
(2016) 09 GAU CK 0055

In the Gauhati High Court

Case No : Writ Petition (C) No. 710 of 2010 and W.P. (C) Nos. 3938, 1446 and 1427 of 2010

Bharati Airtel Limited

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 16-09-2016

Acts Referred:

Assam Electricity Duty Act, 1964 — Section 3(1)(c)
Constitution of India, 1950 — Article 226, 246

Citation : (2016) 5 GauLJ 390 : (2017) 1 GauLR 526 : (2016) 4 GauLT 781

Hon'ble Judges : Mr. Hrishikesh Roy and Mr. Paran Kumar Phukan, JJ.

Bench : Division Bench

Advocate : Mr. M.K. Choudhury, Senior Advocate, Mr. R. Sekhar, Mr. M. Choudhury, Mr. M.K. Mishra, Mr. N.J. Choudhury, Mr. M. Sarma, Mr. I. Gohain and Mr. J. Kalita, Advocates, for the Petitioner; Mr. D. Saikia, Addl. AG, Mr. B. Choudhury and Mr. B. Gogoi, Advocates,

Final Decision : Allowed

Judgement

Mr. Hrishikesh Roy, J.—The levy of electricity duty under the Assam Electricity Duty Act, 1964 (hereinafter referred to as the "Duty Act") is challenged by the petitioner companies, who generate electricity during power failure, to continue the operation of their cellular phone service. As the taxable event under Section 3(1)(c) of the Duty Act, is on generation of electricity, the petitioners question the legislative competence of the State, to levy tax on power produced by them for captive consumption, by referring to the relevant entries in the lists of the Seventh Schedule to the Constitution of India. The burden of electricity duty on cellular phone service provider is contended to be discriminatory since, unlike the power companies, who are subject to such electricity duty, the cellular companies/or those providing infrastructure support to them, do not supply electricity on commercial basis, to others. Since uninterrupted cellular service is essential for their business module, the operators are compelled to arrange back up generation of electricity on account

of failure of the State's power company to provide uninterrupted power supply, notwithstanding the obligation under Section 43 of the Electricity Act, 2003, on the licensee company. Moreover according to the petitioners, the respondents have failed to prescribe a practical mechanism for realisation of electricity duty and accordingly it is contended to be unworkable. One peripheral issue arises out of the exemption limit of 25 KVA and the petitioners seek exemption conferred upon this category, under the govt. notification dated 07.05.2013.

2. We have heard Mr. M.K. Choudhury, the learned Sr. counsel appearing for the petitioner in the W.P. (C) No. 710/2010. The learned advocate Mr. M. Sarma, represents the petitioner in the W.P. (C) No. 3938/2010. The petitioners in the W.P. (C) Nos. 1446/2010 and 1427/2010 respectively, have amalgamated on 03.06.2010 into M/s ATC Telecom Infrastructure Pvt. Ltd. and they are represented here by Mr. M. Choudhury, the learned counsel. The respondents are represented by Mr. D. Saikia, the learned Addl. Advocate General, Assam, assisted by the Govt. advocates Mr. B. Choudhury and Mr. B. Gogoi.

3. Following the decision to abolish the central excise duty on electricity w.e.f. 01.10.1984, the States were to be compensated for the resultant loss of revenue. With this objective, electricity duty was imposed on the licenced power company who supply electricity to the consumers on tariff basis. But through the charging Section 3(1)(c) in the Duty Act, those who generate electricity for self-consumption, were also made liable to pay electricity duty.

Petitioners Arguments

4. Equating electricity duty to a tax when the character of fee is missing from the levy, the counsel argue that such tax cannot be imposed without authority of law as provided by Article 265 of the Constitution. The authority to levy on generation is not traceable to any of the entries of List-II or the concurrent list of Seventh schedule and therefore the State's demand for electricity duty on generation, is contended to be constitutionally impermissible.

5. The petitioners submit that electricity is nothing but a kind of goods, the manufacture of which, is covered under Entry 84 of List-I of the Seventh Schedule and therefore they argue that only the Central Government is competent to impose electricity duty on power production. Under Entry 53 of List-II, the States are empowered to collect tax on consumption or sale of electricity. But since the impugned levy is on generation, under sub-section (c) of Section 3(1) of the Duty Act, the petitioners question the State's legislative competence, to impose duty on self-generated and self-consumed electricity and raise the issue of repugnancy of the State law in a field, covered by the parliamentary enactment.

6. Referring to the definition sections to explain the meaning of "electrical energy" under Section 2(g) of the Indian Electricity Act, 1910 read with Sections 2(23) and 2(70) of the Electricity Act, 2003, the petitioners argue that only when electricity is sold commercially by the power company, tax can be levied. But the

law does not authorise the levy from those compelled to generate electricity to continue their business operation, when power supply fails. As production of electricity by the power company and its supply to consumers is on payment basis whereas the cellular service providers do not supply to outsiders, the demand for electricity duty for captive generation is contended to be discriminatory, as unequals are treated alike, for charging duty.

7. According to the petitioners, practical mechanism is not provided for collection of electricity duty from those who generate electricity during power failure and on this basis, the petitioners contend that the levy is unworkable and therefore the same should not be permitted to be collected, in pursuant to the demand notice issued to the petitioners.

Respondents Arguments

8. The respondents on the other hand argue that duty on self-generated electricity can be competently imposed by the State, through broad interpretation of the Entry 53 of List-II which empowers the States to levy tax on consumption of electricity. Mr. D. Saikia, the learned Addl. Advocate General relies on *Jiyajeerao Cotton Mills Ltd. v. State of Madhya Pradesh* reported in AIR 1963 SC 414 to argue that even when the electricity generated by the cellular companies is for self-consumption and is not sold to others, the levy of electricity duty under a state enactment is permissible as the taxable event according to him, is consumption and not generation.

9. Mr. D. Saikia, the learned Addl. Advocate General submits further that effective mechanism for levy and collection of electricity duty is now provided by the substitution of Section 6 of the Duty Act under the amending notification of 07.09.2010 and referring to the prescription made under the Assam Electricity Duty Rules, 1964, he argues that workable mechanism is already in place to collect duty. The obligation of the assessee who are required to submit returns in the prescribed format and the requirement to install meter to determine the electricity generated for captive consumption under Rule 10, are read by Mr. Saikia to contend that, the submission of the petitioners of absence of effective mechanism to collect electricity duty, is without any basis.

10. The State Counsel cites various decisions in support of his contention and those will be noticed in the later paragraphs.

11. Mr. Saikia further submits that the Duty Act has received the assent of the President and therefore even if some repugnancy is noticed with the Central Act, the application of the Duty Act within Assam, is protected by Article 254(2) of the Constitution.

Preliminary Legal Proposition

12. Article 246 speaks of the laws to be made by the Parliament and by the legislature of the states. The legal authority to enact legislation by either Government must be traced to some entry in any of the lists of Schedule 7. That

apart, a law can be struck down through judicial process mainly for want of legislative competence and also for violation of any of the fundamental rights guaranteed in Part-III or of any other constitutional provision. It is however well settled that no enactment can be struck down by declaring it to be arbitrary or unreasonable and some other constitutional infirmity has to be found, before any enactment is invalidated. [See: *Rajbala and ors. v. State of Haryana* reported in (2016)2 SCC 445].

13. When the Court is required to examine the legal validity of a fiscal legislation, it is authoritatively settled that the taxing statute should be interpreted by the strict letter of law since no tax can be imposed by interpreting the legislative intent. Moreover, there can be no presumption to tax nor equitable consideration can have a role, in interpretation of fiscal statute. [See: *State of Rajasthan v. Basant Agrotech (India) Limited* reported in (2013)15 SCC 1].

Discussion and Decision

14. The petitioners in these cases challenge the constitutional validity of the charging Section 3(1)(c) of the Duty Act and therefore the core issue here is whether the State possess the requisite legislative competence to levy duty on generation of electricity. The definition Section 2(g) of the Duty Act states that words and expressions which have not been defined under the State Act can import the meaning assigned to them, from the Indian Electricity Act.

15. The word "generate" is defined under Section 2(29) of the Electricity Act as "to produce electricity from a generating station for the purpose of giving supply to any premises or enabling a supply to be so given." Since the emphasis here is on "supply", we may also benefit by looking into the definition of supply under Section 2(70) of the Electricity Act. The defined meaning of supply under the Electricity Act is, sale of electricity to a licensee or consumer. Under Section 2(23), electricity is defined as electrical energy generated, transmitted, supplied or traded for any purpose and each of these four expressions relating to electricity, are defined distinctly under the Electricity Act. Therefore according to us, the word generate with its own statutory meaning can't be loosely understood to be same, as sale or consumption. Since each word connotes a specific activity and the context is not unlike the one in the speech of Lord Simmonds in *Russell (Inspector of Taxes) v. Scott* reported in (1948) 2 ALL ER 1, p.4(HL), where the learned Judge observed that :

"Indeed if a collection of items is heterogeneous, it almost seems a conflict in words to say that they belong to the same genus".

16. The generation for captive consumption is recognised distinctly under the statute and it is clear from the definition sections of the Electricity Act that, "generation" relates to sale of the generated electricity to a licensee or consumer. Therefore the legal authority to impose duty for the taxable activity relates to Entry 84 of the Union List, which permits levy of tax on manufacturing or production activities and the law making power is entrusted to the parliament.

On the other hand, the State is competent to levy tax on consumption or sale of electricity under Entry 53 of List-II but the States are not empowered to levy tax on generation of electricity.

17.1 The Supreme Court in *M.P. Cement Manufacturers' Association v. State of M.P.* reported in (2004)2 SCC 249 was examining the above entries in the Seventh Schedule to the Constitution, in the follow way:-

".....

9. The two competing entries in the Seventh Schedule to the Constitution are Entry 84 of List-I and Entry 53 of List-II. They respectively read:

"List-I

84. Duties of excise on tobacco and other goods manufactured or produced in India except ?

(a) alcoholic liquors for human consumption.

(b) 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 this entry.

List-II

53. Taxes on the consumption or sale of electricity"

17.2 Noticing that electricity is goods [See: *Commissioner of Sales Tax v. Madhya Pradesh Electricity Board* reported in (1969)1 SCC 200 at page-204], the Court observed that levy of excise duty on production of electricity is covered within the phrase "other goods manufactured" in Entry 84 of List-I and this is within the exclusive jurisdiction of Parliament. Consequently it was declared that the State has competence to levy tax only on sale and consumption of electricity. [See: *Hoechst Pharmaceuticals Ltd. v. State of Bihar* reported in (1983) 4 SCC 45]. Proceeding on this basis, the Apex Court posed the question whether the state legislature is competent to levy cess on captive power generation, through amendment of the *Madhya Pradesh Upkar Adhiniyam, 1981*. After due application, the Apex Court pronounced that the levy on generation of electricity is not within the legislative competence of the State.

18. The respondents have also relied upon *State of A.P. v. National Thermal Power Corporation Ltd.* reported in (2002) 5 SCC 203. In this constitutional bench decision, the Court was considering the duty levied by the State of Andhra Pradesh from the NTPC, on the sale of electrical energy generated from the power plant at Andhra Pradesh, which was sold to the electricity boards of Karnataka and other States. The Court first noted that electricity is goods, and then it undertook the exercise of interpretation of Entry 53 of List-II of Seventh Schedule. It was then observed that electricity unlike other goods cannot be stored but can be transmitted, transferred and delivered. Noting this distinction,

the Apex Court found that the generation of electricity coincides almost instantaneously with its consumption. Referring to this peculiar characteristic of electricity, Mr. D. Saikia, the learned Addl. Advocate General had argued that since consumption of electricity practically coincides with generation, the taxable event should be understood to be on consumption and in that sense, the State's competency can be traced to Entry 53 of List-II.

19. But above argument in our understanding is unacceptable as the word generation used in the charging Section 3(1)(c) of the Duty Act, cannot be construed to be superfluous and has to be given some logical meaning. The Section 2(23) of the Electricity Act, defines electricity as goods capable of being generated, transmitted, supplied and traded and hence it would be illogical to assume that the legislature had intended these distinct expressions, to be interchangeable with each other. Moreover the word generate is defined under Section 2(29) to mean, production of electricity for the purpose of supply and when we refer to the meaning of supply in Section 2(70), the generation cannot be understood as captive generation. Logically it can only relate to generation for sale to a licensee or consumer. Therefore, the taxable event "generate" in the charging Section 3(1)(c), cannot in our perception be understood to be the same, as consumption and the arguments made to the contrary is rejected.

20. Let us now examine whether a different conclusion can be drawn on State's legislative competence, from *Southern Petrochemical Industries Co. Ltd. v. Electricity Inspector & ETIO* reported in (2007) 5 SCC 447, which was relied upon by the learned Addl. Advocate General. In this case the validity of the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 (hereinafter referred to as the "Tamil Nadu Act"), was the enactment under scrutiny. While examining the constitutional scheme relating to electricity and tax on electricity, the Apex Court observed that, Entry 53 of List-II and Entry 38 of List-III, operate in different fields. Moreover Entry 38 is a non-taxation entry dealing with general aspects of electricity excluding taxation. Explaining the expression "consumption" and "sale" of electricity appearing in Entry 53 of List-II, the Apex Court observed that supply does not mean sale. A fortiori it also does not mean consumption. Thus it is clear enough from the ratio of this case that the taxable event i.e. generation cannot, ipso facto be categorized in the same species of sale and consumption of electricity. Therefore, in our understanding, the decision in *Southern Petrochemical Industries Co. Ltd.* (supra) does not support the case projected by the respondents. Moreover, as is well-known, a decision is an authority for what it decides and not what can logically be deduced therefrom. Since the point relating to the Assam enactment was never under consideration of the Supreme Court in the Tamil Nadu case cited by the respondents, the said decision cannot be an authority in the present cases.

21. In *State of Mysore v. West Coast Paper Mills* reported in (1975) 3 SCC 448, the Court was considering the validity of tax on consumption or sale of electricity under the Mysore Electricity (Taxation Consumption) Act, 1959. The respondent

company generates electricity for itself and consumes it for manufacture of paper and other products. During this process, there is loss of energy such as transmission loss, transformer loss and loss in the re-generation of electrical energy. This ratio convinces us further that generation cannot be equated with consumption on account of loss of electricity after production before it is consumed.

22. The respondents have strongly relied on *Jiyajeerao Cotton Mills Ltd. v. State of Madhya Pradesh* reported in AIR 1963 SC 414 to contend that the State is competent to levy tax on generation of electricity. But interestingly, the Apex Court noted the definition of "consumer" and "producer" in the definition section of the Central Provinces and Berar Electricity Duty Act, 1949. It was then found that the levy of duty upon consumption of electricity energy cannot be regarded as duty of excise, falling within Entry 84 of List-I. When the taxable event in that case was not production or generation but is consumption, the Supreme Court opined that generation, is not covered within consumption. Thus this ratio may be an authority to declare on competency of the State to levy tax on consumption of electricity but it does not help the respondents here, when duty is levied on generation of electricity.

23. Those licenced to produce power for supply to others and the petitioners who are compelled to produce electricity for self-consumption on account of failure of power supply, stand on different footings and can't be treated alike. The learned Addl. Advocate General has relied on *Krishna Das v. Town Area Committee* reported in (1990) 3 SCC 645 to contend that the taxing policy of a State can be discriminatory in the matter of granting exemption and such an exercise will not be considered violative of Article 14. But what we find from the cited case is that merely because taxes are levied on certain service and articles and not on others, this can't ipso facto be discriminatory. But here we are concerned with electricity duty being levied on two unequal entities and therefore the ratio of *Krishna Das* (Supra) doesn't protect the charge of unequals being treated as equals. When the petitioners are also subjected to electricity duty like power companies, although one produces power for commercial supply and the other for self-consumption as back up, the discrimination in our perception is clearly discernible as two distinct entities are treated alike in the present matter.

24. The next point to be considered is whether the Duty Act having received the Presidential assent on 23.12.1964 is protected in its application within Assam, under Article 254(2) of the Constitution. The question may arise when there is inconsistency in the Parliamentary enactment and laws made by the State legislature on matters enumerated in the concurrent list. In this context it was held in *Yogendra Kumar Jaiswal v. State of Bihar* reported in (2016) 3 SCC 183 that in order to examine the inconsistency under Article 254, the source of enactment of the Central Government and the State Government, should be from the concurrent list and in case of repugnancy, the State law will fail on account of Article 246(1). However, the protection envisaged under Article 254(2) through

presidential assent will not operate here since the Duty Act is enacted by the State under Entry 53 of List-II and the Electricity Act is enacted by the Parliament to deal comprehensively with electricity, under Entry 38 of List-III.

25. The theory of repugnancy was examined in *Animal Welfare Board of India v. A. Nagaraja and others* reported in (2014) 7 SCC 547 in certain way and the following extract is relevant :-

".....

Repugnancy

75. We may now examine whether the provisions of the TNRJ Act, which is a State Act, is repugnant to the PCA Act, which is a Central Act, since, both the Acts fall under the Entry 17 in the Concurrent List. Repugnancy between the parliamentary legislation and State legislation arises in two ways :

(i) Where the legislations, though enacted with respect to the matters in their allotted sphere, overlap and conflict, and

(ii) Where two legislations are with respect to the same matters in the Concurrent List and there is a conflict.

In both the situations, the parliamentary legislation will predominate in the first by virtue of the non obstante clause in Article 246(1), and in the second by reason of Article 254(1) of the Constitution. The law on this point has been elaborately discussed by this Court in *Vijay Kumar Sharma v. State of Karnataka* reported in (1990) 2 SCC 562.

....."

But strictly speaking, we are not confronted with the issue of repugnancy in this case as we are required to examine the competency of the State to enact the Duty Act, with reference to the Entry 53 of the List-II.

26. The decision in *Swaroop Vegetables Products Industries v. State of U.P.* reported in (1983) 4 SCC 24 cited by the State counsel also require scrutiny. This judgment was rendered prior to the enactment of the Electricity Act, 2003 and hence the ratio of this case can't apply in the present case where, we are dealing with inconsistency in enactment made by the Parliament and by the State legislature. We must also be conscious that the *M.P. Cement Manufacturers' Association* (supra) decision was rendered after the Electricity Act was enacted and here the Apex Court categorically declared that State is incompetent to charge cess on generation of electricity. Taking support from the later verdict, we declare that the state is incompetent to levy duty on generation which is the taxable event, under Section 3(1)(c) of the Duty Act.

27. In the definition section of the Electricity Act, it is clearly stated that electricity will mean generation, transmission, supply and trade. These are distinct facets and it will be illogical to equate consumption with generation. It is

already settled in State of A.P. v. National Thermal Power Corporation Ltd. reported in (2002) 5 SCC 203 that electricity is goods and thus tax on production of electricity, is directly related to Entry 84 of List-I. Therefore in our opinion, the power to levy tax on generation of electricity for captive consumption, as mentioned in Section 3(1)(c), cannot be relatable to Entry 53 of List-II. The State is thus empowered to levy tax on sale and consumption under Entry 53, but not on generation.

28. When we examine the purport of Section 3(1)(c), it is clear to us that the taxable event in the Duty Act is generation and not use or consumption. Hence the submission made to the contrary by the State counsel on this aspect, do not appeal to us. The word used by the legislature is generate and the charging section can't be construed by excluding this key word. Therefore through an interpretive exercise without accounting for the word generate, the taxable event must not be equated to consumption, as has been suggested by the respondents.

29. It is also significant that Section 6 of the Duty Act provided that special orders be passed for maintenance of records of self-consumption. But until the substitution of Section 6 w.e.f. 07.09.2010, no such special order was issued for maintenance of records by the petitioners. Therefore to charge any electricity duty without the special order under the originally enacted Section 6, would pose multiple challenge. of course, the Assam Electricity Duty Rules, 1964 also provides for mechanism for collection and deposit of electricity duty, keeping accounts, submissions of returns and penalty for the violator. Here it can be noticed that, we are concerned with 3 litigants, who have deposited the duty and the 4th one i.e. the petitioner in the W.P. (C) No. 710/2010, who are protected by the Court's interim order. But the efficacy of the collection procedure will be relevant only when, the levy is held to be competent and since we pronounce otherwise, we do not propose to decide whether the recovery mechanism is adequate or not.

30. In the circumstances, we uphold the plea of the petitioners and declare that the State is not legally competent to levy duty from the cellular phone companies on self-produced and self-consumed electricity. In our opinion, the taxable event is generate and that can't be read as consumption and hence Entry 53 of the State List of the Seventh Schedule don't support the State action. Consequently Section 3(1)(c) of the Assam Electricity Duty Act, 1964 is declared ultra vires the Constitution as being outside the legislative competence of the State.

31. In terms of our above judgment, the writ petitions stand allowed without any order as to cost.