



2023:DHC:7958-DB



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

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Date of Decision: 01.11.2023

+ **W.P.(C) 9975/2021**

M/S NTPC LIMITED

.....Petitioner

Through: Mr. V. Lakshmikumaran, Mr.
Karan Sachdev & Mr. Agrim
Arora, Advs.

versus

ADDITIONAL DIRECTOR GENERAL DGGI
COIMBATORE & ORS.

..... Respondents

Through: Mr. Satish Kumar, SSC for R1to3.
Mr. Asheesh Jain, CGSC with Mr.
Gaurav Kumar, Adv.
Mr. Anurag Ojha, SSC for R5.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition, *inter alia*, praying
as under: -

- “a) Issue an appropriate writ, order or direction quashing
the impugned Notification No. 22/2014-ST dated
16.09.2014 issued by Respondent No. 3 and declaring
the same as ultra vires & violative of Article 14 of the
Constitution of India and Rule 3 of the Service Tax
Rules, 1994; and/or



- b) Issue a writ of certiorari or any other appropriate writ, order or direction in the nature thereof, quashing the proceedings initiated against the Petitioner vide the Show cause-cum-demand Notice No. 62/2020- ST dated 29.12.2020 issued by Respondent No. 1 as being ultra vires Articles 246 and 265 of the Constitution of India, without jurisdiction and contrary to the Circular No. 1053/03/2017-CX dated 10.03.2017; and/or
- c) Issue an appropriate writ, order or direction, declaring Rule 10 of the Place of Provision of Service Rules, 2012 and Rule 2(1)(d)(EEC) of the Service Tax Rules, 1994 to be ultra vires the provisions of the Finance 1994 Act; and/or
- d) Issue an appropriate writ, striking down Section 66B of the Act read with Rule 10 of the POPS Rules in so far as it imposes the levy of Service Tax on the services by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India, where the service provider and the service recipient is located outside India; and/or”

2. The petitioner is essentially aggrieved by the show cause cum demand notice dated 29.12.2020 (hereafter ‘**the SCN**’) issued by respondent no.1, *inter alia*, raising a demand of a sum of ₹2353,44,05,056/- (Rupees Two thousand three hundred fifty-three crore forty-four lakh five thousand and fifty-six only). The said demand has been raised on three accounts. First, a sum of ₹2219,37,54,106/- in respect of capacity charges; ₹133,23,97,621/- in respect of the late payment surcharge; ₹82,53,329/- in respect of ocean freight on transportation of coal. The petitioner was called upon to show cause as to why the said amount should not be recovered under the proviso to Sub-section 1 of Section 73 of the Finance Act, 1994. In addition, respondent no.1 has also proposed levy of penalty under



Section 78 and 77(2) of the Finance Act, 1994. Insofar as the service tax on ocean freight is concerned, the same has been struck down by the High Court of Gujarat in *Messrs Sal Steel Ltd. & Ors. v. Union of India: 2019 9 TMI 1315*. In the case of *Mohit Minerals Pvt. Ltd. v. Union of India, 2022 SCC OnLine Guj 49*, the Gujarat High Court had also struck down the levy of GST in respect of ocean freight and the appeal against the said decision was rejected by the Supreme Court in *Union of India v. Mohit Minerals Pvt. Ltd., 2022 SCC OnLine SC 657*.

3. Insofar as the imposition of service tax on capacity charges and late payment surcharges are concerned, the same are, *prima facie*, covered by the circular dated 03.08.2022 issued by the Department of Revenue, Ministry of Finance, Government of India. The relevant extract of the said circular reads as under: -

“Late payment surcharge or fee

9. The facility of accepting late payments with interest or late payment fee, fine or penalty is a facility granted by supplier naturally bundled with the main supply. It is not uncommon or unnatural for customers to sometimes miss the last date of payment of electricity, water, telecommunication services etc. Almost all service providers across the world provide the facility of accepting late payments with late fine or penalty. Even if this service is described as a service of tolerating the act of late payment, it is an ancillary supply naturally bundled and supplied in conjunction with the principal supply, and therefore should be assessed as the principal supply. Since it is ancillary to and naturally bundled with the principal supply such as of electricity, water, telecommunication, cooking gas, insurance etc. it should be assessed at the same rate as the principal supply. However, the same cannot be said of cheque dishonor fine or penalty as discussed in the preceding paragraphs.



Fixed Capacity charges for Power

10. The price charged for electricity by the power generating companies from the State Electricity Boards (SEBs)/DISCOMS or by SEBs/DISCOMs from individual customers has two components, namely, a minimum fixed charge (or capacity charge) and variable per unit charge. The minimum fixed charges have to be paid by the SEBs/DISCOMS/individual customers irrespective of the quantity of electricity scheduled or purchased by them during a month. They take care of the fixed cost of generating/supplying electricity. The variable charges are charged per unit of electricity purchased and increase or decrease every month depending on the quantity of electricity consumed.

10.1 The fact that the minimum fixed charges remain the same whether electricity is consumed or not or it is scheduled/consumed below the contracted or available capacity or a minimum threshold, does not mean that minimum fixed charge or part of it is a charge for tolerating the act of not scheduling or consuming the minimum the contracted or available capacity or a minimum threshold.

10.2 Both the components of the price, the minimum fixed charges/capacity charges and the variable/energy charges are charged for sale of electricity and are thus not taxable as electricity is exempt from GST. Power purchase agreements may have provisions that the power producer shall not supply electricity to a third party without approval of buyer. Such agreements which ensure assured supply of power to State Electricity Boards/DISCOMS are ancillary arrangements; the contract is essentially for supply of electricity.”

4. Mr. Kumar points out that the said circular was issued after the SCN was issued and the present writ petition was filed. It is, thus, clear that respondent no.1 did not have benefit of the aforesaid circular while issuing the SCN.
5. Mr. Kumaran, learned counsel appearing for the petitioner submits that the petitioner would be satisfied if the SCN is set aside



and the matter is relegated to respondent no.1 for issuance of a fresh show cause notice.

6. The said course commends to us as the said circular was issued after the SCN had been issued by respondent no.1.

7. In view of the above, the SCN is set aside.

8. It is, however, clarified that respondent no.1 is not precluded from issuing a fresh show cause notice after considering the import of the circular as well as the decision of the High Court of Gujarat in *Messrs Sal Steel Ltd. & Ors. v. Union of India* (*supra*) as well as the decision of the Supreme Court in *Union of India v. Mohit Minerals Pvt. Ltd.* (*supra*).

9. It is further clarified that in the event a fresh show-cause notice is issued, the time period commencing from 29.12.2020 till date shall be excluded for the purpose of limitation.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

NOVEMBER 1, 2023
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