



WP Nos.30974 of 2022 etc. batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.01.2024

CORAM

**THE HONOURABLE MR.JUSTICE R.MAHADEVAN
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

W.P.Nos.30974, 30975, 30976, 30977, 31231, 31236, 31239, 31955, 31959,
31961, 32262, 32265, 32268, 32270, 32360, 32363, 32368, 32373, 32376,
32377, 32379, 32380, 32382, 32385, 32571, 32579, 32583, 32584, 32588,
32678, 32681, 32854, 32857, 32859, 32860, 35010, 35011, 35016, 35020,
35022, 35029, 35030, 35031, 35032, 35034 of 2022 and
58, 60, 71, 1161, 1254, 4347, 4348, 4351, 4763, 5223, 5225, 5226, 5232,
5235, 5236, 5238, 5240, 5250, 5255, 5257, 5259, 5325, 5329, 5331, 5333,
5364, 5583, 5592, 5597, 5599, 5619, 5624, 5630, 5632, 5831, 5832, 5833,
5836, 5838, 5944, 5949, 5953, 5957, 6059, 6061, 6066, 6067, 6071, 6228,
6232, 6234, 6237, 6441, 6447, 6755, 6759, 6764, 6879, 6910, 6914, 6917,
6921, 6924, 7197, 7202, 7454, 7458, 7463, 7465, 7854, 8352, 8447, 8448,
8450, 8452, 8454, 9105, 9111, 9115, 9118, 9122, 9262, 9265, 9268, 9270,
9272, 9275, 9278, 10430, 10433, 10435, 10437, 10441, 10677, 10680, 10681,
10683, 10684, 10687, 10707, 10765, 10771, 10775, 10779, 11249, 11256,
11259, 12703, 12705, 12708, 12709, 12710, 12711, 12715, 14063, 14073,
14070, 14076, 14080, 16623, 16626, 16637, 16639, 16642, 17726, 17729,
17731, 17735, 19309, 19312, 19316, 19322, 19325, 19443, 19445, 19450,
22987, 22991, 22995, 22997, 22998, 22999, 29023, 29025, 29027, 29028,
29029, 29517, 29536 of 2023

and

W.M.P. Nos. 30365, 30367, 30369, 30371, 30671, 30673, 30676, 30677,
30680, 30681, 31392, 31393, 31398, 31400, 31402, 31403, 31660, 31662,
31664, 31665, 31667, 31668, 31672, 31674, 31752, 31753, 31757, 31758,
31763, 31765, 31767, 31769, 31770, 31772, 31773, 31774, 31776, 31777,
31778, 31779, 31780, 31781, 31783, 31784, 31975, 31977, 31982, 31983,
31988, 31989, 31991, 31992, 31997, 31998, 32257, 32260, 32261, 32262,
32264, 32265, 32266, 32267, 34440, 34441, 34442, 34443, 34447, 34448,
34451, 34453, 34456, 34459, 34466, 34467, 34468, 34469, 34470, 34471,
34472, 34473, 34475, 34476, of 2022 and



WP Nos.30974 of 2022 etc. batch

55, 56, 1180, 1270, 4397, 4398, 4766, 5221, 5223, 5226, 5228, 5229, 5230,
5236, 5238, 5240, 5241, 5243, 5245, 5247, 5248, 5249, 5251, 5266, 5268,
5273, 5276, 5283, 5285, 5286, 5287, 5356, 5357, 5358, 5359, 5384, 5600,
5612, 5614, 5616, 5617, 5619, 5620, 5650, 5653, 5657, 5659, 5813, 5816,
5818, 5820, 5822, 5945, 5951, 5954, 5958, 6080, 6085, 6093, 6096, 6102,
6244, 6248, 6251, 6257, 6477, 6482, 6830, 6832, 6836, 6838, 6846, 6847,
6973, 7008, 7011, 7013, 7016, 7014, 7018, 7023, 7024, 7027, 7028, 7255,
7256, 7259, 7260, 7533, 7535, 7540, 7541, 7543, 7544, 7545, 7546, 8108,
8541, 8639, 8640, 8641, 8642, 8644, 8645, 8648, 8651, 8655, 8656, 9242,
9244, 9247, 9249, 9252, 9253, 9256, 9258, 9261, 9262, 9359, 9362, 9365,
9366, 9368, 9372, 9377, 10370, 10371, 10374, 10375, 10377, 10378, 10379,
10380, 10382, 10383, 10612, 10614, 10618, 10619, 10620, 10621, 10624,
10625, 10626, 10627, 10631, 10632, 10656, 10707, 10710, 10713, 10715,
10718, 10719, 10720, 10722, 11109, 11130, 11132, 11138, 11141, 11142,
11143, 12490, 12492, 12495, 12497, 12499, 12500, 12501, 12502, 12503,
12504, 12506, 12507, 12512, 12515, 13700, 13701, 13703, 13704, 13708,
13709, 13710, 13711, 13716, 13717, 15924, 15934, 15939, 15943, 15948,
16823, 16825, 16828, 16831, 16832, 18561, 18562, 18568, 18569, 18574,
18575, 18580, 18583, 18587, 18589, 18697, 18698, 18699, 18700, 18701,
18703, 22493, 22498, 22501, 22503, 28603, 28604, 28606, 28608, 28611,
29137, 29139, 29159, 29164 of 2023

W.P.No.30974 of 2022

Tvl.A.Venkatachalam,
1/7, Trichy Road, Kangeyampalayam,
Coimbatore – 641 401.

.. Petitioner

Vs.

The Assistant Commissioner (ST),
Palladam II Assessment Circle, Palladam.

.. Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India
praying for a Writ of Certiorari to call for the records of the respondent in his



WP Nos.30974 of 2022 etc. batch

proceeding in Ref.No.ZD331022040593Y Case ID No.AD331022025289H and quash the impugned proceedings dated 29.10.2022 (Assessment year 2018-2019) passed therein.

For Petitioner : Mr.B.Raveendran

For Respondent : Mr.Haja Nazirudeen,
Additional Advocate General
assisted by Mr.M.Venkateswaran
Special Government Pleader and
Mr.P.Haribabu, Govt. Advocate

COMMON ORDER

Heard all the parties and perused the records.

2. For the sake of clarity and ease of reference, this batch of writ petitions can be segregated into 4 categories viz.,

a) Challenging the *vires* of Entry 17 (viii) of G.O.Ms.No.72 dated 29.06.2017 as amended by para 1 (e) of G.O.Ms.No.170 dated 31.12.2018;

b) Challenge to Circular No.164/20/2021-GST, CBIC – 190354/207/2021 – TO (TRU-II) – CEBEC dated 06.10.2021 – Para 9;

c) Challenge to show cause notices proposing to levy of Goods and Service Tax on Mining Lease / Royalty; and

d) Adjudication orders levying/ demanding Goods and Service Tax on



Mining Lease / Royalty.

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3. Admittedly, in all these cases, the petitioners were permitted to carry on quarrying operation on payment of seigniorage charges paid to the Government for grant of Mining Lease conferring on them to extract various minerals. The lease agreement provided for payment of royalty / seigniorage fee. It is the levy of Goods and Service Tax on such royalty / seigniorage fee collected by the Government, which is the subject matter in issue.

4. Under the GST Law, Section 9 provides for charge or liability for tax. Section 7 defines the taxable event which is “supply”. Section 11 confers power to the Central / State Government to grant exemption from tax. In exercise of the power under Section 9(1) of the CGST Act, 2017, Notification no.11/2017 - Central Tax (Rate) dated 28.06.2017 came to be issued. Sl.No.17 of the said Notification refers to Heading 9973, in this entry, sub item (vi) refers to leasing or rental services with or without operator. The rate is the same as applicable to goods. There is an Annexure to the said Notification, which sets out the “Scheme of Classification of Services”, Sl. No.257 of the Annexure to the Notification refers to Chapter 997337 - "licensing services for the right to use minerals including its exploration and evaluation". The validity of this



WP Nos.30974 of 2022 etc. batch

notification is under challenge.

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5. The Central Board of Indirect Taxes and Customs (CBIC), formerly known as Central Board of Excise and Customs (CBEC) has issued order/circular dated 06.10.2021 in exercise of power under Section 168 of the Central Goods and Services Tax Act, 2017, clarifying that rate of tax leviable on royalty was 18% even prior to G.O.Ms.No.72. The Board has placed reliance on a discussion made in the 45th GST Council Meeting held on 17.09.2021. It has also referred to conflicting rulings of the Authority for Advance Ruling and chosen to follow the view, which provides for levy higher rate even for the period prior to 1st January, 2019. Feeling aggrieved, the Circular dated 06.10.2021 of the Board, in particular paragraph 9 of the same, is challenged as it suffers from error apparent and being contrary to the Entry.

6. In all these Writ Petitions, the primary ground for the levy of Goods and Service Tax on royalty / seigniorage fee is that Royalty is a 'tax' and does not represent 'services'. The challenge is on the premise that in the absence of the foundational fact viz., provision of service, there is no taxable event of supply of service attracting the charge under Section 9 read with Section 7 of the GST Act. We find that divergent / conflicting views was expressed by two



WP Nos.30974 of 2022 etc. batch

Constitution Benches of the Apex Court as to the nature of royalty. While a

Seven Judge Bench of the Hon'ble Supreme Court in *India Cement Ltd. Vs.*

State of Tamil Nadu, [1990 (1) SCC page 12], has held that royalty is a tax, the

said view was departed from in *State of WB Vs. Kesoram Industries Ltd.* [2004

(10) SCC page 201]. The issue was thus referred to a Constitution Bench of

Nine Judges by order dated 30.03.2011 in *Mineral Area Development Authority*

Vs. Steel Authority of India [2011 (4) SCC page 450].

7. Levy of tax on royalty has been the subject of controversy even under the Finance Act, 1994. The authorities levied Service Tax on royalty which was upheld by the Rajasthan High Court. The matters were carried in appeal(s) to the Apex Court and an order of interim stay was granted by the Hon'ble Supreme Court in *Udaipur Chamber of Commerce and Industry Vs. Union of India* [2018 (10) GSTL J167] vide order dated 11th January, 2018 on a challenge to the judgment of the High Court of Rajasthan. Subsequent thereto, with the introduction of GST, tax was levied on royalty. The same was challenged before the Apex Court. The Hon'ble Supreme Court has granted an interim order with regard to levy of Goods and Service Tax on royalty in *Lakhwinder Singh Vs. Union of India & Ors.* The relevant portion reads as under :



WP Nos.30974 of 2022 etc. batch

“1 Issue notice

2 Tag with SLP(C) No 37326 of 2017

3 Until further orders, payment of GST for grant of mining lease / royalty by the petitioner shall remain stayed.”

8. Following the above order, all these Writ petitions were admitted and an interim protection was granted against recovery. It was represented by the counsel on either side that there are other aspects, apart from the principal question, whether Royalty is a Tax or otherwise, which is pending consideration before the Constitution Bench of 9 judges of the Hon'ble Supreme Court and the outcome of the said Constitution Bench Judgment would have a direct and material bearing on the issues raised in all the writ petitions. It may be relevant to refer to the questions framed by the Constitution Bench of the 9 Judges, as follows:

“1. Whether "royalty" determined under Sections 9/15(3) of the Mines and Minerals (Development and Regulation) Act, 1957 (67 of 1957, as amended) is in the nature of tax?

2. Can the State Legislature while levying a tax on land under List II Entry 49 of the Seventh Schedule of the Constitution adopt a measure of tax based on the value of the produce of land? If yes, then would the constitutional position be any different insofar as the tax on land is imposed on mining land on account of List II Entry 50 and its interrelation with List I Entry 547

3. What is the meaning of the expression "Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development" within the meaning of Schedule VII List II Entry 50 of the Constitution of India? Does the Mines and Minerals (Development and Regulation) Act, 1957 contain any provision which operates as a limitation on



WP Nos.30974 of 2022 etc. batch

the field of legislation prescribed in List II Entry 50 of the Seventh Schedule of the Constitution of India? In particular, whether Section 9 of the aforementioned Act denudes or limits the scope of List II Entry 50?

4. What is the true nature of royalty/dead rent payable on minerals produced/mined/extracted from mines?

5. Whether the majority decision in State of W.B. v. Kesoram Industries Ltd. could be read as departing from the law laid down in the seven-Judge Bench decision in India Cement Ltd. v. State of T.N.?

6. Whether "taxes on lands and buildings" in List II Entry 49 of the Seventh Schedule to the Constitution contemplate a tax levied directly on the land as a unit having definite relationship with the land?"

9. In these circumstances, we deem it fit and appropriate to issue the following directions:

(i) In the cases, where the challenge is made to the show cause notices, the writ petitioners shall submit their objections / representations within a period of four weeks from the date of receipt of a copy of this order.

(ii) Upon receipt of the objections / representations from the writ petitioners, the authority concerned shall proceed with the adjudication, on merits and in accordance with law, after affording reasonable opportunity of being heard to the petitioners. However, the orders of adjudication shall be kept in abeyance until the Nine Judge Constitution Bench decides the issue as to the nature of royalty.



WP Nos.30974 of 2022 etc. batch

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(iii) It is made clear that there shall be no recovery of GST on royalty until the Nine Judge Constitution Bench takes a decision.

(iv) Needless to state that on the matters being decided, the writ petitioners if still aggrieved, shall redress their grievance(s), if any, before the appropriate forum, including by filing appeal(s).

(v) Insofar as the challenge to the notification as well as the circular, it is open to the writ petitioners to act upon, after the outcome of the case pending before the Nine Judge Constitution Bench.

(vi) It is also made clear that all the contentions are left open for the writ petitioners to raise in appropriate proceedings, after the outcome of the decision of the Nine Judge Constitution Bench.

10. Accordingly, this batch of writ petitions are disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

(R.M.D., J) (M.S.Q., J)
08.01.2024

Speaking (or) Non Speaking Order
Index: Yes/No
Neutral Citation: Yes/No



WP Nos.30974 of 2022 etc. batch

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R.MAHADEVAN, J.
AND
MOHAMMED SHAFFIQ, J.

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To

The Assistant Commissioner (ST),
Palladam II Assessment Circle,
Palladam.

W.P.Nos.30974 of 2022 etc. batch