aggregate annual generation exceeds such units as may be prescribed; or

(d) electricity sold outside the State and licensees shall have to pay electricity duty on sold energy charges.

(5) (a) For the purpose of computing the electricity duty under this section, the consumption, shown in the meters or any other method to compute the energy sold based on scheduled energy as per CERC/TERC norms shall be taken into account.

(b) For the purpose of sub-section (a), the computing shall be started from the starting of the billing period immediately after the commencement of this Act.”

9. For the present, the challenge has been confined to the leviability of the electricity duty on inter-state sale and sale of electricity outside the country by the petitioner. Since, the vires of the said provision were specifically raised before this court in *ONGC Tripura Power Company Ltd. v. State of Tripura and another* (WP(C) No.14/2021) reported in *2021 SCC OnLine Tri 667* and a definitive declaration has been made by this court earlier, we do not need to dilate on the issue of vires of the said provision. Instead the opinion of this court in the case of *ONGC Tripura Power Company Ltd.*(supra) are profitably extracted hereunder:

“44. In the result, petition is disposed of with following directions and declarations :

(i) Section 4(4)(d) of the E. D. Act, 2019 is unconstitutional and ultra vires, being beyond the competence of the State Legislature ;

(ii) No duty on the petitioner's inter-State sale of electricity shall henceforth be levied and collected ;

(iii) Duty already collected is declared illegal ;

(iv) With respect to the duty already collected, the petitioner shall produce its full accounts before the Secretary, Finance within a period of one month from today pointing out the extent of duty borne by itself and the element of duty passed on by the petitioner. The Secretary thereupon shall verify such documents and pass an order refunding the duty to the extent it is not passed on by the petitioner to the purchaser or any other consumer. Such order shall be passed after allowing the authorized representative of the petitioner to be heard, if so desired by the petitioner. The order shall be passed within three months of the petitioner filing its documents and accounts before the Secretary, Finance Department ;

(v) To the extent the duty is found refundable, the same shall be refunded within four months after the Secretary, Finance passes the order. As long as these timelines are maintained by the respondents, of course subject to the petitioner itself filing necessary documents before the Secretary, Finance within one month from today, such refund shall carry no interest, failing which the refund shall carry simple interest at six per cent. per annum, upon completion of the periods granted in this order till actual payment.”

10. The learned court has not only declared Section 4(4)(d) of the Act of 2019 as unconstitutional and ultra vires being beyond the competence of the State Legislature but has also gone on to hold that no duty on inter-state sale of electricity shall be levied and collected. It has also held that duty already collected is declared to be illegal.

11. Thus we are of the considered view that since the issue relating to levy of electricity duty on inter-State and inter-country sale of electricity is a question of jurisdiction being wholly beyond the competence of the State legislature and the issues stand decided in the case of **ONGC Tripura Power Company Ltd.** (supra) by a Coordinate Bench of this Court, the writ petition is fit to be entertained in the light of the principles laid down by the Apex Court in the case of **Magadh Sugar and Energy Limited v. State of Bihar and Others** reported in **(2022) 16 SCC 428** . Paragraphs 20, 26 & 27 of the report are being extracted hereunder:

“20. While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious alternative remedy is available, the existence of an alternative remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallised by this Court in *Whirlpool Corpn. v. Registrar of Trade Marks* and *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.* Recently, in *Radha Krishan Industries v. State of H.P.* a two-Judge Bench of this Court of which one of us was a part of (D.Y. Chandrachud, J.) has summarised the principles governing the exercise of writ jurisdiction by the High Court in the

presence of an alternative remedy. This Court has observed: (*Radha Krishan Industries case*, SCC p. 795, para 27)

"27. The principles of law which emerge are that:

27.1. The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well.

27.2. The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternative remedy is available to the aggrieved person.

27.3. Exceptions to the rule of alternative remedy arise where: (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged.

27.4. An alternative remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternative remedy is provided by law.

27.5. When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion.

27.6. In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with." (emphasis supplied)

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26. The issues raised by the appellant are questions of law which require, upon a comprehensive reading of the Bihar Electricity Act, a determination of whether tax can be levied on the supply of electricity by a power generator (which also manufactures sugar) supplying electricity to a distributor; and whether the first respondent has the legislative competence to levy duty on the sale of electricity to an intermediary distributor in view of the decision of this Court in *State of A.P.* The question of whether the appellant is liable to file returns under Sections 6-B(1) and 5-A of the Act is directly related to the issue of whether the sale of electricity by the appellant to BSEB falls under the charging provisions of Section 3(1). The questions raised by the appellant can be adjudicated without delving into any factual dispute. Thus, the present matter is amenable to the writ jurisdiction of the High Court.

27. We are of the considered view that the High Court made an error in declining to entertain the writ petition and it would be appropriate to restore the proceedings back to the High Court for a fresh disposal. In order to facilitate the decision on remand, we have recorded the broad submissions of the parties on merits but leave the matter open for a fresh evaluation by the High Court. We accordingly allow the appeal and set aside the judgment of the High Court dated 18-9-2017 arising out of CWJC No. 4300 of 2015. The writ petition is restored to the file of the High Court for fresh determination. The appeal is disposed of in the above terms with no order as to costs."

12. Since the assessment order suffers from illegality and lack of jurisdiction on the levy of electricity duty on inter-state and sale of electricity outside India and calls for determination on a question of law without reference to the factual scenario, the writ petition can be entertained. The impugned

assessment order dated 30.11.2020 [Annexure-18] levies electricity duty on inter-state sale and sale or export of electricity outside India which is beyond the jurisdiction of the State legislature as held in the case of **ONGC Tripura Power Company** (supra), the same cannot be upheld in the eye of law. Accordingly, it is set aside and the matter is remanded to the assessing authority to pass a fresh assessment order in accordance with law. Since the petitioner has confined its prayer to the issue of levy of electricity duty on inter-State and inter-country sale at the present, the other issues as to the vires of Section 4(1), (2)(a), 4(3) and 4(a), (b) & (d) are left open to be raised at an appropriate stage. Petitioner is at liberty to raise other issues on facts and law before the assessing authority. The Assessing Officer shall, upon hearing the parties and upon consideration of the relevant records, pass a fresh assessment order in accordance with law within a reasonable period preferably 12(twelve) weeks from the date of receipt of a copy of the order.

13. With the aforesaid observations and directions, the instant petition stands disposed of. Pending application(s), if any, shall also stand disposed of.

(S.D. PURKAYASTHA), J

(APARESH KUMAR SINGH), CJ

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