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

% *Date of Decision: 13th December, 2023*

\+ **W.P.(C) 9455/2018 & CM APPL. 62085/2023**

BSES RAJDHANI POWER LTD & ANR. ..... Petitioner

Through: Mr. Arvind Datar, Sr. Adv. Mr. Tarun Gulati, Sr. Adv, Mr. Anupam Varma, Mr. Manish Mishra, Mr. Nikhil Sharma, Ms. Manu Tiwari, Mr. Aditya Dhingra & Mr. Ankur Mittal, Advs.

versus

UNION OF INDIA & ORS. ..... Respondent

Through: Mr. Kamal Digpaul & Ms. Ishita Pathak, Advs. for Mr. Ajay Digpaul, CGSC.
Mr. Harpreet Singh, SSC with Ms. Suhani Mathur & Mr. Gurpreet Singh Gulati, Advs.
Mr. Arjun Jain, Adv. for R-2 & 3 through video conference.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (*Oral*)

1. The petitioners have filed the present petition, *inter alia*, praying as under:

> *"(a) Quash and set aside the clarification issued in para 4(1) of the Circular No. 34/8/2018-GST dated 01.03.2018 by the Government of India.*

(b) Declare that in terms of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017, all the activities undertaken by a distribution utility/licensee in accordance with the provisions of the Electricity Act, 2003 are exempt from levy of tax under the Central Goods and Services Tax Act, 2017 and Delhi Goods and Services Tax Act, 2017.

(c) In the alternative, declare that declare the charges such as application fee, meter rent, testing fee, etc collected by the Petitioners are part of composite supply of which principal supply is the actual distribution of electricity and therefore the entire composite supply is exempt from tax under Entry 25 of Notification No. 12/2017-Central Tax (Rate) dated 28.06.2017 and Notification No. 12/2017-State Tax (Rate) dated 30.06.2017;

(d) In the alternative, declare that the Clarification issued in para 4(1) of the Circular No. 34/8/2018-GST dated 01.03.2018 by the Government of India would be applicable prospectively.

(e) Pass such further orders as may be deemed fit and proper in the facts and circumstances of the present case."

2. The Central Government in exercise of its powers under Section 11 of the Central Goods and Services Tax Act, 2017 (hereafter '**the CGST Act**'), had issued a notification being Notification No.12/2017-Central Tax (Rate) dated 28.06.2017. In terms of the said notification, the intra-State supply of services (transmission or distribution of electricity by an electricity transmission or distribution utility) is exempted from the Goods and Services Tax (GST). Serial No. 25 of the said notification is extracted below:

S. No.	*Chapter, Section Heading, Group or Service Code (Tariff*	*Description of services*	*Rate (per cent)*	*Condition*
25	*Heading*	*Transmission or distribution*	*Nil*	*Nil*

	9969	*of electricity by an electricity transmission or distribution utility.*		

3. It is stated by the petitioners that in terms of the said notification, the petitioners being electricity distribution utilities, were neither collecting GST from its customers for the supplies nor depositing the same with the GST authorities.

4. The petitioners are essentially aggrieved by the issuance of the circular being Circular No. 34/08/2018-GST dated 01.03.2018 (hereafter '**the impugned circular**'). In particular, the petitioners are aggrieved by the clarification issued at serial No. 4 of the impugned circular. The same is extracted below:

4.	*(1) Whether the activities carried by DISCOMS against recovery of charges from consumers under State Electricity Act are exempt from GST?* *(2) Whether the guarantee provided by State Government to state owned companies against guarantee commission, is taxable under GST?*	*(1) Service by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST under notification No. 12/2017-CT (R), Sl. No. 25. The other services such as,-* *i. Application fee for releasing connection of electricity;* *ii. Rental Charges against metering equipment;* *iii. Testing fee for meters/ transformers, capacitors etc.;* *iv. Labour charges from customers for shifting of meters or shifting of service lines;*

		v. charges for duplicate bill; *provided by DISCOMS to consumer are taxable.* *(2) The service provided by Central Government/State Government to any business entity including PSUs by way of guaranteeing the loans taken by them from financial institutions against consideration in any form including Guarantee Commission is taxable.*

5. In terms of the impugned circular, it is clarified that the certain charges collected by the petitioners are not covered under the notification No.12/2017-Central Tax (Rate) dated 28.06.2017.

6. According to the petitioners, the charges as referred above are included in the charges for provision of services. It is contended that charges for metering equipment, testing fee for meter, labour charges from customers for shifting of meters, charges for bills and application for releasing connection of electricity are all integral part of services of distribution of electricity.

7. The learned counsel relies on the decision of the Division Bench of the Gujarat High Court in ***Torrent Power Ltd. v. Union of India:*** **R/ Special Civil Application No.5343 of 2018.** In that case, the Court had considered a similar challenge and had set aside the impugned circular.

8. In the said case, the court had examined the contention that the

services which were sought to be excluded from the cover of the "*transmission or distribution of electricity by an electricity transmission or distribution utility"*, which were exempted from levy of GST by virtue of the notification dated 28.06.2017, were an integral part of the said services. The court, *inter alia*, concluded as under:

> *"The services provided by the petitioner are in the nature of composite supply and therefore, in view of the provisions of clause (a) of section 8 of the CGST Act, the tax liability thereof has to b e determined by treating such composite same as a supply of the principal supply of transmission and distribution of electricity is exempt from levy of service tax, the tax liability of the related services shall be determined accordingly."*

9. The Gujarat High Court struck down the impugned circular being ultra-vires to Section 8 of the CGST Act. The operative part of the said decision is as under:

> *"30. For the foregoing reasons, the petition succeeds and is, accordingly, allowed to the following extent:*
> *Paragraph 4 (1) of the impugned circular No.34/8/2018-GST dated 1.3.2018 to the extent the same reads as under is hereby struck down as being ultra vires the provisions of section 8 of the Central Goods and Services Tax Act, 2017 as well as Notification No.12/2017- CT (R) serial No.25:*

4.	*(1) Whether the activities carried by DISCOMS against recovery of charges from consumers under State Electricity Act are exempt from GST?*	*(1) Service by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST under notification No. 12/2017- CT (R), Sl. No. 25. The other services such as,-* *Application fee for releasing connection of electricity;* *Rental Charges against metering equipment;*

		Testing fee for meters/ transformers, capacitors etc.; *Labour charges from customers for shifting of meters or shifting of service lines;* *charges for duplicate bill;* *provided by DISCOMS to consumer are taxable.*

The impugned summons dated 28.3.2018 is hereby set aside to the extent the petitioners are called upon to produce the documents listed at serial No.5 of the annexure thereto, except clause - (vi); income from shifting of HT lines received from MEGA. Consequently, the respondents shall drop the proceedings under the Finance Act, 1994 as well as under the CGST/SGST Acts sought to be initiated by virtue of the impugned summons to the extent the same is based upon item No.4 (1) of the impugned circular dated 1st March, 2018.

31. Rule is made absolute to the aforesaid extent with no order as to costs."

10. We respectfully concur with the decision of the Gujarat High Court.

11. The learned counsel appearing for the Respondent Nos. 2 & 3, who has joined the present proceedings through video conferencing, concedes that the issue stands concluded in favour of the petitioners in view of the aforesaid decision in ***Torrent Power Ltd. v. Union of India*** (*supra*), and submits that the present petition may be disposed of in the terms of the said decision. He, however, submits that the Revenue has preferred an appeal against the said decision, which is pending consideration before the Hon'ble Supreme Court, and his submission may not be construed as foreclosing the rights of the Revenue to pursue the aforesaid remedies.

12. The present petition was listed on 08.11.2023 and this Court had passed the following order:

*1. The petitioner has filed the present petition impugning paragraph No. 4 of a circular dated 01.03.2018, being Circular No.34/8/2018- GST (hereafter '**impugned circular**').*
2. Paragraph No. 4 of the said circular is set out below:

4.	*(1) Whether the activities carried by DISCOMS against recovery of charges from consumers under State Electricity Act are exempt from GST?* *(2) Whether the guarantee provided by State Government to state owned companies against guarantee commission, is taxable under GST?*	*(1) Service by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST under notification No. 12/2017- CT (R), Sl. No. 25. The other services such as,-* *vi. Application fee for releasing connection of electricity;* *vii. Rental Charges against metering equipment;* *viii. Testing fee for meters/ transformers, capacitors etc.;* *ix. Labour charges from customers for shifting of meters or shifting of service lines;* *x. charges for duplicate bill;* *provided by DISCOMS to consumer are taxable.* *(2) The service provided by Central Government/State Government to any business entity including PSUs by way of guaranteeing the loans taken by them from financial*

		institutions against consideration in any form including Guarantee Commission is taxable.

3. It is the petitioner's case that in view of the impugned circular, the petitioner is compelled to pay GST in respect of certain services, that are a part and parcel of the service of distribution of electricity, which is exempted from payment of GST.

4. The petitioner submits that the services such as application fee for releasing connection of electricity, rental charges, testing fee, labour charges for shifting meters, etc. are not chargeable to GST.

5. The petitioner also claims that prior to issuance of the impugned circular, the petitioner being an electricity distribution company, was not charging any GST in respect of the aforesaid services. However, the petitioner had been compelled to collect such charges from the consumers, and pay the same to the GST authorities, by virtue of the impugned circular.

*6. Paragraph No. 4 of the impugned circular was set aside by the Gujarat High Court in **Torrent Power Ltd. v. Union of India: R/ Special Civil Application No.5343 of 2018**, decided on 19.12.2018. Since paragraph No. 4 of the impugned circular has been quashed, the requirement of the petitioner to collect GST from its consumers and deposit the same with the concerned GST authorities does not arise.*

7. As noted above, the petitioner was neither collecting nor depositing GST, in respect of the services in question, prior to the issuance of the impugned circular. However, notwithstanding that paragraph No. 4 of the circular was quashed by the Gujarat High Court, the petitioner has continued to collect GST from its consumers and deposit the same with the GST authorities. Resultantly, the consumers are now burdened with the liability to pay GST in respect of services, which according to the petitioner are exempt from the levy of GST.

8. We find it difficult to accept that the petitioner could collect any GST from its consumers after paragraph 4 of the impugned circular had been set aside.

9. Mr. Gulati, learned Senior Counsel appearing for the petitioner, submits that the petitioner's Transfer Petition (Civil) No.2665/2019 is pending before the Hon'ble Supreme Court and is tagged with a batch of other matters, including the Civil Appeal No. 6278/2019 arising from the decision of the Gujarat High Court, and the Supreme Court is seisin of this issue.

10. In view of the above, we consider it apposite to defer the *consideration of the present petition.*

11. However, we direct that any GST collected by the petitioner hereafter, in respect of the services in question, shall be deposited in this Court on a monthly basis.

12. The petitioner shall maintain a detailed account of the consumers from whom such funds have been collected, along with their bank account numbers to ensure that, if necessary, the amounts deposited can be refunded to the said consumers.

13. List on 08.01.2024."

13. The hearing of the present petition was deferred at the request made by the learned counsel for the petitioners.

14. It is apparent that the petitioners also had sought an adjournment, despite the impugned circular having been set aside, as the petitioners were continuing to collect GST from their customers on the basis that their challenge to the impugned circular was pending. Thus, although the Gujarat High Court had set aside the circular, the benefit of the same had not percolated to the customers, who were availing the supplies made by the petitioners. In the aforesaid circumstances, we had directed the petitioners to deposit the GST collected from the customers for the services in question with this Court.

15. The petitioners have not deposited any amount with the Registry of this Court. Mr. Arvind Datar, learned Senior Counsel appearing the petitioners, submits that depositing the tax in this Court would further complicate the issues. He submits that certain industrial consumers are entitled to avail Input Tax Credit in respect of the GST paid to the petitioners. He further submits that in the circumstances, the GST authorities would not receive the tax collected by the petitioners and yet certain other customers would be entitled to avail

of credit for the same.

16. There is merit in the said contention that the direction to deposit GST with this Court on a monthly basis may give rise to further complications.

17. Since the impugned circular has been set aside and it is clarified that the supplies mentioned in the impugned circular are bundled supplies and form an integral part of the supplies of distribution of electricity, the said supplies are not chargeable to GST. Consequently, the petitioners are also not entitled to collect such charges from their customers. In this view, we consider it apposite to direct that any GST collected by the petitioners after 08.11.2023, be refunded to customers from whom the said GST has been collected.

18. This Court considers it apposite to finally dispose of the present petition with the aforesaid directions.

19. We clarify that nothing stated in this order should be construed as limiting the rights of the customers of the petitioners to seek refund of the GST paid by them prior to 08.11.2023 or avail appropriate remedies.

20. The pending application(s) also stands disposed of.

21. The hearing scheduled on 08.01.2024, stands cancelled.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

DECEMBER 13, 2023/"SK"