

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 51649 OF 2019

(Arising out of Order-in-Original No. 08/COMMR/ST/SGR/2019 dated 01.03.2019 passed by Ld. Principal Commissioner of CGST & CE, Bhopal)

Madhya Pradesh Poorva Kshetra Vidyut Vitran Co. Ltd.Appellant

Office of Chief Financial Officer,
Madhya Pradesh Poorv Kshetra Vidyut
Vitran Co. Ltd.
Block No. 7, 2nd Floor,
Shakti Bhawan, Rampur,
Jabalpur – 482 008 (M.P)

Versus

Principal CommissionerRespondent

CGST and Central Excise
35-C, GST Bhawan, Arera Hills,
Jail Road,
Bhopal – 462 011.

APPEARANCE:

Shri Rajeev Kumar Agarwal, Advocate for the Appellant
Shri Vivek Pandey, Authorized Representative for the Department

**CORAM : HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)**

Date of Hearing/Decision: January 14, 2021

FINAL ORDER No.51031/2021

JUSTICE DILIP GUPTA :

Madhya Pradesh Poorva Kshetra Vidyut Vitran Co. Ltd.¹ has sought the quashing of the order dated March 1, 2019

1 the Appellant

passed by the Principal Commissioner, CGST and Central Excise, Bhopal² by which the demand of service tax has been confirmed with interest and penalty.

2. The period of dispute is from July, 2012 to March, 2017 and the dispute raised in this appeal is as to whether service tax is payable on the amount of late payment surcharge, meter rent and supervision charges received by the appellant from the electricity consumers.

3. The appellant is a wholly owned undertaking of the Government of Madhya Pradesh and is engaged in the distribution of electricity in the eastern area of the State. The "transmission or distribution of electricity by an electricity transmission or distribution utility" is included in the negative list of services in section 66D(k) of the Finance Act, 1994³ and so the power charges collected from the consumers of electricity are exempted from levy of service tax.

4. The officers of the Directorate General of Central Excise Intelligence collected information that the appellant charged **late payment surcharge** in the electricity consumption bills issued to the customers and recovered the same in case the customers made payment after the due date mentioned in the bill. Further investigation revealed that during the period from July, 2012 to March, 2017, the appellant had recovered late payment surcharge but service tax was not paid even though the amount was liable to service tax as it was a "declared service" defined under section 66E(e) of the Finance Act. The officers also noticed

2 the Principal Commissioner
3 the Finance Act

that the appellant was collecting **meter rent** from the consumers and since only “transmission and distribution of electricity” was covered under the negative list and not services related to “transmission and distribution of electricity”, nor it was exempted under any Notification, as was the case prior to the introduction of the negative list, transfer of goods by way of hiring or leasing without transfer of right to use such goods would be a ‘declared service’ under section 66E(f) of the Finance Act. It was also noticed that the appellant was collecting **supervision charges** and collecting **lease rent** from the customers on which service tax was chargeable, but the appellant did not pay service tax. Accordingly, a show cause notice dated April 24, 2018 was issued to the appellant to show cause why service tax on the aforesaid amount collected by the appellant should not be levied with interest and penalty.

5. The appellant filed a reply on February 12, 2019 to the aforesaid show cause notice mentioning therein that neither the appellant was required to pay service tax on the aforesaid amount collected towards late payment surcharge, meter rent, supervision charges or lease rent, nor could the extended period of limitation contemplated under the proviso to section 73 (1) of the Finance Act be invoked.

6. The Principal Commissioner, however, confirmed the demand of service tax with penalty and interest by order dated January 30, 2019.

7. The relevant portion of the order passed by the Principal Commissioner in regard to late payment surcharge is as follow:

"33..... The Service tax law was revamped in June 2012 and was replaced by a 'negative list' concept as a result of which all "activities" undertaken for some consideration were made subject to service tax except those service activities which are either specified in the negative list or are specifically excluded from the definition of term 'service'. An important aspect to be noted here is that the term 'activity' has not been defined. However, the Education Guide so issued by the Tax Research Unit, Central Board of Excise and Customs, Ministry of Finance, seems to suggest that an 'activity' could be both active as well as passive; meaning thereby that it would not only include "acts or deeds done" but would also include "forbearance to act". **Further, the impugned issue of taxability on receipt of the amounts of Late Payment Surcharge (LPS) charged by the noticee from the customers had been examined with reference to section 66E(e) of 'the Act' and it was observed that the empowerment of the noticee to collect late payment surcharge is for the reason that there has been a delay and the same would be tolerated, but for a price of course, as per-determined and agreed upon and the 'noticee' agreed to accept these amount in lieu to refrain from an act, or to tolerate an act.** Hence, the amount of such receipt is appropriately classifiable under the definition of the service declared under section 66E(e) of the Finance Act, 1944."

(emphasis supplied)

8. In regard to the amount collected by the appellant towards the meter rent, the Principal Commissioner observed as follows:

"38..... After inception of Negative List only the service namely "transmission and Distribution of Electricity" are covered under the negative list and **other service beyond the scope of activities of the transmission and distribution of electricity whether or not related to the said service are neither covered under the negative list nor exempted vide any notification as was the case prior to the introduction of negative list.** Also, sub-clause 44 of Section 65B of the Finance Act, 1994(viz. the Act which regulates the levy and collection of Service Tax in India and referred to as 'the Act') defines the term 'service' with a very wide amplitude to mean 'any activity carried out by a person for another for consideration, and includes a 'declared service'. The said definition is subject to certain exclusions like transactions in goods or immovable property or transactions in money and actionable claims. An important aspect to be noted here is that the term 'activity' has not been defined. Further, "transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods" are notified as Declared Service as per clause (f) of Section 66E. **Therefore the amounts of meter rent received by the 'noticee' is correctly classifiable under the category of**

taxable service and is appropriately liable for payment of service tax."

(emphasis supplied)

9. In regard to the amount collected by the appellant towards supervision charges, the Principal Commissioner observed as follows:

"41..... After inception of Negative List only the transmission and Distribution of Electricity" are covered under negative list and services related to the transmission and distribution of electricity neither covered under the negative list nor exempted vide any notification as was the case prior to the introduction of the negative list. **The issue was examined in the light of provision of Section 66D of 'Act' which specified the services which were out of the purview of the Service Tax provision and the amount so collected by the 'noticee' in the form of Supervision Charges neither found entry in Section 66D of the Act nor exempted vide mega exemption notification no. 26/2012-ST dated 20.06.2012 as amended. Therefore the amount of supervision charges received by the 'noticee' is clearly liable for payment of service tax. Now, after determining the issue of taxability of receipt against supervision charges, it's the turn now to arrive the quantification of the said service."**

(emphasis supplied)

10. In regard to the amount collected towards lease rent, the Principal Commissioner observed as follows:

"42. Next issue which comes in the array of charges raised, is non-payment Service tax on lease rent charges received by the noticee from their customers during the period under investigation. Since, the said service is squarely covered under Renting of Immovable Property service which is declared service as per clause (a) of Section 66E of the 'Act'. I, therefore, hold the noticee liable to discharge service tax short/not paid on the taxable value as received by them towards "Lease rent charges" from the customers as service rendered under Section 65B(44) of the Finance Act, 1994, under the provision of section 73(1) of the Act, ibid."

11. It would be seen that the Commissioner has confirmed the demand of service tax on 'late payment surcharge' under section 66E(e) of the Finance Act by holding that the same is a consideration received by the appellant "for tolerating an act of electricity consumers by receiving the payments after the prescribed due date for payment of electricity bills; the Commissioner has confirmed the demand of service tax on 'meter

rent' under section 66E(f) of the Finance Act by holding that the same is a consideration received by the appellant for transfer of goods by way of hiring; and the Commissioner has confirmed the demand of service tax on 'supervision charges' collected from the electricity consumers by holding that the same is a taxable service since it is not covered under any exemption.

12. It needs to be noted that the lease rent amount was deposited by the petitioner after issuance of the show cause notice and so it has not been challenged in this appeal. However, the appellant has challenged the imposition of penalty on the lease rent amount.

13. It is against this order of the Principal Commissioner that the present appeal has been filed.

14. Shri Rajeev Kumar Agarwal, learned counsel appearing for the appellant has made the following submissions to assail the aforesaid order :

- (i) The Principal Commissioner committed an error in holding that service tax was required to be paid on the amount collected towards late payment surcharge, meter rent and supervision charges. In support of the submission reliance has been placed on a decision of the Gujarat High Court on **Torrent Power Limited vs. Union of India**⁴
- (ii) The extended period of limitation could not have been invoked in the facts and circumstances of the present case ; and

4. Special Civil Application No. 5443 of 2018 decided on December 19, 2018

- (iii) Neither penalty could have been imposed nor interest could have been recovered.

15. Shri Vivek Pandey, learned Authorized Representative appearing for the Department, however, supported the impugned order and made the following submissions:

- (i) Declared service is a deeming provision enacted by Parliament and as per definition, it need not be an activity carried out by one person for another;
- (ii) At the time of signing the contract, both the parties planned and agreed to tolerate any breach of contract through the payment of liquidated damages. Hence, the consideration is both intentional and at the desire of the parties;
- (iii) The Constitution Bench of the Supreme Court in **Fateh Chand vs. Balkishan Das**⁵ held that reasonable compensation for a breach of contract has to be proportionate to the actual injury suffered, which means injury tolerated since the word "suffering" is synonymous to "tolerating".
- (iv) A case of compensation or damages for breach of a contract always involves one party tolerating/suffering an injury. Hence, the claim of the appellant in the present case that their contract is not for tolerating anything is fundamentally wrong;
- (v) In this connection, reliance has also been placed upon the decision of the Delhi High Court in **XL Energy Limited Vs. Mahanagar Telephone Nigam Limited**⁶.

5 AIR 1963 SC 1405

6. MANU/DE/1892/2018

16. The submissions advanced by the learned counsel for the appellant and the learned Authorized Representative of the Department have been considered.

17. The issue that arises for consideration in this appeal is whether the appellant is providing taxable service by way of collecting amount under the following headings:

Late payment Surcharge	Taxable under section 66E(e) of the Finance Act as a 'declared service'
Meter Rent	Taxable under section 66E(f) of the Finance Act as a 'declared service'
Supervision Charges	Taxable under section 66B(44) of the Finance Act that defines the term 'service'.

18. As noticed above, there is no dispute on payment of service tax on the lease rent income, on which the demand of service tax to the extent of Rs. 3,69,543/- has been paid by the appellant. The dispute on this amount is only on the amount of penalty that has been levied.

19. The appellant is a Public Sector Undertaking primarily engaged in the business of transmission and distribution of electricity, which is covered under Negative List entry under section 66D(k) of the Finance Act relating to "transmission or distribution of electricity by an electricity transmission or distribution utility". There is no dispute with regard to taxability on power charges paid by the consumers, as it is exempted under the Negative List Entry. The only dispute in the instant case is with regard to various other charges recovered from electricity consumers for supply of electricity.

20. The late payment surcharge, meter rent and supervision charges are collected by the appellant in terms of Madhya Pradesh Electricity Regulatory Commission (Recovery of Expenses and Other Charges for Providing Electric Line or Plant used for purpose of giving supply) Regulations, 2009⁷.

21. The period of dispute is from July, 2012 upto March, 2017. Section 66D of the Finance Act provides for a negative list of services. This negative list comprises, amongst others, in sub-clause (k), "transmission or distribution of electricity by an electricity transmission or distribution utility". The issue involved in this appeal is not regarding the amount collected by the appellant for supply of electricity; the dispute is regarding the amount collected towards late payment surcharge, meter rent and supervision charges.

22. These three charges have been collected by the appellant in terms of the 2009 Regulations. The Principal Commissioner has confirmed the demand of service tax on 'late payment surcharge' under section 66E(e) of the Finance Act by holding that the same is a consideration received by the appellant "for tolerating an act of electricity consumers by receiving the payments after the prescribed due date for payment of electricity bills. The Principal Commissioner has confirmed the demand of service tax on meter rent as a declared service under section 66E(f) of the Finance Act by holding that the same is the consideration received by the appellant for transfer of goods by way of hiring. The Principal Commissioner has also confirmed the

7 M.P 2009 Regulations

demand of service tax on supervision charges collected from electricity consumers by holding that the same is taxable as it is not covered under any exemption.

23. According to the appellant the amount has been collected in terms of the 2009 Regulations and are the services bundled in the ordinary course of business for providing electricity. They are, therefore, required to be treated as a single service for providing services for transmission and distribution of electricity, which service is exempted under the negative list under section 66D(k) of the Finance Act.

24. In this connection it needs to be noted that prior to introduction of the negative list regime for service tax under the Finance Act, there was no specific clause in the charging provisions of the Finance Act requiring payment of service tax on the amount collected from the consumers in relation to transmission and distribution of electricity. The Government of India issued a Notification dated February 27, 2010 exempting taxable service provided to any person by any other person for transmission of electricity. Another Notification dated June 22, 2010 was issued exempting taxable service provided to any person by a distribution, licensee or franchisee for distribution of electricity. There was some confusion and notices were issued by the department in respect of the activities relating to transmission and distribution of electricity for the period prior to the aforesaid notification. Various representations were received by the Government relating to the period prior to February 27, 2010 and

June 22, 2010 as the transmission/ distribution companies believed that service tax was not required to be paid on activities **relating to** transmission and distribution of electricity. A Trade Notice dated July 20, 2010 was then issued by the Government of India providing that service tax shall not be required to be paid for the period prior to the issuance of the aforesaid two notifications on the services relating to transmission and distribution of electricity.

25. A question, however, arose as to whether the exemption granted for transmission and distribution of electricity would also include directly connected activities such as meter rents. The Government of India issued a Circular dated December 07, 2010 clarifying that supply of electricity meters to the consumers was an essential activity having direct and close nexus with transmission and distribution of electricity and was, therefore, covered by the exemption granted to transmission and distribution of electricity.

25. Thereafter, the negative list regime was introduced with effect from July 01, 2012. As noticed above, section 66D(k) includes "transmission or distribution of electricity by electricity transmission or distribution utility in the negative list".

26. The issue as to whether the charges collected in connection with transmission of electricity even after July 01, 2012 would be subjected to tax as according to the Department they would not be exempted under section 66D(k) of the Finance Act, came up for consideration before the Gujarat High Court in

Torrent Power after referring to the position prior to the introduction of the negative list and the Notifications referred to above and the introduction of the negative list regime w.e.f July 01, 2012, the Gujarat High Court observed as follows:

"10. Insofar as the first phase is concerned, the respondents do not dispute that the related/ancillary services to transmission and distribution of electricity are exempt from payment of service tax. The dispute, therefore, relates to the period of the negative list regime and the CGST/SGST regime.

11. Insofar as the second phase, namely, the negative list regime is concerned, with effect from 1.7.2012, section 65B of the Finance Act, 1994 came to be amended and service tax became leviable on all services, other than those services specified in the negative list. Admittedly, transmission and distribution of electricity by an electricity transmission or distribution utility, finds place in the negative list and, is therefore, not exigible to service tax.

12. The first question that arises for consideration is whether services relating to transmission and distribution of electricity fall within the ambit of clause (k) of section 66D of the Finance Act and, are therefore, exempt. In this regard, it may be noted that prior to the coming into force of the negative list regime, goods and services were exempted by virtue of notifications issued in exercise of powers under sub-section (1) of section 93 of the Finance Act. By virtue of Notification No. 11/2010 dated 27.2.2010, the Central Government exempted transmission of electricity from the whole of service tax leviable thereon under section 66 of the Finance Act; and by virtue of Notification No.32/2010-Service Tax dated 22.6.2010, distribution of electricity came to be exempted from the whole of service tax leviable thereon under section 66 of the Finance Act. Thus, what was exempt under those provisions was transmission and distribution of electricity, despite which, during the pre-negative list regime, the respondents have considered services related to transmission and distribution of electricity as exempted from service tax by virtue of those notifications. Insofar as electricity meters are concerned, vide circular No.131/13/2010-ST dated 7.12.2010, it was clarified that supply of electricity meters for hire to consumers being an essential activity, having direct and close nexus with transmission and distribution of electricity, the same is covered by the exemption for transmission and distribution of electricity extended under relevant notifications.

13. Thus, the reason for saying that supply of electricity meters for hire to consumers is covered by the exemption notification is that such service is an essential activity

having direct and close nexus with transmission and distribution of electricity. This circular only provides an interpretation of when a service would stand included in another service, namely, when such service is an essential activity having direct and close nexus with the exempted activity. Therefore, the fact that the exemption notifications came to be rescinded would have no bearing inasmuch as the circular only clarifies what according to the Government of India would stand included in another service. Such interpretation would not change merely because such exemption is now granted under some other provision.

14. **It may be noted that insofar as the exemptions prior to the negative list regime as well as post the negative list regime are concerned, it is the transmission and distribution of electricity that has been exempted by virtue of notifications.** During the negative list regime, transmission and distribution of electricity has been placed in the negative list. Therefore, in all the three phases, what was exempted was "transmission and distribution of electricity". **However, while for the prenegative list phase, the respondents considered the services related to transmission and distribution of electricity as exempt under the exemption notifications, for the negative list regime and the GST regime, they seek to exclude such services from the ambit of transmission and distribution of electricity.** From the affidavits-in-reply filed on behalf of the respondents, there is nothing to show as to how the very services, which stood included within the ambit of transmission and distribution of electricity now stand excluded. The sole refrain of the respondents is that in view of the fact that the exemption notification stands rescinded, the clarification also stands rescinded. What is lost sight of is that the clarification was only in respect of electric meters, whereas all related services were included within the ambit of transmission and distribution of electricity and given the benefit of the exemption notifications. Moreover, the clarificatory circular merely clarifies the stand of the Government as regards what would stand included within the meaning of "transmission and distribution services" namely, essential activities having direct and close nexus with the transmission and distribution of electricity. **The respondents having themselves considered the services in question as being covered by the exemption for transmission and distribution of electricity as such services were essential activities having a direct and close nexus cannot be now permitted to take a U-turn and seek to exclude such services without pointing out any specific change in the nature of the exemptions, except that they are provided under different statutory provisions. In the opinion of this court, the meaning of "transmission and distribution of electricity" does not change either for the negative list regime or the GST regime.** If that be so, the services which stood included within the ambit of transmission and distribution of electricity during the pre-

negative list regime cannot now be sought be excluded by merely issuing a clarificatory circular, that too, with retrospective effect. By the clarificatory circular, the respondents seek to give a different interpretation of the very same services as against the clarification issued for the prenegative list regime.

15. Thus, from the very manner in which the respondents have treated the services related to transmission and distribution of electricity during the pre-negative list regime, such services would stand covered by the exemption granted to transmission and distribution of electricity by virtue of inclusion of such services in the list of negative services under section 66D (k) of the Finance Act as well as by virtue of exemption notification issued under the CGST Act."

(emphasis supplied)

27. The Gujarat High Court also examined whether services provided with fall within the ambit of bundle services as contemplated under Section 66F(3) of the Finance Act and observed that for the phase relating to the negative list, the services in question would fall within the ambit of bundle services, as contemplated under section 66F of the Finance Act and would have to be treated in the same manner as the service which gives the bundle its essential character, namely transmission and distribution of electricity. The service would, therefore, be exempted from payment of service tax. The relevant portion of the order is reproduced below:

"20. The facts of this case are required to be examined in the light of the above statutory provisions. **In this case, we are concerned with transmission and distribution of electricity being the main services and application fee for releasing the connection for electricity; rental charges against metering equipment; testing fee for meters/transformers, capacitors etc.; labour charges from customers for shifting of meters or shifting of service lines; charges for duplicate bills provided by DISCOMS** to consumers being related services. The question is whether an element of provision of these services is combined with an element or elements of provision of the main service of transmission and distribution of electricity. **As noticed earlier, the**

respondents have themselves treated such related/ancillary services as part of the main service of transmission and distribution of electricity for the pre-negative list regime. Apart, therefrom, considering this issue independently, reference may be made to certain provisions of the Electricity Act. Sections 43 and 45 of the Electricity Act.

22. Thus, any line which is used for carrying electricity for any purpose as well as any apparatus connected to any such line for the purpose of carrying electricity is mandatorily required to be provided to the consumer by the licensee. Moreover, any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity, except for electric meter and any electrical equipment, apparatus or appliance under the control of a consumer fall within the ambit of electrical plant as defined under section 2(22) of the Electricity Act. Sub-section (2) of section 43 of the Electricity Act casts a duty upon the licensee to provide if required electric plant or electric line for giving electric supply to the premises. Therefore, providing electric line and electric plant are elements of service which are naturally bundled in the ordinary course of business, with the single service of transmission and distribution of electricity which gives the bundle its essential character. The only related service which does not fall within the ambit of the definitions of electric line and electric plant is the meter used for ascertaining the quantity of electricity supplied to any premises. However, insofar as installation of electricity meter and hire charges collected in respect of electricity meters are concerned, by the circular dated 7th December, 2010, the Government of India has clarified that supply of electricity meters for hire to the consumers is an essential activity having direct and close nexus with transmission and distribution of electricity and therefore, is covered by the exemption for transmission and distribution of electricity extended under the relevant notifications. **Evidently therefore, all the services related to transmission and distribution of electricity are naturally bundled in the ordinary course of business of the petitioner and are required to be treated as provision of the single service of transmission and distribution of electricity which gives the bundle its essential character.**

23. **Besides, a perusal of the GERC Regulations indicates that the services which are sought to be taxed now are the services, which the petitioner is required to mandatorily provide at the rate prescribed by GERC, a statutory authority constituted under the provisions of the Electricity Act. In the opinion of this court, all these services are essential activities which have a direct and close nexus with transmission and distribution of electricity.** In terms of the earlier clarification dated 7.12.2010 issued vide Circular No.131/13-2010-ST, the Government of India had clarified

that an activity, which is an essential activity having direct and close nexus with transmission and distribution of electricity would be covered by the exemption for transmission and distribution of electricity extended under the relevant notifications. Therefore, the taxability of the related/ancillary services are required to be given same treatment as is given to the single service, which gives such bundle its essential character, namely, transmission and distribution of electricity.

25. Thus, insofar as the phase relating to the negative list regime is concerned, the services in question would fall within the ambit of bundled services as contemplated under subsection (3) of section 66F of the Finance Act, and would have to be treated in the same manner as the service which gives the bundle its essential character, namely, transmission and distribution of electricity and, would therefore, be exempt from payment of service tax."

(emphasis supplied)

28. It is clear from the aforesaid judgment of the Gujarat High Court that the activities that are related/ancillary to transmission and distribution of electricity would be exempt from payment of service tax since transmission and distribution of electricity is exempted. It is also clear from aforesaid decision that all services related to transmission and distribution of electricity are bundled services, as contemplated under section 66F(3) of the Finance Act, and are required to be treated as a provision of a single service of transmission and distribution of electricity, which service is exempted from payment of service tax.

29. Thus, for all the reasons stated above, it is not possible to sustain the levy of service tax on the amount collected by the appellant for late payment surcharge, meter rent and supervision charges.

30. The issue that now remains to be decided is about the levy of penalty on the lease rent collected from the customers.

The appellant claims that since it has deposited the lease rent, the levy of penalty may be set aside. It is not possible to accept this contention of the learned counsel for the appellant. The imposition of penalty under 'lease rent' is, therefore, confirmed.

31. Thus, for all the reasons stated above, the confirmation of demand by the Principal Commissioner on late payment surcharge, meter rent and supervision charges are set aside. The levy of penalty on the lease rent amount is confirmed. The appeal is, therefore, allowed to the extent indicated above.

(Order pronounced in the open Court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P V SUBBA RAO)
MEMBER (TECHNICAL)