IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU/SRINAGAR

Reserved on: 02.09.2026
Pronounced on: 29.10.2026
Uploaded on: 29.10.2026

Whether the operative part or full judgment is pronounced: **Full**

WP(C) No.3008/2024
CM Nos. 6821/2025 & 8179/2024
c/w
WP(C) No.3324/2025
CM No.7584/2025
WP(C) No.3329/2025
CM No.7589/2025

(Srinagar Wing)
WP(C) No. 3008/2024
CM Nos. 6821/2025 & 8179/2024

M/S MASS N ERGY AND OTHERS

...PETITIONER(S)/APPELLANT(S)

Through: - Mr. Shariq J. Reyaz, Advocate,
Ms. Humaira Sajad, Advocate,
Mr. Rahul Sharma, Advocate,
Ms. Rupali Sharma, Advocate,
Mr. Akshaj Rahmatra, Advocate.

vs.

UNION OF INDIA AND OTHERS.

…RESPONDENT(S)

Through: - Mr. A. R. Malik, Sr. AAG, with
Ms. Nisha Kangotra, Advocate
Mr. T.M. Shamsi, DSGI, with
Ms. Rehana Qayoom, Advocate

(Jammu Wing)
WP(C) No. 3324/2025, CM No.7584/2025

MAGPIE HYDEL CONSTRUCTION OPERATION INDUSTRIES PVT. LTD.

...PETITIONER(S)/APPELLANT(S)

Through: - Mr. Pranav Kohli, Sr. Advocate, with
Ms. Raunak Gupta, Advocate,
Mr. Rahul Sharma, Advocate,
Ms. Rupali Sharma, Advocate.
Mr. Akshaj Rahmatra, Advocate.

vs.

UNION OF INDIA AND OTHERS

…RESPONDENT(S)

Through: - Mr. A. R. Malik, Sr. AAG, with
Ms. Nisha Kangotra, Advocate

WP(C) No.3329/2025, CM No.7589/2025
CHOUDHARY POWER PROJECTS PVT. LTD.

...PETITIONER(S)/APPELLANT(S)

Rakesh Kumar
2026.10.18 17:58
I attest to the accuracy and
integrity of this document

Through: - Mr. Pranav Kohli, Sr. Advocate, with
Ms. Raunak Gupta, Advocate,
Mr. Rahul Sharma, Advocate,
Ms. Rupali Sharma, Advocate.
Mr. Akshaj Rahmatra, Advocate.

vs.

UNION OF INDIA AND OTHERS.

…RESPONDENT(S)

Through: - Mr. A. R. Malik, Sr. AAG, with
Ms. Nisha Kangotra, Advocate

CORAM: HON'BLE MR. JUSTICE RAJNESH OSWAL, UDGE
HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

Sanjay Dhar 'J':

1) Through the medium of the present judgment, we propose to decide the afore-titled three writ petitions involving identical questions of law and fact. In all the afore-titled three writ petitions, the writ petitioners have laid challenge to the Jammu and Kashmir Water Resources (Regulation and Management) Act, 2010 (hereinafter referred to as "the Act of 2010") and the rules framed thereunder, to the extent that the said legislation seeks to levy water usage charges for generation of electricity. Challenge has also been thrown by the writ petitioners to the demand notices issued by the respondents in respect of water usage charges for generation of electricity pursuant to the provisions contained in the impugned Act.

2) **WP(C) No. 3008/2024**, of Srinagar Wing of the High Court, has been filed by 11 companies, namely, **M/s Mass N Energy Pvt. Ltd., M/s Gousia Road Construction Co., M/s Himalayan Musk Power Pvt. Ltd., M/s O2Z Trading and Industries Pvt. Ltd., M/s Renergy Power Producer Pvt. Ltd., M/s Pahalnar Power Pvt. Ltd., M/s SA Power Utilities Pvt. Ltd., M/s Khari Hydro Power Project Pvt. Ltd., M/s Sharika Enterprises Ltd., M/s P&R Engineering Services Pvt. Ltd. And M/s Rouf Infrastructures Pvt.**

Ltd., to whom various independent hydro power projects have been allocated by the respondents for generation of hydroelectricity, by issuance of letters of allotment in their favour.

3) **WP(C) No. 3324/2025**, of Jammu Wing of the High Court, has been filed by **M/s Magpie Hydel Construction Operation Industries Pvt. Ltd**., that was allotted contract for development of small hydro power projects by the respondents at Mandi, Poonch, Athwatoo Bandipora and Tangmarg, Drang vide various letters of allotment.

4) **WP(C) No. 3329/2025**, of Jammu Wing of the High Court, has been filed by **M/s Choudhary Power Projects Pvt. Ltd.,** that has been allotted the contract for development of small hydro power projects by the respondents at Upper Kalnai River in Kishtwar.

5) All the writ petitioners are independent power producers (IPPs) based in Union Territory of Jammu and Kashmir, to whom various independent hydro power projects have been allocated by the Government of the Union Territory of Jammu and Kashmir for generation of hydroelectricity. The petitioners are operating river-based power projects and, as such, use water for the purpose of generation of electricity.

6) In the year 2010, the Legislature of the erstwhile State of Jammu and Kashmir enacted Jammu and Kashmir Water Resources (Regulation and Management) Act, 2010, and, pursuance thereto, the Jammu and Kashmir Water Resources (Regulation and Management) Rules, 2011 came to be framed. The provisions of the Act provided for levying of water usage charges, inter alia, on use of water for generation of electricity. In exercise of

powers conferred under the provisions of the said Act, the authorities of the Government of the Union Territory of Jammu and Kashmir issued demand notices against the petitioners in respect of water usage charges for generation of electricity from the year 2010 onwards. The said demand notices were issued by the authorities of the Government of Union Territory of Jammu and Kashmir in exercise of the powers under Sections 120, 130 and 145(1)(d) of the Act of 2010.

7) The writ petitioners have challenged the provisions of the Act of 2010 to the extent they provide for levying of water usage charges for generation of electricity in exercise of their powers under the provisions of the impugned Act on the grounds that under the garb of water usage charges, respondent no.2, Government of UT of Jammu & Kashmir is levying tax on generation of electricity, which is beyond the competence of State Legislature. It has been contended by the petitioners that use of water by the hydro power projects is non-consumptive in nature, therefore, water usage charges could not have been levied upon the petitioners and the fact that respondent-Water Resources Regulatory Authority has vide order dated 02.04.2019 fixed the water usage charges for generation of electricity on the basis of head height from which water in hydro power plants is deployed for propelling the turbine and not on the basis of quantum of water used by the hydro power plants shows that the respondents are in fact imposing tax on generation of electricity. According to the writ petitioners under the scheme of the Constitution, the power to impose tax on generation of electricity is beyond the competence of the State Legislature. It is being further contended that even as per stand of the Union

of India, the State Government cannot levy tax on generation of electricity under the garb of water usage charges etc.

8) It has been submitted that as per the contract executed between the petitioners with the UT of J&K, the petitioners are obliged to provide 12% free electricity to the Government of UT of J&K, which is in the form of royalty being paid by the petitioners for use of water, therefore, they are estopped in law from saddling the petitioners with additional cost of water usage charges. It has been further contended that levying of water usage charges/cess upon the petitioners is hit by doctrine of promissory estoppel inasmuch as State Hydro Power Policy does not provide for any form of water usage charges/cess or levy relating to utilization of water resources. It has been submitted that an assurance was extended that no additional charges, tax or cess beyond those expressly mentioned would be imposed upon the writ petitioners. Thus, the writ petitioners have developed a legitimate expectation that no water charges would be levied upon them for full project period of 40 years.

9) Respondent No.1-Union of India has taken a stand that the power to levy taxes on generation of electricity is not vested in the State Legislature. It has been contended that no taxes or duties, which are not specifically mentioned in List-II of the Seventh Schedule to the Constitution of India can be levied by the State Government under any guise whatsoever. It has been submitted that under Entry 53 of List-II (State List), the States are authorized to levy taxes on the consumption or sale of electricity but not on generation of electricity. Therefore, the legislative power of the State does not extend to

imposition of tax on water drawn by any person for non-consumptive use of water for generation of electricity. It has been submitted that the water usage charges under the impugned enactment are, in fact, a tax on generation of electricity, which would ultimately be collected from the consumers of electricity, who may happen to be the residents of other States. Therefore, the impugned Act is contrary to the well-settled principles of law laid down by the Supreme Court in a catena of cases. It has been submitted that the taxable event under the impugned enactment does not arise from the mere use of water, but, from the use of water for generation of electricity. Thus, in pith and substance, the levy constitutes a tax on the generation of electricity rather than a charge for use of water.

10) Respondent-UT of J&K, while defending the impugned enactment, has contended that the State Government is competent to legislate on charges for the storage and use of water for various purposes, including for generation of electricity, under the Constitution of India. It has been submitted that the impugned Act is in consonance with the National Water Policy and that the State desires to conserve and harness water resources in the best possible manner for the benefit of the residents of the UT of J&K. It has been submitted that under Entry 17 of List-II of Seventh Schedule of Constitution of India, water, including water power projects, is specifically mentioned and, therefore, the State is vested with the power to legislate in respect of the regulation of water, which includes the levy of water charges for various purposes, including generation of electricity. It has been submitted that the

water usage charges levied by the Union Territory of Jammu and Kashmir are regulatory in nature and do not partake the character of a tax or cess.

11) It has also been contended that water falls within the definition of "land", as it is derived from or connected with land, therefore, the imposition of water usage charges under the impugned Act is justified under Entry 49 of the State List. It has been contended that because water falls within the definition of "minerals" the State Government is competent to legislate and levy water usage charges, even under Entry 50 of List-II of the Seventh Schedule to the Constitution.

12) Regarding the contention of promissory estoppel, it has been contended by the respondent-State that there can be no promissory estoppel against a legislative enactment. It has been submitted that the impugned Act is a piece of legislation and that promise, if any, was extended to the writ petitioners by the executive. Therefore, the writ petitioners cannot seek to enforce such a promise against the legislative enactment.

13) Lastly, it has been contended that even if it is assumed that water charges levied in terms of the impugned enactment are in the nature of tax on generation of electricity still then because the impugned Act has been adopted by the Parliament of India at the time of enactment of J&K Reorganization Act, 2019, as such, it can be presumed that the impugned enactment has the assent of the Parliament of India, which is vested with power to legislate on the subject of taxation on generation of electricity.

14) We have heard learned counsels for the parties and we have also gone through the material on record including the judgments cited at bar by the learned counsels.

15) From the pleadings of the parties and the submissions made by the learned counsels, the main issues that fall for determination of this Court may be summarized as under:-

(i) What is the true nature of charges sought to be imposed upon the writ petitioners by virtue of the impugned enactment ?

(ii) If it is found that the charges levied under the impugned enactment is a tax, whether the same is levied on drawal of water or on generation of electricity?

(iii) If it is found that the charges levied under the impugned enactment is a tax on generation of electricity, whether the State legislature is competent to pass such an enactment?

(iv) If it is found that the charges levied under the impugned enactment is either tax on water or water usage charges, whether under the scheme of the Constitution and the agreements executed between the parties, the same are legally permissible to be levied by the Government of UT of J&K upon the writ petitioners?

16) Before proceeding to find an answer to the aforesaid issues, it would be apt to refer to the relevant statutory and constitutional provisions that would enable us to find answers to the aforesaid issues.

RELEVANT PROVISIONS OF THE JAMMU AND KASHMIR WATER RESOURCES (REGULATION AND MANAGEMENT) ACT, 2010.

PREAMBLE:

"An Act to consolidate the law relating to use of water, the measurement, construction, control and management of works with respect to water storage, conservation and protection, the irrigation, water supply, drainage, flood control and prevention, the improvement in the flow of water, the protection and improvement in the physical integrity of water courses, lakes and springs, the safety and surveillance of dams, the establishment of the State Water Resources Regulatory Authority for regulating water resources, ensuring judicious, equitable and sustainable management, allocation and utilization of water resources, fixing the rates for use of water and matters connected therewith or incidental thereto."

DEFINITIONS:

(b) "Authority" means the J&K State Water Resources Regulatory Authority established under section 139 of the Act;

(e) "beneficiary" means a person who derives benefits from the usage of water for drinking purposes, irrigation, drainage, generation of electricity or extraction of bed material from any water source, navigation or any other direct or indirect usage ;

(f) "category of use" means use of water for different purposes such as for, generation of electricity, running of water mills, agricultural, irrigation, horticulture, drinking water (domestic, industrial or commercial), navigation and institutional use etc. ;

(k) "dam" means works that include a barrier whether permanent or temporary which has the potential of impounding, diverting or controlling water for multipurpose projects or schemes like generation of electricity, irrigation or any other use;

(n) "electricity" means electrical energy generated by way of usage of water from any water source flowing within the territory of the State ;

(zx) "user" means any person, group of persons, local body, government department, board, company, corporation, society etc. using water for drinking purposes, commercial, industrial or institutional, irrigation, power generation, running of water mills, agriculture, or any other purpose from any source of water;

(zz) "water" means natural resource flowing in any river, stream, tributary, canal, nallah or any other natural course of water or situated upon the surface of any land like lake, pond, lagoon, swamp, spring or ground water but does not include fish;

(zzh) "water usage charges" means the rate levied or charged for use of water and fixed under section 128;

90. Installation of Unit for usage of water.—Save as otherwise provided under Chapters III, IV and VII, no person, group of persons, government department, local authority, corporation, company, society or any other body, by whatever name called (hereinafter in this Chapter called 'the user'), shall install a unit requiring usage of water of any water source except under a licence issued by the licensing authority in accordance with the provisions provided hereinafter in this Chapter.

91. **Preparation of scheme for usage of water by the user:(1)** Any user intending to install a unit requiring usage of water for the purpose of—

(a) generation of electricity ;

(b) irrigation of land ;

(c) drinking purposes (domestic, commercial, industrial or institutional) ;

(d) running of water mills ; and

(e) exploration and exploitation of ground water, shall prepare scheme and submit to the Authority accompanied by such fee and service charges as may be fixed by the Authority for approval.

(2) The said scheme shall specifically indicate the following—

(a) the location of the unit ;

(b) the source of water to be used ;

(c) the purpose for which the unit is to be installed ;

(d) the type of the unit whether domestic, commercial, industrial or for trading purposes;
(e) the quantity of water required for such unit;and
(f) the period for which the water is required.

92. **Approval of the scheme**. —

(1) After receipt of the scheme from a user, the Authority shall consider the viability of the scheme by taking into the account the following factors, namely :—
(a) whether the purpose of the proposed scheme is consistent with the State Water Policy ;
(b) whether the works required to be executed for the proposed scheme are detrimental to any existing, ongoing or proposed water supply, irrigation, flood control or any other scheme in the area ;
(c) whether the proposed scheme is consistent with the requirements of drinking water, irrigation, navigation, flood control or any other public purpose,
and make such inquiries and undertake such other studies, as it may deem necessary.

(2) If the Authority is satisfied that the proposed scheme is viable and meets all the requirements, it may, either approve the scheme as submitted by the user or with such modification as it may deems fit, or reject the same by assigning grounds for such rejection :
Provided that in case of a scheme relating to use of water for generation of electricity, the Authority shall submit its recommendations to the Government for approval of the scheme.

(3) If the user is aggrieved by an order passed by the Authority modifying or rejecting his scheme, he it may prefer an appeal to the Government within a period of thirty days from the date of such order and the decision of the Government thereon shall be final.

(4) In case of a scheme relating to use of water for generation of electricity, the Government may, on receipt of the recommendations from the Authority, take a decision either approving the scheme with or without modifications or rejecting the same:
Provided that no order shall be passed under this sub-section without the agreement of the Power Development Department and in case there is no such agreement, the scheme shall be submitted for orders of the Cabinet whose decision shall be final and binding.

93. Information to the User.—
After the scheme is approved by the Authority under sub-section (2) of section 92 or by the Government under sub-section (4) of section 92, the Authority shall inform the user accordingly and require him to—
(a) obtain a licence for use of water under section96 ;
(b) execute an agreement in such form and manner with the prescribed authority as may be prescribed ; and
(c) pay such fee and water usage charges as fixed under Chapter XI of the Act.

94.Prohibition on installation of a unit.—
No user shall install a unit requiring usage of water without adhering to the requirements of section 97.

95.Ceiling on allocation of water.— The Authority shall fix the minimum and maximum ceiling of water to be allocated to a user for—

(a) generation of electricity (hydro-electric project) ;
(b) irrigation of land ;
(c) drinking purposes; (domestic, commercial, industrial or institutional) ;
(d) exploration of ground water ; and
(e) utilization of water for other purposes.

96.Licence for usage of water.—No person shall install a unit, requiring usage of water or in any other way use the water, for—

(a) distribution of water ;
(b) undertaking trading in water directly or indirectly ;
(c) construction of dams on any water source ; and
(d) exploration or exploitation of ground water, unless he is authorized to do so by a licence, issued under section 97.

97.Grant of licence.—
A user intending to use the water for any purpose specified in sub-section (1) of section 91 and section 96, may make an application accompanied with such fee as may be prescribed to the licensing authority for grant of licence under the Act :
Provided that in case the user is a government department, a local authority or a corporation owned and financed by the Government, it shall be deemed to be a licensee under the Act and shall not be required to obtain a licence under the Act.

WATER USAGE CHARGES (TARIFF)

128.Fixation of water usage charges. —

(1) The Authority shall determine and fix the charges for—
(a) supply of water to a consumer from any water supply scheme for domestic purposes ;
(b) supply of water to, or use of water by, a consumer from any irrigation scheme or any water source for irrigation purposes
(c) supply of water to a consumer for commercial and industrial purposes ;
(d) supply of water to, or use of water by, a licensee under Chapter VI ; and
(e) exploration and exploitation of ground water by a consumer or a licensee.

(2) The water usage charges fixed under sub-section (1) shall be reviewed by the Authority after every three years.

(3) The Authority may fix different water usage charges for use of water for different purposes and while determining and fixing the water usage charges, the Authority shall have regard to—
(a) the purpose for which the water is supplied or used ;
(b) the quantity of water supplied or used ;

(c) the nature of use of such water by the user, whether domestic, commercial or industrial or for trading purposes ;

(d) the timeliness of supply or use of water ; and

(e) the periodicity of supply or use of water.

129. **Prohibition on charging higher water usage charges**:

(1) No licensee who directly or indirectly trades in water or supplies water to users on commercial basis shall charge from any user, water usage charges on rates higher than the rates fixed by the Authority under section 128.

(2) If a licensee charges a price for supply of water exceeding the water usage charges fixed by the Authority under section 128, the excess amount so charged by him alongwith 50% thereof as penalty shall be recovered by the prescribed authority from such licensee.

130. Recovery of water usage charges.—

The prescribed authority shall recover water user charges as per the rates fixed by the Authority from every user or licensee whenever-

(a) water is supplied or made available or used for purposes of irrigation, drinking or for any other purpose from any irrigation work or water supply scheme being run or maintained by the Government ; or

(b) water is used by a consumer from any water source for irrigation purposes ; or

(c) water is supplied or made available or used by a licensee for generation of electricity, irrigation of land,drinking purposes (domestic, commercial, industrial, institutional), running of water mills, exploration of ground water or for trading in any way directly or indirectly in water.

131. Procedure for assessment. —

(1) The Assistant Executive Engineer concerned shall prepare the assessment of water usage charges in respect of water supplied to, or used by, a user or a licensee and serve such assessment on such user or the licensee for payment of the assessed charges.

(2) If a user or licensee is not satisfied with the assessment of water usage charges made under sub-section (1), he may apply to the concerned Executive Engineer for re-assessment within a period of 15 days from the date of service of assessment order under sub-section (1).

(3) The concerned Executive Engineer may either accept the request for re-assessment and have the charges re-assessed or reject the request for reassessment.

(4) The order passed by the concerned Executive Engineer under sub section (3) shall be final.

(5) The user or the licensee shall pay the water user charges as assessed under sub-section (1) or as re-assessed under sub-section (2) within such time as may be specified by the concerned authority.

145. Functions of the Authority. —

(1) The Authority shall discharge the following functions, namely :—

(a) determine the entitlement and distribution for various categories of use of water within each category and the terms and conditions of distribution or allocation ;

(b) enforce the decisions and orders issued under the Act;

(c) fix the priority for equitable distribution of water available at the resource, project, sub-basin and river basin levels during periods of scarcity;

(d) establish a water tariff system and fix the water usage charges for use of water on account of—

(i) drinking purposes (domestic, commercial and industrial)

(ii) irrigation of land ;

(iii) exploitation and use of ground water; and

(iv) generation of electricity :

Provided that water usage charges shall at least recover the cost of the project and the expenditure incurred on its operation, maintenance and management.

(e) regulate use of water by the users and licensees from all water sources in the State;

(f) adjudicate upon the disputes between the licensees and the department;

(g) specify or enforce standards with respect to quality, continuity and reliability of service by the department and the licensees ;

(h) ensure satisfactory service on the part of the concerned department or agency to the users or licensees ;

(i) ensure transparency while exercising the powers and discharging its functions ;

(j) advise the Government in the promotion of competition for the optimum utilization of water resources in the State;

(k) administer and manage inter-State water resources apportionment on river systems of the State ;

(l) approve and review water resources schemes and projects : Provided that before approving any scheme or project, the Authority shall ensure that the proposed scheme or project is in conformity with—

(i) the integrated State Water Policy and plan ;

(ii) the economic, hydrologic and environmental viability; and

(iii) the obligations of the State under any agreement, or decree or judgment of a court or tribunal, or inter-State water entitlement :

Provided further that while approving any new water resources scheme or project, instructions issued by the Government from time to time relating to investment priority are strictly observed;

(m) establish a system of enforcement, monitoring and measurement of the use of water both in quantity and type of use ;

(n) establish a regulatory system for the water resources of the State including surface and subsurface waters, to regulate the use of water and apportion the entitlement to the use of the water between water using categories ;

(o) promote efficient use of water and to minimize the wastage of water ; and

(p) discharge such other function as may be prescribed or assigned to it by the Government.

(2) The Authority may review and revise the water usage charges fixed by it under clause (d) of sub-section (1) after every three years.

(3) In the event of water scarcity, the Authority, may re-fix the entitlements and adjust the quantities of water available to all users and licensees in such manner as the Authority may deem necessary to overcome such scarcity and to ensure equitable distribution of available water.

(4) The Authority shall, in accordance with the State Water Policy, coordinate with all concerned agencies to implement a comprehensive hydro meteorological data system for the state.

(5) The Authority shall, promote and implement sound water conservation and management practices throughout the State.

(6) The Authority shall support and aid the enhancement and preservation of water within the State in close coordination with the other States.

(7) The Authority shall ensure that while approving the water schemes and projects, the principle of 'tail to head' irrigation is implemented.

(8) The Authority shall strive to make the water available to the drought prone areas of the State.

185-A. Constitution of Fund for utilization of Water Usage Charges.— (1) The Finance Department will constitute a 'fund' under a proper Account No. in the Jammu and Kashmir Bank or allot an 'Account Head' in which amount realized as water usage charges under the Act from such users who are generating power from Hydroelectric Projects in the State shall be deposited. 2 [(2) The fund, so created, shall be operated upon by the Administrative Secretary, Finance Department, for the purpose of being utilized for establishment of Hydel Projects, Hydroelectric Projects, Multipurpose Hydroelectric Projects, buying back Hydroelectric Power Projects already established in the State, capital investment in electric transmission and distribution network within the territory of the State and the purchase of power by the State Government or its entities, with the prior approval of the Government.

RELEVANT PROVISIONS OF THE CONSTITUTION OF INDIA

245. Extent of laws made by Parliament and by the Legislatures of States.—

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.

(2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

246. Subject-matter of laws made by Parliament and by the Legislatures of States.—(1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").

(2) Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List").

(3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the "State List").

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included 2 [in a State] notwithstanding that such matter is a matter enumerated in the State List.

248. Residuary powers of legislation.—(1) [Subject to article 246A, Parliament] has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists.

265. Taxes not to be imposed save by authority of law.—No tax shall be levied or collected except by authority of law.

288. Exemption from taxation by States in respect of water or electricity in certain cases.—(1) Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Explanation.—The expression "law of a State in force" in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation

of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

366. Definitions.—In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly;

SEVENTH SCHEDULE: LIST-I (UNION LIST)

56. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.

84. Duties of excise on the following goods manufactured or produced in India, namely:— (a) petroleum crude; (b) high speed diesel; (c) motor spirit (commonly known as petrol); (d) natural gas; (e) aviation turbine fuel; and (f) tobacco and tobacco products.

97. Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

SEVENTH SCHEDULE: LIST-II (STATE LIST).

17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I.

18. Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.

45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.

49. Taxes on lands and buildings.

50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.

53. Taxes on the consumption or sale of electricity.

17) Since the present writ petitions involve the interpretation of the provisions of the Constitution pertaining to the power of the Parliament and the State Legislatures to legislate on the earmarked fields/subjects, it would also be apt to notice the legal position on this aspect as has been enunciated by the Supreme Court in its various judgments. These legal precedents would guide us in finding answers to the issues involved in the present writ petitions.

18) In the above context, it would be apt to refer to the legal position discussed in nine judges Bench judgment delivered by the Supreme Court in the case of **Mineral Area Development Authority and another Vs. Steel Authority of India and another 2024 (10) SCC 1.** In the said case, the Supreme Court while discussing the scheme of legislative power and constitutional limits has observed as under:-

> "**31**. Part XI of the Constitution deals with the relations between the Union and the States. Article 245 provides that subject to the provisions of the Constitution, Parliament may make laws for the whole or any part of the territory of India and the Legislature of a State may make laws for the whole or any part of the State.The power to enact laws is inherently related to the sovereignty of the Union and State legislatures in their respective fields. While the sovereign legislative powers of Parliament and the State legislatures are plenary, they are subject to well-defined constitutional limitations. The language of Article 245 makes the exercise of legislative powers expressly subject to the provisions of the Constitution. Therefore, laws made by a legislature may be void not only for the lack of legislative power in respect of the subject-matter, but also for transgressing constitutional limitations. It is the duty of constitutional courts to resolve disputes regarding a breach of constitutional limits by the Union and State legislatures.
> **32**. The scheme of distribution of legislative powers between Parliament and the State legislatures is embodied in Article 246. Article 246 is similar to Section 100 of the GOI Act 1935. Article 246 deals with the subject matter of laws made by Parliament and the Legislatures of States and is set below:
> "**246. Subject-matter of laws made by Parliament and by the Legislatures of States** –
> (1) Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to makes laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the "Union List").
> (2) Notwithstanding anything in clause (3), Parliament and, subject to clause (1), the Legislature of any State also, have the power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List")
> (3) Subject to clauses (1) and (2), the Legislature of any State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II

in the Seventh Schedule (in this Constitution referred to as the "State List")

(4) Parliament has power to make laws with respect to any matter for any part of the territory of India not included in a State notwithstanding that such matter is a matter enumerated in the State List."

33. Article 246 confers exclusive power on Parliament to make laws with respect to any of the matters enumerated in List I (the Union List) of the Seventh Schedule. The exclusive power of the State legislatures with respect to the matters enumerated in List II is subject to the exclusive legislative powers of Parliament.

34. In **Hoechst Pharmaceuticals** v. **State of Bihar**, this Court culled out the following principles underlying Article 246:

a. Parliament has exclusive power to make laws with respect to the matters enumerated in List I;

b. The non-obstante clause in Article 246(1) provides for predominance or supremacy of the Union legislature;

c. The legislative powers of the Union legislature is not encumbered by anything contained in Articles 246(2) and 246(3) for these clauses are expressly limited and made subject to the non-obstante clause in Article 246(1);

d. The State legislature has exclusive power to make laws with respect to any of the matters enumerated in List II;

e. The exclusive power of the State legislature to legislate with respect to any of the matters enumerated in List II has to be exercised subject to Article 246(1), that is, the exclusive power of Parliament to legislate with respect to matters enumerated in List I;

f. Consequently, in case of any conflict between an entry in List I and an entry in List II which is not capable of reconciliation, the power of Parliament to legislate with respect to a matter enumerated in List I must supersede protanto the exercise of power of the State legislature; and

g. Both Parliament and State legislatures have concurrent powers of legislation with respect to any of the matters enumerated in List III, the law enacted by Parliament prevailing in the event of any inconsistency or conflict.

35. Article 245 (read with Article 246) is the source of the legislative powers of Parliament and the State legislatures. The entries in the Seventh Schedule delineate the subject matter over which the appropriate legislature can enact laws. The entries are legislative heads and not the source of legislative powers. A legislation could be composite in nature, drawing upon several entries in a particular list. Such a legislation is referred to as a "ragbag" legislation.

36. Article 254 clarifies that if the law made by a State legislature is repugnant to any provisions of a law made by Parliament with respect to any of the matters enumerated in List III, the law made by Parliament would prevail and the law made by the State legislature would be void to the extent of the repugnancy. The issue of repugnancy arises only when both the

legislatures are competent to legislate on the subject with respect to List III. The issue of repugnancy does not arise if the legislations enacted by Parliament and the State legislatures deal with separate and distinct legislative subject matters. By virtue of Article 248, Parliament has exclusive legislative powers to make laws with respect to any of the matters not enumerated in List II or List III. However, how should courts deal with a situation where two legislations, enacted by Parliament and State legislature in pursuance of their respective legislative powers, appear to conflict with each other? The answer lies in Article 246 itself.

37. Article 246 incorporates the principle of federal supremacy. In **Hoechst Pharmaceuticals** (supra), this Court held that the words "notwithstanding anything contained in clauses (2) and (3)" in Article 246(1) and the words "subject to clauses (1) and (2)" in Article 246(3) embody that principle. The principle postulates that in case of an inevitable conflict between Union and State powers, the Union's power of legislation over a subject enumerated in List I shall prevail over the State powers of legislation over a subject enumerated in List II and III. However, it is also settled that this principle cannot be resorted to unless there is an irreconcilable direct conflict between the entries in the Union and State Lists. Such a conflict must be an actual one and not a mere seeming conflict between the two entries in two lists.

38. **Hoechst Pharmaceuticals** (supra) laid down the following principles to resolve any direct conflict between the entries in List I and List II:

(i) in case of seeming conflict, the two entries should be read together without giving a narrow and restricted reading to either of them;

(ii) an attempt should be made to see whether the two entries can be reconciled so as to avoid a conflict of jurisdiction; and

(iii) no question of conflict arises between two Lists if the impugned legislation in pith and substance appears to fall exclusively under one list and the encroachment upon the other list is incidental.

39. Articles 245 and 246 embody the essence of Indian federalism. The division of legislative powers between Union and States is an emanation of the federal project. This division also serves as a constitutional limitation on legislative powers. Parliament cannot entrench upon the plenary power of the State legislatures in the ordinary course, except where the Constitution itself specifically allows it. The appropriate legislature must possess legislative competence to enact a law on the subject matter it seeks to legislate.

40. With respect to the powers of taxation, Article 265 provides that no tax shall be levied or collected except by authority of law. In **Mafatlal Industries** v. **Union of India**, a nine-Judge Bench of this Court held that the "law" mentioned under Article 265 refers to a valid law whose validity has to be determined with reference to other provisions in the Constitution.

Therefore, with respect to taxation laws particularly, there is a constitutional requirement that the law imposing tax must be in conformity with the provisions of the Constitution, particularly Part III dealing with the fundamental rights. This is also a constitutional limitation because the appropriate legislature has to ensure that the law is in accord with the principles of equality and non-discrimination. Any legislation enacted by the legislature in excess of its constitutional powers is void."

19) In the same judgment, the Supreme Court laid down the guidelines with regard to interpretation of the Legislative entries in the following manner:-

> **41.** The structure of the legislative entries in the three Lists of the Seventh Schedule follows an express and deliberate pattern. The entries are classified into general and taxing entries. In the Union List, entries 1 to 81 enumerate general subject matters, while entries 82 to 92-C pertain to the powers of taxation. Similarly, entries 1 to 45 in the State List enumerate the general entries and entries 46 to 63 provide for taxing entries. The legislature does not derive the power to tax from the general entries - taxation is considered to be a distinct matter for purposes of legislative competence.
>
> **42.** The distinction between the general and taxing entries was explained by this Court in **M P V Sundararamier** (supra) in the following manner:
>
> > "In List I, Entries 1 to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law by Parliament. An examination of these two groups of Entries shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second. Thus, entry 22 in List I is "Railways", and Entry 89 is "Terminal taxes on goods or passengers, carried by railway, sea, or air; taxes on railway fares and freights". If Entry 22 is to be construed as involving taxes to be imposed, then Entry 89 would be superfluous. Entry 41 mentions "Trade and commerce with foreign countries; import and export across customs frontiers". If these expressions are to be interpreted as including duties to be levied in respect of that trade and commerce, then Entry 83 which is "Duties of customs including export duties" would be wholly redundant. Entries 43 and 44 relate to incorporation regulation and winding up of corporations. Entry 85 provides separately for Corporation tax. Turning to List II, Entries 1 to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes. Entry 18, for example, is "Land" and Entry 45 is "Land Revenue". Entry 23 is "Regulation of mines" and Entry 50 is "taxes on mineral rights". **The above analysis – and it is not exhaustive of the Entries in the Lists – leads to the interference that taxation is not intended to be**

> **comprised in the main subject in which it might on an extended construction be regarded as included, but is treated as a distinct matter for purposes of legislative competence**. And this distinction is also manifest in the language of Art. 248, Cls. (1) and (2), and of Entry 97 in List I of the Constitution. […]
>
> To sum up: […] (2) Under the scheme of the Entries in the Lists, taxation is regarded as a distinct matter and is separately set out**.**"

43. The above position of law has been expressly affirmed by the nine-Judge Bench of this Court in **Jindal Stainless Ltd** v. **State of Haryana**. Thus, it is an accepted principle that the subject matter of taxation is dealt with under distinct entries and, therefore, cannot be traced to a non-taxing entry. The taxing powers of Parliament and the State legislatures are mutually exclusive and clearly demarcated. There can be no overlap between the taxing powers of the Union and the States. Entries relating to taxing powers must be construed with clarity and precision to maintain exclusivity and a construction of a taxation entry which may lead to overlapping must be eschewed. If a taxing power is enumerated within a particular legislative list, it is automatically excluded from the purview of subject-matters in other legislative lists. The residuary power of Parliament also includes the power of making any law imposing a tax not mentioned in either List II or List III.

44. The legislative fields or entries in the Seventh Schedule have used general words to define and delineate the legislative powers of Parliament and State legislatures. The rule that words should receive their ordinary, natural, and grammatical meaning applicable to statutes also applies to the entries contained in the Seventh Schedule. It is also a well-accepted principle that the entries should not be read in a narrow or pedantic sense but must be given their broadest meaning and the widest amplitude because they are intrinsic to a machinery of government. The ambit of the entries extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in them. Since the Seventh Schedule uses general terms, there is always a possibility of an overlap and conflict between two or more entries.

45. Many entries in the Seventh Schedule may appear to overlap because of the language used in the entries. The necessary corollary to the scheme of legislative distribution is that that any invasion by Parliament in the field assigned to the States and vice versa is a breach of the Constitution. Even though the Constitution distributes legislative powers between the Union and the States, there have been situations where a legislation purporting to deal with a subject in one list, touches on a subject in another list. To remedy such situation, the doctrine of pith and substance is used to examine whether the legislature has the competence to enact a law with regard to either of the three lists under the Seventh Schedule of the Constitution. There may arise situations where a legislature may frame a law that in substance and reality transgresses its legislative competence. Such a piece of legislation is called "colourable legislation" because the legislature veils its transgression by making it seem as if the legislation is within its legislative competence. To examine whether the legislature has transgressed its legislative

competence, the substance of the legislation is material. If the subject-matter is in substance beyond the legislative powers of the legislature, the form in which the law is clothed would not save it from the vice of unconstitutionality.

46. The Constitution has used specific expressions to resolve potential overlaps or conflicts between and among the entries in the three Lists. The entries in the Seventh Schedule have used different phraseologies to either subject or restrict their scope and ambit. Some of the legislative entries in the State List have been made subject to broad or specific limitations or restrictions with respect to the entries in the Union List or Concurrent List. This would emerge from the tabulation set out below:

Phraseology used	**Entries in State List**
Subject to the provisions of any law made by Parliament	**37**
Subject to the provisions of entries in List I	**2,17,22,24,33**
Subject to particular field of legislation in List I	**23**
Subject to the provisions of entries in List III	**26,27,57**
Subject to the provisions of List I and List III	**13**
Subject to any limitations imposed by Parliament by law	**50**
Other than	**7,12,32,63**
Not including	**1,51,54,66**

47. The above table is an indication of the extent to which the legislative powers of the States have been restricted, limited, or altogether precluded. The use of the expression "other than" or "not including" serves the purpose of redacting from the ambit of the legislative power of the States to the extent suggested. Where the Constitution intends to limit or preclude the legislative powers of the State to a particular extent, it has used specific terminologies such as "other than" and "not including".

48. Where the entries have used the phrase "subject to", the legislative power of the State is made subordinate to Parliament with respect to either the Union List or the Concurrent List. The expression "subject to" conveys the idea of a provision yielding place to another provision or other provisions to which it is made subject. Therefore, where the Constitution intends to displace or override the legislative powers of the States, it has used specific terminology – "subject to". However, the Constitution has also indicated the extent to which a particular legislative entry under List II is subordinated. For instance, the subjection is either with respect to provisions of List I or List III, or it can also be to the extent of "any limitations" imposed by Parliament by law. Thus, it is imperative that the entries in List II must be read and interpreted in their proper context to understand the extent of their subordination to Union powers.

49. There are numerous entries in the State List where the Constitution has imposed no restrictions on the exercise of the legislative powers of the States. With respect to such entries, the absence of any express limitations indicates that the Constitution did not intend to fetter the legislative powers of the States.

50. In addition to the above terminologies, the entries in the Seventh Schedule also indicate the manner in which a restriction or limitation can be imposed on the legislative powers of the State. This assumes clarity from the following tabulation.

Phraseology used	**Entries in State List**
Declared by or under law	**23,27,67 of List I**
Declared by Parliament by law	**24,52,53,54,56,62 ,63,64 of List I**
Declared by Parliament by law	**51.f List II**

51. The Constitution deploys three expressions to signify the manner in which the legislative power could be exercised by Parliament – "declared by or under law", and "declared by Parliament by law", and "imposed by Parliament by law" The difference in the character of these provisions can be gathered from the Constitution (Seventh Amendment) Act 1956 which substituted the expression "declared by Parliament by law" with "declared by or under law made by Parliament" in Entry 67 of the Union List. The object of the amendment was to enable the delegate under the statute to make the required declaration. The expression "by law" means that the legislative power should be effectuated through the provisions of a statute. In comparison, "by or under law" means that the legislative intent could be effectuated either through the provisions of the statute or by any subordinate authority vested with powers in that behalf by the statute. It is important to note that Entry 50 of List II use the expression "by law relating to mineral development". We will have to bear the meaning of the expression "by law" in mind to give an appropriate interpretation to the entry.

20) Again, the Supreme Court in the case of **State of Karnataka and another Vs. State of Meghalaya and another,**(2023) 4 SCC 416, after discussing the legal position summed up the following principles :-

"(1) In the scheme of the lists in the Seventh Schedule, there exists a clear distinction between the general subjects of legislation and heads of taxation. They are separately enumerated.
(2) Power of "regulation and control" is separate and distinct from the power of taxation and so are the two fields for purposes of legislation. Taxation may be capable of being comprised in the main subject of general legislative head by placing an extended construction, but that is not the rule for deciding the appropriate legislative field for taxation between List I and List II. As the fields of taxation are to be found clearly enumerated in Lists I and II, there can be no overlapping. There may be overlapping in fact but there would be no overlapping in law. The subject-matter of two taxes by reference to the two lists is different. Simply because the methodology or mechanism adopted for assessment and

quantification is similar, the two taxes cannot be said to be overlapping. This is the distinction between the subject of a tax and the measure of a tax.

(3) The nature of tax levied is different from the measure of tax. While the subject of tax is clear and well defined, the amount of tax is capable of being measured in many ways for the purpose of quantification. Defining the subject of tax is a simple task; devising the measure of taxation is a far more complex exercise and therefore the legislature has to be given much more flexibility in the latter field. The mechanism and method chosen by the legislature for quantification of tax is not decisive of the nature of tax though it may constitute one relevant factor out of many for throwing light on determining the general character of the tax.

(4) The entries in List I and List II must be so construed as to avoid any conflict. If there is no conflict, an occasion for deriving assistance from non obstante clause "subject to" does not arise. If there is conflict, the correct approach is to find an answer to three questions step by step as under:

> One — Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?
>
> Two — In which entry the impugned legislation falls by finding out the pith and substance of the legislation? and
>
> Three—Having determined the field of legislation wherein the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored?

(5) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of the State Legislature cannot be annulled as unconstitutional merely because it may have an effect on the price of the commodity.

(6) The heads of taxation are clearly enumerated in Entries 83 to 92-B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any head of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248(2) and Entry 97 in List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II."

21) From the foregoing discussion of law on the subject, it comes to the fore that while interpreting the provisions of the Constitution, particularly the legislative entries, a liberal and expansive approach has to be adopted, and an inclusive meaning has to be given to a particular entry. While doing so, the principles of interpretation of statutes have to be taken as the guiding factor. The constitutional philosophy and the basic structure of the Constitution have

to be kept in mind by the constitutional court while interpreting a legislative entry. It is also to be kept in mind that the words and expressions used in the constitutional provisions should not be given an unnatural or uncommon meaning and that, while interpreting a constitutional entry, it must be construed that the said entry extends to all ancillary matters that can reasonably be included in it.

22) In the backdrop of aforesaid legal position relating to interpretation of the provisions of the Constitution and the legislative entries contained therein, let us now proceed to determine the issues involved in the present batch of writ petitions.

Issue No.(i): **What is the true nature of charges sought to be imposed upon the writ petitioners by virtue of the impugned enactment?**

23) The writ petitioners claim that under the guise of water usage charges respondent-UT of J&K is seeking to impose tax on generation of electricity. The respondent-UT of J&K on the other hand contends that in terms of the impugned Act only user charges on water drawn in connection with generation of electricity are being levied and that the same does not partake the character of tax on generation of electricity. It has been contended that the impugned Act is in consonance with the National Water Policy and that the State deserves to conserve and harness the water resources in the best possible manner for the benefit of residence of UT of J&K.

24) In order to determine the true nature of the charges, it is necessary to survey the provisions of the Act of 2010. The expression used in the said Act for the charges sought to be levied upon the writ petitioners is "water usage

charges". While the writ petitioners claim that these are, in fact, taxes on the generation of electricity, the respondent-UT of J&K claims that, as the name suggests, these are only charges to be levied on the use of water by hydro power projects. Before accepting or rejecting the rival stands of the parties on the nature of the levy, it would be apt to notice the legal position on the subject.

25) The Supreme Court in the case of **Jalkal Vibhag Nagar Nigam and others v. Pradeshiya Industrial and Investment Corporation and another,** 2021 12 SCR 210, has observed that the nomenclature given to a levy in an enactment does not determine the nature or true character of the levy. In the said case, the Supreme Court while considering the question as to whether the tax levied as water tax or sewerage tax by Jal Sansthan under the U.P. Water and Sewerage Act was actually water tax, observed thus :-

> "28. The nomenclature that the legislature has ascribed to the tax does not determine either the nature of the levy or its true and essential character. The legislature may choose a label for a tax. The label however will not determine or for that matter clarify the nature of the levy. The nature of the levy has to be deduced from the nature of the tax, the provision which specifies the taxing event and, as in the case of Section 52, the unit upon which the levy is to be imposed. The legislature may choose a label for the tax based on the nature of the levy. On the other hand, the legislature may choose a label having a relationship with the function of the authority which imposes the tax as in the present case. The tax has been labelled as the water tax or a sewerage tax simply because it is imposed by the Jal Sansthan constituted under the UP Water Supply and Sewerage Act. That does not alter the nature of the levy which in substance is a tax on lands and buildings within the meaning of Entry 49 of List II of the Seventh Schedule."

26) From the foregoing analysis of law on the subject, it is clear that the nomenclature given by the legislature to a particular type of levy does not determine the true character of the said levy. For determining the true character of the levy, the Court has to consider the pith and substance of the

relevant legislation. The relevant provisions of the enactment under which the charges are levied have to be analyzed carefully so as to arrive at a conclusion as to the real nature of the levy. Mere nomenclature of the levy would not be determinative of its nature.

27) A related question that has to be determined is whether the charges sought to be levied upon the writ petitioners constitute a tax or usage charges/fee. For determination of the said issue, it is necessary to understand the distinction between a tax and a fee. This issue has been dealt with by the Supreme Court in the case of **Hingir-Rampur Coal Co. Ltd. v. State of Orissa, AIR 1961 SC 459**. The observations made in paragraphs 9 to 11 of the said judgment are relevant to the context and the same are reproduced hereunder:-

> **"9**.The first question which falls for consideration is whether the levy imposed by the impugned Act amounts to a fee relatable to Entry 23 read with Entry 66 in List II. Before we deal with this question it is necessary to consider the difference between the concept of tax and that of a fee. The neat and terse definition of tax which has been given by Latham, C. J., in Matthews v. Chicory Marketing Board (1) is often cited as a classic on this subject. "A tax", said Latham, C. J., "is a compulsory exaction of money by public authority for public purposes enforceable by law, and is not payment for services rendered". In bringing out the essential features of a tax this definition also assists in distinguishing a tax from a fee. It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which

> ultimately is utilised for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. Though there is an element of quid pro quo between the tax- payer and the public authority there is no option to the tax-payer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, co-relation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a co-relation between the service and the levy, or whether the levy is either not co-related with service or is levied to such an excessive extent as to be a presence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognized by the Constitution. Several Entries in the Three Lists empower the appropriate Legislatures to levy taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters covered in the said List excluding of course the fees taken in any Court.

28) In light of the aforesaid observations of the Supreme Court, it emerges that distinction between a tax and usage charges is that a ‘tax’ is a compulsory exaction for public purposes, whereas ‘usage charges’ constitute consideration for the supply or consumption of goods. There is no direct quid pro quo in the case of a tax, whereas usage charges are linked to the quantity consumed or supplied. In the case of usage charges/fees, there is a correlation between the charges/fees collected and the services rendered, whereas, in the case of a tax, no such correlation exists, as the tax collected goes into a fund that is ultimately utilized for public purposes.

29) With the aforesaid position of law in mind, let us now analyze the relevant provisions of the Act of 2010, so as to ascertain the true nature of the levy. As per Section 2(zzh) of the Act of 2010, 'water usage charges' have been defined to mean the rate levied or charged for the use of water and fixed under Section 128 of the Act. In terms of Section 128 of the Act, the Water Resources Regulatory Authority (hereinafter referred to as "the authority") has been vested with the power to determine the charges for the supply of water or use of water by a licensee under Chapter VI. Section 145 of the Act prescribes the functions of the Water Resources Regulatory Authority. Under this provision, the Authority is vested with the power to discharge several functions, including the establishment of a water tariff system and the fixing of water usage charges for the use of water *inter alia* on account of generation of electricity. It is, however, laid down in the said provision that the water charges shall, at the least, recover the cost of the project and the expenditure incurred on its operation, maintenance and management.

30) When we analyze the aforesaid legal framework in the context of hydropower projects, it comes to the fore that no services are being provided to such projects in lieu of the charges sought to be levied upon them. As per the proviso to sub-section (1) of Section 145 of the Act of 2010, the water usage charges are to be used to recover the costs of the projects and the expenditure incurred on their operation, maintenance and management. In the case of hydropower projects, the respondent UT of J&K or its functionaries have no obligation to incur any expenditure on the operation, maintenance and management of such projects. Thus, the purpose for which water usage

charges are being levied under the impugned Act in the case of users other than licensees of hydropower projects may qualify as water charges/fee, but when it comes to the levy of the said charges upon hydropower projects, in the absence of any quid pro quo in the form of any service in lieu of such charges, the same partake the character of tax.

31) The aforesaid position is further strengthened by the provisions contained in Section 185-A of the Act of 2010. As per sub-section (1) of the said provision, a separate fund is to be constituted in respect of the amount realized as water usage charges from power-generating hydroelectric projects. Sub-section (2) provides the manner in which the said fund is to be applied. As per this provision, the fund is to be utilized for the establishment of hydel projects, hydroelectric projects and multipurpose hydroelectric projects, buying back hydroelectric power projects already established in the State, capital investment in the electric transmission and distribution network within the territory of the State, and the purchase of power by the State Government or its entities with the prior approval of the Government.

32) The aforesaid provision clearly goes on to show that the water charges sought to be levied upon hydropower projects are not to be applied in connection with any services rendered to such projects, but the same are to be applied for purposes that are neither directly nor indirectly connected with provision of any service to the licensee power-generating projects. Thus, it can safely be stated that the water usage charges sought to be levied upon power-generating hydro projects in terms of the Act of 2010 are nothing but a tax. These charges do not possess the characteristics of usage charges or a fee.

The nomenclature assigned to the charges sought to be levied upon hydroelectric projects by virtue of the impugned Act is misleading, and it clearly partakes the character of tax.

33) Accordingly, Issue No.1 is determined by holding that the levy imposed upon hydropower projects in terms of Act of 2010, is a tax and not water usage charges.

Issue No.(ii): **If it is found that the charges levied under the impugned enactment is a tax whether the same is levied on drawal of water or on generation of electricity?**

34) Having held that the water usage charges sought to be levied upon the writ petitioners through the medium of the impugned legislation are in the nature of a tax and not in the nature of water usage charges, the next issue that arises for determination is whether the tax is on the drawal of water or on the generation of electricity. The respondent UT of J&K has contended that even if it is assumed that the water usage charges partake the character of a tax, the same has been levied on the drawal of water by the hydropower projects and not on the generation of electricity. This is being seriously disputed by the writ petitioners, who claim that the tax sought to be levied upon them is, in fact, a tax on the generation of electricity.

35) With a view to find an answer to the question as to whether the tax sought to be levied upon the writ petitioners through the medium of the impugned legislation is a tax on water or whether it is a tax on generation of electricity, the Court has to adjudge the real nature and character of the levy with reference to taxable event and the incidence of levy.

36) The legal position on the aforesaid aspect has been explained by the Supreme Court in the case of **Municipal Council, Kota, Rajasthan Vs. Delhi Cloth and General Mills Co.Ltd.** (2001) 3 SCC 654,in the following manner**:-**

> **"16**. Whenever a challenge is made to the levy of tax, its validity may have to be mainly determined with reference to the legislative competence or power to levy the same and in adjudging this issue the nature and character of the tax has to be inevitably determined at the threshold. It is equally axiomatic that once the legislature concerned has been held to possess the power to levy the tax, the motive with which the tax is imposed become immaterial and irrelevant and the fact that a wrong reason for exercising the power has been given also would not in any manner derogate from the validity of the tax. In M/s Jullundur Rubber Goods Manufacturers' Association v. The Union of India and Another, AIR (1970) SC 1589 this Court while dealing with a challenge to the levy of rubber cess under Section 12 (2) of the Rubber Act, 1947 as amended in 1960 observed that the tax in the nature of excise duty does not cease to be one such merely because the stage of levy and collection has been as a matter of legislative policy shifted by actually providing for its levy and collection from the users of rubber, so long as the character of the duty as excise duty is not lost and the incidence of tax remained to be on the production or manufacture of goods. Likewise, once the legislature is found to possess the required legislative competence to enact the law imposing the tax, the limits of that competence cannot be judged further by the form or manner in which that power is exercised. In (Morris) Leventhal and Others v. David Jones, Ltd., AIR (1930) PC 129, the question arose as to the power of the legislature to impose 'Bridge Tax', when the power to legislate was really in respect of 'tax on land'. It was held therein as follows:
>
> > "The appellants' contention that though directly imposed by the legislature, the bridge tax is not a land tax, was supported by argument founded in particular on two manifest facts. The bridge tax does not extend to land generally throughout New South Wales, but to a limited area comprising the City of Sydney and certain specified shires, and the purpose of the tax is not that of providing the public revenue for the common purposes of the State but of providing funds for a particular scheme of betterment. No authority was vouched for the proposition that an impost laid by statute upon property within a defined area, or upon specified classes of property, or upon specified classes of persons, is not within the true significance of the term a tax. Nor so far as appears has it ever been successfully contended that revenue raised by statutory imposts for specific purposes is not taxation"
>
> **17**. A Division Bench of the Allahabad High Court, in a decision, reported in Raza Buland Sugar Co, Ltd., Rampur v.

Municipal Board, Rampur, AIR (1962) Allahabad 83 had an occasion to consider the nature and character of an impost levied by the name, 'water tax', when the power was to levy 'tax on buildings'. The Division Bench, while applying the ratio in AIR 1930 PC 129 (supra) held as hereunder:

> "5. Tax' means burden of charges imposed by the legislative power of a State on person or property to raise money for public purposes. The expression 'fee' connotes recompense for services rendered. There is an element of quid pro quo in the case of fee. It is not so in the case of a tax. The learned counsel for the petitioner pointed out that cl.(b) of Sec.129 provides that water tax is to be imposed solely with the object of defraying the expenses connected with construction, main-tenance, extension or improvement of municipal water works and that all moneys derived therefrom shall be expended on the aforesaid object. He argued that the fact that the money raised from water tax is to be spent only on the supply of water, introduces an element of quid pro quo. The argument does not appear to be tenable. Sec.129 (B) mentions the object of the tax. As the maintenance of regular supply of water and extending the supplies is one of the most beneficial public purposes, the Section lays down that the money realised from this impost is to be spent on the construction, maintenance and extension of water works so that the purpose may not suffer on account of paucity of funds. In (Morris) Leventhal v. David Jones Ltd., AIR (1930) PC 129, their Lordships of the Judicial Committee held that there was no authority for the proposition that revenue raised by statutory imposts for specific purposes is not taxation.
>
> XXX X XX X XX
>
> 10. It is obvious that the subject-matter of water tax is not water. Though it is called water tax, it is not levied on its production. As explained by their Lordships of the Judicial Committee in Governor- General in Council v. Province of Madras, AIR (1945) P. C 98, it is not the mime of the lax but its real nature, its 'pith and substance' as it has sometimes been said, which must determine into what category it falls."

18. We affirm the statement of law thus made above to be correct and in our view it is not the nomenclature used or chosen to christen the levy that is really relevant or determinative of the real character or the nature of the levy, for the purposing of adjudging a challenge to the competency or the power and 'authority to legislate or impose a levy. What really has to be seen is the pith and substance or the real nature and character of the levy which has to be adjudged, with reference to the charge viz., the taxable event and the incidence of the levy. We are convinced on the indisputable facts on record that the levy sought to be imposed and recovered as 'Dharmada' being only on the goods brought within the municipal limits of Kota for consumption, use or sale therein the same in truth, reality and substance is only an 'octroi' for the purpose of carrying out the several public charitable objects statutorily enjoined upon the Municipal Board and enumerated in Sections 98 and 99 and those undertaken pursuant to the stipulations contained in

> Sections 101 and 102 of the Act. The mere fact that it is called by a different name (all the more so when the word 'octroi' itself is not found used in Entry 52 of List-II of the Seventh Schedule) for historical reason and administrative needs or exigencies by the draftsmen of the notification does not in any manner either undermine the nature and character of the levy or render it any the less a levy envisaged under Entry 52 of List-II of the Seventh Schedule.

37) From the foregoing analysis of the legal position, it comes to the fore that while deciding the real character and nature of the tax sought to be imposed in a particular case, the pith and substance of the relevant legislation has to be examined. The provisions of the relevant legislation have to be carefully scrutinized to ascertain the taxable event and the incidence of the levy.

38) It is to be noted that in the present case, we are dealing with a situation where hydroelectric projects are generating electricity from water power. In a conventional hydropower project, water passes through a turbine, generates electricity and is returned to the river or discharged downstream. The water is used for the extraction of energy from the hydraulic force, but it is not consumed in the same way as water used for irrigation or industrial purposes. Thus, in a hydropower project, the water is subjected to non-consumptive use.

39) The respondent-Regulatory Authority has issued various orders in exercise of its powers under Sections 128(2) and 145(2) of the Act of 2010 from time to time, the latest being Order No. 39/JKSWRRA of 2019 dated 02.04.2019. As per this order, the tariff for water usage charges has been fixed on the basis of head height. In the case of a head height of up to 30 meter, the tariff is Rs. 0.05 per cubic metre; in the case of a head height from 31 meter to 60 meter, the tariff is Rs. 0.12 per cubic metre; in the case of a head height

from 61 meter to 90 meter, the tariff is Rs. 0.14 per cubic metre; and in the case of a head height above 90 meter, the tariff is Rs. 0.25 per cubic metre.

40) This means that the tariff rate is proportional to the head height from which the water is channelled to the turbine of the power projects and not on the basis of the quantity of water supplied to the hydropower projects. The fact that the tariff is calculated by reference to the head height, in other words, the vertical fall of water through the turbine, is of great significance. In hydropower projects, the power available from water depends on the volume of water flowing and the head height. A tariff based on head height is, therefore, a proxy for the hydropower potential rather than a charge for the physical quantity of water supplied. The levy is, therefore, economically directed at hydropower projects and electricity generation. The tariff, as already stated, is proportional to the head height from which the water falls on the turbine and not to the volume of water, which clearly shows that the focus of the tariff is on the generation of electricity and not on the volume of water supplied.

41) The true character of a levy must be determined by examining its substance and incidence and not merely by the nomenclature employed by the Legislature or the authority imposing the levy. In the present case, the tariff is not computed by reference to the quantum of water drawn, consumed or utilized by the hydro power projects. It is fixed at the prescribed rate per cubic metre with reference to the head height, with the amount increasing in proportion to the height from which the water falls. The head height is a parameter reflecting the potentiality of water and the energy potential

available for conversion into electricity and is not a measure of the volume of water used. The method of computation thus furnishes a strong indication that the economic subject-matter of the levy is the hydro-power potential exploited for generation of electricity, while the use of water constitutes the means through which such electricity is generated.

42) In the face of the aforesaid facts, water usage cannot be divorced from the generation of electricity, as the same constitutes a single, inescapable event. In fact, in the operation of hydropower projects, the utilization and non consumption of water constitutes an inextricable and indispensable facet of the generation process; consequently, any statutory levy, charge, or exaction imposed at any stage prior to or during the generation of power tantamounts, in substance and effect amounts to tax upon the generation of electricity itself. The head height formula for levying the tariff goes on to show that the incidence of the tax is the generation of electricity because the greater the head height, the greater would be the amount of electricity generated. The quantum of water usage charges is proportional to the amount of electricity generated and not to the volume of water used. The generation of electricity is, therefore, the incidence of tax in the present case and not the drawal of water, as has been claimed by the respondent UT of Jammu & Kashmir.

43) Upon a consideration of the nature and character of the levy, the provisions of the Act of 2010, the tariff notification and the statutory scheme as a whole, conclusion can safely be drawn that the levy, in substance, is on the generation of electricity rather than a charge for the use of water. A similar view has been taken by the Division Bench of the Himachal Pradesh High

Court in the case of **N.H.P.C. Ltd. Vs. State of H.P. and others,** [CWP No. 2916/2023 with connected matters decided on 05.03.2024]. High Court of Uttrakhand has also taken the same view in the case of **T.H.D.C.India Ltd. through its CMD Vs. State of Uttarakhand and others,** [SLP 149/2021 and connected matters decided on 27.04.2026].

44) In view of the foregoing discussion, the answer to the second issue is that the water usage charges sought to be levied upon the petitioners through the medium of impugned legislation is in fact a tax on generation of electricity.

Issue No.(iii): **If it is found that the charges levied under the impugned enactment is a tax on generation of electricity, whether the State Legislature is competent to pass such an enactment?**

45) Having held that the charges levied upon the petitioners in terms of the impugned enactment is in the nature of tax on generation of electricity, the question that arises for determination is as to whether such tax can be imposed under the legislative authority of the State.

46) In the above context, it has to be noted that the impugned Act has been enacted in the year 2010 when erstwhile State of J&K was enjoying a special status in terms of Article 370 of the Constitution as it existed then. At the relevant time, the executive and legislative powers of the State of J&K extended to all matters except those with respect to which the Parliament had the power to make laws for the State under the provisions of the Constitution of India. Thus, except the subjects coming within the exclusive domain of the Parliament by virtue of different entries in the Seventh Schedule of the

Constitution, the residuary powers both executive and legislative vested with erstwhile state of J&K. At the relevant point of time, entries 1 to 96 of List-I of Seventh Schedule were applicable to the State of J&K and Entry 97, which is residuary entry encompassing all matters not specified in List-II or List-III of Seventh Schedule, was not applicable to the State of J&K.

47) In this backdrop of the constitutional position existing at the relevant time, we have to see whether the legislature of erstwhile state of J&K was competent to pass the impugned legislation, which, as already stated, imposes a tax on generation of electricity. It is to be noted here that the court has to test the legislative competence with regard to enactment of a particular legislation with reference to the law that was prevailing at the time of its enactment and not with reference to law which prevails when its vires are challenged before the Court.

48) Legal position is well settled that the laws made by the legislature may be declared void for lack of legislative power in respect of the subject matter. The Supreme Court in the case of **Mineral Area Development Authority and another Vs. Steel Authority of India and another etc. (2024) 10 SCC 1,** has held that with respect to taxation laws there is a constitutional requirement that the law imposing tax must be in conformity with the provisions of the Constitution, particularly Part III dealing with the fundamental rights. It has been held that the structure of the legislative entries in the three Lists of the Seventh Schedule follows an express and deliberate pattern inasmuch as the entries are classified into general and taxing entries. In the Union List, entries 1 to 81 enumerate general subject matters, while

entries 82 to 92-C pertain to the powers of taxation. Similarly, entries 1 to 45 in the State List enumerate the general entries and entries 46 to 63 provide for taxing entries. The court further held that the legislature does not derive the power to tax from the general entries and taxation is considered to be a distinct matter for purposes of legislative competence. It was further held that taxing powers of Parliament and the State Legislatures are mutually exclusive and clearly demarcated. Thus, there can be no overlap between the taxing powers of the Union and the States. While explaining the manner in which taxing power must be construed, the Supreme Court went on to observe that the same should be done with clarity and precision to maintain exclusivity and a construction of a taxation entry which may lead to overlapping must be eschewed. It was further observed that if a taxing power is enumerated within a particular legislative list, it is automatically excluded from the purview of subject-matters in other legislative lists and the residuary power of Parliament also includes the power of making any law imposing a tax not mentioned in either List II or List III.

49) With the aforesaid legal position in mind, let us now discuss as to whether the tax on generation of electricity falls within the legislative field of the Parliament or the same was falling within the legislative field of erstwhile State of J&K at the relevant time. A perusal of List-II of Seventh Schedule of the Constitution would reveal that vide Entry 53, the State is empowered to pass an enactment imposing tax on consumption or sale of the electricity. None of the entries in List-II of Seventh Schedule vests power with the State to impose tax on generation of electricity. Specifically there was no entry in

List-I providing for taxation on generation of electricity by the Parliament. It is to be noted that entry 97, which is a residuary entry of List-I was not applicable to erstwhile State of J&K and the residuary powers were vested with the Legislature of the J&K.

50) It is the contention of the writ petitioners that power to legislate on the field of generation of electricity was vested with the Parliament vide un-amended Entry 84 as it existed at the relevant time. The said entry relates to imposition of duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption; opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of the said entry. It is being contended that expression "other goods" which finds mention in Entry 84 of the List-I would include "electricity" as such manufacture/generation of electricity can be taxed by the Parliament.

51) In the context of finding an answer to the question, whether "goods" would include electricity as well, it would be apt to notice the ratio laid down by the Supreme Court in the case of **Commissioner of Sales Tax Madhya Pradesh Vs. Madhya Pradesh Electricity Board,** (1969) 1SCC 200**.** In the said case the Supreme Court while determining a dispute in the context of Sales Tax Act and considering the question as to whether the electricity is goods or not, observed as under:-

> "….the goods as defined for the purpose of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book, it cannot cease to be movable property when it has all the attributes of such property. It is capable of

> abstraction, consumption and use which, if done dishonestly, would attract punishment under section 39 of the Indian Electricity Act, 1910. It can be transmitted, transferred, delivered, stored, possessed etc., in the same way as any other movable property…."

52) The aforesaid ratio laid down by the Supreme Court was approved by the constitution Bench of the Supreme Court in the case of **State of Andhra Pradesh Vs. National Thermal Power Corporation Ltd.**(2002)) SCC 203, subject to modification that the electricity cannot be stored, and the word "stored' in the afore-quoted passage was held to be erroneous or an oversight. The court while explaining the characteristics of electricity observed as under:-

> "Another significant characteristic of electric energy is that its generation or production coincides almost instantaneously with its consumption. To quote from Aiyar's Law Lexicon (Second Edition, 2000) 'Electricity in physics is "the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves." Its true nature is not understood. Imperial Dict. (quoted in Spensley v. Lancashire Ins. Co., 54 Wis. 433, 442, 11 NW 894, where the court, quoting from the same authority, said, "We are totally ignorant of the nature of this cause whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another.' This characteristic quality of electric energy was judicially noticed in Indian Aluminium Co.etc.etc. Vs. State of Kerala & Ors. (1996) 7 SCC 637. Vide para 25 this Court has noted, "Continuity of supply and consumption starts from the moment the electrical energy passes through the meters and sale simultaneously takes place as soon as meter reading is recorded. All the three steps or phases (i.e. sale, supply and consumption) take place without any hiatus. It is true that from the place of generating electricity, the electricity is supplied to the sub-station installed at the units of the consumers through electrical higher-tension transformers and from there electricity is supplied to the meter. But the moment electricity is supplied through the meter, consumption and sale simultaneously take place." "as soon as the electrical energy is supplied to the consumers and is transmitted through the meter, consumption takes place simultaneously with the supply. There is no hiatus in its operation. Simultaneously sale also takes place." These properties of electricity as goods are of immense relevance as we would state hereafter."

53) In the aforesaid judgment, the Supreme Court went on to hold that supply, sale and consumption of electricity is simultaneous and because of its instantaneous consumption by a consumer outside the State, it would amount to inter-state sale. The Court by terming generation and consumption of electricity as inter-state sale held that the State Legislature while imposing taxes on transaction of sale or purchase of goods has, to get over the provisions of Article 286 and 269 of the Constitution. The relevant observations of the Supreme Court are reproduced as under:-

> **"26.** As a matter of fact, while considering the question as to competence of the State Legislature to levy tax on sale of electricity generated by the National Thermal Power Corporation Ltd. -- within the ambit of Entries 53 and 54 of List II -- which was the subject matter of dispute in the aforesaid case, the Supreme Court went on to hold that as manufacture, supply, sale and consumption of electricity is simultaneous, when it is sold to a consumer outside the State, it would amount to inter-state sale and, therefore, beyond the legislative competence of the state. Following observations in paragraph 29 of the judgment may usefully be quoted:
>
> > "……However, we are dealing with the case of electricity as goods, the property whereof, as we have already noted, is that the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. Electricity as goods comes into existence and is consumed simultaneously, the event of sale in the sense of transferring property in the goods merely intervenes as a step between generation and consumption. In such a case when the generation takes place in one State wherefrom it is supplied and it is received in another State where it is consumed, the entire transaction is one and can be nothing else excepting an inter-State sale on account of instantaneous movement of goods from one State to another occasioned by the sale or purchase of goods, squarely covered by section 3 of C. S. T. Act."
>
> **27**. As indicated above, the controversy in the aforesaid case was whether the state legislature was competent to levy duty on sale of electrical energy generated by the National Thermal Power Corporation Ltd. at its thermal power stations situated in the State of Andhra Pradesh and sold to the Electricity Boards of Karnataka, Kerala, Tamil Nadu and State of Goa in pursuance of contracts of sale. In that context, the scope of Entries 53 and 54 of List II came to be considered. The competence of the State to levy tax on sales of electricity for consumption was upheld observing:

> "With these two things in mind, namely, that electricity is goods, and that sale of electricity has to be construed and read as sale for consumption within the meaning of Entry 53, the conflict, if any, between Entry 53 and Entry 54 ceases to exist and the two can be harmonized and read together because electricity if it is goods it is covered in Entry 54 also. It is not disputed that duty on electricity is tax. Tax on the sale or purchase of goods including electricity but excluding newspapers shall call within Entry 54 and shall be subject to provisions of Entry 92A of List I. Taxes on the consumption or sale for consumption of electricity within the meaning of Entry 53 must be consumption within the territory of the State and not beyond the territory of the State. Any other sale of electricity shall continue to be subject to the limits provided by Entry 54……"
>
> **28**. Reference to above observations/finding would be incomplete without noticing Entries 53 and 54 of List II and Entry 92A of List I as under:
>
> "53. Taxes on the consumption or sale of electricity.
>
> 54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.
>
> 92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-state trade or commerce."
>
> **29**. From the conjoint reading of above entries and the observations of the Supreme Court, it is clear that tax on sale of electricity can be levied by the state legislature if it is for consumption within the state. Tax on sale outside the state would attract Entry 92A and, therefore, would be beyond the legislative competence of the state."

54) The question whether the levy of duty on the production of electricity falls within the domain of Parliament or the State Legislature was directly considered by the Supreme Court in **M.P. Cements Manufacturers Association v. State of Madhya Pradesh,** (2004) 2 SCC 249, and it was held that Parliament has exclusive legislative competence to legislate with respect to the levy of duty on the production of electricity. While holding so, the Supreme Court observed as under:-

> "…A plain reading of the amendment provision makes it clear that the levy of cess was "on the electrical energy produced". The phrase "whether for sale or supply" merely clarified that all electricity produced irrespective of its destination would be liable to cess at the specified rate. The use of the word "whether" after the phrase "energy produced"means that the cess would apply on units produced whichever of the alternatives mentioned

> after the word "whether", namely, sale or supply or consumption is the case. There is no reason to assume that the words used did not reflect the intention of the Legislature. The imposition envisaged was on the production of electricity units. The charge was on generation and not on the sale or consumption of electricity…"

55) Relying upon the aforesaid judgments of the Supreme Court, a Division Bench of this Court, in the case of **National Hydro-Electric Power Corp. Ltd. and another v. State of J&K and others**, 2005(2) JKJ[HC] 5, quashed SRO 141 dated 21.04.1999, which provided for the levy of electricity duty on the generation of electricity, on the ground that the same was beyond the legislative competence of the erstwhile State of J&K.

56) From the foregoing analysis of legal position, it is clear that the electricity being goods and in terms of unamended entry 84 of List-I which was in existence at the time when the impugned Act came to be enacted, vested powers with the Parliament to legislate on the field of generation of electricity. The enactment of the impugned legislation to the extent it seeks to impose tax on generation of electricity was, therefore, beyond the legislative competence of the erstwhile State of J&K. To that extent, the provisions of impugned Act of 2010 are ultra vires the Constitution.

57) Accordingly Issue No.(iii) is answered by holding that imposition of tax on generation of electricity under the guise of water usage charges under the impugned Act of 2010, was beyond the competence of erstwhile State of J&K.

Issue No.(iv): **If it is found that the charges levied under the impugned enactment is either tax on water or water usage charges, whether under the scheme of the Constitution and the agreements executed between the parties, the same are legally permissible to be levied by**

the Government of UT of J&K upon the writ petitioners?

58) In view of answer to issues No.(i) to (iii), the decision on this issue has become redundant. However, it has been contended by learned Sr. AAG appearing on behalf of the respondent UT of J&K that even if it is assumed that the levy imposed on usage of water by virtue of the impugned enactment is a tax on water, still then because water falls within the definition of "land", as such, in terms of entry 49 of the List-II of Seventh Schedule power is vested with State Legislature to impose taxes on water. To support this contention, learned Sr. AAG has placed heavy reliance upon the judgments delivered by the Supreme Court in cases of **Anant Mills Co. Ltd Vs. State of Gujarat and others,**(1975) 2 SCC 175**, Kendriya Nagrik Samiti, Kanpur Vs. Jal Sansthan, Kanpur and others,**1982 SCC online Allahabad 559**, State of West Bengal Vs. Kesoram Industries Ltd. and others,** (2004) 10 SCC 201**.**

59) It has further been contended that "water" also falls within the definition of "Mineral" as such in terms of Entry 50 of the List-II the State Legislature is vested with power to impose tax on water. In this regard, learned Sr. AAG has placed reliance upon the judgment of the Supreme Court in the case of **Ichachapur Industrial Co-operative Society Ltd. v. Competent Authority, Oil and Natural Gas Commission,** (1997) 2 SCC 42.

60) In the above context, it is to be noted that we have come to conclusion that the usage charges sought to be levied upon the petitioners through the medium of impugned legislation is in the nature of tax on generation of electricity. Therefore, the argument raised by learned Sr. AAG appearing on

behalf of the respondents is besides the point. Even if it is assumed that usage charges constitute a tax on water and not a tax on generation of electricity, still then the respondent-State does not have a case to save the legislation. This is so because even if it is assumed that the "land" includes "water" or that water is "mineral" still then in the face of nature of categorization of various fields in entries appearing in the State List, it becomes clear that water falls under a separate and distinct category whereas land and minerals fall under distinct categories. While the "water" has been categorized separately under Entry 17 of List-II, the land has been categorized separately under Entry 18 of List-II with taxing Entry 49. Taxing entry for mineral is Entry 50 of List-II. However, there is no taxing entry in the State List in respect of the water.

61) Once the water has been categorized separately from the land and the mineral, merely because water can also come within the definition of land or minerals would not make any difference. Intention of the Constitution framers has to be gathered from the manner in which various fields have been categorized in these lists. If the constitution framers intended to categorize water with land or mineral, there was no need to provide a separate entry for water. If we include the water with land or mineral then Entry 17 of List-II becomes redundant, which could never have been the intention of the Constitution framers. It is to be noted that Entry 17 of List-II, which relates to water is a regulatory entry and it does not vest power with the State to impose tax on water. There is no corresponding taxing entry in List-II of Schedule VII for the field of water. Therefore, the ground urged by learned Sr.AAG

appearing for the respondents to justify the taxation on water by the State Legislature is not tenable in law.

62) So far the judgments cited at bar by learned Sr. AAG are concerned, in all those cases, the Courts were dealing with legislations which in the facts and circumstances of the relevant cases imposed tax on water as being part of land or mineral. The incidence of tax in all those cases was not the water but the land or mineral. In the instant case, if the argument of learned Sr. AAG that tax is sought to be levied on drawal of water is accepted, then it is a case of imposition of tax on water as a separate component and not as part of land or mineral. There being no separate field in List-II of Seventh Schedule authorizing imposition of tax on water, the State Legislature cannot frame a legislation providing for imposition of tax on water. As already stated, Entry 17 of the List-II is a regulatory entry and under this field, the State legislature can frame regulatory laws only. Thus, the impugned legislation to the extent it imposes water usage charges on entities other than hydropower generating units would be within the competence of the State Legislature, but levy of water tax would be beyond its competence.

63) An argument has been raised by learned Sr. AAG appearing for the respondents that even if it is assumed that it is the Parliament which is vested with the power to legislate in respect of the field of generation of electricity, still then because the impugned Act has been adopted in terms of Section 96 of the J&K Reorganization Act, 2019, which is an Act of Parliament, it can be presumed that the impugned enactment has the assent of Parliament. On this

analogy, it is being argued that taxation on generation of electricity by virtue of the impugned enactment is saved.

64) The argument appears to be an attempt in desperation to save the impugned legislation. If we have a look at the provisions of the J&K Reorganization Act, it becomes clear that what is being provided under the said Act is saving of certain State enactments and repeal of certain others. It also provides for extension of Central enactments to the UT of J&K and Ladakh and adoption of State enactments. Merely because the Act provides for adoption of State enactments and saves their application to UTs of J&K and Ladakh, the said enactments do not become the enactments passed by the Parliament. If we accept the said argument, it would lead to absurdities. It shall result in a situation where a subject which, as per the Reorganization Act, is reserved for the UT of J&K for legislative and executive powers, would become a subject of the Union Government. This is not the intention of the J&K Reorganization Act. In fact, **Section 32(1)** of the said Act clearly delineates the subjects over which the UT of J&K has legislative and executive powers. Merely because the certain State Acts have been adopted in terms of the J&K Re-organization Act, which is an enactment of the Parliament, the adopted enactments would not cease to be enactments of the State of UT of J&K.

65) A piece of legislation, which is ultra vires the Constitution at the time of its enactment cannot be legitimized by its adoption by the Parliament subsequently. In this context, it would be apt to refer to the ratio laid down by the Supreme Court in the case of **Deep Chand v. State of U.P., 1959 SCC**

OnLine SC 12. In the said judgment, it has been held that if, at the time when an Act is passed, the State has no power to pass the said enactment, it becomes unconstitutional and, therefore, void from its inception. It is a stillborn legislation, which cannot be validated. Similarly, the Supreme Court in the case of **Krishna Chandra Gangopadhyaya v. Union of India, (1975) 2 SCC 302**, has held that the only solution in a case where an Act has been passed without competence by the Legislature is to remove the defect, which rendered the enactment unconstitutional and to enact a valid law within the legislative competence of the Legislature.

66) In view of the aforesaid legal position, the argument that because the impugned Act has been adopted and applied to the UT of J&K in terms of the J&K Reorganization Act, which is an enactment passed by Parliament, the said Act has therefore become an Act of Parliament, is wholly misconceived. The J&K Reorganization Act would not save the impugned legislation once it is shown that it was beyond the competence of State Legislature at the time it was enacted.

67) For what has been discussed hereinbefore, the writ petitions are allowed by holding as under:-

(i) The impugned **Jammu and Kashmir Water Resources (Regulation and Management) Act, 2010**, to the extent it provides for levying water usage charges upon the hydro power projects, amounts to imposing a tax on the generation of electricity and, therefore, the State Legislature did not have the competence to impose such tax upon the writ petitioners

(ii) The impugned enactment, to the extent it imposes water usage charges upon the petitioners, is held to be ultra vires the Constitution and is struck down to the said extent.

(iii) The impugned demand notices issued against the writ petitioners are quashed, and the respondent-State is restrained from imposing any tax on the generation of electricity under the garb of water usage charges or any other tax.

(Sanjay Dhar)
Judge

(Rajnesh Oswal)
Judge

Jammu,
29.10.2026
"M. L. Verma-Secretary"

Whether the **judgment** is reportable: **YES**
Whether the **judgment** is reportable: **YES**

HIGH COURT
JAMMU & KASHMIR AND LADAKH