

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 25th April, 2016**

+ **W.P.(C) No.No.2740/2012 & CM No.5895/2012 (for stay).**

ANAMIKA SUGAR MILLS PVT LTD.

..... Petitioner

Through: Mr. C. Mukund, Mr. Ashok Jain and Mr.
Pankaj Jain, Advs.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Jasmeet Singh, CGSC with Mr. Srivats
Kaushal and Ms. Astha Sharma, Advs. for UOI.
Mr. Sachin Sharma and Mr. Ajeet Kumar, Advs.
for R-5.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This petition under Article 226 of the Constitution of India impugns the order dated 30th November, 2010 and the consequential order dated 27th March, 2012, both of the Directorate of Sugar, Ministry of Consumer Affairs, Food and Public Distribution, directing the petitioner to, from its production during 2010-11 (October 2010 to September, 2011) of levy sugar sell the quantity of 1806.5 Metric Tonnes (MT) of the production to Uttar Pradesh Government.

2. Notice of the petition was issued and vide order dated 9th May, 2012 it was directed that till the next date the petitioner will supply 560.8 MT towards the levy sugar to the consignee as per the allotment orders and that the petitioner shall maintain stocks of 1246 MT of sugar in case any further allocation is required to be made towards levy sugar. The said interim order has continued in force. Counter affidavit was filed by the respondents No.1 to 4 Union of India to which a rejoinder was filed the petitioner. Additional affidavit was filed by respondents 1 to 4 Union of India to which also response was filed by the petitioner. A counter affidavit has also been filed by the respondent No.5 State of Uttar Pradesh to which also a rejoinder has been filed by the petitioner. The counsels have been heard. The counsel for the respondents No. 1 to 4 Union of India in accordance with the directions in the order dated 3rd November, 2015 while reserving judgment, handed over a compilation of relevant Rules and Regulations qua which clarification was sought during the hearing.

3. It is the case of the petitioner,

- i. Levy sugar means sugar requisitioned by the Central Government under Section 3 of Essential Commodities Act, 1955 r/w clause 2 of the Levy Sugar Supply (Control) Order, 1979 at a price not

exceeding the price determined under Section 3C of the Essential Commodities Act for distribution through the Public Distribution System to people below poverty line; the remaining quantity of sugar other than levy sugar is called the free sale sugar or non-levy sugar.

- ii. The Central Government fixes the quota of levy sugar for each crushing season and releases the monthly quota for each sugar mill thereby regulating the quantum of levy sugar to be released by the manufacturers as well as the quantum of non levy sugar to be sold in the open market.
- iii. The price of levy sugar is always determined at a subsidized rate as against free sale sugar.
- iv. As per para 4 of the Notification dated 17th January, 2005 of the Central Government, if free sale sugar is not sold within the time prescribed then it becomes levy sugar.
- v. The Central Government vide Notification dated 18th June, 2002 allowed the sugar mills to sell in open market equivalent quantity of levy sugar which remains unlifted after lapse of three months from

the date of allotment; however the levy obligation of the concerned sugar mills will remain unchanged.

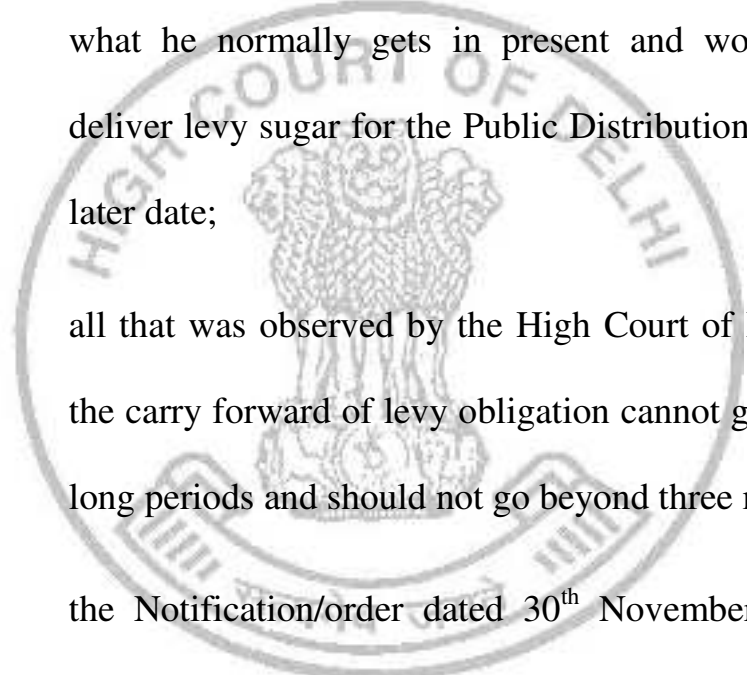
- vi. The aforesaid Notification was challenged by way of writ petition being CWJC 9555/2006 before the Patna High Court which, vide order dated 2nd September, 2008 held that the carry forward rule cannot hold good and held that the carry forward liabilities will lapse, extinguishing the liability.
- vii. LPA 438/2009 preferred to the Division Bench of the Patna High Court against the aforesaid judgment was dismissed.
- viii. SLP (C) No. CC 3253/2010 preferred to the Supreme Court was disposed of vide order dated 13th April, 2011 as having become infructuous in view of the issuance of subsequent Notification dated 30th November, 2010 i.e. the Notification impugned in this petition.
- ix. The impugned Notification/order dated 30th November, 2010 also is bad because-
 - a. allowing levy sugar to be carried forward and added to the next year and so increasing the liability year after year is arbitrary and unreasonable;

- b. levy sugar is meant for distribution through Public Distribution System and under the Public Distribution System if a beneficiary is not supplied sugar in any month, the beneficiary in the next month is not entitled to the quota of the earlier month also;
 - c. the need for sugar by those below poverty line does not accumulate over the months;
 - d. if for any reason the Government does not lift levy sugar and the unlifted levy sugar is sold by the sugar mills in the open market, the Government cannot after two years lift the earlier unlifted quantity putting the sugar mills to a huge loss as the sugar mills are required to supply at the rate fixed for the year for which it had remained unlifted.
- x. The impugned Notification/order dated 30th November, 2010 also was challenged before the Patna High Court in CWJC 13466/2011 by one M/s Vishnu Sugar Mills Ltd and was quashed vide judgment / order dated 12th January, 2012.

4. The challenge in the petition is twofold. Firstly, that unlifted levy sugar of one season cannot be carried forward and secondly that unlifted levy sugar even if to be carried forward cannot be compelled to be sold at the price of the year to which it pertains.

5. The respondents no. 1 to 4 Union of India in its counter affidavit pleaded,

- (i) presently only 10% of the sugar production of a sugar mill is requisitioned as levy sugar for distribution through ration/fair price shop in the Public Distribution System at a uniform retail price throughout the country;
- (ii) Section 3(2)(f) of the Essential Commodities Act empowers the Central Government to evolve policy qua the movement of levy and non-levy sugar;
- (iii) the High Court of Patna vide judgment and order dated 4th September, 2006 in writ petition No.6964/2006 with CWJC 7960/2006 upheld the carry forward rule of levy obligation reasoning –

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- a. that the unlifted allocation of levy sugar, after three months of initial allocation could be sold at a free sale price thus ensuring better price recovery for the producers to meet their immediate liabilities, with liability to supply levy sugar at controlled price at a future date – this protects the interest of the producer as he gets more than what he normally gets in present and would have to deliver levy sugar for the Public Distribution System at a later date;
- b. all that was observed by the High Court of Patna is that the carry forward of levy obligation cannot go for unduly long periods and should not go beyond three months;
- c. the Notification/order dated 30th November, 2010 was issued in this light, to limit the carry forward levy obligation to maximum of two sugar seasons subsequent to the sugar season to which the levy obligation pertains;
- d. the petitioner cannot make a grievance of being made to supply carry forward levy sugar at the price of the year to which the unlifted levy pertains, having gained from sale

in free market of the unlifted quantities; if it were to be held that the petitioner is entitled to the current prices, the petitioner would undoubtedly enrich itself by on one hand getting higher market price for unlifted quantities and at the same time getting the prevalent levy price for the carry forward liability.

6. The respondents no. 1 to 4 Union of India in the additional affidavit have inter alia pleaded (i) that against the judgment of the Single Judge of the Patna High Court quashing the order / Notification dated 30th November, 2010, LPA 618/2012 had been preferred and in which there was a stay of operation of the judgment of the Single Judge (and which appeal, at the time of hearing also was informed to be still pending); (ii) that the High Court of Karnataka vide order dated 4th February, 2013 in Writ Petition No.17662/2012 title *N.S.L. Sugar Ltd. Vs. Union of India* had upheld the Notification/order dated 30th November, 2010; and, (iii) that the petitioner had given an undertaking to complete the backlog in levy supply for the year 2009-2010 and also undertaken to supply sugar at rates as fixed by the Central Government for the concerned season and cannot now contend to the contrary.

7. Needless to state the petitioner in its rejoinder pleads the undertaking to have been given under duress.

8. The respondent No.5 State of U.P. in its counter affidavit has emphasized its need for levy sugar which has been withheld under interim order in this petition.

9. At the time of hearing it was informed that since the year 2013 the system of levy sugar has been done away with. The counsel for the petitioner during the hearing also argued that the demand by the respondents in the year 2012 of the backlog levy sugar was for the year 2009 – 2010 and at the prices of the year 2009-2010 is arbitrary.

10. The counsel for the respondents no. 1 to 4 Union of India during the hearing met the arguments of the counsel for the petitioner, of there being no need for the unlifted levy sugar of the previous year in the subsequent year, by contending that the same is required to return the sugar borrowed by the Central Government from the State Governments. Similarly, the argument of the irrationality of paying the price of the year 2009-2010 for deliveries of unlifted quantities of that year in the year 2012, is met by contending that the petitioner has already earned more than what it would have got for the levy sugar and thus cannot have any grievance.

11. Since the Notifications/order dated 30th November, 2010 as well as the earlier Notification which though also provided for carry forward of the levy sugar but without fixing any limit of two years as done vide Notification/order dated 30th November, 2010 have been the subject matter of judgments of the High Courts of Patna and Karnataka. I have perused the said judgments and find –

A. A single Judge of the Patna High Court vide judgment dated 4th September, 2006 in CWJC6964/2006 held the continuing levy liability to be not unreasonable because it was an informed balanced decision, valid in law and not arbitrary. It was further observed that the carry forward rule would be reasonable only if it is carried forward for a reasonable short time; however if it is extended for unreasonable long period, then the question may arise as to its reasonableness or otherwise; finding that the extension in that case was for a few months only and considering the circumstances in which the levy stocks could not be lifted, the challenge to the unreasonableness of carry forward rule was dismissed.

B. The same learned Single Judge of the Patna High Court in subsequent judgment dated 2nd September, 2008 in CWJC

9555/2007, finding that the carry forward rule enabled the Government to carry forward the levy liability year after year without any limit and with the possibility of the levy liability for any particular year being far in excess of the stipulated 10%, held the carry forward rule to be bad but gave the Government three months time to liquidate the accumulated carry forward liability.

C. The Division Bench of the High Court of Patna in appeal against the aforesaid vide order dated 20th July, 2009 in LPA No.429/2009 merely observed that there was no need to interfere since the learned Single Judge had not interfered and merely allowed the Government to liquidate the carry forward levy liability within three months. It was also observed that the carry forward rule must be practical and should not be stretched beyond a reasonable period ignoring the realities of lack of demand and non utilization of levy sugar in the past years.

D. A Single Judge of the High Court of Patna in judgment dated 12th January, 2012 in CWJC 13466/2011 titled ***M/s Vishnu Sugar Mills Ltd. Vs. Union of India*** quashed the Notification/order dated 30th November, 2010 considering himself to be bound by the earlier

judgments aforesaid and observing that since the Division Bench had approved of the period of three months as reasonable for carrying forward the levy liability, the impugned Notification permitting carry forward of levy liability for two years exceeded the test of reasonableness.

- E. The Division Bench of the High Court of Patna vide order dated 27th July, 2012 in LPA No.618/2012 titled ***Union of India Vs. M/s Vishnu Sugar Mills Ltd.*** (which was informed to be still pending), without giving any reason, stayed the operation of the judgment dated 12th January, 2012 of the learned Single Judge.
- F. The High Court of Karnataka dismissed the challenge to the Notification/order dated 30th November, 2010 merely observing that since the said Notification fulfilled the loopholes of the earlier Notification dated 18th June, 2002 by limiting the carry forward to two years during which time the Government of India will have to necessarily pass orders relating to allotment/lifting the levy sugar and if such orders are not passed then the sugar producers would be entitled to treat levy sugar as non-levy sugar, the same protects the interest of the producer as he would get more than what he normally

gets from levy sugar and would have to deliver levy sugar for the PDS at a later date maintaining supplies for the weaker section and that there was nothing arbitrary therein. The statement of the counsel for the Government of India that endeavours were being made to pass orders relating to allotment of levy sugar on regular basis was also noted.

12. As would be apparent from the analysis above, neither of the aforesaid judgments have tested the carry forward rule on the annals of the statutory provisions.

13. The Essential Commodities Act was enacted in the interest of the general public, for the control of the production, supply and distribution and trade and commerce in certain commodities. Section 3 thereof empowers the Central Government to, if is of the opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, to regulate or prohibit the production, supply and distribution thereof and trade and commerce therein. Clause (f) of sub Section (2) thereof expressly empowers the Central Government to require any person holding stock of or engaged in production, buying and selling of any essential

commodity, to sell the whole or specified part of such commodity to the Central Government or to a State Government or any other person and in such circumstances as may be specified. Section 3C provides that where the producer is required by an order made with reference to Section 3(2)(f) to sell any kind of sugar, there shall be paid to that producer only such amount as the Central Government may, by order, determine, having regard to:

- “(a) the fair and remunerative price, if any, determined by the Central Government as the price of sugarcane to be taken into account under this section;*
- (b) the manufacturing cost of sugar;*
- (c) the duty or tax, if any, paid or payable thereon; and*
- (d) a reasonable return on the capital employed in the business of manufacturing of sugar.”*

It further explains:

- “(a) “fair and remunerative price” means the price of sugarcane determined by the Central Government under this section;*
- (b) “manufacturing cost of sugar” means the net cost incurred on conversion of sugarcane into sugar including net cost of transportation of sugarcane from the purchase centre to factory gate, to the extent it is borne by the producer;*
- (c) “producer” means a person carrying on the business of manufacturing sugar;*

(d) *“reasonable return on the capital employed” means the return on net fixed assets plus working capital of a producer in relation to manufacturing of sugar including procurement of sugarcane at a fair and remunerative price determined under this section.”*

14. In exercise of power thereunder, the Central Government has issued the Levy Sugar Supply (Control) Order 1979 in which ‘levy sugar’ is defined as the “sugar requisitioned by the Central Government” under Section 3 (2) (f) of the Essential Commodities Act and which empowers the Central Government to “from time to time by order, issue directions to any producer to supply levy sugar of such type or grade, in such quantities and from such place of manufacture or storage, either to such persons or organizations in such areas or markets or to such State Government/Union Territory Administration as may be specified in the order”. Sub clause 1A of clause 2 of the said order further provides that the “producer shall supply levy sugar at a price not exceeding the price determined under sub-Section (3C) of Section 3 of the Essential Commodities Act”.

15. Vide notification dated 7th October, 2009 of the Central Government, issued in exercise of power under Section 3(2)(f) of the Essential Commodities Act, every domestic producer of sugar was required to sell 20% of sugar produce in 2009-2010 sugar season (October-September),

w.e.f. 1st October, 2009 to the Central Government under the Levy Sugar Supply (Control) Order 1979.

16. The said quantity of levy sugar was vide notification dated 24th September, 2010 reduced to 10% for the sugar season 2010-2011 w.e.f. 1st October, 2010 and was vide notification 25th November, 2011 fixed at 10% from October, 2011 w.e.f. 1st October, 2011 till further orders.

17. The impugned order dated 30th November, 2010 is as under:

“Subject: Conversion of un-lifted levy sugar into non-levy sugar and sale thereof in the open market

Sir,

Reference is invited to this Directorate letter no.5-5(Maha)/99-SC-II dated 18.06.2002 communicating the decision of the Central Government to allow the sugar mills to sale equivalent quantity of their un-lifted levy sugar remaining un-lifted after a lapse of three months from the date of allotment in the open market subject to the levy obligation of the concerned sugar mills remaining unchanged. The Factories were also advised to furnish information on un-lifted levy sugar in the prescribed proforma duly certified by the concerned State authorities/FCI.

2. The above decision of the Central Government does not provide time limit for carrying forward the levy obligation in respect of sugar converted from levy sugar to non-levy . The Central Government has reviewed its earlier decision and has decided as under:

I. The sugar mills will be allowed to sell equivalent quantity of their un-lifted levy sugar which remains un-lifted after lapse of three months from the date of allotment, in the open market. However, the levy obligation of the concerned sugar mill will remain unchanged. For this purpose the concerned sugar mill will be required to request to the Directorate of Sugar with the certificate from the concerned State Authorities/FCI in the prescribed proforma enclosed with the letter dated 18.06.2002. A copy of the proforma is enclosed for ready reference. Where the State Agencies/FCI do not furnish the requisite certificate, the matter shall be brought to the notice of the Chief Director (Sugar), Directorate of Sugar who will take up the matter with the concerned authorities.

II. The period of carry forward of levy obligation would be maximum two sugar seasons subsequent to the sugar season to which the levy obligation pertains, subject to the condition that:

There should not be any complaint, whatsoever, from the allottee State/FCI/APO about non-delivery of allotted quantity of levy sugar by the sugar mill concerned. In other words, there should not be any willful default by the sugar mill in delivery/dispatch of levy sugar.

The quantity of levy sugar obligation proposed to be carried forward should be physically available with the sugar mill in their godowns and should be certified by the Central Excise Authority concerned.

Where the levy sugar obligation of a sugar mill is carried forward to future sugar seasons(s), the sugar mill shall be entitled to the levy price only for the sugar season to which the levy obligation pertains; and

Action for sale of un-lifted levy sugar will be initiated only on receipt of specific request of the concerned sugar mill. It is clarified that no sugar mill shall sale the un-lifted levy

sugar without obtaining release order from the Directorate of Sugar.”

18. The consequential impugned order dated 27th March, 2012 requires the petitioner to “from their production during 2010-2011 (October 2010 to September, 2011) of levy sugar sell the allocated quantity i.e. 1806.5 MT of sugar to U.P. Government”

19. According to the additional affidavit of the respondents no.1 to 4 Union of India, 20% levy liability of the petitioner for the year 2009-2010 was of 2581.3 MT; however allocation orders issued were for 1335.6 MT only and the quantity actually lifted was 424.8 MT only; another 350 MT were lifted in the year 2011-12 against the levy liability of the year 2009-2010, making the total quantity lifted for the year 2009-2010 774.8 MT and leaving a balance of 1806.5 MT out of the total liability of 2581.3 MT.

20. It was this 1806.5 MT which was sought to be lifted in pursuance to the impugned order dated 27th March, 2012, out of the sugar season 2011-2012.

21. Out of the said 1806.5 MT also, 560.8 MT had already been lifted before the petition was filed and there is a stay operating with respect to the balance 1246 MT.

22. The Levy Sugar Supply (Control) Order 1979 empowers the Government to from time to time pass orders *inter alia* fixing the quantity of levy sugar. The orders aforesaid issued thereunder direct domestic producers of sugar to sell the percentage (specified therein) of sugar produce in the specified sugar season (October-September) to the Central Government or as directed by the Central Government. Though the quantity of levy sugar fixed for the sugar season 2009-2010 (October-September) was 20% of the sugar produce, the quantity so fixed from the sugar season October 2010 onwards is only 10%. The question which arises is, whether the Central Government has to purchase (against the obligation on sugar producers under said orders) the sugar in the same sugar season or can exercise the right to such purchase thereafter also. By the impugned orders, the sugar producers have been obliged to sell, thereby entitling the Central Government to exercise the right of purchase, upto the next two sugar seasons i.e. the 20% levy sugar of the sugar season 2009-2010 which the sugar producers were obliged to sell to Central Government need not be purchased by Central Government in 2009-

2010 and could be purchased till 2011-12. Naturally, the sugar producers will then have to hold/store the quantity of levy sugar not purchased by Central Government for two years. The impugned notifications however permit the sugar producers to sell the same in open market but with liability to sell the equivalent quantity from the next two years produce, giving the sugar producers a choice, either to store the quantities not so purchased by Central Government, for two years, or to make up deficiency from subsequent years. It axiomatically follows that in the event of Central Government purchasing the entire quantity of levy fixed for the next year in the same year, the sugar producer, in that year, will end up being required to sell to Central Government levy sugar in excess of the percentage/quantity specified for that year. What is for adjudication is whether the Essential Commodities Act and the Levy Sugar Supply (Control) Order, 1979 permit that.

23. Neither the Levy Sugar Supply (Control) Order, 1979 empowers the Government to pass any order for carry forward nor any other provision so empowering the Government has been shown. On the contrary clause 2(4) of the Levy Sugar Supply (Control) Order enables the levy sugar of which delivery has been taken, to be *inter alia* “stored”, indicating that the delivery

has to be taken in the same year, even if, only to store the sugar so purchased. While fixing the levy quantity for subsequent years also, no provision has been made of the same being in addition to the unlifted levy quantities for previous year.

24. Though the order dated 7th October, 2009 supra of the Central Government directing that “every domestic producer of sugar shall sell 20% of sugar produced in 2009-2010 sugar season (October-November), w.e.f. the first day of October, 2009, to the Central Government or as directed by the Central Government under the Levy Sugar Supply (Control) Order 1979, as amended from time to time” is capable of being read as, though obliging the sugar producer to sell the specified quantity of the specified year to the Central Government but not correspondingly obliging the Central Government to affect the purchase in that year only and to in its discretion affect the purchase beyond the specified year also but a combined reading of the provisions of the Act and the Levy Sugar Supply (Control) Order would show that such an interpretation would be a strained one and not flowing from the provision of law i.e. Section 3 under which the order dated 7th October, 2009 has been issued. It cannot be lost sight of that the essential commodity in relation where to decision is to be taken is an agricultural

produce for human consumption. The reason for which the Central Government under Section 3 of the Act can regulate the production supply and distribution of the essential commodity i.e. for maintaining supply or for securing equitable distribution and availability at fair price, also is suggestive of the seasonal nature of the power conferred thereunder. Section 3(2)(f) insofar as concerning sugar has to be read along with Section 3C and the factors for determination of price thereunder are again indicative of the periodical/seasonal nature of the directions thereunder as the same change from year to year/season to season. The Central Government by exercise of powers under the Act is entitled to only compel the producers of sugar to sell the specified produce of that season to the Central Government to enable the Central Government to equitably make sugar available at fair price to certain section of the consumers but is not found to be authorising the Central Government to 'hoard' and is not found to be creating any vested right in the Central Government even if has no need of sugar for that particular year. It cannot also be lost sight of that the Central Government, if of the opinion that its requirement for levy sugar for subsequent year would be more, can always fix a higher percentage of the produce of that year/season as levy sugar for subsequent year and is not required to fall back on its unclaimed

rights of the previous year. Rather, what is found to have happened is that while the percentage of the total produce specified as levy sugar for the year 2009-2010 was 20%, for the subsequent two years it was only 10%.

25. The same is however not to be read as permitting the sugar mills to, by practicing dilatory or other tactics, allow the year/sugar season to lapse without fulfilling their levy obligation in spite of allocation orders and lifting orders. If the government has done all that it is required to do for lifting the notified quantity of sugar and the entire quantity remains to be lifted for reasons attributable to the sugar mills, certainly the sugar mills would be liable to make up the said deficiency in the subsequent year in addition to being liable for any penalty and prosecution therefor. However where the Government for its own reasons has not been able to lift the entire levy liability, there is nothing which empowers the Government to in the next year, in excess of the levy quantity notified for that year, lift the unfulfilled levy quantities of the previous years.

26. The petition thus succeeds and is allowed. The carry forward rule of levy sugar contained in the impugned Notification/order dated 30th November, 2010 is quashed / set aside in terms of the above and axiomatically the impugned order dated 27th March, 2012 directing the

petitioner to supply the unlifted levy quantities of the year 2009-2010 in the year 2011-2012 is also quashed/set aside. It is declared that the petitioner is not liable for supply of the balance 1246 MT of sugar out of the levy quantities of the year 2009-2010 to the respondents if has otherwise fulfilled the levy quantities for the year 2011-2012. However considering that it was informed that the levy concept has been done away since the year 2013, I further deem it appropriate to clarify that the petitioner shall not be entitled to any compensation from the respondents for the supplies already made in terms of the order which were impugned and have been quashed.

No costs.

APRIL 25, 2016
M..

RAJIV SAHAI ENDLAW, J.