

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

PRINCIPAL BENCH

SERVICE TAX APPEAL NO. 50826 OF 2020

(Arising out of Order-in-Appeal No. BHO-EXCUS-001-APP-280-19-20 dated 13.01.2020 passed by the Commissioner (Appeals), CGST & Central Excise, Bhopal, M.P.)

**The Commissioner, CGST,
Central Excise & Service Tax,
Bhopal (M.P.)**

...Appellant

VERSUS

**M/s. Madhya Pradesh Poorva
Kshetra Vidyut Vitran Co. Ltd.
(M.P.P.L.V.V.C.L.),
Narsingpur Road, Makronia,
SAGAR (M.P.) - 470004**

...Respondent

APPEARANCE:

Shri Radhe Tallo, Authorized Representative for the Department
Shri Rajeev Aggarwal, Advocate for the Respondent

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

Date of Hearing/ Decision: 13.07.2022

FINAL ORDER NO. 50611/2022

JUSTICE DILIP GUPTA:

This appeal has been filed by the Commissioner, CGST, Central Excise and Service Tax, Bhopal (M.P.)¹ to assail the order dated January 13, 2020 passed by the Commissioner (Appeals) by which the order dated August 14, 2019 passed by the Additional Commissioner confirming the demand of service tax has been set aside and the appeal has been allowed.

2. The period involved in this appeal is from April 2017 to June 2017 and the issue relates to payment of service tax on the amount

1. the Commissioner

collected by the respondent towards late payment surcharge, meter rent charge and supervision charges.

3. It transpires from the record that for the earlier period from July 2012 to March 2017 a show cause notice dated April 24, 2018 had also been issued to the respondent regarding payment of service tax on the amount collected by the respondent towards late payment surcharge, meter rent charge and supervision charges. Though the Additional Commissioner had confirmed the demand of service tax, but the Tribunal in **Madhya Pradesh Poorva Kshetra Vidyut Vitran Co. Ltd. vs. Principal Commissioner, CGST and Central Excise, Bhopal**² allowed the appeal and set aside the order.

4. The show cause notice leading to the present proceedings was issued for the subsequent period from April 2017 to June 2017 on April 24, 2018.

5. The respondent 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.

6. The officers of the Directorate General of Central Excise Intelligence collected information that the respondent charged late payment surcharge in the electricity consumption bills issued to the customers and recovered the same in case the customers made

2. Service Tax Appeal No. 51649 of 2019 decided on 14.01.2021
3. the Finance Act

payment after the due date mentioned in the bill. Further investigation revealed that the respondent 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 that the respondent 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 respondent was collecting supervision charges from the customers on which service tax was chargeable, but the appellant did not pay service tax. Accordingly, a show cause notice dated March 27, 2019 was issued to the respondent to show cause why service tax on the aforesaid amount collected by the respondent should not be levied with interest and penalty.

7. The respondent filed a reply to the aforesaid show cause notice mentioning therein that neither the respondent 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.

8. The Additional Commissioner, however, confirmed the demand of service tax with penalty and interest by order dated August 14, 2018.

9. The respondent filed an appeal which was allowed by the Commissioner (Appeals) by order dated January 13, 2020. It is this order that has been assailed by the Department in this appeal.

10. 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'

11. As noticed above, the dispute for earlier period was decided by the Tribunal by order dated 14.01.2021 in favour of the respondent after placing reliance upon the decision of the Gujarat High Court in **Torrent Power Limited vs. Union of India**⁴.

12. These three charges have been collected by the appellant in terms of the 2009 Regulations. The Additional 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 respondent "for tolerating an act of electricity consumers by receiving the payments after the prescribed due date for payment of electricity bills. The Additional 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 respondent for transfer of

4. **Special Civil Application No. 5443 of 2018 decided on 19.12.2018**

goods by way of hiring. The Additional Commissioner also confirmed the 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. The Commissioner (Appeals) set aside the findings recorded by the Additional Commissioner and allowed the appeal.

13. According to the respondent 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.

14. 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.

15. 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.

16. 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".

17. 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)

18. 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. This as what was held by the Tribunal in **Madhya Pradesh Poorva Kshetra Vidyut Vitran**.

19. There is, therefore, no error in order passed by the Commissioner (Appeals) holding that service tax would not be leviable on late payment surcharge, meter rent charge and supervision charges. The appeal is, accordingly, dismissed.

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)