

(1985) 02 PAT CK 0018

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 1570 of 1979

Tata Yodogawa Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-02-1985

Acts Referred:

Central Excises and Salt Act, 1944 — Section 4
Constitution of India, 1950 — Article 366(12)
Electricity (Supply) Act, 1948 — Section 46, 49
Finance Act, 1978 — Section 36
Provisional Collection of Taxes Act, 1931 — Section 3

Citation : (1986) 7 ECC 118 : (1986) 25 ELT 644 : (1985) PLJR 673

Hon'ble Judges : Lalit Mohan Sharma, J

Bench : Single Bench

Advocate : K.D. Chatterjee and N.G. Ganguli, for the Appellant; Aftab Alam, Additional Standing Counsel, Central Govt. and N.A. Shamsi and K.P. Verma, General and P.K. Verma, for the Respondent

Final Decision : Dismissed

Judgement

Lalit Mohan Sharma, J.—The main question in this case is whether generation of electric energy can be subjected to payment of excise duty. Electricity has been included in the tariff item 11E of the Central Excises and Salt Act, 1944 (hereinafter referred to as "the Excise Act") by the Finance Act 19 of 1978. The petitioner has challenged the amendment as ultra vires and has prayed for quashing of the imposition of the additional burden placed on the consumers by the notification, Annexure I, issued by the Bihar State Electricity Board, respondent No. 2.

2. The petitioner is a public limited company running a small factory engaged in the production of steel ingots from steel scraps with the help of electric arc furnace. The energy is supplied by the respondent-Electricity Board. Prior to the passing of the Finance Act, 1978, no excise duty was payable for electricity. By Section 36 of the Finance Act, the Excise Act was amended by inclusion of tariff

item 11E, which reads as follows :

"11E. Electricity 2 paise per kilo watt hour."

Pursuant to the amendment, the respondent-Electricity Board issued a notification dated 13th May, 1978 as contained in the impugned Annexure I stating about imposition of the excise duty and levying a surcharge at the rate of 3 paise per unit on electricity consumption by all categories of services except agricultural services with effect from 1st March, 1978.

3. Mr. K.D. Chatterjee, for the petitioner, pressed three grounds in support of the writ petition, namely,

(i) the imposition of excise duty on electricity is illegal and without jurisdiction ;

(ii) the Electricity Board is not authorised to make any demand with retrospective effect ; and

(iii) the Board has no power to realise the surcharge at the rate of 3 paise per unit when the rate of excise duty has been fixed at 2 paise per unit only.

4. It has been strenuously contended that excise duty can be levied only on such goods which are "manufactured" and no duty can be imposed on such articles in respect to which process of "manufacture" is not applicable. It is asserted that electricity is not "manufactured". The term "manufacture" implies conversion of one commodity into another and is generally referable where raw materials are converted into finished goods. Mr. Chatterjee therefore argued that although coal is used for generation of electricity, it is not a transformation of coal into electric energy. Referring to the 84th entry in List I of Schedule 7 to the Constitution of India, using the word "goods" and Article 366(12) defining "goods" as including all materials, commodities and articles, Mr. Chatterjee argued that the necessity of inserting a separate entry No. 53 in List II of the Seventh Schedule indicates that "electricity" is not included in the expression "goods", for, otherwise entry No. 54 by itself would have served the purpose. Reliance was placed on the observations in paragraphs 16 to 18 of the judgment in Union of India (UOI) Vs. Delhi Cloth and General Mills, . Mr. Aftab Alam, Standing Counsel, Central Government, representing the Union of India and Mr. Advocate General, the learned counsel for the Electricity Board, defended the validity of the impugned tariff item and Annexure I.

5. The entry 84 in List I of Schedule 7 of the Constitution uses not only the word "manufacture" but also "produce". The expression "produce" is of a very wide connotation and, to my mind, it is not possible to suggest that the generation of electric energy is not included in the term "production". So far as the expression "goods" is concerned, there is again no reason to give it a narrow meaning. The Article 366(12) does not attempt to define the word exhaustively - the definition is inclusive in nature. It is well established that the language used in the entries in the Schedule of the Constitution should be interpreted in a broad way so as to give widest amplitude of power to the legislature to legislate and not in a narrow

or pedantic sense. The argument of Mr. Chatterjee that only such things can be considered to be "goods" which can be felt by senses, does not help him, for, this category is not confined to such articles which can be seen or heard or smelt. Electricity is perfectly capable of being felt and sometimes in a big way to the great discomfort of a person. A similar argument was addressed in the Commissioner of Sales Tax, Madhya Pradesh, Indore Vs. Madhya Pradesh Electricity Board, Jabalpur, in which the interpretation of Madhya Pradesh General Sales Tax Act was in dispute and the Supreme Court observed that 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. I do not mean to suggest that the decision of the Supreme Court in the said case interpreting "goods" as covering electricity concludes the question in the present case as the same was given in relation to another Act but the observations made therein are certainly relevant for testing the general argument addressed before me. The argument of Mr. Chatterjee based on entries 53 and 54 of the second List mentioned above was also pressed before the Madhya Pradesh High Court and was accepted but the Supreme Court rejected it in the following terms (see para 9 of the judgment) :

"The reasoning which prevailed with the High Court was that a well defined distinction existed between the sale or purchase of goods and consumption or sale of electricity, otherwise there was no necessity of having entry No. 53, but under entry 53 tax can be levied not only on sale of electricity but also on its consumption which could not probably have been done under entry 54. It is difficult to derive much assistance from the aforesaid entries. What has essentially to be seen is whether electric energy is "goods" within the meaning of the relevant provisions of the two Acts."

6. I do not find any reason to give the expression "goods" a limited and restricted meaning, as suggested on behalf of the petitioner and I hold that it covers electric energy for the purpose of excise law.

7. It was next urged that since excise duty is related to production of goods, the additional burden which is under challenge being in the nature of a tax on consumption, that is, sale of electricity is not covered by the entry 84 and is, therefore, ultravires of the powers of the Union Government. Reliance was placed on tariff item 11E fixing the rate by reference to kilowatt hour. Mr. Chatterjee contended that this measure cannot be applied to production. The parties filed further affidavits during the course of hearing of the case on this aspect. The Executive Officer of the petitioner-company, who is a graduate in electrical engineering, pledged his oath in support of the argument. He stated that electrical energy is measured in terms of kilowatt hours and this is the unit represented by consumption of thousand watts during the period of one hour. He further said that the unit of kilowatt can only be reckoned with reference to use or consumption of electricity and unless electricity is used or consumed for one hour, a unit of kilowatt hour cannot be reckoned.

8. The learned Standing Counsel, Central Government, challenged the proposition by relying on statements extracted from the books.

(i) The Electrical Engineers Reference Book

(ii) Electrical Technology by H. Cotton

(iii) Standard Hand Book for Electrical Engineers

as contained in Annexures A, B and C respectively to the supplementary counter-affidavit of the respondent No. 1, A counter-affidavit on behalf of the Electricity Board was also filed in which it was asserted that the kilowatt hour is unit of measurement of technical (sic) energy whether it is generated or consumed. The three affidavits have attempted to discuss the question from a scientific point of view. I do not consider it necessary to go into the highly technical aspect of the matter, as in my view, it is not possible to hold in favour of the petitioner that merely because kilowatt hour has been used as unit of measure in the disputed item the tax must be assumed to be not included in the excise duty. Assuming what has been stated on behalf of the petitioner to be correct in this regard still it is possible to measure the production by reference to the consumption

9. On the question whether surcharge is invalid on the ground of its retrospective nature, it was said that the assent of the President to the introduction of tariff item 11E by amendment by Section 36 of the Finance Act, 1978 was given on 12th May, 1978 and since this section has not made the provision retrospective in nature, the additional duty was not payable before this date and as the demand has been made with effect from the 1st March, 1978, the same must be partially struck down. The argument overlooks the provisions of Section 3 of the Provisional Collection of Taxes Act (Act XVI of 1931) which reads as follows:-

"3. Power to make declarations under this Act. - Where a bill to be introduced in Parliament on behalf of Government provides for the imposition or increase of a duty of customs or excise, the Central Government may cause to be inserted in the bill a declaration that it is expedient in the public interest that any provision of the Bill relating to such imposition or increase shall have immediate effect under the Act."

The Section 4 of the Act further directs that "a declared provision shall have the force of law immediately on the expiry of the day on which the Bill containing it is introduced." In the last counter-affidavit of the respondent No. 2, it has been stated that the necessary notification containing the required declaration had been made at the appropriate time so as to bring the new provisions in force with effect from 1st March, 1978. In view of this counter-affidavit, Mr. Chatterjee did not pursue the point.

10. Lastly, it was urged that since the additional burden of the Electricity Board was raised by only 2 paise per unit, it cannot be permitted to raise the charges by 3 paise per unit. The Electricity Board is authorised to realise the electric charges from the consumers at the rates which are included in the tariff by virtue

of the provisions of Sections 46 and 49 of the Electricity (Supply) Act, 1948. As has been stated in the counter-affidavit of the Electricity Board, the relevant tariff has been modified by raising the rate by 3 paise per unit. The reason for enhancement of the charges by the Board is not solely the inclusion of excise tariff item 11E. The Electricity Board is not a mere agent of the Central Government to collect excise duty on its behalf. It has changed its tariff in its authority under the Electricity (Supply) Act, 1948. The justification for raising the rate by 3 paise has been successfully explained in the counter affidavit. It has been stated that the increase in the excise duty payable on coal and oil which are basic fuel for power generation has caused a rise in the costs of electricity generation. It is also said that certain amount of electricity is lost in transmission, transformation and distribution system before it reaches the consumer and the Board has to pay excise duty on generation which includes those units which are lost in transit. As a matter of policy, the electricity consumed for agricultural purposes has been exempted and the burden in this regard also has to be borne by other consumers. For all these reasons, the Board has to impose further surcharge of 3 paise per unit. The stand taken by the respondent in this regard appears to be well founded. The last point pressed on behalf of the petitioner must also, therefore, be rejected.

11. Accordingly, this writ application is dismissed but without costs.