BEFORE THE HON'BLECENTRALELECTRICITY REGULATORY COMMISSION

PETITION NO. _________ OF 2022

IN THE MATTER OF: Petition under section 79(1)(f) of the Electricity Act 2003 for (i) approval of "Change in Law" and (ii) seeking an appropriate mechanism for grant of an appropriate adjustment/ compensation to offset financial/ commercial impact of change in law events on account of imposition of water tax as a result of operation of the "Uttarakhand Water Tax on Electricity Generation Act, 2012" (AdhiniyamSankhya 09 of 2013)in terms Power Purchase Agreements entered by THDC India Limited in relation to Tehri Hydro Electric Power Project (1000 MW) and Koteshwar HEP (400 MW) with different beneficiaries read with Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 and Order dated 12.07.2022 passed in Special Appeal No. 149 of 2021 by Hon'ble High Court of Uttarakhand.

AND

IN THE MATTER OF:

THDC India Limited ...Petitioner

Versus

Punjab State Power Corporation Limited and Ors. ...Respondents

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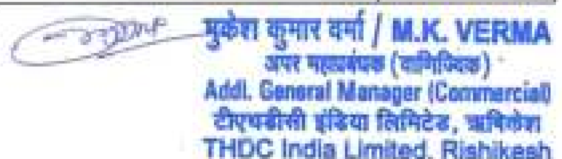

	Copy of the Order dated 12.02.2021 passed by Hon'ble High Court of Uttarakhand in the Writ Petition No. 187/2016	
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THDC India Limited

Mukesh Kumar Verma
Addl. General Manager (Commercial)
THDCIL-Rishikesh

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

Place: Rishikesh
Date: 12:09:2022

Annexure-10

WPMS No. 187 of 2016

U. C. Dhyani, J.

Mr. Shobhit Saharia, Advocate present for the petitioner.

Mr. R.C. Arya, Standing Counsel present for the State.

Mr. Rajesh Sharma, Advocate for the Union of India.

It is the submission of learned counsel for the petitioner that if, finally, the Court decides that the petitioner is liable to pay water tax, then the petitioner will certainly deposit the same in favour of the State Government.

Interim relief application is disposed of by directing that the respondents not to take coercive measure for recovery of the water tax demand (annexure no. 3 & 4.)

As prayed, six weeks' time is granted to the respondents to file counter affidavit.

(U. C. Dhyani, J.)
18.05.2016

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Annexure - 11

Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition No. 631 of 2017 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 187 of 2016 (M/S)

THDC India Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 272 of 2016 (M/S)

National Hydro Power Corporation .... Petitioner

versus

State of Uttarakhand & others .... Respondents

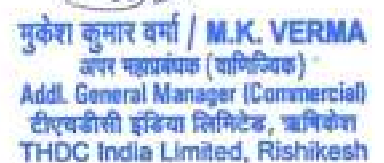
with

Writ Petition No. 1500 of 2016 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents



with

Writ Petition No. 2074 of 2016 (M/S)

M/s Swasti Power Pvt. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 3084 of 2016 (M/S)

M/s Bhilangana Hydro Power Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 123 of 2017 (M/S)

M/s Jaiprakash Power Ventures Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 641 of 2018 (M/S)

M/s Swasti Power Pvt. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 2396 of 2019 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 3603 of 2019 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 279 of 2020 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

Mr. V.K. Kohli, Mr. Mohan Parasaran, Mr. Gourab Banerji, Mr. Arvind Vashistha, Mr. D.S. Patni, Senior Advocates assisted by Mr. Divya Kant Lahoti, Mr. Alok Mehra, Mr. Shobhit Saharia, Advocates for the petitioner(s).
Mr. Dinesh Dwivedi, Senior Advocate assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates with Ms. Anjali Bharwava, Mr. P.C. Bisht, Addl. Chief Standing Counsel and Mr. Narain Dutt, Brief Holder for the respondent State.
Mr. Aditya Singh, Advocate for petitioner M/s Bhilangana Hydro Power Ltd.
Mr. Gopal K. Verma, Addl. C.S.C. for the State of Uttar Pradesh.
Mr. Rajesh Sharma and Mr. Sanjay Bhatt, Standing Counsel for the Union of India.
Mr. U.K. Uniyal, Senior Advocate assisted by Mr. Rajeev Srivastava & Mr. Jitendra Chaudhary, Advocates for respondent UPPCL.

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THDC India Limited, Rishikesh

Chronological list of cases cited:

1. (2017) 12 SCC 1, Jindal Stainless Limited & another Vs State of Haryana and others
2. (2010) 6 SCC 449, Goa Glass Fiber Ltd. Vs. State of Goa & another.
3. (2010) 12 SCC 1, Bhanumati & others Vs. State of U.P.
4. (2005) 8 SCC 334, State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat
5. (2004) 1 SCC 712, Dharam Dutt Vs. Union of India.
6. (2004) 2 SCC 249, M.P. Cement Manufacturers' Association Vs. State of Madhya Pradesh & others
7. (2004) 6 SCC 465, State of Punjab vs. Nestle India Ltd. & another
8. (2004) 10 SCC 201, State of West Bengal Vs. Kesoram Industries Ltd. & others.
9. (2001) 3 SCC 654, Municipal Council Kota Vs. Delhi Cloth and General Mills Co. Ltd.
10. (1997) 2 SCC 42, Ichchapur Industrial Cooperative Society Ltd. Vs. Competent Authority, Oil and Natural Gas Commission
11. (1997) 2 SCC 453, State of Bihar Vs. Bihar Distillery Ltd.
12. (1996) 3 SCC 709, State of Andhra Pradesh & others Vs. McDowell & Co. and others.
13. (1995) 1 SCC 274, Kasinka Trading & another Vs. Union of India & another.
14. 1993 Supp. (1) SCC 96 (II), In the matter of: Cauvery Water Dispute Tribunal
15. (1992) 2 SCC 411, Amrit Banaspati Co. Ltd. & another Vs. State of Punjab & another.
16. (1990) 1 SCC 12, India Cements Ltd. & others Vs. State of Tamil Nadu
17. (1990) 1 SCC 109, Synthetics & Chemicals Ltd. Vs State of U.P.
18. (1983) 4 SCC 45, Hoechst Pharmaceuticals Ltd. & others Vs. State of Bihar.
19. (1969) 2 SCC 55, Assistant Commissioner of Urban Land Tax Vs. Buckingham & Carnatic Co. Ltd.
20. AIR 1967 SC 40, Firm Bansidhar Presukhdas Vs State of Rajasthan
21. 1965 2 Andhra Law Times 297, N.R. Reddy Vs. State of Andhra Pradesh.
22. AIR 1953 SC 375, K.C. Gajapati Narayan Deo & others Vs. State of Orissa.

[Per: Hon'ble Lok Pal Singh, J.]

Since identical issue of fact and law is involved in the aforementioned writ petitions, therefore, they are being decided by this common judgment for the sake of brevity and convenience.

2) Writ Petition no. 1500 (M/S) of 2016 shall be the leading case.

3) Petitioners in the present batch of petitions are power generating companies, engaged in production of electricity by utilizing the river water. The petitioner, Alaknanda Hydro Power Company Ltd. (AHPCL) seeks to assail the constitutional validity and vires of the Uttarakhand Water Tax on Electricity Generation Act, 2012 (hereinafter referred to as 'the Act'), *inter alia*, on the following grounds:

(i) The enactment, promulgation and notification of the said Act being in violation of the provisions of Articles 200, 246, 248, 256, 285, 288(2) and 300A of the Constitution of India.

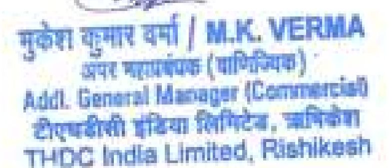
(ii) The enactment, promulgation and notification of the said Act being in violation of the provision of Entry 97 of List I of the Seventh Schedule of the Constitution of India.

(iii) The enactment, promulgation and notification of the said Act being in violation of the provisions of Entry 17 of List II of the Seventh Schedule of the Constitution of India.

(iv) The consideration of and the assent given for the enactment and the notification of the said Act being in violation of Article 200 and 288(2) of the Constitution of India having been accorded the consent by the Governor of the State of Uttarakhand, without obtaining the consent of the President of India.

(v) The fixation of the rates of water tax in terms of the provisions of Chapter 5 of the said Act by means of a notification issued by respondent no. 1 to 5 being in violation of Article 288(2) of the Constitution of India as that the said Act was promulgated without obtaining consent from the President of India, in violation of mandatory provisions under the Article 288(2) of the Constitution of India, wherein it is obligatory on part of the State Legislature, in case of fixation of any 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. The rates of Water Tax having not received the previous consent of the President.

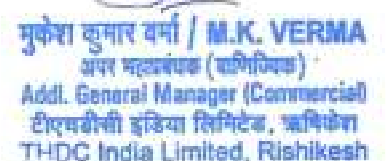
(vi) The enactment, promulgation and notification of the said Act imposing Water Tax violating the



fundamental rights of the petitioner of carry on its trade and business under Article 19(1)(g) of the Constitution of India.

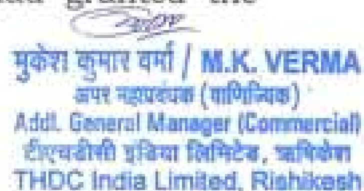
(vii) The enactment, promulgation and notification of the said Act, being arbitrary, manifesting arbitrariness in State action and being exercise of the colourable powers of the respondent State of Uttarakhand, thus violating the fundamental rights of the petitioner under Articles 14 and 19(1)(g) of the Constitution of India.

4) The genesis of the present controversy from where it arises is that in the year 1981, a Project named Srinagar Hydro Electric Project, having capacity of 330 MW was conceptualized by the then Govt. of U.P. The project development was entrusted to the Irrigation department of erstwhile Government of Uttar Pradesh and was planned to be developed with the World Bank funds. It is stated that due to inordinate delay caused by the Govt. of U.P. in developing the project, the World Bank withdrew the funding and due to paucity of funds, the Govt. of U.P. decided to entrust the Project to private parties for development. TATA Power Corporation Ltd. (TATA/TPCL) took over the Project development works, which could not succeed in making progress with the Project development and ultimately, in the year 2005, GVK Group of Hyderabad took over and entrusted with the Project development work. Prior to that, when Duncans North Hydro Power Co. Ltd. (Duncans) [Now known as Alaknanda Hydro Power Company Ltd.] was entrusted the Project, an MoU and an Implementation Agreement (IA) dated 27.08.1998 was entered into between the parties. Earlier, the



erstwhile State of U.P. and the Duncans entered into a Water Usage Agreement dated 28.08.1998 in order to facilitate Duncans to use the water from the Alaknanda River for generating power from the Project. In the meantime, in the year 2000, the State of Uttarakhand came into existence. After bifurcation of erstwhile State of U.P., the benefits to be emanated from the Project were conceptualized to be shared between the State of U.P., State of Uttarakhand and the Alaknanda Hydro Power Company Limited (AHPCL); and to give effect to the understanding between the said three parties, existing IA was amended and restated as Restated Implementation Agreement (RIA). The petitioner AHPCL, Govt. of U.P. and Govt. of Uttarakhand amended the IA and had entered into the restated Implementation Agreement on 10.02.2006 (RIA) to depict in clear terms, the rights and obligations of each party, including but not limited to the aspect of 12% power to be supplied by the petitioner to the Govt. of Uttarakhand for free of cost and as a 'Royalty' for using the Alaknanda River water by the Project which is situated in the State of Uttarakhand.

5) Clause 1.65 of the RIA categorically states that "Water use Agreement' or WUA means the document, as executed between the then Govt. of U.P. and the Company on 28th August, 1998 whereby the then Govt. of U.P. had granted the



rights to the Company to use the water from the Alaknanda River for generation of electric energy for the Project."

6) Clause 13 of the RIA defines the Water Use Rights and provides that "The Govt. of Uttarakhand hereby grants to the Company the right, free of any and all charges during the Term to utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environment clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA) which now stands substituted by the provisions of this RIA, Govt. of Uttarakhand shall not impose any taxes, duties, levies or charge of any kind of electricity generated by this Project during the term of this RIA.

7) It is contended that in view of the aforesaid, no taxes / cess / fee etc. shall be applicable on the water which is exclusively used by the petitioner company for generation of electricity. Further, Clause 17.1 of the RIA dated 10.02.2006, provides as under:

> "17.1 Company Obligations: The entire energy generated at the generation terminals of the Project

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> shall be referred to as the "Energy Output". The difference between the Energy Output and the Auxiliary consumption shall be referred to as the "Saleable Energy." The Saleable Energy shall be supplied, duly metered by the Company, at 400 KV interconnection Point at 400 KV outlet gantry at Company's switchyard. Govt. of Uttarakhand shall be entitled to 12% of the Saleable Energy from the Project free of cost. Govt. of U.P. / UPPCL and the Company agree that this 12% free of cost Saleable Energy will be supplied to the Govt. of Uttarakhand by the Company in lieu of the 12% Saleable Energy previously required to be supplied free of cost by the Company to Govt. of U.P. / UPSEB. The GoUP/UPPCL/Company shall facilitate such transfer of 12% Saleable Energy to Govt. of Uttarakhand at 400 KV interconnection points at 400 KV outlet gantry at Company's switchyard at Srinagar....".

8) It is stated that though the petitioner has commenced construction of the dam and other Project development works in the year 2005-06, it could complete the works only in the month of April 2015 and had declared commercial operations of its Unit-1 on 23.04.2015; Unit-3 on 10.05.2015 and Units-2 & 4 on 20.06.2015. Thus, until April 2015, the Project has not used any water from the Alaknanda river for generation of power. It is further stated that at the time of inception of the project or at any time prior to the enactment of the Uttarakhand Water Tax on Electricity Generation Act, 2012 (the Act) there was no imposition of any tax or cess on the water drawn by the petitioner that was used either for construction purposes or for power generation. No tax / cess / royalty was imposed on the petitioner at an earlier point in time, plausibly because of the compliance with the RIA terms which contemplates that 12% power generated from the Project would be given free of

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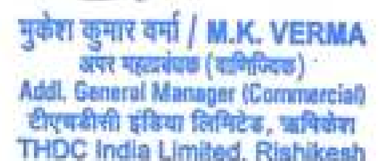
cost to the State of Uttarakhand as / towards Royalty in lieu of the use of natural resources by the petitioner, viz. the water resources. It is stated that vide impugned Notification dated 07.11.2015 (purportedly under Section 17(1) of said Act) issued by the respondent no. 3, the petitioner was informed about the promulgation of the Act and further informed that the Hydro Power Projects situated in the State of Uttarakhand of more than 5 MW capacity (like petitioner) were liable to pay tax on the water drawn for the purposes of generation of electricity for next three years at the rates as follows:

Sl. No	Available Head	Rate of Water Tax
1	Upto 30.00 M	02 Paise per cubic meter
2	31.00 M to 60.00 M	05 Paise per cubic meter
3	61.00 M to 90.00 M	07 Paise per cubic meter
4	Above 90.00 M	10 Paise per cubic meter

9) Thereafter, vide an impugned letter dated 07.12.2015 issued by the respondent no. 8 was received by the petitioner which had highlighted the necessity of petitioner's registration under the said Act and to fill the form and deposit the registration fee to complete registration process under the Act. It is alleged, that all of a sudden, petitioner received the impugned letter dated 26.04.2016 issued by respondent no. 7 demanding an amount of Rs.27,97,39,600/- (for a period Nov. 2015 to March 2016) for the alleged use of water to generate electricity under the said Act. In terms of the



provision of Section 12(2) of the Act, the hydro power stations in Uttarakhand are required to apply for registration to the Commission established under the Act within a period of six months from the date of commencement of the Act, which is 15.08.2015 and the Commission shall pass an order to register the user within a period of six months from the date of receipt of application in accordance with the provisions of the Act. The above referred Section further states that in case the user fails to apply or register within time stipulated, the Commission shall forthwith impose penalty which may be enhanced in case of prolonged default. The relevant Sections 9, 10 and 12 of the Act are extracted hereunder:

> "9. No person shall install a Scheme, requiring usage of water or in any other way use the water, unless he / she is authorized to do so by a registration certificate, issued under Section 10.
>
> 10. Any user intending to use water (non-consumptive use) for generation of electricity shall be issued a registration certificate after the execution of an agreement between the user and the Commission under the Act.
>
> 12(1) The registered user shall be liable to pay water tax for the water drawn for electricity generation as per the provisions of the Act.
>
> (2) Where any user has constructed a Hydropower scheme, for purpose of generation of electricity, prior to the commencement of the Act, such user shall, within a period of six months from the date of commencement of the Act, apply for registration under the Act and the Commission shall pass on order to register the user within a period of six months from the date of receipt of application in accordance with the provisions of the Act.
>
> (3) If the user as mentioned in sub-section (2) fails to or register within time stipulated therein, the Commission shall forthwith impose suitable penalty which may be enhanced in case of prolonged default.

10) Chapter 4 of the Act describes "Assessment of Water Drawn by User".

11) Section 14.1 of the Act provides for the procedure to assess the water drawn. The same reads as under:

> "The Commission shall install or cause to be installed flow measuring device within, the premises of Scheme or at such other place where the Commission deems fit for purposes of measuring the water drawn for electricity generation or may adopt any indirect method for assessment of water drawn by the user."

12) Section 14.2 of the Act provides as under:

> "The Commission may either install or, require a user to install a flow measuring device as per the specifications approved by the Commission at his premises or at his location or at such other place as the Commission may direct and thereafter adjust the expenditure incurred by such user on such installation towards the Water Tax payable by the user."

13) It is the case of the petitioner that the respondent neither installed any flow measuring device within the premises for measuring the water drawn nor had it adopted any alternate method in measuring the quantity of water used; and the respondent neither did prescribe any specification for adjusting the expenditure incurred by the petitioner. As such, the impugned notice(s) was issued without complying with the procedure under Section 14 of the Act. Chapter 5 of the Act deals with "Water Tax". Section 17.1 of the Act prescribes – "The user shall be liable to pay the Water Tax under the Act at such rates as the Government may by notification fix in this behalf." Further, Section

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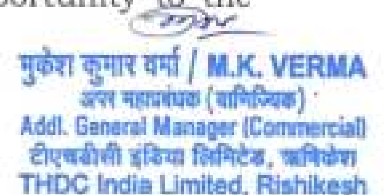
19(1) of the Act mandates that the assessment of water drawn by the user for electricity generation and computation of water tax thereof shall be carried out by the Commission. Section 19(2) provides that the user shall pay the water tax as assessed under sub-section (1).

14) It is alleged that neither any Commission was established under the Act nor has such Commission computed the tax based on the water drawn by the petitioner, as such, not only the impugned notice is bad in the eyes of law for want of compliance under Sections 14, 17 and 19 of the Act, but also non-maintainable as the amounts claimed under the notice are baseless and are made on mere surmises and presumptions.

15) According to the petitioner, the quantum of electricity generated in a Hydro Station is proportionate to the 'Head' being difference in the levels at entry and exit of water conductor system. Hence, the same volumes of water passing through Hydro Turbines will generate more electricity in a High Head Power Station as compared to Hydro Station with Low Head. Thus, levying water tax based on volume of water on per cubic meter basis on a graded scale of 'head' is in fact levy of tax on electricity generation itself. It is contended that the Notification providing for levy of water tax has been passed without due notice and opportunity to the



petitioner. Moreover, the liability which has been fastened upon the petitioner towards royalty, is not in accordance with either the express conditions of RIA or in accordance with the provisions of the Act. The RIA is a tripartite agreement between the Govt. of U.P., Govt. of Uttarakhand and the petitioner. The terms and conditions thereunder were imposed upon the AHPCL / petitioner by the Govt. of U.P. and Govt. of Uttarakhand. As per the terms of the RIA, there shall not be any Royalty, Tax, Cess or any other payment that shall be made by the petitioner. Thus, there is an express waiver provided by the Govt. of U.P. and Govt. of Uttarakhand to the petitioner under the RIA, which is a binding agreement on both of them. Any changes made to the RIA without the express consent from the petitioner shall not only amount to the breach of the terms of the RIA agreement, but also the acts of the Govt. of U.P. and Govt. of Uttarakhand amount to unilateral, arbitrary and thus untenable under the law. It is alleged that the provisions of the Act shall not be applied to the petitioner and that the petitioner shall not be made liable to pay tax or cess. On the other hand, the same RIA envisages 12% power from the Project to be provided to the State of Uttarakhand for free of cost, due to usage of water from the River situated in the State of Uttarakhand. As such, any imposition of tax, cess or royalty would tantamount to double taxation and thus, the Act becomes illegal and therefore, inapplicable to the petitioner and

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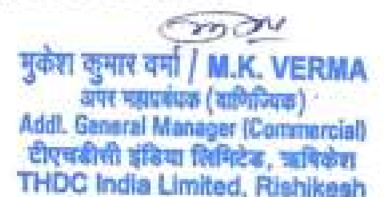
that the impugned notice is liable to be declared illegal and the same shall be quashed. It is alleged that the State of Uttarakhand being the party to the RIA should not have made applicable the provisions of the Act to the petitioner, as it cannot on one hand agreed to not impose or exempt through an agreement (RIA) any tax, cess or royalty payable by the petitioner and on the other hand, subsequently nullify the terms of RIA without caring to honour the agreement by enacting a legislation appropriating such given right and thereby demanding tax on water used for generating power, while it is continuing to enjoy 12% free power from the Project under the terms of the Power Purchase Agreement (PPA). Thus, the State of Uttarakhand is trying to get double benefit, which act of the State is arbitrary and that the impugned Act is liable to be struck down. The acts of the State of Uttarakhand are infringing the fundamental right of the petitioner. Hence, present writ petition.

16) Counter affidavit has been filed on behalf of respondent nos. 1 and 3, stating therein that the petitioner is not entitled for any relief as the State Government is competent to legislate and charge on the storage and usage of water for generation of electricity as per the provisions of the Constitution of India. It has further been stated that in order to manage its water resources effectively, the respondent Stat thought it necessary to own all its'



water resources and manage it properly so that the future water conflict can be avoided. To manage the water resources, maintain them in good conditions, to conduct studies and research, the Act in question was framed which is in consonance with the National draft Water Policy and the action plan. Citing examples of various countries where water charges from water users, particularly from hydro electric projects are being charged at present, it has been stated that in order to frame detailed State water policy, as a first step, the Uttarakhand Water Management and Regulatory Act, 2013 (Uttarakhand Act no. 24 of 2013) was brought into existence. The object of which itself suggests that the Act was made to provide for the establishment of the Uttarakhand Water Management and Regulatory Authority bill to regulate water resources within the State. It has further been stated that as Uttarakhand is blessed with abundant water resources an due to growing demand these sources need to be conserved and harnessed in the best possible manner for the benefit of the State and the Nation. Hence, "The Uttarakhand Water Tax on Electricity Generation Act, 2012", came into existence for a specific purpose of recovering usage charges on water for generating electricity from water sources as defined under the Act. It is also stated that the writ petition filed by the petitioner challenging the provisions of the aforesaid Act is absolutely on the wrong premises and grounds and is against the settled provisions of the Constitution

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of India. It is stated that as per the provisions of Entry 17 List II of the Constitution of India, water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power projects are given in List II (State List) subject to the provisions of Entry 56 of List I (Union List). Entry 56 of the List I includes regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under control of Union is declared by Parliament by law to be expedient in the public interest and such parliamentary regulation under the Constitution are confined to Navigation Shipping etc. but not storage and usage of water for generation of electricity. The only legislation enacted by parliament under Entry 56 of the List I is the River Board Act, 1956 to promote integrated and optimum development of inter-state river valleys. It is stated that the Act envisages the Board to be expert bodies in irrigations, electrical Engineering, Flood control Navigation, Water conservation. These bodies are to be advisory bodies and their function is to advise the State Government as regard to the development and regulation of inter-state rivers and river valley within their jurisdiction, but under entry 56 of List-I, the Union Government has no power to legislate on charge or tariff an usage of water for generation of electricity from the users of natural water resources. Apart from entry 56 of List-I, the union may perhaps take steps to prevent floods, construction of dams etc. under entry 24 of List-I

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which speaks of shipping and navigation of inland waterways declared by parliament to be national water ways as regards to mechanical propelled vessels. Therefore, it is evident from the aforesaid discussion that State Government is absolutely competent to legislate on charges on usage of water for generation of electricity from natural water resources situated within the territory of the State Government. In paragraph-32 of the counter affidavit it has been stated that the Hon'ble Governor of Uttarakhand has given assent to the legislation of the said Act, 2012 passed by the state legislature using his discretionary power under Article 200 & 163(2) of the Constitution of India, hence the violation of Article 246 of the Constitution does not arise as the matter legislated is not a matter which is enumerated in list I (union list) or list II (concurrent list).

17) In the rejoinder affidavit, most of the averments made in the writ petition are reiterated. It is stated that the entry 56 of List I exclusively empowers the Union of India to legislate all issues pertaining to inter-state rivers and any enroot by the State Legislature is considered to be an extra-territorial law and in transgression of power of the concerned State Legislature. It is a universally known fact that River Ganges originates from Gangotri and till submerges in Bay of Bengal it flows through not only Uttarakhand but also passes through the State of U.P., Bihar and West Bengal.

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18) Heard learned counsel for the parties and perused the entire material available on record.

19) The issues which arise for consideration of this Court are formulated as under:

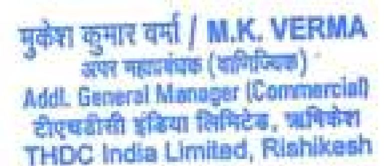
(i) Whether the State of Uttarakhand has legislative competence to levy tax, or not?

(ii) Impugned enactment and tax cannot be placed in Entry 17 of List II of the Seventh Schedule of the Constitution of India as it is a general entry and will not sustain the tax law; Entry 17 of the List II is limited by the words 'to say' and does not postulate tax law or a tax.

(iii) Entry 17 of List II is subject to Entry 56 of List I. The subject of inter state falls within the exclusive domain of the Union. River Ganga is an inter state river, therefore, it is entirely within the exclusive domain of the Union under Entry 56 of List I and hence the State cannot impose tax on inter state river water.

(iv) Since the title of the Act is "Uttarakhand Water Tax on Electricity Generation Act, 2012" (the Act) and Section 12 of the impugned Act speaks of tax on generation of electricity.

(v) Whether the impugned Act imposing water tax is hit by Article 288(2) of Constitution because of lack of consent of the President of India?



(vi) Whether the Notification 151 under Section 17(1) of the impugned Act fixing the rate of tax as per cubic meter of water used in generation of electricity is also equally invalid as mandated under Article 288(2) of the Constitution?

(vii) Whether the impugned Act is mala fide or a colourable exercise of State's legislative powers. The RIA or otherwise signed by the petitioner prior to the commencement of the Act amounts to betrayal of the Act?

(viii) Whether there is promissory estoppel against the State in view of the fact that they have agreed not to levy any charges or tax as stipulated in RIA? Had the state has power to levy tax on generation of electricity, or not?

(ix) Is the installation of the flow measuring device is absolutely necessary for measuring water flow for the purposes of taxation?

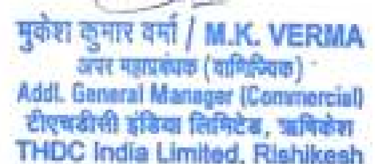
20) Before proceeding further, it would be apt to reproduce herein the definitions contained in Chapter I of the Act. The same are extracted hereunder:

"Definitions 2. In these rules, unless there is anything repugnant in the subject or context :-

(a) "Act" means the Uttarakhand Water Tax on Electricity Generation Act, 2012;

(b) "Commission" means Uttarakhand State Commission for Water Tax on Electricity Generation established under section 21 of the Act;

(c) "Electricity" means electrical energy generated by way of water drawn from any



water source flowing within the territory of the State;

(d) "Government" means Government of Uttarakhand;

(e) "Notification" means a notification published in the Gazette of the State, and the term "notify" shall be construed accordingly;

(f) "User" means any person, group of persons, local body, Government Department, company, corporation, society etc. drawing water or any other authority authorized under chapter –II of the Act to avail the facility to draw water from any source for generation of electricity;

(g) "Water" means natural resource following in any river, stream, tributary, canal, nallah or any other natural course of water or stipulated upon the surface of any land like, pond, lagoon, swamp, spring;

(h) "Water Source" means a river and its tributaries, stream, nallah, canal, spring, pond, lake, water course or any other source from which water is drawn to generate electricity'

(i) "Water Tax" means the rate levied or charged for water drawn for generation of electricity and fixed under this Act."

21) At the very outset, Mr. Gourab Banerji, Mr. V.K. Kohli, Mr. Mohan Parasaran, Mr. Arvind Vashistha, Mr. D.S. Patni, learned Senior Counsel appearing on behalf of the petitioners and Mr. Aditya Singh, learned counsel in the batch of writ petitions would submit that if the impugned Act does not fall within any of the entries in List II, then the same is ultra vires the Constitution and beyond the legislative competence of the State. They drew attention of this Court towards Entry 17 of the List II, which reads as under:

"17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water

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storage and water power subject to the provisions of Entry 56 of List I."

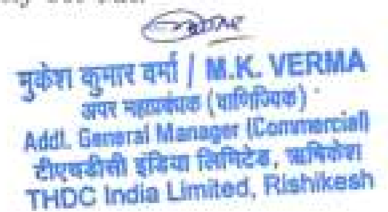
22) It is further submitted that the above entry cannot be the source of power for levying the impugned tax and does not confer any legitimacy or legislative competence to the State to levy such a tax. The said entry is a 'general entry' relating to the subject matter 'water and allied matters' and is not a 'taxing entry' and does not confer any authority to the State to levy tax on non-consumptive usage of water.

23) Reliance is placed on the judgment of Hon'ble Apex Court in **Kesoram Industries Ltd. case**[8]. Para 31, sub-para 3 of the said judgment is extracted hereunder:

> "31(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deducted from a general legislative entry as an ancillary power."

24) Further reliance has been placed on paragraph no. 74(3) of *Kesoram's* case, wherein it has been held as under:

> "74(3) 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 Article 248 clauses (1) and (2) and of Entry 97 in List I of the Constitution. Under the scheme of the entries in the lists, taxation is regarded as a distinct matter and is separately set out."



25) Paragraph nos. 75, 76 and 100 of the *Kesoram's* case are also relied upon. The same read as under:

> "75. Referring to M.P.V. Sundararamier & Co. Vs State of A.P., AIR 1958 SC 468, Sabyasachi Mukharji, J. (as His Lordship then was) speaking for six out of the seven Judges constituting the Bench in **Synthetics and Chemicals Ltd.**[17] held that under the constitutional scheme of division of powers in the Seventh Schedule, there are separate entries pertaining to taxation and other laws. A tax cannot be levied under a general entry.
>
> 76. The abovesaid principles continue to hold the field and have been followed in cases after cases.
>
> 100. Article 265 mandates - no tax shall be levied or collected except by authority of law. The scheme of the Seventh Schedule reveals an exhaustive enumeration of legislative subjects, considerably enlarged over the predecessor Government of India Act. Entry 97 in List I confers residuary powers on Parliament. Article 248 of the Constitution which speaks of residuary powers of legislation confers exclusive power on Parliament to make any law with respect to any matter not enumerated in the Concurrent List or the State List. At the same time, it provides that such residuary power shall include the power of making any law imposing a tax not mentioned in either of those lists. It is, thus, clear that if any power to tax is clearly mentioned in List II, the same would not be available to be exercised by Parliament based on the assumption of residuary power. The seven-Judge Bench in Union of India Vs Harbhajan Singh Dhhillon, (1971) 2 SCC 779 ruled, by a majority of 4:3, that the power to legislate in respect of a matter does not carry with it a power to impose a tax under our constitutional scheme...."

26) On the strength of *Kesoram's* judgment, it is submitted that in para 76 of the judgment, Hon'ble Supreme Court has categorically held that the above said principle continues to hold the field and has been followed in case after case. It has been categorically held that a tax cannot be levied under a general entry. In regard to the validity of the Act, much less, Entries 17 and 18 of List II it

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has been argued that both the entries are general entries and no tax whatsoever can be levied under a general entry, in view of the authoritative pronouncement of the Hon'ble Supreme Court in Kesoram's judgment.

27) The next contention of learned Senior Counsel appearing on behalf of the petitioners is that the case of the State is primarily rests on Entries 49, 45 and 48 of List II of the Seventh Schedule to the Constitution. The same read as under:

> "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.
>
> ......
>
> 48. Estate duty in respect of agricultural land.
>
> ......
>
> 49. Taxes on land and buildings."

28) It is contended that according to the State, Entries 48 and 49 relate to "land" and include everything above or below the surface and water is part of land and that the expression "land" should be widely construed, to include water stored on land or flowing over land."

29) Further placing reliance on *Kesoram's* judgment, learned Senior Counsel would submit that in said judgment, Hon'ble Supreme Court has considered the scope and ambit of the expression

'land' used in Entry 49 of List II. Paragraph no. 44 of said judgment is extracted hereunder:

> "44. In **Asstt. Commissioner of Urban Land Tax**[19] for the purpose of attracting the applicability of Entry 49 in List II, so as to cover the impugned levy of tax on lands and buildings, the Constitution Bench laid down twin tests, namely : (i) that such tax is directly imposed on lands and buildings, and (ii) that it bears a definite relation to it. Once these tests were satisfied, it was open for the State Legislature, for the purpose of levying tax, to adopt the annual value or the capital value of the lands and buildings for determining the incidence of tax. Merely, on account of such methodology having been adopted, the State Legislature cannot be accused of having encroached upon Entry 86, 87 or 88 of List I. Entry 86 in List I proceeds on the principles of aggregation and tax is imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land, was held to be intra vires the powers of the State Legislature and not trenching upon Entry 86 in List I. So is the view taken by another Constitution Bench in Shri Prithvi Cotton Mills Ltd. Vs Broach Borough Municipality, (1969) 2 SCC 283 where the submission that the levy was not a rate on lands and buildings as appropriately understood but rather a tax on capital value, was discarded."

30) On the strength of *Asstt. Commissioner of Urban Land Tax's* judgment as reiterated in *Kesoram's* case, it is stated that the impugned tax is not directly imposed on land (for example, property tax / municipal tax) and it does not bear a definite relationship to land, i.e., it has no nexus to the land. Therefore, the impugned tax cannot, by any stretch of imagination, be traceable to Entry 49 of List II.

31) It is contended that Entry 48 of List II is also wholly irrelevant in the context of present case and cannot at all be the source of power because the said entry pertains to Estate Duty in respect of agriculture lands.

32) Learned Senior Counsel arguing in respect of Entry 45 of List II, relied upon the judgment of Hon'ble Supreme Court in **India Cements Ltd.**[16] and would submit that the term 'land revenue' has been jurisprudentially explained by the Constitution Bench in para 20 and 21 of said judgment as under:

> "20. ....Entry 45 deals with land revenue, which is a well known concept and has existed in India before the Constitution came into force. In **N.R. Reddy**[21], Jaganmohan Reddy, J. as the learned Judge then was of the Andhra Pradesh High Court, while sitting in a Division Bench observed that no land revenue Act existed in the composite State of Madras nor had the ryotwari system ever been established by legislative enactment. The learned Judge at page 306 of the report observed that in the earlier days, sovereigns had in exercise of their prerogative right claimed a share of the produce of all cultivated land known as 'Rajabhagam' or by any of the various other names, and had fixed their share or its commuted money value from time to time, according to their will and pleasure..."
>
> 21. It is, however, clear that over a period of centuries, land revenue in India has acquired a connotative meaning of share in the produce of land to which the King or the government is entitled to receive."

33) On the strength of *India Cements Ltd.* judgment, learned Senior Counsel would submit that land revenue cannot be equated to a tax simpliciter and the same has to be correlated to a share of the sovereign on produce from land as

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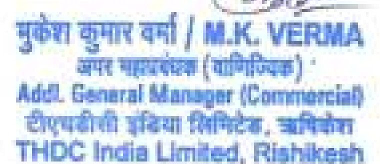
traditionally understood and is in the nature of royalty for use of land resulting in consumption of benefit derived from land. They would further submit that there is no consumption of water at all in the present case. Water is merely used for the purpose of feeding the same into generators, which produce electricity and is thereafter let downstream, without using it in any manner. It is vehemently argued that in the absence of any consumption of water, there cannot be any tax or cess on use of water.

34) Per Contra, Mr. Dinesh Dwivedi, learned Senior Counsel appearing on behalf of the State placed reliance on the following judgments in order to buttress his submission that the word 'land' is very wide and includes everything above or below the surface:

(i) Raza Buland Sugar Co. Ltd. Rampur Vs Municipal Board, Rampur, AIR 1962 Allahabad 83
(ii) Nizam Sugar Factory Ltd. Vs City Municipality, AIR 1965 AP 91
(iii) R.S. Rekhchand Mohota Spinning and Weaving Mills Ltd. Vs State of Maharashtra, (1997) 6 SCC 12
(iv) Ichchapur Industrial Cooperative Society Ltd. Vs Competent Authority, Oil & Natural Gas Commission & another, (1997) 2 SCC 42
(v) India Cements Ltd. & another Vs State of Tamil Nadu, (1990) 1 SCC 12
(vi) State of Bihar & others Vs Indian Aluminium Company & others, (1997) 8 SCC 360

35) So far as the first question is concerned with regard to the competence of the legislature traceable to Entry 17 of List II of the seventh



Schedule to the Constitution of India, any law of legislative competence is to be decided only on two ground and none else. The first ground is that it must be in the legislative competence of the State to make that law under Article 246 of the Constitution. The second ground is it has to be only of legislative competence or breach of fundamental right or any other express provision of the constitution. The third ground is limitation expressed by the Constitution under Article 288 and 304A and 192. Article 245 of Constitution of India speaks about the extent of laws made by Parliament and by the Legislatures of States. It says that unless and until there is unreasonableness the power of the legislature could not be restricted. In **State of A.P. & others Vs McDowell & Co. and others**[12], Hon'ble Apex Court has held that the power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.

36) The very premise that the impugned tax is on generation of electricity is absolutely incorrect. Here the tax is being levied on the activity of "drawing water" and the true nature of the tax is that it is on "water drawn or usage of it". It is

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assessed on the quantity of water used and not on the units of electricity generated. So far entries 54 and 56 are concerned, both the entries are general regulatory entries that do not countenance tax. They also cannot restrict the power of the State to tax the "usage of water" which falls under List II, i.e., State list. Both these entries do not relate to taxation being non-taxing entries. So far as Entry 97 is concerned, the impugned tax law is directly traceable to Entries 17, 18, 45, 49, 50 of List II of Seventh Schedule to the Constitution and Entry 97 has no role here. Similarly, Entry 38 of List III, being a non-taxing entry or being a general regulatory entry, is hardly relevant for either imposing a tax or limiting the power of the State to tax "usage of water from its source". No tax can be levied under it. The taxing power in this case to levy water tax can be inferred from Entries 17, 18, 45, 49 and 50. If these are read collectively then there is ample power in the States to tax use of water by the petitioners for generating electricity. Thus, the State of Uttarakhand does have legislative competence to levy tax.

37) Learned Senior Counsel appearing for the petitioner AHPCL drew attention of this Court towards the title of the Act - "Water Tax on Electricity Generation". He would submit that the said Act seeks to levy tax on water when it is drawn for generation of electricity and not when water is drawn for any other purpose. In other words, the

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tax can be levied under the impugned Act only when the drawl of water results in generation of electricity. It is contended that the impugned Act levies tax on generation of electricity which is merely dressed up as water tax under the impugned Act. Therefore, from a bare perusal of the impugned Act along with its Statement of Objects and Reasons, it becomes clear that the impugned Act, in pith and substance is a tax on water used for "generation of electricity" and is not a tax on "water". It is contended that the tax on generation of electricity falls on Entries 54, 56, 84 and 97 of List I and, therefore, State Legislature is incompetent to levy tax under the Act. It is argued that Entry 17 of List II does not authorize or empower a State to levy any such tax on use of water. Learned Senior Counsel placed reliance on the judgment of the Allahabad High Court in AIR 1962 All 83, affirmed by Hon'ble Supreme Court in **Municipal Council Kota**[9], and on the strength of said judgment he would submit that nomenclature of the tax is not relevant, but what is relevant is the real nature and character of the legislation. Rather, the present impost is not a tax directly on land as was explained by the Constitution Bench in its decision in State of West Bengal Vs Kesoram Industries, (2004) 10 SCC 201. He would further submit that tax not being on land but purportedly on water, falls foul of the ratio of the said judgment. Thus, even if it be assumed that the tax is on water, such is not a tax on land under Entry 49 of List II.

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It is contended that there is no specific entry which expressly empowers the State of levy tax on "water" for use of water despite a general Entry, the State cannot derive the same by broadly interpreting other entries for taxation of "Land" and "Minerals" and by drawing inference from the definitions given to these terms under various other acts, to bring water tax on water usage in their legislative competence.

38) Per contra, Mr. Dinesh Dwivedi, learned Senior Counsel appearing on behalf of the respondent State would submit that the incidence of tax under the impugned Act is 'drawl of water' and generation of electricity is a separate and subsequent activity which has nothing to do with the impugned Act. It is contended that the nature and character of the levy, its pith and substance, the taxable event or the incidence of the tax can only be seen by reading the law as a whole. Section 2(f), (g) and (i) read with Sections 4, 5, 8, 9, 10, 12, 14 17, 18, 19 & 25(5) clearly show that the tax is in relation to "water drawn / user for the generation of electricity". Word "for" used in Sections 3(2), 4, 5, 10, 12, 14, 18 and 19 between the phrase "water drawn by the user" and "generation of electricity" clearly shows that the levy is on the activity of drawing of water for its user. "For generation of electricity" only denotes that only such user of water is to be taxed which is for electricity generation, but the tax is on water drawn or used. The moment

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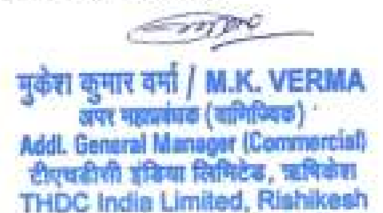
water is drawn the tax is levied. It is a tax primarily on the user for drawing water from any water source under Section 2(h). The subject matter of the tax is the "user of water" which is resorted to for electricity generation but the incidence of tax falls only on the drawing of water and not the generation of electricity. It is contended that if the tax was on electricity generation then the appropriate measure of tax would be on "units of electricity generated" and not on "paise per cubic meter of water drawn". Thus, the claim of the petitioners that the tax is on "electricity generation" is wholly incorrect. He would further submit that the Entries relied upon by the petitioners, i.e, Entries 54, 56, 84 and 97 of List I to show that tax on generation of electricity falls on these Entries of List I and, therefore, the State has no legislative competence is totally baseless.

39) It is true that the nature and character of the levy, its pith and substance, the taxable event or the incidence of the tax can only be seen by reading the law as a whole. The doctrine of pith and substance shall surely be applied while ascertaining the nature and character of the levy. The Court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the Legislature to the legislation is immaterial. Regard must be had to the

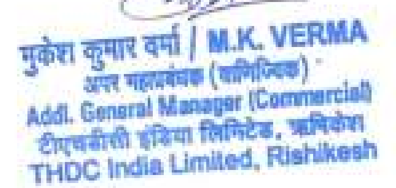


enactment as a whole, to its main objects and to the scope and effect of its provisions.

40) Mr. Aditya Singh, learned counsel appearing for the petitioner M/s Bhilangana Hydro Power Ltd. would submit that water being mineral is now controlled by Mines and Minerals Regulation and Development Act, enacted under Entry 54, a regulatory entry. Thus, the State has no power to tax the minerals under the Act.

41) In the opinion of this Court, since Entry 54 of List I of the Seventh Schedule to the Constitution is a regulatory entry and not a taxing entry, therefore, the said entry cannot restrict the power of the State to tax "land or mineral" under Entries 49 and 50 of List II.

42) Learned Senior Counsel appearing on behalf of the respondent State would further submit that Entries 48 and 49 relate to 'land' and include everything above or below the surface and water is part of land and that the expression 'land' should be widely construed, to include water stored on land or flowing over land. Placing reliance on the judgment of Hon'ble Supreme Court in **Ichchapur Industries Cooperative Society Ltd.**[10], it is submitted that water is covered under the definition of mineral and, therefore, the State can derive legislative competence to levy tax on water from Entry 49 of



List II of the Seventh Schedule to the Constitution of India.

43) Relevant paragraphs of the judgment rendered by Hon'ble Supreme Court in *Ichchapur Industries'* judgment are extracted hereunder:

> "17. In view of the availability of right to lay down pipelines for transporting a "mineral" after the amendment of the Act, the respondents can legally lay down the pipelines through the land in question for carrying and transporting "water" provided "water" is a "mineral".
>
> 18. The definition of "minerals" which we have already quoted above would indicate that the meaning given to it in the Mines Act, 1952 is to apply here also on the basis of classic principle of Legislation by Reference or Incorporation which is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. The provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it.
>
> 19. On this principle the definition of "minerals" as set out in the Mines Act, 1952 shall be deemed to have been bodily lifted and incorporated into this Act. We have, therefore, to look to that Act to find out the true meaning of the word "minerals" which is defined in Section 2(jj) as under:
>
> "2.(jj) 'minerals' means all substances which can be obtained from the earth by mining, digging, drilling, dredging, hydraulicking, quarrying or by any other operation and includes mineral oils (which in turn include natural gas and petroleum)."
>
> 20. The definition would indicate that "minerals" are substances which can be obtained from the earth by employing different technical devices indicated in the definition, namely, "mining, digging, drilling, dredging, hydraulicking, quarrying". These words are followed by the words "by any other operation". On account of the vicinity of these words with the previous words, namely, mining, digging, drilling, etc., they have to be understood in the same sense and, therefore, if "minerals" are obtained from earth "by any other operation" such operation should

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be an operation akin to the device or operation involved in mining, digging, drilling etc. Another significant feature of the definition is the use of words "substances which can be obtained from the earth" which indicate that the "minerals" need not necessarily be embedded in the earth or lie deep beneath the surface of the earth. They may be available either on the surface of the earth or down below. If the "mineral" is available on the surface, the operation which would obviously be employed would be dredging, quarrying or hydraulicking or any other similar operation. The definition, therefore, is very wide in terms but in spite of its wide connotation every substance which can be obtained from earth would not be a "mineral".

23. But there are subterranean waters which lie wholly beneath the surface of the earth and which either ooze or seep through the surface strata without pursing any defined course of channel (percolating waters) or flow in a permanent and regular but invisible course, or lie under the earth in a more or less immovable body, as a subterranean lake. This water can be obtained only by the process of "Drilling" which, according to Chambers Dictionary also includes "Boring".

24. Now, if it is a substance which can be obtained from the earth by the process of drilling. It would immediately fall within the definition of "Mineral" set out and placed in this Act. Even otherwise, Rutley's Elements of Mineralogy, 26th Edition, brought out by H.H. READ, F.R.S., Professor Emeritus of Geology in the Imperial College of Science and Technology and the University of London, "Mineral" is defined as under:-

> "A mineral is a substance having a definite chemical composition and atomic structure and formed by the inorganic processes of nature."

25. On the basis of this definition, Rutley says:- "Again, water, snow and ice come within the definition since they are naturally occurring homogeneous inorganic substances of a definite chemical composition.

27. In Civil Appeal no. 10538 of 1983, decided by us on 17.12.1996, we have already indicated the Rule to interpret a "definition" and have stressed that the definition has to be read in the context in which it is used and the purpose for which the Act was made. We observed that where the definition clause is preceded by the words "unless the context otherwise

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> requires", the definition has to be interpreted in the light of the context in which it is used. We observed:
>
> > "This implies that a definition, like any other word in a statute, has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the legislature."
>
> 28. If the question is examined in this background, it would be noticed that the definition of "mineral" which has been bodily lifted from the Mines Act, 1952 and has been placed in the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 was deliberately introduced by Amending Act no. 13 of 1977 so that while carrying petroleum through the pipelines, any other minerals may also be carried through it. If, therefore, water is treated as a "mineral" it would be permissible for the ONGC to carry it through any other pipeline without any further notification or declaration under Section 3 or 6 of the Act. This interpretation which is in consonance with the scientific definition of a "mineral", serves the purpose of the Petroleum ad Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962. The contention of the learned counsel for the appellant that "water" should be understood in the same sense in which it is understood by a common man cannot, therefore, be accepted. This Act is an Act of Parliament intended to deal with the particular technology and the commodities involved therein. We are, therefore, of the view that in this Act, "water" has been used in both the senses, namely, that (i) it is a mineral; and (ii) the most common, readily and freely available substance on earth."

44) This Court is in complete agreement with the contention of learned Senior Counsel appearing for the respondent State. Entries 48 and 49 relate to 'land' and include everything above or below the surface and water is part of land and that the expression 'land' should be widely construed, to include water stored on land or flowing over land. In view of the above proposition of law it an safely be presumed that as "water" is covered under the definition of mineral, therefore, the State can derive legislative competence to levy tax on water from

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Entry 49 of List II of the Seventh Schedule to the Constitution of India.

45) Mr. Mohan Parasaran, learned Senior Counsel appearing on behalf of petitioner Tehri Hydro Development Corporation India Ltd. highlighted various provisions of the Act as under:

46) Section 2(i) of the Act, defines "Water Tax" as "the rate levied or charged for water drawn for generation of electricity and fixed under this Act".

47) Section 2(f) defines the term 'user' as any person, group of persons, local body, Government Department, company, corporation, society etc. drawing water or any other authority authorized under Chapter II of the Act to avail the facility to draw water from any source for generation of electricity.

48) Section 10 speaks about – User entitled to use water (non-consumptive use) for generation of electricity shall be issued a Registration Certificate after execution of an agreement between the user and the Commission under the Act.

49) Section 12(1) of the Act is the charging section. The same reads as under:

> "(1) The registered user shall be liable to pay water tax for the water drawn for electricity generation as per the provisions of the Act.

50) Section 17(i) of the Act says – The user shall be liable to pay Water Tax under the Act at such rates as the Government may by notification fix.

51) Placing reliance on the aforementioned provisions of the Act, Mr. Parasharan, learned Senior Counsel would submit that the levy under the Act is on non-consumptive use of water for the purpose of generation of electricity and these crucial facts are to be kept in mind while deciding the legislative competence of the State under Entries 45 and 49 of List II. According to him, Entry 45 of List II pertains to land revenue and Entry 49 pertains to tax on land and buildings and both cannot be used for the purpose of deriving legitimacy by the State to impose a tax on non-consumptive use of water.

52) The next argument advanced by Mr. Parasaran in regard to inter-state rivers is that the petitioner THDC has been drawing the water from the rivers Ganga and Bhagirathi since 2006 and 2011 in relation to the Tehri Hydro Power Project and the Koteshwar Hydro Electric Project, respectively, for generation of electricity and simultaneous inter-State sale and consumption of the same. It is stated that river Ganga is an inter-State river and river Bhagirathi is also a tributary of

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river Ganga. Learned Senior Counsel would submit that List II of the Seventh Schedule to the Constitution does not contemplate or mention any matter in any of it entries contained therein which deals with imposition of levy of taxes on usage or consumption of water, consumptive or otherwise. The sole entry contained in List II, is Entry 17 which contemplates the State legislature to make and frame laws in relation to water supplies, irrigation and canals drainage and water storage as well as water power, but the same does not contemplate any provision for imposing taxes on water. He would further submit that although legislative power includes all incidental and subsidiary power, the power to impose a tax is not such a power under our Constitution. Each of the Union and the State lists which are Lists I and II start by enumerating first the entries conferring general legislative powers as distinct from taxation powers. Items 1 to 81 of List I deal with the exclusive general legislative powers of Parliament while 82 to 92 enumerate the taxes which Parliament may impost. The same pattern of classification and conferment of general legislative as distinguished from taxing power is adopted in State List (List II). Entries 1 to 44 of this List deal with general legislative power while Items 45 to 63 deals with specific taxes which might be imposed exclusively by the State Legislatures. Therefore, power to tax must be derived from a specific taxing entry, failing which there is legislative competence

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and it will be the power of the Central Government by virtue of Entry 97 of List I. In other words, power of the State to levy tax cannot be traced to any general entry (Entry 1 to Entry 44 of List II) and can be levied only if it is traceable to any taxing entries (Entry 45 to 63 of List II). Therefore, there is no question of the State having any power to impose a tax through the Act, in the absence of any specific taxing entry in List II.

53) In reply, learned Senior Counsel appearing for the respondent State placed reliance on a judgment of Hon'ble Apex Court in **Cauvery Water Disputes Tribunal**[14], wherein it has been held as under:

> "68. Shri Venugopal has in this connection urged that it is Entry 97 of the Union List which deals with the topic of the use, distribution and control of waters of an inter-state river. The use, distribution and control of the waters of such rivers, by itself is not a topic which is covered by Article 262. It is also, according to him, not a topic covered by Entry 56 which only speaks of regulation and development of inter-State rivers and river valleys meaning thereby the entirety of the rivers and river valleys and not the waters at or in a particular place. (emphasis supplied) Further, the regulation and development, according to him, has nothing to do with the use, distribution or allocation of the waters of the inter-State river between different riparian States. That topic should, therefore, be deemed to have been covered by the said residuary Entry 97.
>
> 69. With respect to the learned counsel, it is not possible to accept this interpretation of Entry 97. This is so firstly because, according to us, the expression 'regulation and development of inter-State rivers and river valleys" in Entry 56 would include the use, distribution and allocation of the waters of the inter-State rivers and river valleys between different riparian States. Otherwise the intention of the Constituent Assembly to provide for the Union to take over the regulation and development under its control makes no sense and serves o purpose. What is further, the River Boards Act, 1956 which is admittedly enacted under Entry 56 for the regulation and development of inter-State rivers and river valleys does cover the field of the use, distribution and allocation of the waters of the inter-State rivers and river valleys.

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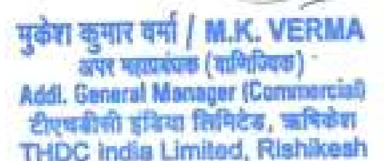
> This shows that the expression "regulation and development" of the inter-State rivers and river valleys in Entry 56 has legislatively also been construed to include the use, distribution or allocation of the waters of the inter-State rivers and river valleys between riparian States. We are also of the view that to contain the operation of Entry 17 to the waters of an inter-State river and river valleys within the boundaries of a State and to deny the competence to the State legislature to interfere with or to affect or to extend to the use, distribution and allocation of the waters of such river or river valley beyond its territory, directly or indirectly, it is not necessary to fall back on the residuary Entry 97 as an appropriate declaration under Entry 56 would suffice. The very basis of a federal Constitution like ours mandates such interpretation and would not bear an interpretation to the contrary which will destroy the constitutional scheme and the Constitution itself. Although, therefore, it is possible technically to separate the "regulation and development" of the inter-State river and river valley from the "use, distribution and allocation" of its water, it is neither warranted nor necessary to do so.
>
> 70. The above analysis of the relevant legal provisions dealing with the inter-State rivers and river valleys and their waters shows that the Act, viz., the Inter-State Water Disputes Act, 1956 can be enacted and has been enacted only under Article 262 of the Constitution. It has not been enacted under Entry 56 as it relates to the adjudication of the disputes and with no other aspect either of the inter-State river as a whole or of the waters in it."

54) It is contended that the *Cauvery Water's* case pertained to Article 262 and the Inter-State Water Disputes Act which is neither traceable to Entry 56 nor the Entry 97 of List I. The Act in question in that case pertained to Article 262 and was not under Entry 56. It is further contended that having considered the scope of Entry 56 and Entry 17 it was held by the Hon'ble Supreme Court that the State is competent to legislate on the use of water of inter-State river within its territory, provided there is no law of the Parliament otherwise under Entry 56 of List I.

55) Learned Senior Counsel for the respondent State would further submit that the



River Bhagirathi is a State river, over which the power projects of petitioner THDC situates; it is not an inter-State river but originates and ends in the State of Uttarakhand and hence, the law has been made by virtue of the power of the State under Entry 17 of List II. According to him, since Bhagirathi is not an inter-State river, the State of Uttarakhand has the power to impose a tax on 'use of water meant for electricity generation' and since the tax is not on electricity generated, the same falls within the State's legislative competence. It is contended that since the power of the State under Entry 17 of List II is only subject to the Power of the Union under Entry 56 of List I and since no law has been framed by the Union under Entry 56 of List I vis-à-vis river Bhagirathi, the State of Uttarakhand is competent to levy the tax.

56) In the case in hand, there is no such Act of Parliament which may restrict the power of the State to tax use of water / water drawn. Firstly the nature of the tax imposed by the Act and the activity on which the incidence falls has to be determined in order to further determine the competence of the State legislature to tax. It is quite evident that tax law is an economic legislation. Tax sought to be levied is a purely revenue collecting device to enable the State to function and fulfill its aims and obligations towards the welfare of the people. Federal structure of the Constitution gives complete separation of the taxing powers of

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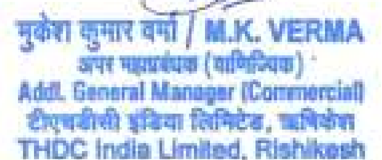
the State and the Union. Both are sovereign in their respective fields. Any attempt made to whittle down the powers of the State to tax, or subject it to assent, or approval of the Centre would not only be against the federal structure of our Constitution but would make the State appendages on the Centre. There is complete separation of taxing powers of the Centre and the State and, as such, the possibility of overlapping is totally absent. Any interpretation which recognizes any kind of approval or consent of the Centre, will defeat the Constitutional objective of the separation of taxing powers between the Centre and the States and make the States appendages of the Centre. It is to be borne in mind that tax is a separate matter from general regulatory entries. Regulatory entries are not for taxation. The term 'tax' is wide and includes all kinds of imposts including fee. It includes all kinds of compulsory extractions by the State. Hence, the submission advanced by learned Senior Counsel in this regard is totally misconceived.

57) Hon'ble Apex Court in *Kesoram's* judgment has held as under:

> 31. Article 245 of the Constitution is the fountain source of legislative power. It provides - 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. The legislative field between the Parliament and the Legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in



List I in Seventh Schedule, called the 'Union List'. Subject to the said power of the Parliament, the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the 'Concurrent List'. Subject to the abovesaid two, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the 'State List'. Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarized and restated by a Bench of three learned Judges of this Court on a review of the available decisions in **Hoechst Pharmaceuticals Ltd.**[18] -. They are-

> (1) the various entries in the three Lists are not 'powers' of legislation but 'fields' of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.
>
> (2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.
>
> (3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

(4) The entries in the List being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of a Legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in Lists I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three Lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other Legislature is of no consequence. The Court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the Legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the Legislature which enacted it, an incidental encroaching in the field assigned to another Legislature is to be ignored. While reading the three Lists, List I has priority over

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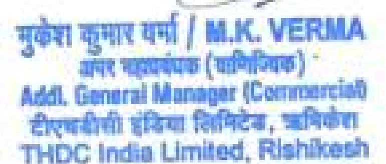
> Lists III and II, and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter with in List II though it may incidentally affect any item in List I.

58) Thus, it is abundantly clear that the legislative field between the Parliament and the Legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in Seventh Schedule, called the 'Union List'. Subject to the said power of the Parliament, the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the 'Concurrent List'. Subject to the abovesaid two, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the 'State List'. Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The various entries in the three Lists are not 'powers' of legislation but 'fields' of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent



sources of taxation to the Union and the States. In this batch of writ petitions, the question of repugnancy between law made by Parliament and a law made by the State Legislature does not arise. The same may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law. Nothing has been found which suggests that there is overlapping of power of taxation of the Union as well as the State.

59) Mr. D.S. Patni, learned Senior Counsel appearing on behalf of petitioner would submit that there is promissory estoppel against the State in view of the fact that they have agreed not to levy any charges or tax and have given assurance in this regard. Attention of this Court is drawn towards Clause 13 and 18.4 of the Restated Implementation Agreement (RIA) dated 8th February 2006, entered into between the Govt. of Uttarakhand, Govt. of U.P., U.P. Power Corporation Ltd. and Alaknanda Hydro Power Co. Ltd (formerly Duncans North Hydro Power Co. Ltd.) for the implementation of Shrinagar Hydro Electric Project in District Pauri Garhwal.

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60) Clause 13 of the RIA is in regard to 'Water Use Rights'. Clause 13.1 reads as under:

> "13.1 The GOU hereby grants to the Company the right, free of any and all charges during the term to utilize the water of Alaknanda river for the project and to generate electric energy at the site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environment clearance. Such a right was earlier available to the company under the then signed Water Use Agreement (WUA), which now stands substituted by the provisions of this RIA. GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this Project during the term of this RIA."

61) Clause 18 of the RIA, is in respect of 'Must-run Project'. Clause 18.4 reads as under:

> "18.4 Payment of Water Use Charge –The parties agree that the Company shall have no payment liability for use of water. GOU will not charge for the use of water under this RIA at any time during the tenure of the RIA."

62) Mr. U.K. Uniyal, learned Senior Counsel appearing on behalf of U.P. Power Corporation Ltd. (UPPCL) has supported the contention of learned Senior Counsel for the petitioners. In addition to that, Mr. Uniyal submits that at the time of RIA entered into between the Govt. of Uttarakhand, Govt. of U.P., UPPCL and the petitioner AHPCL, it was unanimously decided that the Govt. of Uttarakhand shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this Project during the term of this RIA. A specific condition has also been laid in Clause 18.4 of the RIA that the company shall have no payment

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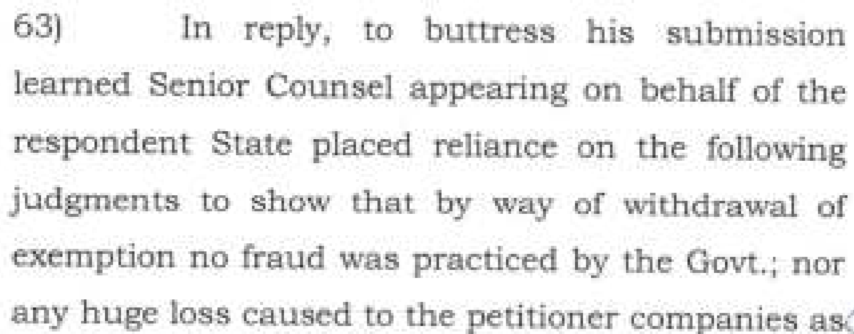
liability for use of water and Govt. of Uttarakhand will not charge for the use of water under this RIA at any time during the tenure of the RIA. Learned Senior Counsel would further submit that the purpose of giving the relaxation of non-imposition of tax for use of water was a kind of concession to the petitioner so that it may show its interest for generation of electricity in the State of Uttarakhand. Such a concession cannot be withdrawn by the State of Uttarakhand and it would be against the promise made with the petitioner. He would also submit that the imposition of tax on use of water for generation of electricity would enhance the cost of electricity which would ultimately affect the consumers. He submits that imposition of tax on use of water for generation of electricity would amount to imposing indirect tax on generation of electricity and the State cannot retreat from its assurance when all the parties to the RIA are bound by the terms and conditions of agreement. According to learned Senior Counsel, what has been argued on behalf of the petitioner AHPCL is correct and the enactment of the impugned Act is barred by principle of promissory estoppel.

63) In reply, to buttress his submission learned Senior Counsel appearing on behalf of the respondent State placed reliance on the following judgments to show that by way of withdrawal of exemption no fraud was practiced by the Govt.; nor any huge loss caused to the petitioner companies as



burden of tax would ultimately be shifted on the consumer.

(i) Kasinka Trading & another Vs Union of India & another, (1995) 1 SCC 274
(ii) Amrit Banaspati Co. Ltd. & another Vs State of Punjab & another, (1992) 2 SCC 411
(iii) State of Punjab Vs Nestle India Ltd. & another, (2004) 6 SCC 465

64) Paragraph nos. 13 and 27 of the **Kasinka Trading**[13] are extracted hereunder:

> "13. The ambit, scope and amplitude of the doctrine of promissory estoppel has been evolved in this country over the last quarter of a century through successive decision of this Court starting with Union of India v. Indo-Afgan Agencies Limited, AIR 1968 SC 718 . Reference in this connection may be made with advantage to Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council, (1970) 1 SCC 582 : Motilal Padampat Sugar Mills Co. Ltd. v. State of UP : Jit Ram Shiv Kumar v. State of Haryana, (1981) 1 SCC 11 : Union of India v. Godfrey Philips India Ltd., (1985) 4 SCC 369: Indian Express Newspapers (Bom) Pvt. Ltd. v. Union of India, (1985) 1 SCC 641 : Pournami Oil Mills v. State of Kerala [1986] Supp. SCC 728 : Shri Bakul Oil Industries v. State of Gujarat, (1987) 1 SCC 31 : Asst. Commissioner of Commercial Taxes v. Dharmendra Trading Co., (1988) 3 SCC 570 : Amrit Banaspati Co. Ltd. v. State of Punjab (1992) 2 SCC 511 and Union of India V Hindustan Development Corpn. (1993) 3 SCC 499. In Godfrey Philips India Limited (supra) this Court opined:
>
> > "We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires; if it can be shown by the Government or public authority that having regard to the facts as they have they have transpired, it would be inequitable to hold the Government or Public authority to the promise of representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or Public authority. The doctrine of promissory estoppel would be displaced in such a case,

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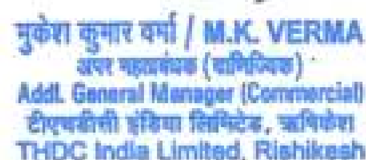
because on the facts, equity would not require that the Government or Public authority should be held bound by the promise or representation made by it."

Indeed, the submission on the fact situation is not controvertible but in the absence of any material placed before the High Court or even in this appeal to establish that the notification dated 29.08.1980 was issued for any oblique or extraneous consideration and was not "in public interest", it is not possible to find fault with that notification for the reasons we have already given while dealing with the first batch of cases. The appellants, who are in business, have to be prepared for tides in the business. In Pournami Oil Mills, 1986 Supp SCC 728, it was the incentive to set up new industry in the State with a view to boost the industrialization that exemption had been granted and it was in that fact situation that the doctrine of promissory estoppel was held available to the appellant therein. Again in Bakul Oil Industries, (1987) 1 SCC 31, it was the incentive to set up industries in a conforming area that the exemption had been granted and the Court held that the Government could withdraw an exemption granted by it earlier only if such withdrawal could be made without offending the rule of promissory estoppel and without depriving an industry entitled to claim exemption for the entire specified period for which exemption had been promised to it at the time of giving incentive. Both these cases therefore cannot advance the case of the appellant and are distinguishable on facts because the exemption notification under Section 25 of the Act which was issued in this case did not hold out any incentive for setting up of any industry to use PVC resins and on the other hand had been issued in exercise of the statutory powers, in public interest and subsequently withdrawn in exercise of the same powers again in public interest. In our opinion, no justifiable prejudice was caused to the appellants in the absence of any unequivocal promise by the Government not to act and review its policy even if the necessity warranted and the "public interest" so demanded. Thus, in the facts and circumstances of these cases, the appellants cannot invoke the doctrine of promissory estoppel to question the withdrawal notification issued under Section 25 of the Act."

65) Further, in paragraph nos. 4 and 10 of **Amrit Banaspati**[15], it has been held by Hon'ble Apex Court as under:



"4. What, therefore, requires to be examined, is if any promise was made by the Government or its officials to the appellant that sales tax shall be refunded to it and if the appellant acting on it altered its position. For this it is necessary to narrate few facts even though both the learned Single Judge and Division Bench have dealt with it elaborately. Admittedly, a brochure was issued in December 1966 by the Government of Punjab announcing its 'New Policy' declaring that incentive and concession, one of them being refund of sales tax, would be available to those persons who set up selective large scale industries in the focal point. Whether this brochure was authorized or not and its legal effect on rights of parties shall be adverted to later. But it is undisputed that acting on it the appellant's representative met the Chief Minister of the State personally and found that he was interested in encouraging Vanaspati manufacturing units in the State; therefore, its Manager wrote a letter in June 1968 to the Chief Minister expressing willingness to set up the unit provided the concession were made available to it which as replied by the Director of Industries on July 2, 1968 assuring the appellant that the concession as announced shall be available and further informed the appellant that the Government was willing to consider such additional concession which the appellant may require for implementation of the scheme. It was followed by exchange of correspondence and various meetings between appellant's representative and officials of Government....

....It is, thus, obvious that there was representation to the appellant that it would be entitled to concession and incentives announced by the Government if it set up its unit in the focal point. Whether such representation resulted in binding agreement is different issue but the representation coming from the Industries Secretary and the Director of Industries in pursuance of Government Policy cannot be held to be unauthorized or beyond the scope of authority..."

10. But promissory estoppel being an extension of principle of equality, the basic purpose of which is to promote justice founded on fairness and relieve a promise of any injustice perpetrated due to promisor's going back on its promise, is incapable of being enforced in a court of law if the promise which furnishes the cause of action or the agreement, express or implied, giving rise to binding contract is statutorily prohibited or is against public policy....

...A promise or agreement to refund tax which is due under the Act and realized in accordance with law would be a fraud on the Constitution and breach of

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> faith of the people. Taxes like sales tax are paid even by a poor man irrespective of his savings with a sense of participation in growth of national economy and development of the State. Its utilization by way of refund not to the payer but to a private person, a manufacturer, as an inducement to set up its unit in the State would be breach of trust of the people amounting to deception under law."

66) Hon'ble Apex Court in the case of **Nestle India**[7] has held as under:

> "40. The case of Kasinka Trading Vs Union of India, (1995) 1 SCC 274 cited by the appellant is an authority for the proposition that the mere issuance of an exemption notification under a provision in a fiscal statute such as Section 25 of the Customs Act, 1962, could not create any promissory estoppel because such an exemption by its very nature is susceptible to being revoked or modified or subjected to other conditions. In other words, there is no unequivocal representation. The seeds of equivocation are inherent in the power to grant exemption. Therefore, an exemption notification can be revoked without falling foul of the principle of promissory estoppel. It would not, in the circumstances, be necessary for the Government to establish an overriding equity in its favour to defeat the petitioner's plea of promissory estoppel. The Court also held that the Government of India had justified the withdrawal of exemption notification on relevant reasons in the public interest. Incidentally, the Court also noticed the lack of established prejudice to the promise when it said:
>
> > "The burden of customs duty etc. is passed on to the consumer and therefore the question of the appellants being put to a huge loss is not understandable."
>
> (See also Shrijee Sales Corpn. Vs Union of India, (1997) 3 SCC 398 and STO Vs Shree Durga Oil Mills, (1998) 1 SCC 572). We do not see the relevance of this decision to the facts of this case. Here the representations are clear and unequivocal."

67) Learned Senior Counsel for the petitioner THDC placed Reliance on the judgment rendered by nine Judge Bench of Hon'ble Apex Court in **Jindal Stainless Limited**[1]. In paragraph nos. 24, 26 and

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45 it has been observed by Dr. T.S. Thakur, CJ (as Lordship then was) speaking for himself and Sikri and Khanwildar, JJ., as under:

> "24. Exercise of sovereign power, is, however, subject to constitutional limitations especially in the federal system like ours where the States also to the extent permissible exercise the power to make laws including laws that levy taxes, duties and fees. That the power to levy taxes is subject to constitutional limitations is no longer res integra. A Constitution Bench of this Court has in Synthetics and Chemicals Ltd. Vs State of U.P., (1990) 1 SCC 109 recognised that in India the Centre and the States both enjoy the exercise of sovereign power to the extent the Constitution confers upon them that power. This Court declared :
>
> > "56. ...We would not like, however, to embark upon any theory of police power because the Indian Constitution does not recognise police power as such. But we must recognise the exercise of sovereign power which gives the State sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to constitutional limitations. This power, according to some constitutional authorities, is to the public what necessity is to the individual, Right to tax or levy impost must be in accordance with the provisions of the Constitution."
>
> 26. It would thus appear that even when Articles 246(2) and (3) confer exclusive power on the State Legislatures to make laws with respect to matters in the Seventh Schedule such legislative power is exercisable subject to constitutional limitations referred to above. What is significant is that the power of the State Legislatures to levy taxes is also subject to the limitations of Article 304(a) of the Constitution appearing in Part XIII thereof, which Part regulates trade, commerce and intercourse within the territory of

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India and comprises Articles 301 to 307. The provisions of these Articles have been the subject-matter of a series of decisions of this Court including several Constitution Bench decisions to some of which we shall presently refer. The language employed in the provisions and the non obstante clauses with which the same start have all the same given rise to several contentions issues for determination by this Court over he past five decades or so. The fact that the present batch of cases had to be referred to a nine-Judge Bench to once again examine the very same issues as have been debated and determined in the previous judgments of this Court only shows that the task of interpreting the provisions is by no means easy and has in fact become more and more difficult on account of the pronouncements of this Court taking different views not many of which have been unanimous."

68) In reply, Learned Senior Counsel appearing on behalf of the respondent State placed reliance on paragraph nos. 28, 29, 91 and 332 of the judgment (supra) as under:

"28. The power to levy taxes, being a sovereign power controlled only by the Constitution, any limitation on that power must be express. That proposition is well settled by the decisions of this Court in Umeg Singh Vs State of Bombay, AIR 1955 SC 540 and Firm Bansidhar Premsukhdas Vs State of Rajasthan, AIR 1967 SC 40. In Umeg Singh case this Court stated the legal position in the following words:

"12. ...The legislative competence of the State Legislature can only be circumscribed by express prohibition contained in the Constitution itself and unless and until there is any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally, there is no fetter or limitation on the plenary powers which the State Legislature enjoys to legislate on the topics enumerated in the Lists II and III of the Seventh Schedule to the Constitution. ...

13. The fetter or limitation upon the legislative power of the State Legislature which had plenary powers of legislation within the ambit of the legislative heads specified in the Lists II and III of the Seventh Schedule to the Constitution could only be imposed by the Constitution itself and not by any obligation

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which had been undertaken by either the Dominion Government or the Province of Bombay or even the State of Bombay. Under Article 246 the State Legislature was invested with the power to legislate on the topics enumerated in Lists II and III of the seventh Schedule to the Constitution and this power was by virtue of Article 245(1) subject to the provisions of the Constitution. The Constitution itself laid down the fetters or limitations on this power e.g. in Article 303 or Article 286(2). But unless and until the court came to the conclusion that the Constitution itself had expressly prohibited legislation on the subject either absolutely or conditionally the power of the State Legislature to enact legislation within its legislative competence was plenary. Once the topic of legislation was comprised within any of the entries in the Lists II and III of the Seventh Schedule to the Constitution the fetter or limitation on such legislative power had to be found within the Constitution itself and if there was no such fetter or limitation to be found there the State Legislature had full competence to enact the impugned Act no matter whether such enactment was contrary to the guarantee given, or the obligation undertaken by the Dominion Government or the Province of Bombay or even the State of Bombay.

29. Again in Bansidhar Case (supra) this Court reiterated the legal position in the following words:

"7... It is well-established that Parliament or the State Legislatures are competent to enact a law altering the terms and conditions of a previous contract or of a grant under which the liability of the Government of India or of the State Governments arises. The legislative competence of Parliament or of the State Legislatures can only be circumscribed by express prohibition contained in the Constitution itself and unless and until there is any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally, there is no fetter of limitation on the plenary powers which the Legislature is endowed with for legislating on the topics enumerated in the relevant lists. This view is borne out by the decision of the Judicial Committee in Jagannath Baksh Singh v. The United Provinces, 1946 8 FCR 111, in which a similar complaint was made by the talukdars of Oudh against the United Provinces Tenancy Act (U.P. Act 17 of 1939). It was held by the Judicial Committee that the Crown cannot deprive itself of its legislative authority by the mere fact that in

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the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists, and no court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence. *If therefore, it be found that the subject-matter of a Crown grant is within the competence of a Provincial legislature nothing can prevent that legislature from legislating about it unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally.* Accordingly, in the absence of any such express prohibition, the United Provinces Tenancy Act, 1939, which in consolidating and amending the law relating to agricultural tenancies and other matters connected therewith in Agra and Oudh, dealt with matters within the exclusive legislative competence of the Provincial legislature under Item 21 of List 11 of the Seventh schedule to the Government of India Act, 1935, was intra vires the Provincial legislature notwithstanding that admittedly some of its provisions cut down the absolute rights claimed by the appellant talukdar to be comprised in the grant of his estate as evidenced by the sanad granted by the Crown to his predecessor. The same principle has been reiterated by this Court in Umeg Singh and others v. The State of Bombay, AIR 1955 SC 540. It was pointed out that in view of Article 246 of the Constitution, no curtailment of legislative competence can be spelt out of the terms of clause 5 of the Letters of Guarantee given by the Dominion Government to the Rulers of "States" subsequent to the agreements of Merger, which guaranteed, inter alia, the continuance of Jagirs in the merged 'States'. This principle also underlies the recent decision of this Court in Maharaja Shree Umaid Mills Ltd. v. Union of India, AIR 1963 SC 953, in which it was pointed out that there is nothing in Article 295 of the Constitution which prohibits Parliament from enacting a law altering the terms and conditions of a contract or of a grant under which the liability of the Government of India arises...." (emphasis supplied)

91. Suffice it to say that the interpretation of any provision of the Constitution will be true and perfect only when the Court looks at the Constitution holistically and keeps in view all important and significant features of the constitutional scheme constantly reminding itself of the need for a harmonious construction lest interpretation placed on a given provision has the effect of diluting or whittling down the effect or the importance of any other provision or feature of the Constitution. So interpreted Article 301 appearing in Part XIII does not, in our opinion, work as an impediment on the States' taxing powers except in situations where such taxes fall foul of

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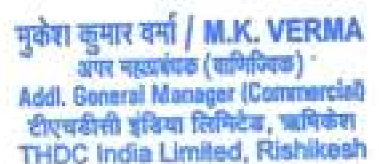
Article 304(a) of the Constitution. The contextual approach thus fully matches the textual interpretation which we have placed on Part XIII."

332. The above Constituent Assembly Debates and the history of Article 301 show that freedom envisaged in Article 301 is not freedom from taxation but only freedom from trade barriers. So long as the tax remains non-discriminatory, its validity cannot be judged under Article 301. Under Article 246(3) of the Constitution, a 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 of the Seventh Schedule. Article 246(3) is subject to clauses (1) and (2) of Article 246, i.e. matters enumerated in List I and III of the Seventh Schedule. As per Article 265, a tax can be imposed only under authority of law and there is no role of the executive. Taxation includes the imposition of any tax as defined under Article 366(28):

> "366(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly."

It is a sovereign power of compulsory exaction as a part of any burden by public authority for public purposes enforceable by law. Imposing a tax is a compulsory exaction made for a public purpose without reference to any special benefit to the taxpayers."

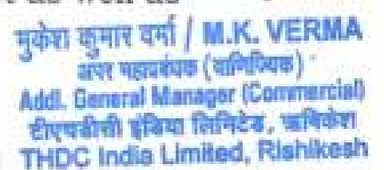
69) Firstly, this Court has to deal with the issue – whether the Govt. of Uttarakhand is bound by promissory estoppel to enact the impugned Act? Having considered the rival submissions of learned counsel for the parties and after going through the dictum of Hon'ble Apex Court in **Kasinka Trading**[13], **Amrit Banaspati**[15] and **Nestle India Ltd.**[7], this Court is of the considered view that action of the State Government is not barred by the principle of promissory estoppel.



70) Therefore, this Court is of the view that the doctrine of estoppel is not available against the government in exercise of legislative, sovereign or executive power. If this is permitted to continue, the legislature can never be precluded from exercising its legislative function by resort to the doctrine of estoppel. This proposition is unexceptional, because the Government owes a duty to the public to act in a particular manner and the doctrine of estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The rule of promissory estoppel cannot be pleaded to defeat the provisions of law. The doctrine of estoppel cannot be applied in teeth of an obligation or liability imposed by law, particularly when there is total absence of power of exemption from tax.

71) The second issue for consideration of this Court is – whether the State legislature is competent to enact the impugned Act, or not?

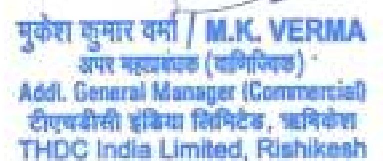
72) The petitioners in the present batch of writ petitions have challenged the constitutional validity and vires of the Act precisely on the ground that since the State Government itself entered into an RIA with the petitioner companies, State of U.P. and UPPCL and RIA has been executed between the parties, their action is barred by the principle of promissory estoppel. Also, the challenge is on the constitutional validity and vires of the Act as well as



the legislative competence of the State. In so far as the argument of learned Senior Counsel for the AHPCL as well as learned Senior Counsel for UPPCL is concerned, detailed observations have been made while discussing the facts and law in this regard in the body of this judgment and it has been held that the action of the State Government in enacting the Act is not barred by the principle of promissory estoppel. In so far the legislative competence of the State is concerned, the contention of the petitioners is that it does not give any authority in view of Article 288 of the Constitution of India.

73) Article 200 of the Constitution of India provides as under-

> "200. Assent to Bills. –When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:
>
> Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom:
>
> Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position

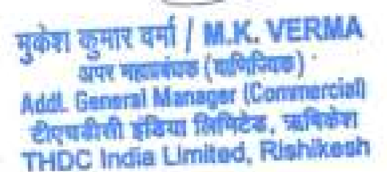


which that Court is by this Constitution designed to fill."

74) Further, Article 288 of the Constitution of India stipulates as under:

> "**288. Exemption from taxation by State 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 authorize 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."

75) A perusal of the provisions contained in Article 288 of the Constitution of India would depict that the tax is not 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 the Parliament for regulating or developing any inter-State river or river valley. Rather, it is a tax on non-consumptive



use of water meant for generation of electricity, which does not fall under Article 288(1) of the Constitution of India. So far as another contention of learned Senior Counsel appearing for the petitioner THDC that in view of provision contained in Article 288(2) of the Constitution of India the legislature of a State can impose any such tax only if the law has received the assent of the President of India is concerned, it is apparent that the Act is not in violation of Article 288(2) of the Constitution, rather the same is in conformity with the provisions contained under Entry 17 of List II of the Seventh Schedule to the Constitution of India. The bill passed by the State legislature under Entry 17 of List II has been accorded assent by the Hon'ble Governor of Uttarakhand under Article 200 of the Constitution before the bill took the shape of an Act. Furthermore, Article 163(2) of the Constitution stipulates - if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. A plain reading of Article 200 of the Constitution would depict that as the matter relates to Entry 17 of List II under which States are empowered to make laws, thus after the approval of Bill by the State legislature, the Hon'ble Governor has accorded assent to the aforesaid Bill

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using his discretionary powers under this Article. Also, as the matter does not relate to the List I (Union List), therefore, there was no need for the consideration of the President on the aforesaid bill. Therefore, the submissions advanced by learned Senior Counsel for the petitioner regarding violation of Articles 200 and 288 of the Constitution by the State are misconceived.

76) It is apt to note here that there is no prohibition in the Constitution that the State legislature cannot enact any law for imposition of tax on water for non-consumptive use in the State of Uttarakhand, therefore, in absence of any provision in this regard, no fault can be attached to the Act in question.

77) Mr. Gourab Banerji, learned Senior Counsel appearing on behalf of the petitioner M/s Swasti Power Pvt. Ltd. has raised an argument that the respondent State cannot argue contrary to its pleadings. It is submitted that the respondent State has blatantly contradicted the submissions made by them in the counter affidavit filed by them. In the counter affidavit dated 11.06.2018, filed in Writ Petition no. 641 (M/S) of 2018, the respondent State at paragraph 28(e) has categorically stated that:

> "The said Act 2012, has been enacted as per provisions of entry 17 of List II of the Seventh Schedule to the Constitution which relates to legislative competence of the State to legislate on

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> matters pertaining to State list (List II). Further, bill passed under Article 288(2) of the Constitution by the State Legislature has been given assent by the Hon'ble Governor under Article 200 and 163(2) of the Constitution to become it an Act."

Relying on said paragraph of the counter affidavit it is stated that the respondent State suddenly at the stage of final arguments has diverged from the submissions made by them in the counter affidavit and have raised arguments, which are completely contradictory to the submissions made by them in the counter affidavit. Such submissions are also contrary to the Statement and Objects of the Act and Legislative debate held on 14.12.2011 on the impugned Act. It is further submitted that at the stage of final argument the respondents have for the first time raised the argument that the impugned Act has been enacted under the provisions of Entry 17, 18, 45, 49 and 50 of List II, which is contrary to the submissions made by them in the counter affidavit. He would further state that the counter affidavit dated 11.06.2018 was filed by the respondent State through Mr. Anand Bardhan, Principal Secretary, Department of Irrigation, Government of Uttarakhand, who is duly appointed representative of the State. Therefore, the respondent State cannot build a new case at such a belated stage of final arguments, by totally contradicting the submissions made by its duly appointed representative by way of counter affidavit. The arguments advanced on behalf of the respondent State during the final

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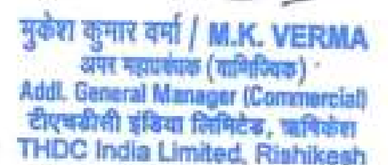
arguments are also contrary to the legislative intent behind enactment of the impugned Act, as depicted in the Legislative debate on the impugned Act, whereby it is stated that the State is deriving legislative competence to enact the impugned Act from Entry 17 of List II. Thus, the respondent State should not be allowed to advance its arguments at such a belated stage contrary to the submissions made by it in the counter affidavit as well as the legislative intent behind impugned Act.

78) In **Goa Glass Fibre Limited**[2], Hon'ble Apex Court has held as under:

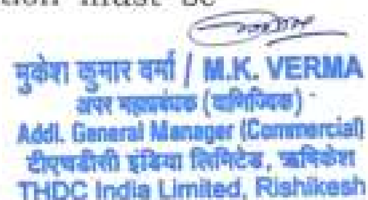
> "27. The Act stands totally on a different footing and the judgment of the High Court dated 19.04.2001/24.04.2001 has no bearing on it. The Act stands independent of the judgment of the High Court and its validity cannot be tested on these grounds. The petitioners have strongly relied upon the different stands allegedly taken by the State in the earlier proceedings and the present proceedings in support of their challenge to the constitutionality of the Act. This Court in Sanjeev Coke Mfg. Co. Vs Bharat Coking Coal Ltd. (1983) 1 SCC 147 has held that the validity of the legislation is not to be judged by what is stated in an affidavit filed on behalf of the State and that it should fall or stand on the strength of its provisions."

79) Much emphasis has been made by the petitioners on the counter affidavit filed by the respondents. In the counter affidavit initially filed by Mr. Anand Bardhan, Principal Secretary (Irrigation), Govt. of Uttarakhand, the source of drawing the power has been stated, but on later stage by filing another counter affidavit the State has drastically changed its stand. It is true that the



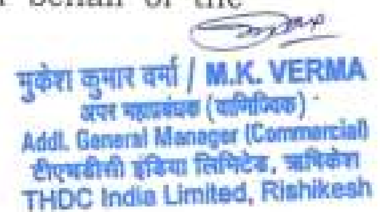
State has changed its defence by filing another affidavit but it should be kept in mind that in the matters where the validity of law has been assailed on certain grounds by the petitioners, it is the petitioners alone, who have to attack the validity of the enactment and they have to substantially prove that by raising the plea and on interpretation of the provisions of the law that enactment is beyond the competence of the State. Filing of improper counter affidavit or not raising a specific plea in the counter affidavit has no relevance at all. In other words, in a matter of challenge to the vires of an Act, counter affidavit has not much relevance. It is for the petitioners to attack the validity of the Act on legal sustainable grounds. The petitioners in the present case failed to make out any grounds in the absence of pleadings in this regard in the writ petitions filed by them.

80) Another argument advanced on behalf of petitioners M/s Swasti Power Pvt. Ltd. and THDC is that the impugned Act is violative of the fundamental rights of the petitioners enshrined under Article 14 and Article 19(1)(g) of the Constitution of India. It is stated that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled namely (i) that the classification must be



founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group, and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also contended that by means of imposing and levying tax on the water drawn for the purpose of generating electricity, the petitioners are being vexed and taxed twice, whereby it is being subject to double taxation viz. by payment of royalty in the form of grant of 12% free electricity, of total saleable energy from the hydro power projects and thereafter payment of water tax in terms of the impugned Act.

81) So far as contention of learned Senior Counsel that the impugned Act is unconstitutional, insofar as it seeks to take away the fundamental rights guaranteed to the petitioner under Article 14 of the Constitution of India is concerned, the other petitioners in the present batch of writ petitions have taken a plea that their fundamental rights guaranteed under Article 14 of the Constitution is violated by the State under the impugned Act. There is nothing in the Act which suggests any discrimination, unreasonable classification or manifest violation of equality clause. Therefore, the contention in this regard raised on behalf of the



petitioners has no force. So far as violation of Article 19(1)(g) of the Constitution is concerned, it is to be noted here that by issuance of the impugned Act only a tax on water has been introduced uniformly and rationally and none of the rights of the petitioners in regard to freedom to practice any profession, or to carry on any occupation, trade or business has been violated. The Act has been enacted for a specific purpose of recovering usage charges on water for generating electricity from water sources as defined under the Act. Entry 17 of the List II of the Seventh Schedule to the Constitution empowers the State Government to legislate on the charge / tax / cess / on use of water. Since Uttarakhand is mainly a hilly cash-starved State with limited revenue resources, therefore, a uniform tax has been introduced on all who uses the water of the State rivers viz. river Bhagirathi and Alaknanda in order to give sustenance to its economy. The Act nowhere imposes ban on use of water for generation of electricity except under provisions of the Act, rather it imposes tax on use of water (non-consumptive) for electricity generation. Furthermore, a perusal of the pleadings in this regard taken by the petitioners, would depict that nowhere it has been stated in what manner the impugned Act infringes the fundamental right of the petitioners. It is settled position in law that whoever states that provisions of any Act infringes his / her fundamental right, a heavy duty casts upon such person to demonstrate

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in what manner such infringement has been done. In absence of specific pleadings in this regard it would be presumed that the Act does not infringe upon the fundamental right of the petitioners in any way. Hence, the submissions of learned Senior Counsel have no force.

82) Mr. V.K. Kohli and Mr. D.S. Patni, learned Senior Counsel would submit that the enactment, promulgation and notification of the said Act, being arbitrary, manifesting arbitrariness in State action, are nothing but exercise of the colourable powers of the respondent State and the State has no power to levy tax on generation of electricity. Reliance has been placed on the judgment of Hon'ble Apex Court in **M.P. Cement Manufacturers' Association**[6]. Relevant paragraphs 14, 15, 16 and 17 of the judgment, relied by the petitioner, are excerpted hereunder:

> "14. A plain reading of Sub-Section (2) of Section 3 introduced by the amendment to the 1981 Adhiniyam 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. There is a conscious linguistic departure from the language used in Section 3 of the Electricity Duty Act, 1949 and indeed the language used in Section 3(1) of the same

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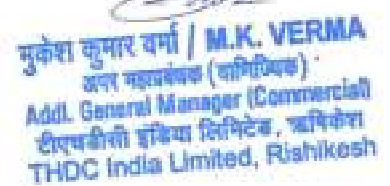
Act where the cess is levied on the total units of electrical energy sold or supplied by distributors of electrical energy. When dealing with producers under sub-Section (2) of the same section, the cess is required to be paid "on the total units of electrical energy produced". If, as is contended by the respondents, the incidence of levy under Section (1) and sub-section (2) were identical, the same language should have been used in both sub-sections. The deliberate change in language reflects an intention to alter the subject matter of levy as far as producers were concerned.

15. Our interpretation of sub-section (2) of Section 3 is buttressed by and in keeping with the language and effect of the proviso to the said sub-section. It has been held that the normal function of the proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. The proviso to Section 3(2) excepts "electrical energy produced" from payment of the cess in five cases. This would show that the general application of Section 3(2) to which an exception was being carved by the proviso was in respect of the production of electrical energy. Were it not for the exception in the proviso to Section 3(2), what would be subjected to tax would be electrical energy produced by the five categories mentioned under the proviso. Although in categories (i), (ii), (iii) and (v) the exemption is granted with reference to the tilization of the electrical energy produced, under exception (iv) significantly, all electrical energy produced by a Rural Electrical Co-operative Society registered under the M.P. Co-operative Societies Act, 1960 is exempted. The difference of language between the proviso to sub-section (2) of Section 3 and the proviso to sub-section (1) of Section 3 is also telling. Under the proviso to sub-section (1), the exception is of electrical energy sold or supplied to specified authorities.

16. That the intention of the Legislature was to levy cess on the production of electricity is also borne out from the Statement of Objects and Reasons which accompanied the Act which replaced the Ordinance. It says:

> "With a view to impose cess on the electricity generated by the producers from their captive power plants/diesel generating sets for self consumption or for sale at the rate of 20 paise per unit on all generated electricity units, it has



> been decided to amend the Madhya Pradesh Upkar Adhiniyam, 1981 (1 of 1982) suitably."
>
> 17. There can, in the circumstances, be no doubt that the levy was sought to be imposed on the generation of electricity by the amendment, a levy which the State admittedly was incompetent to impose."

83) Now the question which arises for consideration of this Court is – whether the impugned Act is *mala fide* or in colourable exercise of the State's legislative powers when it overrides the promise made by it in the RIA agreement or otherwise, signed with the petitioners prior to commencement of the Act?

84) Hon'ble Apex Court in **K.C. Gajapati Narayan Deo**[22] while examining the scope and meaning of doctrine of colourable legislation has held as under:

> "9. It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the, question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction.
>
> If the Constitution of a State distributes the legislative powers amongst different bodies, which

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have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject-matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colorable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere presence or disguise. As was said by Duff J. in Attorney-General for Ontario v. Reciprocal Insurers and Others, 1924 A C 328 at p. 337 (B):

> "Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers.

It is said by Lefroy in his well known work on Canadian Constitution that even if the legislature avow

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> on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction, yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered 'ultra vires'."

85) A bare reading of the Act would reveal that the nature of impugned tax is not on 'generation of electricity' but on the 'use of water' or say 'water drawn for generation of electricity'. The word 'water drawn' means the actual user of water for generation of electricity. The incidence of tax is on the activity of drawing of water or its user and not on generation. Perusal of various provisions of the Act establishes that the incidence of the tax, as envisaged in Sections 4, 5, 8, 9, 10, 12, 17, 18 and 19 clearly falls on the water drawn / usage for generating electricity. Generation of electricity only identifies the kind of user, i.e. user meant for generation of electricity. This is only to distinguish this usage from others which are not to be taxed. If this tax was intended to be on generation of electricity then the legislature could not have exempted other kinds of generations of electricity like solar or wind generation. This is also clarified by the use of word 'for' between the phrase "water drawn by the user" and "generation of electricity". This yet again reflects that the tax is on the activity of drawing of water, to use the same for generation of electricity. The same inference follows from the presence of the word "use" or "user" all over the Act as well as the definitions contained in Section 2(f),

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(i) and (h). So the competency of the legislature in enacting the law is fully proved in the present case. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. Whether a statute is constitutional or not is always a question of power. The substance of the Act is material and not the form or outward appearance. Once after investigation the court comes to the conclusion having considered the object, purpose or design of the Act it can certainly ascertain the true character and substance of the enactment and the motives which induced the legislature to exercise its powers goes into oblivion. Thus, from a bare perusal of the Act read along with the Statement of Object and Reasons it is abundantly clear that in the Act incidence of tax is on the activity of drawing of water or its user and not on generation.

86) Learned Senior Counsel appearing on behalf of the petitioners next contended that the respondent neither installed any flow measuring device within the premises for measuring the water drawn nor had it adopted any alternate method in measuring the quantity of water used; and the respondent neither did prescribe any specification for adjusting the expenditure incurred by the petitioner. As such, the impugned notice(s) was issued without complying with the procedure under Section 14 of the Act.

87) Before further discussion it will be appropriate to reproduce Section 14 of the impugned Act. Section 14.1 of the Act for the procedure to assess the water drawn. It reads as under:

> "The Commission shall install or cause to be installed flow measuring device within, the premises of Scheme or at such other place where the Commission deems fit for purposes of measuring the water drawn for electricity generation or may adopt any indirect method for assessment of water drawn by the user."

88) Section 14.2 of the Act provides as under:

> "The Commission may either install or, require a user to install a flow measuring device as per the specifications approved by the Commission at his premises or at his location or at such other place as the Commission may direct and thereafter adjust the expenditure incurred by such user on such installation towards the Water Tax payable by the user."

89) So far as installation of the flow measuring device is concerned, Section 14 of the Act prescribes three alternatives:

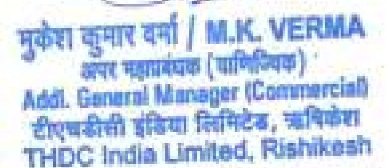
(a) Commission may itself install it within the premises of the Scheme;
(b) Commission may cause the device to be installed by the user, with the cost being allowed to be adjusted against the tax to be paid; and
(c) It may adopt any indirect method for assessment of water drawn

Thus, Sections 14.1 and 14.2 of the Act makes it is mandatory for the Commission to install a flow measuring device.

90) The claim of the petitioners with regard to the "flow measuring devices" not being installed by

the Commission under Section 14.1 of the Act falls in the third alternative of adopting an indirect method for assessment of water drawn by the user. This method is left to the discretion of the Commission. When the petitioners failed to register and provide the requisite information about the water drawn in the past three years, or the current user, the Commission was left with no option but to make a best judgment assessment of the water drawn by the user and the tax due, based on the relevant available figures of the earlier years. On the basis of best judgment assessment, notices were sent to the users, disclosing all the factors relied upon in computation of the tax due. The petitioners were informed that the assessments are provisional and not final. These notices were issued by the Superintending Engineer, who was appointed as the Nodal Office in the order dated 30.10.2015. This order also contains appropriate delegation of power for further action. Thus, the procedure adopted by the respondent cannot be said to be unreasonable.

91) It is also the contention of learned Senior Counsel appearing on behalf of the petitioners that till date the State Commission, as required under Section 20 read with Section 2(b) of the Act has not been established and, therefore, the functions of registration of the units under Section 12 or the assessment of the water drawn by the user, the tax computation or its imposition under Sections 14, 17, 18 and 19 of the Act cannot be done.



92) Section 2(b) of the Act was amended by Amendment Act no. 4 of 2016, by means of which the "Commission", as constituted under Section 3 of the Uttarakhand Water Management and Regulatory Act, 2013 (as amended by Amendment Act no. 3 of 2016) was adopted or incorporated as "Commission" under the Act. Section 20(1) clearly contemplates a situation where Commission could not be established in time. In such a situation, the Principal Secretary / Secretary (Irrigation) was to discharge all the functions of the Commission under the Act. Order dated 30.10.2015 was issued in this regard under the proviso to Section 20(1) appointing the Principal Secretary (Irrigation), Govt. of Uttarakhand to discharge the functions of the Commission. These provisions clearly establish that there was an authority that was functional under the Act to discharge all the functions of the Commission. Thus, the assessment of water drawn by the units and their registration under Section 12; the assessment and the computation of tax and its recovery under Section 14 to 19 could be legally done even in the absence of the Commission.

93) Mr. U.K. Uniyal, learned Senior Counsel for UPPCL drew attention of this Court towards clause 17 of the RIA dated 8th February 2006, which deals with "Delivery of Electricity". Clause 17.1 of the RIA stipulates that Govt. of Uttaranchal (now Uttarakhand) shall be entitled to 12% of the Saleable Energy from the Project free of cost.

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GOUP/UPPCL and the Company agree that this 12% free of cost Saleable Energy will be supplied to the GOU by the Company in lieu of the 12% Saleable Energy previously required to be supplied free of cost by the Company to GOUP/UPSEB. It is vehemently argued that the Govt. of Uttarakhand is being provided 12% saleable energy by the petitioner free of cost as royalty in lieu of use of natural resources of the State.

94) The submission of learned Senior Counsel appearing for the UPPCL has no substance. In so far 12% saleable energy being provided to the State of Uttarakhand is concerned, the same has been provided in the power and benefit sharing formula of the Ministry of Energy, Govt. of India Notification dated 01.11.1990 for the compensation of distress caused due to setting up the hydro-electric project, whereas the levy of tax on use of water as per the Act is meant for the use of natural resources of the State of Uttarakhand. It has come on record that the State has levied the same tax on use of water for electricity generation even on its' own Public Sector Undertakings responsible for electricity generation and, as such, there is no violation of the provision of the contract in any way. Besides this, having considered the requirement of imposition of tax, law has been enacted by the State Government on use / drawal of water for generation of electricity for the betterment of this hilly state keeping in mind the fact that source of revenue are

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very meager, therefore, need for a uniform tax has been introduced on all who uses the water for the purposes of generation of electricity.

95) The other point raised by the learned Senior Counsel for the petitioners is that the impugned tax is not based on the quantity of water used but is based on flow rate of water on per cubic meter basis at different Head heights of a dam, used for the purpose of generation of electricity. It is contended that a perusal of the rates of tax in the impugned Act will show that the same is directly relatable to the Height of the Head. There is no mention of the volume of water stored and used for generation of electricity, as the basis for levy of tax. Learned Senior Counsel would further submit that the levy of tax is simply based on the premise 'higher the Head, the more will be the electricity generated for the same volume of water used'. Thus, the levy is not on use of water but on the amount of electricity generated, depending on the height of the Head and has no correlation to the 'use of water'. It is contended that the height of the Head is directly proportional to the number of units of electricity generated, higher the Head, more the units of electricity generated. Though such a ground has been taken in the writ petition, but the same is not happily worded. In so far as the variation on height of head is concerned, higher the head, more water flows from it resulting in higher number of units of electricity generated. This is in

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correlation with the use of water and cannot be read separately. It is a general principle that more the height of head more units of electricity will be generated. On the other hand, the water used from the lower head, having lesser height, will generate less units of electricity. Thus, the differentiation in taxation is just and reasonable. Therefore, the tax levied by the State is a tax on generation of electricity and not on use of water.

96) It is also apt to mention here that the nature and character of the levy, its pith and substance, the taxable event or the incidence of the tax can only be seen by reading the law as a whole. A plain reading of Sections 2(f), 2(g) and 2(i) read with Sections 4, 5, 8, 9, 10, 12, 14, 17, 18 and 19 of the Act would reveal that the tax is in relation to 'water drawn for generation of electricity', as such the levy is on the activity of drawing of water by its user. It says that only such user of water has to be taxed, who is drawing water, only and only for the purposes of generation of electricity. The moment water is drawn the tax is levied. It is a tax primarily on the user for drawing water from any water source. One should not forget the intent of the legislature that the subject matter of tax is the 'user of water' which is resorted to for electricity generation, but the incidence of tax falls only on the drawing of water and not the generation of electricity. Thus, the State legislature has rightly made 'paise per cubic meter of water drawn' as a

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measure of tax and not 'units of electricity generated' while enacting the Act. The State legislature is well within its competence to levy tax on flow rate of water on per cubic meter basis based on different Head heights of different dams used for the purpose of electricity generation.

97) In **Bhanumati**[3], their Lordships of the Hon'ble Apex Court emphasized on the point how the Court should consider the challenge to the constitutional validity of a statute. Relevant paragraphs 82 to 86 are extracted hereunder:

> "82. In **Bihar Distillery Ltd.**[11], this Court in SCC para 17 at p. 466 laid down certain principles on how to judge the constitutionality of an enactment. This Court held that in this exercise the Court should:
>
> (a) try to sustain the validity of the impugned law to the extent possible. It can strike down the enactment only when it is impossible to sustain it;
>
> (b) the Court should not approach the enactment with a view to pick holes or to search for defects of drafting or for the language employed;
>
> (c) the Court should consider that the Act made by the legislature represents the will of the people and that cannot be lightly interfered with;
>
> (d) the Court should strike down the Act only when the unconstitutionality is plainly and clearly established;
>
> (e) the Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it.
>
> This Court abstracted those principles from various judgments of this Court.
>
> 83. In State of Bihar (supra) this Court also considered the observations of Lord Denning in Seaford Court Estates Ltd. Vs Asher, (1949) 2 KB 481 and highlighted that the job of a judge in construing a statute must proceed on the constructive task of finding the intention of Parliament and this must be done (a) not only from the language of the statute but also (b) upon consideration of the social conditions which gave rise to it (c) and also of the mischief to remedy which the statute was passed and if necessary (d) the judge must

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THDC India Limited, Rishikesh

> supplement the written word so as to give "force to life" to the intention of the legislature.
>
> 84. Reliance was also placed on another decision of this Court in **Dharam Dutt**[5]. This judgment is relevant in order to deal with the argument of the learned counsel for the appellants that in reducing the period for bringing the no-confidence motion from "two years" to "one year" and then in reducing the required majority from 2/3rd to simple majority, the legislature was guided by the sinister motive of some influential Ministers to get rid of a local leader who, as a Pradhan of Panchayat, may have become very powerful and competitor of the Minister of the State.
>
> 85. In Dharam Dutt (supra) this Court held that if the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. If the legislature has competence, the question of motive does not arise at all and any inquiry into the motive which persuaded Parliament into passing the Act would be of no use at all.
>
> 86. Reliance was also placed on the Constitution Bench judgment of this Court in **Mirzapur Moti Kureshi Kassab Jamat**[4]. Lahoti, C.J. speaking for the Bench laid down in SCC p. 562, para 39 of the Report that the legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in legislative process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature. Of course the Court must always recognise the presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies heavily on the party which assails it."

98) In view of foregoing discussion and keeping in mind the dictum of the Hon'ble Apex Court in *Bhanumati's* judgment it can safely be presumed that the Court should strike down the enactment only when there is no other possible way by which the enactment could be sustained. The Court should refrain itself from approaching the enactment with a view to pick holes or to search for defects of drafting or for the language employed. It should always be borne in mind that the Act made

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by the legislature represents the will of the people and it is in the interest of the public at large. Lastly, the Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it. In other words, if the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. If the legislature has competence, the question of motive does not arise at all and any inquiry into the motive which persuaded legislature into passing the Act would be of no use at all. One should not forget that the legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in legislative process only when the Act is beyond the legislative competence of the legislature and it breaches the fundamental right or any other express provision of the constitution. Last but not the least, the Court must always recognise the presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies heavily on the party which assails it. The Constitution does not by itself prescribe any standard tax assessment process, except that it should be fair, reasonable and transparent. As tax law is an economic legislation, the Court should practice judicial restraint in approach and grant greater latitude to the legislature. The purpose of enactment of a tax law by the State legislature is primarily for public interest, as the State needs tax, which is public

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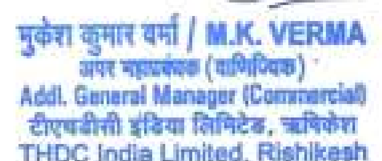
money, and ultimately has to be used in the welfare of people at large. Pubic interest should not be sacrificed at the cost of individual interest.

99) It has been informed that the petitioners in the batch of present writ petitions were enjoying the interim order granted by a co-ordinate Bench of this Court vide order dated 31.05.2016, passed in WPMS no. 1500 of 2016. The same is excerpted hereunder:

> "Mr. D.S. Patni, Advocate for the petitioner.
>
> Mr. P.C. Bisht, Standing Counsel for the State of Uttarakhand / respondent nos. 1, 3, 4, 5, 7 and 8.
>
> Mr. Rakesh Thapliyal, Advocate for respondent no. 2.
>
> Mr. Sanjay Bhatt, Central Government Standing Counsel for respondent no. 6.
>
> Mrs. Bina Pandey, Standing Counsel for the State of U.P. / respondent nos. 10 and 11.
>
> Heard.
>
> Issue notice to respondent no. 9. Steps be taken within a week.
>
> List after the notice is served upon the said respondent.
>
> Also, heard on interim relief application.
>
> It is the submission of learned counsel for the petitioner that if, finally, the Court decides that the petitioner is liable to pay water tax, then the petitioner will certainly deposit the same in favour of the State Government.
>
> Interim relief application no. 5226 of 2016 is disposed of by directing respondent no. 7 not to take coercive measures for recovery of the water tax demand from the petitioner, which was issued by said authority vide letter dated 26.04.2016 (Annexure no. 8 to the writ petition).
>
> As prayed, six weeks' time is granted to the respondents to file counter affidavit(s)."

100) This court is of the opinion that such an interim order is not in coherence with the principle of law laid down by Hon'ble Apex Court in



catena of judgments. Therefore, interim orders granted earlier by this Court in favour of the petitioners, in the batch of writ petitions, stands vacated.

101) It has further been informed that the Nodal officer has made provisional assessment of water drawn by the petitioner companies and the tax due thereon, based on the relevant available figures of the preceding years as also on the basis of past usage of water and the current figures supplied by the Irrigation Department. The need for such exercise has arisen due to the denial of the relevant data by the petitioner companies, pertaining to the water drawn by them from the source.

102) Learned Senior Counsel appearing on behalf of the respondent State has placed a compilation before the Court showing that the petitioners herein have included the water tax imposed by the State Government while calculating the cost of electricity. The contention of the learned Senior Counsel for the respondent State has been denied by the learned Senior Counsel appearing for the petitioners. Be that as it may, the fact remains that since the validity of the Act has been upheld by this Court it makes no difference as to whether the petitioners have included water tax in the costing of the electricity generation or not.

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Rishikesh

103) Assessment was made provisionally subject to the objections of the petitioner companies. The petitioners did not raise any objection to the provisional assessment, rather they approached this Court straight away. On the one hand, the petitioners have challenged the constitutional validity and vires of the Act, on the other hand, they are challenging the validity of the notices issued to them. In so far validity of the notice is concerned, firstly it is a provisional assessment subject to the objections to be filed by the petitioners; secondly, the constitutional validity of the Act has been upheld by this Court. Thus, no fault can be attached to the provisional assessment and the notice of demand so issued to the petitioners.

104) In view of the above discussion, all the aforementioned writ petitions are hereby dismissed. No order as to costs.

(Lok Pal Singh, J.)

Dt. February 12, 2021.

Negi

मुकेश कुमार वर्मा / M.K. VERMA
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ANNEXURE-12

(A)

HIGH COURT OF UTTARAKHAND
AT NAINITAL

SCRUTINY REPORT

1. Filed on……………………
2. Case no. ……………………..
3. CNR number…………………………
4. Court Fees Paid and if sufficient………………………..
5. If No. Deficiency of………………………………………
6. Limitation Began on………………….. Expired on…………..
7. If barred by Limitation there is delay of………………days
8. If Delay Condonation Application is filed……………………..
9. If any Caveat has been filed………………………………………
10. Caveator served/not served……………………………..
11. Notice served on Opposite Party on……………………………..
12. This is………………………………………………………………
13. Defects, if any-
    i. ……………………………………………………………………..
    ii. ……………………………………………………………………..
    iii. ……………………………………………………………………
    iv. ……………………………………………………………………..
    v. ……………………………………………………………………..
14. **Remarks, if any**…………………………………………………

A.R.O/R.O/S.O **S.O/A.R(Stamp Reporting)**

S.0/A.R(Defects Scrutiny) **D.R.(Institution)**

(B)

HIGH COURT OF UTTARAKHAND
AT NAINITAL

PRESENTATION FORM

1. Case Category- Special Appeal under Chapter VIII Rule 5 of the High Court Rules
2. District-Tehri Garhwal
3. Titled as THDC Vs State & Ors
4. Name of Advocate(s) with Bar Council Registration Numbers, Contact Numbers, email address etc- Shobhit Saharia (Advocate)
   Bar Council Registration no.- UP10113 OF 2000
   Contact no. 9837249350, 05942-238078
   Email id- s.saharia@gmail.com
5. Contact no. and email address of the petitioner-THDC India Ltd. Through CMD, Ganga Bhawan, Pragatipuram, Rishikesh, District - Dehradun
6. Copies served on whom-Respondents
7. Mode of service-
8. Date of the service-
9. Any other information

....

....

Dated: 5.04.2021

SHOBHIT SAHARIA
ADVOCATE
COUNSEL FOR THE APPELLANT

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

(C)

IN THE HON'BLE HIGH COURT OF UTTARAKHAND AT NAINITAL

INDEX

IN

SPECIAL APPEAL NO. 149 Of 2021

(Under Chapter VIII Rule 5 Of the High Court Rules)

District: - Tehri Garhwal

THDC India Ltd. ....Appellant

VS

State of Uttarakhand

& Others

....Respondents

Sl No.	Description of Paper	Page no.	Date of filing	Court fees paid	Part A/B
1.	Scrutiny Report	A			
2.	Presentation Form	B			
3.	Index	C-C1			
4.	Receipt of Court Fees Paid	D			
5.	Delay Condonation Application	1-7			
	Affidavit	8-9			
6..	Special Appeal	10-25			
7.	Certified copy of order dated-12-02-2021.	26-113			
8.	Stay Application	114-115			
9.	Affidavit	116-117			

(C-T)

10.	Affidavit Of Service	118-119			
11.	Vakalatnama	120-21			
12.					
13.					
14.					
15.					
16.					
17.					
18.					
19.					
20.					

Entries from Serial No.1 to Serial No.11 have been filed by me.

Date: 5/4/21

Shobhit Saharia
Advocate
Counsel for the Appellant

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
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THDC India Limited, Rishikesh

D

IN THE HON'BLE HIGH COURT OF UTTARAKHAND AT NAINITAL

COURT FEE

IN

SPECIAL APPEAL NO...........Of 2021

(Under Chapter VIII Rule 5 Of the High Court Rules)

District: - Tehri Garhwal

THDC India Ltd

....Appellant

VS

State of Uttarakhand & Others ....Respondents

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

(1)

IN THE HON'BLE HIGH COURT OF

UTTARAKHAND

AT NAINITAL

DELAY CONDONATION APPLICATION NO…….. OF

2021

(Under Section 5 of the Limitation Act)

IN

SPECIAL APPEAL NO………..Of 2021

(Under Chapter VIII Rule 5 Of the High Court Rules)

DISTRICT:- TEHRI GARHWAL

THDC India Ltd., through its CMD, Ganga Bhawan, Pragatipuram, Rishikesh-249201, Uttarakhand.

…….. **Appellant**

Versus

1. State of Uttarakhand

   Through The Chief Secretary

   State of Uttarakhand

2

2. Uttarakhand Jal Sansthan,

Through its Managing Director,

State of Uttarakhand

3. Secretary, Department of Irrigation,

State of Uttarakhand

4. Secretary, Department of Industries,

State of Uttarakhand

5. Principal Secretary, Department of Energy,

State of Uttarakhand

..........**Respondents**

6. The Secretary to Government of India,

Ministry of Power, Government of India,

Sharam Shakti Bhawan, Rafi Marg,

New Delhi-110 001

......**Proforma Respondents**

मुकेश कुमार वर्मा / M.K. VERMA
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THDC India Limited, Rishikesh

To,

(3)

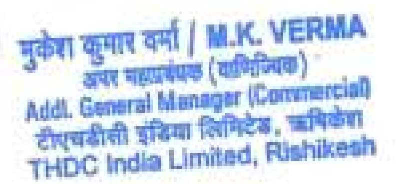
The Hon'ble Chief Justice and his other companion Judges of the aforesaid case.

That the Humble application of the appellants/ applicants is most respectfully showeth as under:

1. That applicant preferred writ petition bearing no. 187 of 2016 (M/S), assailing the Constitutional validity of water tax being imposed on the generation of Electricity by the State, vide Uttarakhand Water Tax on Electricity Generation Act, 2012, brought into effect from 15-8-2015.

2. That various other similarly situated hydro power generation projects also preferred writ petitions seeking similar relief.

3. That the ld. Single Judge after hearing the parties reserved the Judgment and vide common Judgment and order dated 12-2-2021, has been pleased to dismiss the writ petitions.

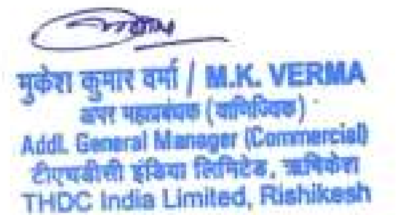


4. That application for obtaining certified copy of the Judgment dated 12.02.2021 was made on 15.02.2021, as 12-2-2021 was Friday and next two days were Saturday and Sunday.

5. That certified copy of the Judgment was delivered by the Registry of the Hon'ble Court on 23.02.2021.

6. That on the basis of material available on record and after due deliberations and discussions, it was decided to prefer special appeal and counsel was requested to draft the same and to provide it to the corporate office.

7. That duly drafted special appeal was immediately sent through mail on 18-3-2021 and after receiving the same it was decided to get the same vetted through the office of ld. senior counsel and in continuation of the same time was sought from the office of ld. Senior counsel and on 23-3-2021 through virtual mode briefing and conference was held with the ld. Senior Counsel.



8. That on 24-3-2021, on the basis of certain suggestions and clarifications, as suggested in the virtual conference, amended draft appeal was made and mailed to the Law & Arbitration Department, THDCIL, Rishikesh.

9. That thereafter draft special appeal with applications & affidavits was received by Corporate Commercial Deptt., THDCIL, Rishikesh, where the competent authority is posted, for getting the same signed and notarized, on 24-3-2021 through Law & Aarbitration Department., THDCIL, Rishikesh.

10. That after incorporating some factual changes in Stay Application, draft special appeal was finalised and approved by the competent authority at Corporate Office, THDCIL, Rishikesh on 30-3-2021 as offices were closed due to work off on 27.3.2021, 28.3.2021 and 29.3.3021 and thereafter on 31-3-2021, competent and authorized authority signed the relevant papers and appeal and applications with affidavits and got same notarized

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THDC India Limited, Rishikesh

(6)

and same are sent on 31.3.2021 without any further delay, for being filed.

11. That there is no deliberate or intentional delay in filing Special Appeal.

12. That in light of the above mentioned facts and circumstances, it is most humbly prayed that this Hon'ble Court may graciously be pleased to condone the delay of ..10... days in filing of the above mentioned Special Appeal, failing which the appellant/applicant shall suffer irreparable loss and injury.

PRAYER

It is therefore respectfully prayed that this Hon'ble Court may graciously be pleased to allow this application and may very kindly be condone the delay of .10.. days in filing of the Special Appeal, failing which the appellant/applicant shall suffer irreparable loss and injury.

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THDC India Limited, Rishikesh

(7)

Date:- 5/4/21

Shobhit Saharia

Advocate

Counsel for the Appellant/Applicant

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(8)

IN THE HON'BLE HIGH COURT OF UTTARAKHAND

AT NAINITAL

AFFIDAVIT

IN

DELAY CONDONATION APPLICATION NO........ OF 2021

(Under Section 5 of the Limitation Act)

IN

SPECIAL APPEAL NO.....................OF 2021

NOTARIAL NOTARIAL

(Under Chapter VIII Rule 5 of the High Court Rules)

DISTRICT:- TEHRI GARHWAL

THDC India Ltd., through its CMD, Ganga Bhawan, Pragatipuram, Rishikesh-249 201, Uttarakhand.

.... Appellant

Versus

State of Uttarakhand and others.

...........Respondents

Affidavit of Mukesh Kumar Verma,
Aged about 55 years,
S/o. Late Sh. RamKrishna Verma,
Presently posted as Addl. General Manager (Commercial dept.), THDCIL, Rishikesh

Deponent

I, the deponent above named do hereby solemnly affirmed and state of Oath as under:-

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

(9)

2. That the deponent is presently posted as Addl. General Manager (Commercial dept.), THDCIL-Rishikesh, he is competent and duly authorized to file the instant affidavit in support of the delay condonation application filed in the above noted Special Appeal and as such he is well acquainted with the facts deposed to below.

I, the deponent above named do hereby solemnly affirm on oath and verify that the contents of Paragraph No. ...1 to 12...................of the Application are personal knowledge and those of Paragraph No.......................................of the Application are based on perusal of records and those of Paragraph No.......................................of the Application are based on legal advice, which I believe to be true and no part of this affidavit is false and nothing material has been concealed.

So Help Me God

Deponent

I, Ajay Vaish S/o Late Shri Brij Behari Lal Vaish age 52 years, Sr. Manager (Commercial dept.), THDCIL-Rishikesh, do hereby identify the deponent from the papers which he produced before me and I am satisfied that he is the same person making this affidavit.

Identifier

Solemnly affirmed before me on this ...31... day of March' 2021 at about 11:35 a.m./p.m. by the deponent, who has been identified by the aforesaid person.

I have satisfied myself by examining the deponent that the deponent has understood the contents of this affidavit, which has been read over and explained to him by me.

(Oath Commissioner/Notary)

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
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टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

(16)

IN THE HON'BLE HIGH COURT OF UTTARAKHAND

AT NAINITAL

SPECIAL APPEAL NO………..Of 2021

(Under Chapter VIII Rule 5 Of the High Court Rules)

DISTRICT:- TEHRI GARHWAL

THDC India Ltd., through its CMD, Ganga Bhawan, Pragatipuram, Rishikesh-249 201, Uttarakhand.

…….. Appellant

Versus

1. State of Uttarakhand and others

………..Respondents

The present Special Appeal is being preferred assailing the propriety, justifiability and legality of Judgment and order dated 12-2-2021 passed in Writ Petition No. 187 of 2016(MS), titled as THDC India Ltd. V. State of Uttarakhand and others, vide which writ petition preferred by the appellant, along with other writ petitions preferred by other companies, has been dismissed, upholding the validity of Uttarakhand Water Tax on Electricity Generation Act, 2012, brought into effect from 15-8-2015, by reading the source of power of Taxation of State Government to Entry 49 of the State List, in Schedule VII of the Constitution, which though patently relate to "*Taxes on lands and Buildings*" by reading and interpreting "water as equivalent to land".

This misdirected and unsustainable interpretation, in fact is based on preposition raised by State at the stage of final arguments, to the effect that "*that the word 'land' is very wide and includes everything above or below the surface*" *(paragraph 34, 42, 43 and 44 of impugned judgment).*

More pertinently, State in its counter affidavit, justified and stated on oath in unequivocal terms that it traces its source of power to impose tax

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on non consumptive usage of water for generation of Electricity to Entry 17 of State List, Schedule VII to the Constitution, though it is a "General Entry" relating to the subject matter water and it is not a "Taxing Entry" and does not confer any authority to the State to levy tax on non-consumptive usage of water.

The present appeal is being filed and preferred on the following amongst other grounds:-

GROUNDS

A. Because ld. Single bench has been pleased to uphold the validity of a Tax Legislation by overlooking the admission made on affidavit by the State, tracing its source of power to tax on a "General Entry" 17 in List II of Schedule VII of Constitution Of India and admission being the best evidence.

B. Because in paragraph 35 of the impugned Judgment ld. Single bench though specifically frames the question that "*So far as the first question is concerned with regard to competence of the legislature traceable to Entry 17 of List II of seventh schedule to the Constitution of India...*" and thereafter states the two grounds on which legislative competence is to be decided, however did not answer the same and vaguely in paragraph 36 holds that "*So far as Entry 97 is concerned, the impugned tax law is directly traceable to Entries 17, 18, 45, 49, 50 of List II OF Seventh Schedule to the Constitution and Entry 97 has no role*" AND reiterates that:

"*The taxing power in this case to levy water tax can be inferred from Entries 17, 18, 45, 49 and 50. If these are read collectively then there is ample power in the States to tax use of water by the petitioners for generating electricity. Thus, the State of Uttarakhand does have legislative competence to levy tax.*"

C. Because the above quoted findings, in the preceding paragraph, given by the ld. Single Bench are self contradictory to the finding given in the self same paragraph to the effect that "*So far as entries 54 and 56 are concerned, both the entries are general*

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regulatory entries that do not countenance tax. They also cannot restrict the power of the State to tax usage of water which falls in List II, i.e., State list. ***Both these do not relate to taxation being non-taxing entries"***

Meaning thereby although the difference between taxing and non taxing general entries in the List is duly acknowledged however in the same breath power of taxation is being traced to entries 17 and18, which are general entries and further by vaguely reading them with 45, 49 and 50 of List II and finally upholding the validity by relying upon Entry 49 of List II, i.e. the State List.(paragraph 44 of the impugned judgment)

D. Because the ld. Single bench has not taken into consideration the fact that taxing entries are very specific and categorical and are in fact to be given a very restrictive meaning as in terms of Article 265 of the Constitution of India, *"No tax shall be* ***levied*** *or collected except by authority of law"* and is settled principle of law that such authority must be very specific categorical and unambiguous.

E. Because the source of power to Tax or to Framing of Taxing Statue cannot be justified by reading general as well as taxing entries together and that too when such entries are not related at all.

F. Because the ld. Single bench failed to appreciate that when one is concerned with issue of tax on non consumptive usage of "water" the same cannot be read along with entry 45 an 49 as the said taxing entries relate to "land", which itself is specifically and distinctly defined in Entry "18" of List II.

G. Because by reading "Land" as mentioned in Entry 18, as including "Water" by virtue of applying some unknown principle of interpretation and giving a go by to the basic and golden rule of Interpretation of reading and giving, meaning to words as they are, and justifying it by stating that everything found above and below the surface is *"land"* , **the whole distinction between "water" in Entry 17" and "Land" in Entry 18" has been done away with and Entry 17 has actually been rendered otiose** as one can find water either above the surface or below the surface.

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H. Because such finding and interpretation of Constitutional Entries is patently unsustainable in the eyes of law.

I. Because the only basis for giving the finding that "water" being found above the surface or below the surface, can be read as part of "land" and thus taxing powers can be traced to entry 49 in List II is submission of State noted in paragraph 34, 42 of the impugned judgment, reliance on *Ichchapur Industries Cooperative Society ltd* case *(1997(2)SCC 42)* referred in paragraph 43 and conclusive finding in paragraph 44 of the impugned Judgment, notwithstanding the fact that:

a. The facts and circumstances of the *Ichchapur Industries* case were patently different and distinguishable

b. The question framed in the very first paragraph of the *Ichchapur Industries Cooperative Society ltd* case was *"whether water is mineral* ***within the meaning of Mines Act, 1952 read with Section 2(ba) of the Petroleum and Minerals Piplelines (Acquisition of Right of User of land) Act, 1962"*** spells out the scope and context in which the meaning of word "water" as given in Central Acts was to be read contrary to "water" as given in List II of Seventh Schedule.

c. Paragraph 12 and 13 of the *Ichchapur Industries Cooperative Society ltd* case Judgment further clarifies the context in which the word "water" was being interpetate, by stating

12."... the question whether "water" is a mineral or not, first.

13. This question arises ***in view of the provisions contained in section 7 of the Act*** *which provides that where the right of the user, in any land, has vested in Central Government or... ...lay pipelines or to do any other act necessary for laying up of pipelines"*

d. The fact that meaning of word "mineral" was being taken from one Central Act i.e. Act of 1952 and by applying classic

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principle of legislation by Reference or Incorporation, it was read into Petroleum Pipelines Act, 1977, by referring to its SOR

e. Hon'ble Apex court itself in paragraph 27 and 28 of *Ichchapur Industries Cooperative Society ltd* case specifically states that "*This implies that a definition like any other word in a statue,* ***has to be read in light of the context and scheme of the Act*** *as also the object for which the Act was made by the legislature*" and then stated the water in Act of 1977 can be read as a mineral in light of particular technology and the commodities involved therein.

J. Because there is no discussion with respect to the specific pleadings and arguments raised on the strength of *Astt.Commissioner of Urban Land Tax case,* to the effect that source of legislative power with respect to impugned tax legislation, vide which tax is sought to be levied on non-consumptive usage of water, cannot be traced to Entry 49 of List II, in as much as impugned tax is not directly imposed on land and neither it bears any definite relationship to land. This specific pleading though find mention in paragraph 30 of the impugned Judgment however there is no finding returned by the ld. Single Bench and impugned judgment is wholly silent on this aspect.

K. Because State, in order to support its competence, has primarily relied upon Entry 17 of List II of the VII Schedule to the Constitution in its counter to the writ petition. Entry 17 of List II reads as follows:-

> "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.*"

And through written submissions it was specifically and respectfully submitted before the ld. Single Bench that the above entry cannot be the source of power for levying the impugned tax and does not confer any legitimacy or legislative competence to the

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State, to levy such a tax. The said entry is a 'general entry' relating to the subject matter 'water and allied matters' and is not a 'Taxing entry' and does not confer any authority to the State to levy tax on non-consumptive usage of water.

L. Because above principle of law is well settled and reliance was placed on the following case laws.

a. In State of ***West Bengal Vs Kesoram Industries Limited and others (2004) 10 SCC 201***, a Constitution Bench of the Hon'ble Supreme Court has categorically held as follows (See page 281 at para 31, sub-para 3):

"(3) *Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.*"

b. The Hon'ble Supreme Court has reiterated the principle laid down in the celebrated decision of ***M.P.V. Sundararamier & Co., Vs State of Andhra Pradesh and another,*** AIR 1958 SC 468, at para 51. In fact, it may be noted that the judgment in Sundararamier's case has been affirmed by a Constitution Bench of 7 Hon'ble Judges of the Hon'ble Supreme Court in ***Synthetics and Chemicals Limited Vs State of Uttar Pradesh and others,*** (1990) 1 SCC 109.

c. In ***Kesoram Industries*** (supra), following the decision in ***Sundararmier*** (supra), the Hon'ble Supreme Court has observed at para 74 (3) as follows:

"3. *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*

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also manifest in the language of Article 248 clauses (1) and (2) and of Entry 97 in List I of the Constitution. Under the scheme of the entries in the lists, taxation is regarded as a distinct matter and it separately set out."

In para 76 of the above judgment, the Hon'ble Supreme Court has categorically held that the above said principle continues to hold the field and has been followed in case after case. In fact, in para 75 of the said judgment, the Hon'ble Supreme Court, by specifically adverting to the decision in ***Synthetic and Chemicals*** (supra), has categorically held that a tax cannot be levied under a general entry.

However though the above case laws and paragraphs have been quoted and referred in the impugned Judgment by the ld. Single bench, it has been held that by collective reading of entries 17, 18, 45,49 and 50 of List II, source of legislative power to impose tax on usage of water for generation of Electricity can be traced.

How?, on what basis ?, general entries and taxing entries being read together? and that too in wholly evasive and vague manner, impugned judgment is wholly silent on this aspect and it has been vaguely and evasively held that *"impugned tax law is directly traceable to Entries 17, 18, 45, 49, 50 of List II of Seventh Schedule to the Constitution and Entry 97 has no role here"* in paragraph 36 of the impugned judgment.

M. Because effort was made to somehow trace the source of power to impose tax on water for generation of electricity and finding that there is no taxing entry relating to imposition of tax on water for generation of electricity in List II of seventh schedule, last ditch argument was raised by the State, (though not taken in counter affidavit or written pleadings), that Entries 48 and 49 in State List relate to 'Land' and include everything above or below the surface and water is part of land and that the expression 'Land' should be

widely construed, to include water stored on land or flowing over land.

N. Because in this regard, it was specifically submitted that in ***Kesoram Industries*** case, the Hon'ble Supreme Court has considered the scope and ambit of the expression 'land' used in Entry 49 of List II, from paras 39 to 49 of the Judgment. In particular, at para 44, the Hon'ble Supreme Court, after adverting to the decision in ***Assistant Commissioner of Urban Land Tax Vs Buckingham and Carnatic Mills Limited,*** (1969) 2 SCC 55 has held as follows:

> *"44. In Asstt. Commr. Of Urban Land Tax v. Buckingham and Carnatic Co. Ltd. for the purpose of attracting the applicability of Entry 49 in List II, so as to cover the impugned levy of tax on lands and buildings, the Constitution Bench laid down twin tests, **namely: (i) that such tax is directly imposed on the lands and buildings, and (ii) that it bears a definite relation to it.** Once these tests were satisfied, it was open for the State Legislature, for the purpose of levying tax, to adopt the annual value or the capital value of the lands and buildings for determining the incidence of tax. Merely, on account of such methodology having been adopted, the State Legislature cannot be accused of having encroached upon Entry 86, 87 or 88 of List I. Entry 86 in List I proceeds on the principle of aggregation and tax is imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land, was held to be intra*

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vires the powers of the State Legislature and not trenching upon Entry 86 in List I. So is the view taken by another Constitution Bench in Shri Prithvi Cotton Mills Ltd v. Broach Borough Municipality where the submission that the levy was not a rate on lands and buildings as appropriately understood but rather a tax on capital value, was discarded." (Emphasis supplied)

In the present case, applying the above twin tests laid down in ***Buckingham and Carnatic Mills*** (supra) as reiterated in ***Kesoram*** (supra), it can be seen that (i) the impugned tax is not directly imposed on land (for example, property tax/Municipal Tax) and (ii) it does not bear a definite relationship to land i.e., it has no nexus to the land.

By applying the above principle laid down in various decisions as quoted in ***Kesoram Industries*** (supra) from paras 39 to 49, the impugned tax cannot, by any stretch of imagination, be traceable to Entry 49 of List II, however ld. Single bench in the impugned Judgment has held that source of legislative power *in its opinion* can be traced to Entry 49, which is patently unsustainable in the eyes of law.

O. Because in the present case, there is no consumption of water at all. Water is merely used for the purpose of feeding the same into the Generators, which produce electricity and is thereafter let downstream, without using it in any manner. In the absence of any consumption of water, there cannot be any tax or cess on use of water.

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P. Because State cited various judgements in order to buttress its case that the word 'land' is very wide and includes everything above or below the surface, however each and every case, which find mention in paragraph 34 the impugned Judgment, was duly distinguished in the following manner :

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a. ***Raza Buland Sugar Co. Ltd., Rampur v. Municipal Board, Rampur,*** AIR 1962 Allahabad 83 – This judgment relates to levy of water tax under the Uttar Pradesh Municipality Act, 1916 and it is levied for maintenance of regular water supply. The same is a municipal tax and is directly relatable to 'tax on land and buildings' in Entry 49 of List II. The said judgment will not be of any avail to the case of the State in interpreting Entry 45 of List II which pertains to land revenue.

b. ***Nizam Sugar Factory Ltd. v. City Municipality,*** AIR 1965 AP 91 – This is a case regarding levy of water tax under the Hyderabad District Municipality Act 18 of 1956. This is also a municipal tax levied on the measure of annual value of the premises and is clearly relatable to Entry 49 of List II, which is a tax directly imposed on land and buildings and bears definite relation to it. This will have no application to the facts of the present case.

c. ***R.S. Rekhchand Mohota Spinning and Weaving Mills Ltd Vs State of Maharashtra,*** (1997) 6 SCC 12 – It is respectfully submitted that this decision relied upon by the State, will not be applicable to the present case, in as much as that is a clear case where there was consumption of water by the assesse. In any event, the said judgment has subsequently been distinguished by the Hon'ble Supreme Court in ***Bimolangshu Roy (Dead) Through Legal Representatives Vs State of Assam and another,*** (2018) 14 SCC 408 at para 15 pages 419 and 420.

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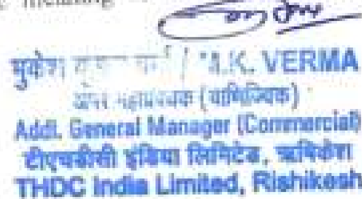
d. ***Ichchapur Industrial Cooperative Society Limited Vs Competent Authority, Oil & Natural Gas Commission and another,*** (1997) 2 SCC 42 - In this case, the question before the Hon'ble Supreme Court was whether 'water' is a mineral within the meaning of the "Mines Act, 1952" read with



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relevant provisions of the Petroleum and Minerals Pipelines (Acquisition of Right of User of Land) Act, 1963. The question before the Hon'ble Supreme Court and its consideration of the same make all the difference vis-a-vis the present case. By its very nature, minerals are exploited from the earth and thereafter consumed. In that case, it was held that water is a mineral which is capable of being carried through petroleum pipelines as any other minerals may also be carried and thus it is lawful to lay pipelines for transport not only petroleum but also water, which is a mineral. This judgment cannot be treated out of context and has to be understood only in the light of the peculiar facts of that case. Treating water as a mineral does not either support or improve the case of the State in the present writ petition since it is the specific case of the State that the tax is on mere use of water and not for consumption of water.

e. ***India Cements Limited and others Vs State of Tamil Nadu,*** (1990) 1 SCC 12: This judgment has also been dealt with in para 11(a) herein above and far from supporting the case of the State, it supports the case of the Petitioner.

f. ***State of Bihar and others Vs Indian Aluminium Company and others,*** (1997) 8 SCC 360 – In this case, the question before the Hon'ble Supreme Court was whether Bihar Forest Restoration and Improvement of Degraded Forest land Taxation Act, 1992 was constitutionally valid. The Act under challenge there came into being for the purpose of providing resources and restoration of degraded forest land and improvement of forest areas. While interpreting the meaning of the word 'tax on land' under Entry 49 of List II, the Hon'ble Supreme Court has categorically held in para 15 as follows:

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> *"Therefore, in order that a tax can be levied under Entry 49 of List II it is essential that 'land' as a unit must exist on which the tax is imposed."*

The Hon'ble Supreme Court has held that the tax in that case was not levied on land but on the absence of land (Degraded forests) and hence was not within the legislative competence of the State under Entry 49 of List II in as much as the rate of tax levied in the case of mining or excavation varied with the extent of land voided. The Hon'ble Supreme has held that since the tax is levied on the activity of mining, which is removable from the earth and not on the land itself and hence outside the ambit of Entry 49 of List II. The ratio of this case will have no bearing on the present case, which is a tax on non-consumption but only on use.

Q. Because the ld. Single bench did not even discuss and returned no finding and gave no reason for not agreeing with patent distinguishable facts, circumstances and context, while holding and agreeing with State that source of legislation to tax on usage of water for generation of electricity is traceable to Entry 49 of List II

R. Because ld. Single bench did not took into consideration the facts, as averred in para 24 at page 30 of the writ petition, that the impugned ***tax is not based on the quantity of water used*** but is ***based on flow rate of water on cubic meter basis at different Head Heights of a dam,*** used for the purpose of generation of electricity and as such this is nothing but a tax on Generation of Electricity and is hence beyond the legislative competence of the State, for the following reasons:-

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i. Entry 53 of List II gives power to States to tax only on '*Consumption or Sale of Electricity*'. However, none of the entries 45 to 63 gives any power to State to Tax Generation of Electricity. In the said situation, the exclusive right to levy any

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Tax on Generation of Electricity is with the Parliament, by virtue of the Residuary Power vested in it under Article 248 read with Entry 97 of List-I, which gives exclusive power to the parliament to make any law with respect to '*Any matter not enumerated in List II or List III **including any tax** not mentioned in either of those Lists*'.

b. This aspect has been considered by the Hon'ble Supreme Court in ***CST MP Vs MPEB,*** 1969 (1) SCC 200, where it has been held that electricity is 'Goods'. The Hon'ble Supreme Court has held that the right to levy any Tax or Duty on manufacture of any Goods in India (except alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotic), exclusively vests with the Parliament under Entry 84 of List I and hence, the right to levy any tax on Generation/Manufacture of Electricity is within the exclusive domain of the Parliament.

S. Because ld. Single bench failed to appreciate that a bare perusal of the rates of tax in Impugned Act will show that the same is directly relatable to the **Height of the Water Head.** Importantly, there is no mention of the volume of water stored and used for Generating Electricity, as the basis for levy of tax. It will be pertinent to point out that the Higher the water Head, the more will be the Electricity Generated for the same volume of water used. It clearly appears that the levy is not on use of water but on the amount of Electricity generated, depending of the Height of the water Head and hence, it has no correlation to the 'use of water'.

T. Because ld. Single bench failed to appreciate that the Height of the Head is directly proportional to the number of units of Electricity generated, since higher the Head, more the units of Electricity generated. If that be so, the tax levied by the State, in PITH & SUBSTANCE, is a tax on Generation of Electricity and not on Use of Water as sought to be made out. Hence, it is clearly beyond the legislative competence of the State.

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U. Because ld. Single bench failed to appreciate that even though nomenclature of the levy is not material, what has to be seen primarily when a challenge is made to a levy, is the legislative competence or power to levy a tax and in adjudicating this issue, the nature and character of the tax has to be determined at the threshold.

V. Because ld. Single bench failed to appreciate that even though the nomenclature used to name a levy is not determinative of the real character or nature of the levy, going by the above, the present, in pith and substance, is clearly a tax on generation of electricity, even though it is called a tax on use of water, in the absence of any other indicator, confines within the measure of tax and determine the nature of the tax itself.

W. Because ld. Single bench failed to appreciate that a a bare perusal of the provisions of the Impugned Act would disclose the following:

a. Section 2(f) defines the term 'user' as any person, group of persons, local body, Government Department, company, corporation, society etc. drawing water or any other authority authorized under chapter -II of the Act to avail the facility to draw water from any source for generation of electricity.

b. Section 10 – User entitled to use water (non-consumptive use) for generation of electricity shall be issued a Registration Certificate after execution of an agreement between the user and the Commission under the Act.

c. Section 17(i) - The user shall be liable to pay Water Tax under the Act at such rates as the Government may by notification fix.

Thus, the levy under the Act is on non-consumptive use of water for the purpose of generation of electricity. In other words, Entry 45 of List II pertains to land revenue and Entry 49 pertains to tax on land and buildings and both cannot be used for the purpose of deriving legitimacy by the State to impose a tax on non-consumptive use of water

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X. Because ld. Single bench failed to appreciate that a reading of Entry 17 of List II does not authorize or empower a state to levy any such tax. Power of the State to levy tax cannot be traced to any general entry (Entry 1 to Entry 44 of List II) and can be levied only if it is traceable to any taxing entries (Entry 45 to 63 of List II). Hence, there is no question of the State having any power to impose a tax through the Impugned Act, in the absence of any specific taxing entry in List II.

Y. Because ld. Single bench failed to appreciate that impugned levy, if left unchallenged, will result in drastic increase of Electricity Tariff, which will have to be passed on to the end consumer, who are from different states. The levy will render the very functioning of the Petitioner unviable, will be against public interest (as per separate note) and is manifestly arbitrary

Z. Because ld. Single bench failed to appreciate that State has sought to contend that the 12% free supply of power as per the Articles of Association of the Petitioner is only to compensate the distress in setting up the project on account of submergence, dislocation of population etc. and is not a Royalty *in lieu* of use of natural resources. However, a perusal of Clause 62 (A)(ii) of the Articles of Association of the Petitioner (pg. 119), will clearly show the reason for the stipulation of providing the 12% free power to the then UP Govt., is only as '***Royalty in lieu of use of natural resources***' and will hence be binding on the successor State of Uttarakhand, as per Sec 55 & 79 of the Uttar Pradesh Reorganization Act, 2000.

AA. Because ld. Single bench failed to appreciate that while imposing any Tax the relevant question is whether there is any specific source of power to impose such Tax while in the case in hand ld. Single bench misdirected by holding that since there is no law framed by Parliament under Entry 56 List I thus State can frame a taxing law and power to tax be traced to Entry 49, which is patently unsustainable in the eyes of law

BB. Because impugned Judgment and order dated 12-2-2021, passed in Writ Petition No. 187 of 2016(MS), titled as THDC India Ltd. V.

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State of Uttarakhand and others, even otherwise is inappropriate, illegal, irregular and unsustainable in the eyes of law.

RELIEF SOUGHT

The relief sought through the present appeal is to set-aside Judgment and order dated 12-2-2021 passed in Writ Petition No. 187 of 2016(MS), titled as THDC India Ltd. V. State of Uttarakhand and others, vide which writ petition has been dismissed, as well as to declare the Uttarakhand Water Tax on Electricity Generation Act, 2012 (Act 9 of 2013), as Ultra vires, arbitrary, Unconstitutional and unsustainable in the eyes of law and quashing all the steps and proceedings initiated thereunder by the respondent State and or to pass such further orders or directions which this Hon'ble Court may deem fit and proper in the circumstances of the case, or otherwise the appellant shall suffer irreparable loss and injury.

Date: 5/4/21

Shobhit Saharia

Advocate

Counsel for the Appellant

Signature of Shri Mukesh Kumar Verma

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Reserved Judgment

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition No. 631 of 2017 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others, ... Respondents

with

Writ Petition No. 187 of 2016 (M/S)

THDC India Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 272 of 2016 (M/S)

National Hydro Power Corporation .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 1500 of 2016 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

[illegible] .... Respondents

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with

Writ Petition No. 2074 of 2016 (M/S)

M/s Swasti Power Pvt. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 3084 of 2016 (M/S)

M/s Bhilangana Hydro Power Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 123 of 2017 (M/S)

M/s Jaiprakash Power Ventures Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

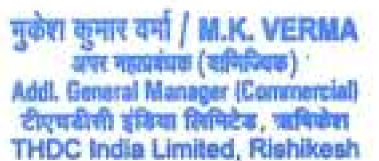
Writ Petition No. 641 of 2018 (M/S)

M/s Swasti Power Pvt. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with



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Writ Petition No. 2396 of 2019 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 3603 of 2019 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

with

Writ Petition No. 279 of 2020 (M/S)

Alaknanda Hydro Power Co. Ltd. .... Petitioner

versus

State of Uttarakhand & others .... Respondents

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Mr. Dinesh Dwivedi, Senior Advocate assisted by Dr. Abhishek Atrey, Mr. Prateek Dwivedi, Mr. Shivam Singh, Advocates with Ms Anjali Bharwava, Mr. P.C. Bisht, Addl. Chief Standing Counsel and Mr. Narain Dutt, Brief Holder for the respondent State.
Mr. Aditya Singh, Advocate for petitioner M/s Bhilangana Hydro Power Ltd.
Mr. Gopal K. Verma, Addl. C.S.C. for the State of Uttar Pradesh
Mr. Rajesh Sharma and Mr. Sanjay Bhatt, Standing Counsel for the Union of India.
Mr. U.K. Uniyal, Senior Advocate assisted by Mr. Rajeev Srivastava & Mr. Jitendra Chaudhary, Advocates for respondent UPPCL.

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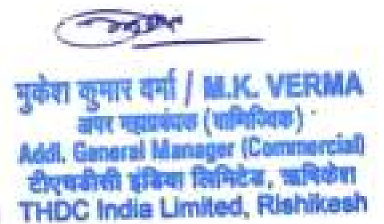
Chronological list of cases cited

1. (2017) 12 SCC 1, Jindal Stainless Limited & another Vs. State of Haryana and others
2. (2010) 6 SCC 449, Goa Glass Fibre Ltd. Vs. State of Goa & another
3. (2010) 12 SCC 1, Bhanumati & others Vs. State of U.P.
4. (2005) 8 SCC 534, State of Gujarat vs. Mirzapur Moti Kureshi Kassab Jamat
5. (2004) 1 SCC 712, Dharam Dutt Vs. Union of India
6. (2004) 2 SCC 249, M.P. Cement Manufacturers' Association Vs. State of Madhya Pradesh & others
7. (2004) 5 SCC 465, State of Punjab vs. Nestle India Ltd. & another
8. (2004) 10 SCC 201, State of West Bengal Vs. Kesoram Industries Ltd. & others
9. (2001) 3 SCC 654, Municipal Council Kota Vs. Delhi Cloth and General Mills Co. Ltd.
10. (1997) 2 SCC 42, Ichchapur Industrial Cooperative Society Ltd. Vs. Competent Authority, Oil and Natural Gas Commission
11. (1997) 2 SCC 453, State of Bihar Vs. Bihar Distillery Ltd.
12. (1996) 3 SCC 709, State of Andhra Pradesh & others Vs. McDowell & Co. and others
13. (1995) 1 SCC 274, Kasinka Trading & another Vs. Union of India & another
14. 1993 Supp. (1) SCC 96 (II), In the matter of: Cauvery Water Dispute Tribunal
15. (1992) 2 SCC 411, Amrit Banaspati Co. Ltd. & another Vs. State of Punjab & another
16. (1990) 1 SCC 12, India Cements Ltd. & others Vs. State of Tamil Nadu
17. (1990) 1 SCC 109, Synthetics & Chemicals Ltd. Vs State of U.P.
18. (1983) 4 SCC 45, Hoechst Pharmaceuticals Ltd. & others Vs. State of Bihar.
19. (1969) 2 SCC 55, Assistant Commissioner of Urban Land Tax Vs. Buckingham & Carnatic Co. Ltd.
20. AIR 1967 SC 40, Firm Bansidhar Premsukhdas Vs State of Rajasthan
21. 1965 2 Andhra Law Times 297, N.B. Reddy Vs. State of Andhra Pradesh.
22. AIR 1953 SC 375, K.C. Gajapati Narayan Deo & others Vs. State of Orissa.

[Per: Hon'ble Lok Pal Singh, J.]

Since identical issue of fact and law is involved in the aforementioned writ petitions, therefore, they are being decided by this common judgment for the sake of brevity and convenience.

2) Writ Petition no. 1500 (M/S) of 2016 shall be the leading case.



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3) Petitioners in the present batch of petitions are power generating companies, engaged in production of electricity by utilizing the river water. The petitioner, Alaknanda Hydro Power Company Ltd. (AHPCL) seeks to assail the constitutional validity and vires of the Uttarakhand Water Tax on Electricity Generation Act, 2012 (hereinafter referred to as 'the Act'), *inter alia*, on the following grounds:

(i) The enactment, promulgation and notification of the said Act being in violation of the provisions of Articles 200, 246, 248, 256, 285, 288(2) and 300A of the Constitution of India.

(ii) The enactment, promulgation and notification of the said Act being in violation of the provision of Entry 97 of List I of the Seventh Schedule of the Constitution of India.

(iii) The enactment, promulgation and notification of the said Act being in violation of the provisions of Entry 17 of List II of the Seventh Schedule of the Constitution of India.

(iv) The consideration of and the assent given for the enactment and the notification of the said Act being in violation of Article 200 and 288(2) of the Constitution of India having been accorded the consent by the Governor of the State of Uttarakhand, without obtaining the consent of the President of India.

(v) The fixation of the rates of water tax in terms of the provisions of Chapter 5 of the said Act by means of a notification issued by respondent no. 1 to 5 being in violation of Article 288(2) of the Constitution of India as that the said Act was promulgated without obtaining consent from the President of India, in violation of mandatory provisions under the Article 288(2) of the Constitution of India, wherein it is obligatory on part of the State Legislature, in case of fixation of any 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. The rates of Water Tax having not received the previous consent of the President.

(vi) The enactment, promulgation and notification of the said Act imposing Water Tax violating the

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erstwhile State of U.P. and the Duncans entered into a Water Usage Agreement dated 28.08.1998 in order to facilitate Duncans to use the water from the Alaknanda River for generating power from the Project. In the meantime, in the year 2000, the State of Uttarakhand came into existence. After bifurcation of erstwhile State of U.P., the benefits to be emanated from the Project were conceptualized to be shared between the State of U.P., State of Uttarakhand and the Alaknanda Hydro Power Company Limited (AHPCL); and to give effect to the understanding between the said three parties, existing IA was amended and restated as Restated Implementation Agreement (RIA). The petitioner AHPCL, Govt. of U.P. and Govt. of Uttarakhand amended the IA and had entered into the restated Implementation Agreement on 10.02.2006 (RIA) to depict in clear terms, the rights and obligations of each party, including but not limited to the aspect of 12% power to be supplied by the petitioner to the Govt. of Uttarakhand for free of cost and as a 'Royalty' for using the Alaknanda River water by the Project which is situated in the State of Uttarakhand.

5) Clause 1.65 of the RIA categorically states that "Water use Agreement' or WUA means the document, as executed between the then Govt. of U.P. and the Company on 28th August, 1998 whereby the then Govt. of U.P. had granted the

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fundamental rights of the petitioner of carry on its trade and business under Article 19(1)(g) of the Constitution of India.

(vii) The enactment, promulgation and notification of the said Act, being arbitrary, manifesting arbitrariness in State action and being exercise of the colourable powers of the respondent State of Uttarakhand, thus violating the fundamental rights of the petitioner under Articles 14 and 19(1)(g) of the Constitution of India.

4) The genesis of the present controversy from where it arises is that in the year 1981, a Project named Srinagar Hydro Electric Project, having capacity of 330 MW was conceptualized by the then Govt. of U.P. The project development was entrusted to the Irrigation department of erstwhile Government of Uttar Pradesh and was planned to be developed with the World Bank funds. It is stated that due to inordinate delay caused by the Govt. of U.P. in developing the project, the World Bank withdrew the funding and due to paucity of funds, the Govt. of U.P. decided to entrust the Project to private parties for development. TATA Power Corporation Ltd. (TATA/TPCL) took over the Project development works, which could not succeed in making progress with the Project development and ultimately, in the year 2005, GVK Group of Hyderabad took over and entrusted with the Project development work. Prior to that, when Duncans North Hydro Power Co. Ltd. (Duncans) [Now known as Alaknanda Hydro Power Company Ltd.] was entrusted the Project, an MoU and an Implementation Agreement (IA) dated 27.08.1998 was entered into between the parties. Earlier, the

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rights to the Company to use the water from the Alaknanda River for generation of electric energy for the Project."

6) Clause 13 of the RIA defines the Water Use Rights and provides that "The Govt. of Uttarakhand hereby grants to the Company the right, free of any and all charges during the Term to utilize the water of Alaknanda river for the project and to generate electric energy at the Site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environment clearance. Such a right was earlier available to the Company under the then signed Water Use Agreement (WUA) which now stands substituted by the provisions of this RIA, Govt. of Uttarakhand shall not impose any taxes, duties, levies or charge of any kind of electricity generated by this Project during the term of this RIA.

7) It is contended that in view of the aforesaid, no taxes / cess / fee etc. shall be applicable on the water which is exclusively used by the petitioner company for generation of electricity. Further, Clause 17.1 of the RIA dated 10.02.2006, provides as under:

"17.1 Company Obligations: The entire energy generated at the generation terminals of the Project

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> shall be referred to as the "Energy Output". The difference between the Energy Output and the Auxiliary consumption shall be referred to as the "Saleable Energy." The Saleable Energy shall be supplied, duly metered by the Company, at 400 KV interconnection Point at 400 KV outlet gantry at Company's switchyard. Govt. of Uttarakhand shall be entitled to 12% of the Saleable Energy from the Project free of cost. Govt. of U.P. / UPPCL and the Company agree that this 12% free of cost Saleable Energy will be supplied to the Govt. of Uttarakhand by the Company in lieu of the 12% Saleable Energy previously required to be supplied free of cost by the Company to Govt. of U.P. / UPSEB. The GoUP/UPPCL/Company shall facilitate such transfer of 12% Saleable Energy to Govt. of Uttarakhand at 400 KV interconnection points at 400 KV outlet gantry at Company's switchyard at Srinagar....".

8) It is stated that though the petitioner has commenced construction of the dam and other Project development works in the year 2005-06, it could complete the works only in the month of April 2015 and had declared commercial operations of its Unit-1 on 23.04.2015; Unit-3 on 10.05.2015 and Units-2 & 4 on 20.06.2015. Thus, until April 2015, the Project has not used any water from the Alaknanda river for generation of power. It is further stated that at the time of inception of the project or at any time prior to the enactment of the Uttarakhand Water Tax on Electricity Generation Act, 2012 (the Act) there was no imposition of any tax or cess on the water drawn by the petitioner that was used either for construction purposes or for power generation. *No tax / cess / royalty was* imposed on the petitioner at an earlier point in time, plausibly because of the compliance with the RIA terms which contemplates that 12% power generated from the Project would be given free of

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said to the State of Uttarakhand on / towards Royalty in lieu of the use of natural resources by the petitioner, viz. the water resources. It is stated that vide impugned Notification dated 07.11.2015 (purportedly under Section 17(1) of said Act) issued by the respondent no. 3, the petitioner was informed about the promulgation of the Act and further informed that the Hydro Power Projects situated in the State of Uttarakhand of more than 5 MW capacity (like petitioner) were liable to pay tax on the water drawn for the purposes of generation of electricity for next three years at the rates as follows:

Sl. No	Available Head	Rate of Water Tax
1	Upto 30.00 M	02 Paise per cubic meter
2	31.00 M to 60.00 M	05 Paise per cubic meter
3	61.00 M to 90.00 M	07 Paise per cubic meter
4	Above 90.00 M	10 Paise per cubic meter

9) Thereafter, vide an impugned letter dated 07.12.2015 issued by the respondent no. 8 was received by the petitioner which had highlighted the necessity of petitioner's registration under the said Act and to fill the form and deposit the registration fee to complete registration process under the Act. It is alleged, that all of a sudden, petitioner received the impugned letter dated 26.04.2016 issued by respondent no. 7 demanding an amount of Rs.27,97,39,600/- (for a period Nov. 2015 to March 2016) for the alleged use of water to generate electricity under the said Act. In terms of the

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provision of Section 12(2) of the Act, the hydro power stations in Uttarakhand are required to apply for registration to the Commission established under the Act within a period of six months from the date of commencement of the Act, which is 15.08.2015 and the Commission shall pass an order to register the user within a period of six months from the date of receipt of application in accordance with the provisions of the Act. The above referred Section further states that in case the user fails to apply or register within time stipulated, the Commission shall forthwith impose penalty which may be enhanced in case of prolonged default. The relevant Sections 9, 10 and 12 of the Act are extracted hereunder:

> "9. No person shall install a Scheme, requiring usage of water or in any other way use the water, unless he / she is authorized to do so by a registration certificate, issued under Section 10.
>
> 10. Any user intending to use water (non-consumptive use) for generation of electricity shall be issued a registration certificate after the execution of an agreement between the user and the Commission under the Act.
>
> 12(1) The registered user shall be liable to pay water tax for the water drawn for electricity generation as per the provisions of the Act.
>
> (2) Where any user has constructed a Hydropower scheme, for purpose of generation of electricity, prior to the commencement of the Act, such user shall, within a period of six months from the date of commencement of the Act, apply for registration under the Act and the Commission shall pass an order to register the user within a period of six months from the date of receipt of application in accordance with the provisions of the Act.
>
> (3) If the user as mentioned in sub-section (2) fails to or register within time stipulated therein, the Commission shall forthwith impose suitable penalty which may be enhanced in case of prolonged default.

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10) Chapter 4 of the Act describes "Assessment of Water Drawn by User".

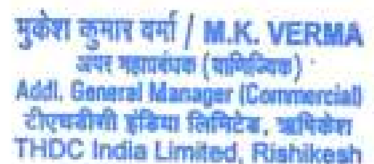
11) Section 14.1 of the Act provides for the procedure to assess the water drawn. The same reads as under:

> "The Commission shall install or cause to be installed flow measuring device within, the premises of Scheme or at such other place where the Commission deems fit for purposes of measuring the water drawn for electricity generation or may adopt any indirect method for assessment of water drawn by the user."

12) Section 14.2 of the Act provides as under:

> "The Commission may either install or, require a user to install a flow measuring device as per the specifications approved by the Commission at his premises or at his location or at such other place as the Commission may direct and thereafter adjust the expenditure incurred by such user on such installation towards the Water Tax payable by the user."

13) It is the case of the petitioner that the respondent neither installed any flow measuring device within the premises for measuring the water drawn nor had it adopted any alternate method in measuring the quantity of water used; and the respondent neither did prescribe any specification for adjusting the expenditure incurred by the petitioner. As such, the impugned notice(s) was issued without complying with the procedure under Section 14 of the Act. Chapter 5 of the Act deals with "Water Tax". Section 17.1 of the Act prescribes - "The user shall be liable to pay the Water Tax under the Act at such rates as the Government may by notification fix in this behalf." Further, Section



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19(1) of the Act mandates that the assessment of water drawn by the user for electricity generation and computation of water tax thereof shall be carried out by the Commission. Section 19(2) provides that the user shall pay the water tax as assessed under sub-section (1).

14) It is alleged that neither any Commission was established under the Act nor has such Commission computed the tax based on the water drawn by the petitioner, as such, not only the impugned notice is bad in the eyes of law for want of compliance under Sections 14, 17 and 19 of the Act, but also non-maintainable as the amounts claimed under the notice are baseless and are made on mere surmises and presumptions.

15) According to the petitioner, the quantum of electricity generated in a Hydro Station is proportionate to the 'Head' being difference in the levels at entry and exit of water conductor system. Hence, the same volumes of water passing through Hydro Turbines will generate more electricity in a High Head Power Station as compared to Hydro Station with Low Head. Thus, levying water tax based on volume of water on per cubic meter basis on a graded scale of 'head' is in fact levy of tax on electricity generation itself. It is contended that the Notification providing for levy of water tax has been passed without due notice and opportunity to the

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petitioner. Moreover, the liability which has been fastened upon the petitioner towards royalty, is not in accordance with either the express conditions of *RIA* or in accordance with the provisions of the Act. The *RIA* is a tripartite agreement between the Govt. of U.P., Govt. of Uttarakhand and the petitioner. The terms and conditions thereunder were imposed upon the AHPCL / petitioner by the Govt. of U.P. and Govt. of Uttarakhand. As per the terms of the *RIA*, there shall not be any Royalty, Tax, Cess or any other payment that shall be made by the petitioner. Thus, there is an express waiver provided by the Govt. of U.P. and Govt. of Uttarakhand to the petitioner under the RIA, which is a binding agreement on both of them. Any changes made to the *RIA* without the express consent from the petitioner shall not only amount to the breach of the terms of the RIA agreement, but also the acts of the Govt. of U.P. and Govt. of Uttarakhand amount to unilateral, arbitrary and thus untenable under the law. It is alleged that the provisions of the Act shall not be applied to the petitioner and that the petitioner shall not be made liable to pay tax or cess. On the other hand, the same *RIA* envisages 12% power from the Project to be provided to the State of Uttarakhand for free of cost, due to usage of water from the River situated in the State of Uttarakhand. As such, any imposition of tax, cess or royalty would tantamount to *double taxation* and thus, the Act becomes illegal and therefore, inapplicable to the petitioner and

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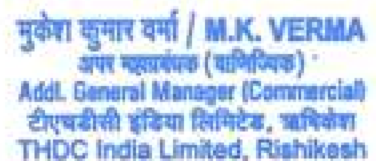
that the impugned notice is liable to be declared illegal and the same shall be quashed. It is alleged that the State of Uttarakhand being the party to the RIA should not have made applicable the provisions of the Act to the petitioner, as it cannot on one hand agreed to not impose or exempt through an agreement (RIA) any tax, cess or royalty payable by the petitioner and on the other hand, subsequently nullify the terms of RIA without caring to honour the agreement by enacting a legislation appropriating such given right and thereby demanding tax on water used for generating power, while it is continuing to enjoy 12% free power from the Project under the terms of the Power Purchase Agreement (PPA). Thus, the State of Uttarakhand is trying to get double benefit, which act of the State is arbitrary and that the impugned Act is liable to be struck down. The acts of the State of Uttarakhand are infringing the fundamental right of the petitioner. Hence, present writ petition.

16) Counter affidavit has been filed on behalf of respondent nos. 1 and 3, stating therein that the petitioner is not entitled for any relief as the State Government is competent to legislate and charge on the storage and usage of water for generation of electricity as per the provisions of the Constitution of India. It has further been stated that in order to manage its water resources effectively, the respondent Stat thought it necessary to own all its



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water resources and manage it properly so that the future water conflict can be avoided. To manage the water resources, maintain them in good conditions, to conduct studies and research, the Act in question was framed which is in consonance with the National draft Water Policy and the action plan. Citing examples of various countries where water charges from water users, particularly from hydro electric projects are being charged at present, it has been stated that in order to frame detailed State water policy, as a first step, the Uttarakhand Water Management and Regulatory Act, 2013 (Uttarakhand Act no. 24 of 2013) was brought into existence. The object of which itself suggests that the Act was made to provide for the establishment of the Uttarakhand Water Management and Regulatory Authority bill to regulate water resources within the State. It has further been stated that as Uttarakhand is blessed with abundant water resources an due to growing demand these sources need to be conserved and harnessed in the best possible manner for the benefit of the State and the Nation. Hence, "The Uttarakhand Water Tax on Electricity Generation Act, 2012", came into existence for a specific purpose of recovering usage charges on water for generating electricity from water sources as defined under the Act. It is also stated that the writ petition filed by the petitioner challenging the provisions of the aforesaid Act is absolutely on the wrong premises and grounds and is against the settled provisions of the Constitution

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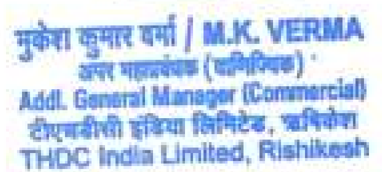
of India. It is stated that as per the provisions of Entry 17 List II of the Constitution of India, water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power projects are given in List II (State List) subject to the provisions of Entry 56 of List I (Union List). Entry 56 of the List I includes regulation and development of inter-state rivers and river valleys to the extent to which such regulation and development under control of Union is declared by Parliament by law to be expedient in the public interest and such parliamentary regulation under the Constitution are confined to Navigation Shipping etc. but not storage and usage of water for generation of electricity. The only legislation enacted by parliament under Entry 56 of the List I is the River Board Act, 1956 to promote integrated and optimum development of inter-state river valleys. It is stated that the Act envisages the Board to be expert bodies in irrigations, electrical Engineering, Flood control Navigation, Water conservation. These bodies are to be advisory bodies and their function is to advise the State Government as regard to the development and regulation of inter-state rivers and river valley within their jurisdiction, but under entry 56 of List-I, the Union Government has no power to legislate on charge or tariff an usage of water for generation of electricity from the users of natural water resources. Apart from entry 56 of List-I, the union may perhaps take steps to prevent floods, construction of dams etc. under entry 24 of List-I



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which speaks of shipping and navigation of inland waterways declared by parliament to be national water ways as regards to mechanical propelled vessels. Therefore, it is evident from the aforesaid discussion that State Government is absolutely competent to legislate on charges on usage of water for generation of electricity from natural water resources situated within the territory of the State Government. In paragraph-32 of the counter affidavit it has been stated that the Hon'ble Governor of Uttarakhand has given assent to the legislation of the said Act, 2012 passed by the state legislature using his discretionary power under Article 200 & 163(2) of the Constitution of India, hence the violation of Article 246 of the Constitution does not arise as the matter legislated is not a matter which is enumerated in list I (union list) or list II (concurrent list).

17) In the rejoinder affidavit, most of the averments made in the writ petition are reiterated. It is stated that the entry 56 of List I exclusively empowers the Union of India to legislate all issues pertaining to inter-state rivers and any enroot by the State Legislature is considered to be an extra-territorial law and in transgression of power of the concerned State Legislature. It is a universally known fact that River Ganges originates from Gangotri and till submerges in Bay of Bengal it flows through not only Uttarakhand but also passes through the State of U.P., Bihar and West Bengal.

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18) Heard learned counsel for the parties and perused the entire material available on record.

19) The issues which arise for consideration of this Court are formulated as under:

(i) Whether the State of Uttarakhand has legislative competence to levy tax, or not?

(ii) Impugned enactment and tax cannot be placed in Entry 17 of List II of the Seventh Schedule of the Constitution of India as it is a general entry and will not sustain the tax law; Entry 17 of the List II is limited by the words 'to say' and does not postulate tax law or a tax.

(iii) Entry 17 of List II is subject to Entry 56 of List I. The subject of inter state falls within the exclusive domain of the Union. River Ganga is an inter state river, therefore, it is entirely within the exclusive domain of the Union under Entry 56 of List I and hence the State cannot impose tax on inter state river water.

(iv) Since the title of the Act is "Uttarakhand Water Tax on Electricity Generation Act, 2012" (the Act) and Section 12 of the Impugned Act speaks of tax on generation of electricity.

(v) Whether the impugned Act imposing water tax is hit by Article 288(2) of Constitution because of lack of consent of the President of India?

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(vi) Whether the Notification 151 under Section 17(1) of the impugned Act fixing the rate of tax as per cubic meter of water used in generation of electricity is also equally invalid as mandated under Article 288(2) of the Constitution?

(vii) Whether the impugned Act is mala fide or a colourable exercise of State's legislative powers. The RIA or otherwise signed by the petitioner prior to the commencement of the Act amounts to betrayal of the Act?

(viii) Whether there is promissory estoppel against the State in view of the fact that they have agreed not to levy any charges or tax as stipulated in RIA? Had the state has power to levy tax on generation of electricity, or not?

(ix) Is the installation of the flow measuring device is absolutely necessary for measuring water flow for the purposes of taxation?

20) Before proceeding further, it would be apt to reproduce herein the definitions contained in Chapter I of the Act. The same are extracted hereunder:

"Definitions 2. In these rules, unless there is anything repugnant in the subject or context :-

(a) "Act" means the Uttarakhand Water Tax on Electricity Generation Act, 2012;

(b) "Commission" means Uttarakhand State Commission for Water Tax on Electricity Generation established under section 21 of the Act;

(c) "Electricity" means electrical energy generated by way of water drawn from any

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water source flowing within the territory of the State;

(d) "Government" means Government of Uttarakhand;

(e) "Notification" means a notification published in the Gazette of the State, and the term "notify" shall be construed accordingly;

(f) "User" means any person, group of persons, local body, Government Department, company, corporation, society etc. drawing water or any other authority authorized under chapter -II of the Act to avail the facility to draw water from any source for generation of electricity;

(g) "Water" means natural resource following in any river, stream, tributary, canal, nallah or any other natural course of water or stipulated upon the surface of any land like, pond, lagoon, swamp, spring;

(h) "Water Source" means a river and its tributaries, stream, nallah, canal, spring, pond, lake, water course or any other source from which water is drawn to generate electricity'

(i) "Water Tax" means the rate levied or charged for water drawn for generation of electricity and fixed under this Act."

21) At the very outset, Mr. Gourab Banerji, Mr. V.K. Kohli, Mr. Mohan Parasaran, Mr. Arvind Vashistha, Mr. D.S. Patni, learned Senior Counsel appearing on behalf of the petitioners and Mr. Aditya Singh, learned counsel in the batch of writ petitions would submit that if the impugned Act does not fall within any of the entries in List II, then the same is ultra vires the Constitution and beyond the legislative competence of the State. They drew attention of this Court towards Entry 17 of the List II, which reads as under:

"17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water

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> Storage and water power subject to the provisions of Entry 56 of List I."

22) It is further submitted that the above entry cannot be the source of power for levying the impugned tax and does not confer any legitimacy or legislative competence to the State to levy such a tax. The said entry is a 'general entry' relating to the subject matter 'water and allied matters' and is not a 'taxing entry' and does not confer any authority to the State to levy tax on non-consumptive usage of water.

23) Reliance is placed on the judgment of Hon'ble Apex Court in **Kesoram Industries Ltd. case**[4]. Para 31, sub-para 3 of the said judgment is extracted hereunder:

> "31(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deducted from a general legislative entry as an ancillary power."

24) Further reliance has been placed on paragraph no. 74(3) of *Kesoram's* case, wherein it has been held as under:

> "74(3) 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 Article 248 clauses (1) and (2) and of Entry 97 in List I of the Constitution. Under the scheme of the entries in the lists, taxation is regarded as a distinct matter and is separately set out."

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25) Paragraph nos. 75, 76 and 100 of the *Kesoram's* case are also relied upon. The same read as under:

> "75. Referring to M.P.V. Sundararamier & Co. Vs State of A.P., AIR 1958 SC 468, Sabyasachi Mukharji, J. (as His Lordship then was) speaking for six out of the seven Judges constituting the Bench in **Synthetics and Chemicals Ltd.**[17] held that under the constitutional scheme of division of powers in the Seventh Schedule, there are separate entries pertaining to taxation and other laws. A tax cannot be levied under a general entry.
>
> 76. The abovesaid principles continue to hold the field and have been followed in cases after cases.
>
> 100. Article 265 mandates - no tax shall be levied or collected except by authority of law. The scheme of the Seventh Schedule reveals an exhaustive enumeration of legislative subjects, considerably enlarged over the predecessor Government of India Act. Entry 97 in List I confers residuary powers on Parliament. Article 248 of the Constitution which speaks of residuary powers of legislation confers exclusive power on Parliament to make any law with respect to any matter not enumerated in the Concurrent List or the State List. At the same time, it provides that such residuary power shall include the power of making any law imposing a tax not mentioned in either of those lists. It is, thus, clear that if any power to tax is clearly mentioned in List II, the same would not be available to be exercised by Parliament based on the assumption of residuary power. The seven-Judge Bench in Union of India Vs Harbhajan Singh Dhillon, (1971) 2 SCC 779 ruled, by a majority of 4:3, that the power to legislate in respect of a matter does not carry with it a power to impose a tax under our constitutional scheme...."

26) On the strength of *Kesoram's* judgment, it is submitted that in para 76 of the judgment, Hon'ble Supreme Court has categorically held that the above said principle continues to hold the field and has been followed in case after case. It has been categorically held that a tax cannot be levied under a general entry. In regard to the validity of the Act, much less, Entries 17 and 18 of List II it

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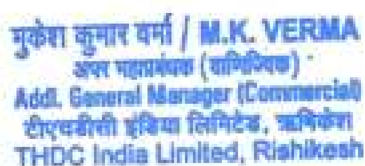
has been argued that both the entries are general entries and no tax whatsoever can be levied under a general entry, in view of the authoritative pronouncement of the Hon'ble Supreme Court in Kesoram's judgment.

27] The next contention of learned Senior Counsel appearing on behalf of the petitioners is that the case of the State is primarily rests on Entries 49, 45 and 48 of List II of the Seventh Schedule to the Constitution. The same read as under:

> "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.
>
> ......
>
> 48. Estate duty in respect of agricultural land.
>
> ......
>
> 49. Taxes on land and buildings."

28] It is contended that according to the State, Entries 48 and 49 relate to "land" and include everything above or below the surface and water is part of land and that the expression "land" should be widely construed, to include water stored on land or flowing over land."

29] Further placing reliance on *Kesoram's* judgment, learned Senior Counsel would submit that in said judgment, Hon'ble Supreme Court has considered the scope and ambit of the expression



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'land' used in Entry 49 of List II. Paragraph no. 44 of said judgment is extracted hereunder:

> "44. In **Asstt. Commissioner of Urban Land Tax**[13] for the purpose of attracting the applicability of Entry 49 in List II, so as to cover the impugned levy of tax on lands and buildings, the Constitution Bench laid down twin tests, namely : (i) that such tax is directly imposed on lands and buildings, and (ii) that it bears a definite relation to it. Once these tests were satisfied, it was open for the State Legislature, for the purpose of levying tax, to adopt the annual value or the capital value of the lands and buildings for determining the incidence of tax. Merely, on account of such methodology having been adopted, the State Legislature cannot be accused of having encroached upon Entry 86, 87 or 88 of List I. Entry 86 in List I proceeds on the principles of aggregation and tax is imposed on the totality of the value of all the assets. It is quite permissible to separate lands and buildings for the purpose of taxation under Entry 49 in List II. There is no reason for restricting the amplitude of the language used in Entry 49 in List II. The levy of tax, calculated at the rate of a certain per centum of the market value of the urban land, was held to be intra vires the powers of the State Legislature and not trenching upon Entry 86 in List I. So is the view taken by another Constitution Bench in Shri Prithvi Cotton Mills Ltd. Vs Broach Borough Municipality, (1969) 2 SCC 283 where the submission that the levy was not a rate on lands and buildings as appropriately understood but rather a tax on capital value, was discarded."

30. On the strength of *Asstt. Commissioner of Urban Land Tax's* judgment as reiterated in *Kesoram's* case, it is stated that the impugned tax is not directly imposed on land (for example, property tax / municipal tax) and it does not bear a definite relationship to land, i.e., it has no nexus to the land. Therefore, the impugned tax cannot, by any stretch of imagination, be traceable to Entry 49 of List II.

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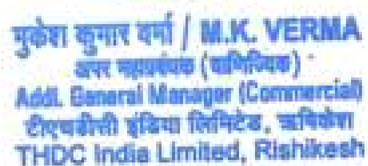
31) It is contended that Entry 48 of List II is also wholly irrelevant in the context of present case and cannot at all be the source of power because the said entry pertains to Estate Duty in respect of agriculture lands.

32) Learned Senior Counsel arguing in respect of Entry 45 of List II, relied upon the judgment of Hon'ble Supreme Court in **India Cements Ltd.**[19] and would submit that the term 'land revenue' has been jurisprudentially explained by the Constitution Bench in para 20 and 21 of said judgment as under:

> "20. ...Entry 45 deals with land revenue, which is a well known concept and has existed in India before the Constitution came into force. In **N.R. Reddy**[21], Jaganmohan Reddy, J. as the learned Judge then was of the Andhra Pradesh High Court, while sitting in a Division Bench observed that no land revenue Act existed in the composite State of Madras nor had the ryotwari system ever been established by legislative enactment. The learned Judge at page 306 of the report observed that in the earlier days, sovereigns had in exercise of their prerogative right claimed a share of the produce of all cultivated land known as 'Rajabhagam' or by any of the various other names, and had fixed their share or its commuted money value from time to time, according to their will and pleasure..."
>
> 21. It is, however, clear that over a period of centuries, land revenue in India has acquired a connotative meaning of share in the produce of land to which the King or the government is entitled to receive."

33) On the strength of *India Cements Ltd.* judgment, learned Senior Counsel would submit that land revenue cannot be equated to a tax simpliciter and the same has to be correlated to a share of the sovereign on produce from land as



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traditionally understood and is in the nature of royalty for use of land resulting in consumption of benefit derived from land. They would further submit that there is no consumption of water at all in the present case. Water is merely used for the purpose of feeding the same into generators, which produce electricity and is thereafter let downstream, without using it in any manner. It is vehemently argued that in the absence of any consumption of water, there cannot be any tax or cess on use of water.

34) Per Contra, Mr. Dinesh Dwivedi, learned Senior Counsel appearing on behalf of the State placed reliance on the following judgments in order to buttress his submission that the word 'land' is very wide and includes everything above or below the surface:

(i) Raza Buland Sugar Co. Ltd. Rampur Vs Municipal Board, Rampur, AIR 1962 Allahabad 83
(ii) Nizam Sugar Factory Ltd. Vs City Municipality, AIR 1965 AP 91
(iii) R.S. Rekhchand Mohota Spinning and Weaving Mills Ltd. Vs State of Maharashtra, (1997) 6 SCC 12
(iv) Ichchapur Industrial Cooperative Society Ltd. Vs Competent Authority, Oil & Natural Gas Commission & another, (1997) 2 SCC 42
(v) India Cements Ltd. & another Vs State of Tamil Nadu, (1990) 1 SCC 12
(vi) State of Bihar & others Vs Indian Aluminium Company & others, (1997) 8 SCC 360

35) So far as the first question is concerned with regard to the competence of the legislature traceable to Entry 17 of List II of the seventh

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Schedule to the Constitution of India, any law of legislative competence is to be decided only on two ground and none else. The first ground is that it must be in the legislative competence of the State to make that law under Article 246 of the Constitution. The second ground is it has to be only of legislative competence or breach of fundamental right or any other express provision of the constitution. The third ground is limitation expressed by the Constitution under Article 288 and 304A and 192. Article 245 of Constitution of India speaks about the extent of laws made by Parliament and by the Legislatures of States. It says that unless and until there is unreasonableness the power of the legislature could not be restricted. In **State of A.P. & others Vs McDowell & Co. and others**[12], Hon'ble Apex Court has held that the power of Parliament or for that matter, the State Legislatures is restricted in two ways. A law made by Parliament or the legislature can be struck down by courts on two grounds and two grounds alone, viz., (1) lack of legislative competence and (2) violation of any of the fundamental rights guaranteed in Part III of the Constitution or of any other constitutional provision. There is no third ground.

36) The very premise that the impugned tax is on generation of electricity is absolutely incorrect. Here the tax is being levied on the activity of "drawing water" and the true nature of the tax is that it is on "water drawn or usage of it". It is

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assessed on the quantity of water used and not on the units of electricity generated. So far entries 54 and 56 are concerned, both the entries are general regulatory entries that do not countenance tax. They also cannot restrict the power of the State to tax the "usage of water" which falls under List II, i.e., State list. Both these entries do not relate to taxation being non-taxing entries. So far as Entry 97 is concerned, the impugned tax law is directly traceable to Entries 17, 18, 45, 49, 50 of List II of Seventh Schedule to the Constitution and Entry 97 has no role here. Similarly, Entry 38 of List III, being a non-taxing entry or being a general regulatory entry, is hardly relevant for either imposing a tax or limiting the power of the State to tax "usage of water from its source". No tax can be levied under it. The taxing power in this case to levy water tax can be inferred from Entries 17, 18, 45, 49 and 50. If these are read collectively then there is ample power in the States to tax use of water by the petitioners for generating electricity. Thus, the State of Uttarakhand does have legislative competence to levy tax.

37) Learned Senior Counsel appearing for the petitioner AHPCL drew attention of this Court towards the title of the Act - "Water Tax on Electricity Generation". He would submit that the said Act seeks to levy tax on water when it is drawn for generation of electricity and not when water is drawn for any other purpose. In other words, the

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tax can be levied under the impugned Act only when the drawl of water results in generation of electricity. It is contended that the inpugned Act levies tax on generation of electricity which is merely dressed up as water tax under the impugned Act. Therefore, from a bare perusal of the impugned Act along with its Statement of Objects and Reasons, it becomes clear that the impugned Act, in pith and substance is a tax on water used for "generation of electricity" and is not a tax on "water". It is contended that the tax on generation of electricity falls on Entries 54, 56, 84 and 97 of List I and, therefore, State Legislature is incompetent to levy tax under the Act. It is argued that Entry 17 of List II does not authorise or empower a State to levy any such tax on use of water. Learned Senior Counsel placed reliance on the judgment of the Allahabad High Court in AIR 1962 All 83, affirmed by Hon'ble Supreme Court in **Municipal Council Kota**[9], and on the strength of said judgment he would submit that nomenclature of the tax is not relevant, but what is relevant is the real nature and character of the legislation. Rather, the present impost is not a tax directly on land as was explained by the Constitution Bench in its decision in State of West Bengal Vs Kesoram Industries, (2004) 10 SCC 201. He would further submit that tax not being on land but purportedly on water, falls foul of the ratio of the said judgment. Thus, even if it be assumed that the tax is on water, such is not a tax on land under Entry 49 of List II.

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It is contended that there is no specific entry which expressly empowers the State of levy tax on "water" for use of water despite a general Entry, the State cannot derive the same by broadly interpreting other entries for taxation of "Land" and "Minerals" and by drawing inference from the definitions given to these terms under various other acts, to bring water tax on water usage in their legislative competence.

38) Per contra, Mr. Dinesh Dwivedi, learned Senior Counsel appearing on behalf of the respondent State would submit that the incidence of tax under the impugned Act is 'drawl of water' and generation of electricity is a separate and subsequent activity which has nothing to do with the impugned Act. It is contended that the nature and character of the levy, its pith and substance, the taxable event or the incidence of the tax can only be seen by reading the law as a whole. Section 2(f), (g) and (i) read with Sections 4, 5, 8, 9, 10, 12, 14 17, 18, 19 & 25(5) clearly show that the tax is in relation to "water drawn / user for the generation of electricity". Word "for" used in Sections 3(2), 4, 5, 10, 12, 14, 18 and 19 between the phrase "water drawn by the user" and "generation of electricity" clearly shows that the levy is on the activity of drawing of water for its user. "For generation of electricity" only denotes that only such user of water is to be taxed which is for electricity generation, but the tax is on water' drawn or used. The moment

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water is drawn the tax is levied. It is a tax primarily on the user for drawing water from any water source under Section 2(h). The subject matter of the tax is the "user of water" which is resorted to for electricity generation but the incidence of tax falls only on the drawing of water and not the generation of electricity. It is contended that if the tax was on electricity generation then the appropriate measure of tax would be on "units of electricity generated" and not on "paise per cubic meter of water drawn". Thus, the claim of the petitioners that the tax is on "electricity generation" is wholly incorrect. He would further submit that the Entries relied upon by the petitioners, i.e, Entries 54, 56, 84 and 97 of List I to show that tax on generation of electricity falls on these Entries of List I and, therefore, the State has no legislative competence is totally baseless.

39) It is true that the nature and character of the levy, its pith and substance, the taxable event or the incidence of the tax can only be seen by reading the law as a whole. The doctrine of pith and substance shall surely be applied while ascertaining the nature and character of the levy. The Court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the Legislature to the legislation is immaterial. Regard must be had to the

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enactment as a whole, to its main objects and to the scope and effect of its provisions.

40) Mr. Aditya Singh, learned counsel appearing for the petitioner M/s Bhilangana Hydro Power Ltd. would submit that water being mineral is now controlled by Mines and Minerals Regulation and Development Act, enacted under Entry 54, a regulatory entry. Thus, the State has no power to tax the minerals under the Act.

41) In the opinion of this Court, since Entry 54 of List I of the Seventh Schedule to the Constitution is a regulatory entry and not a taxing entry, therefore, the said entry cannot restrict the power of the State to tax "land or mineral" under Entries 49 and 50 of List II.

42) Learned Senior Counsel appearing on behalf of the respondent State would further submit that Entries 48 and 49 relate to 'land' and include everything above or below the surface and water is part of land and that the expression 'land' should be widely construed, to include water stored on land or flowing over land. Placing reliance on the judgment of Hon'ble Supreme Court in **Ichchapur Industries Cooperative Society Ltd.**[16], it is submitted that water is covered under the definition of mineral and, therefore, the State can derive legislative competence to levy tax on water from Entry 49 of

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List II of the Seventh Schedule to the Constitution of India.

43) Relevant paragraphs of the judgment rendered by Hon'ble Supreme Court in *Ichchapur Industries'* judgment are extracted hereunder:

> "17. In view of the availability of right to lay down pipelines for transporting a "mineral" after the amendment of the Act, the respondents can legally lay down the pipelines through the land in question for carrying and transporting "water" provided "water" is a "mineral".
>
> 18. The definition of "minerals" which we have already quoted above would indicate that the meaning given to it in the Mines Act, 1952 is to apply here also on the basis of classic principle of Legislation by Reference or Incorporation which is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. The provisions so incorporated become part and parcel of the later Act as if they had been bodily transposed into it.
>
> 19. On this principle the definition of "minerals" as set out in the Mines Act, 1952 shall be deemed to have been bodily lifted and incorporated into this Act. We have, therefore, to look to that Act to find out the true meaning of the word "minerals" which is defined in Section 2(jj) as under:
>
> "2.(jj) 'minerals' means all substances which can be obtained from the earth by mining, digging, drilling, dredging, hydraulicking, quarrying or by any other operation and includes mineral oils (which in turn include natural gas and petroleum)."
>
> 20. The definition would indicate that "minerals" are substances which can be obtained from the earth by employing different technical devices indicated in the definition, namely, "mining, digging, drilling, dredging, hydraulicking, quarrying". These words are followed by the words "by any other operation". On account of the vicinity of these words with the previous words, namely, mining, digging, drilling, etc., they have to be understood in the same sense and, therefore, if "minerals" are obtained from earth "by any other operation" such operation should

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be an operation akin to the device or operation involved in mining, digging, drilling etc. Another significant feature of the definition is the use of words "substances which can be obtained from the earth" which indicate that the "minerals" need not necessarily be embedded in the earth or lie deep beneath the surface of the earth. They may be available either on the surface of the earth or down below. If the "mineral" is available on the surface, the operation which would obviously be employed would be dredging, quarrying or hydraulicking or any other similar operation. The definition, therefore, is very wide in terms but in spite of its wide connotation every substance which can be obtained from earth would not be a "mineral".

23. But there are subterranean waters which lie wholly beneath the surface of the earth and which either ooze or seep through the surface strata without pursuing any defined course of channel (percolating waters) or flow in a permanent and regular but invisible course, or lie under the earth in a more or less immovable body, as a subterranean lake. This water can be obtained only by the process of "Drilling" which, according to Chambers Dictionary also includes "Boring".

24. Now, if it is a substance which can be obtained from the earth by the process of drilling, it would immediately fall within the definition of "Mineral" set out and placed in this Act. Even otherwise, Rutley's Elements of Mineralogy, 26th Edition, brought out by H.H. READ, F.R.S., Professor Emeritus of Geology in the Imperial College of Science and Technology and the University of London, "Mineral" is defined as under:-

> "A mineral is a substance having a definite chemical composition and atomic structure and formed by the inorganic processes of nature."

25. On the basis of this definition, Rutley says:- "Again, water, snow and ice come within the definition since they are naturally occurring homogeneous inorganic substances of a definite chemical composition.

27. In Civil Appeal no. 10538 of 1983, decided by us on 17.12.1996, we have already indicated the Rule to interpret a "definition" and have stressed that the definition has to be read in the context in which it is used and the purpose for which the Act was made. We observed that where the definition clause is preceded by the words "unless the context otherwise

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> requires", the definition has to be interpreted in the light of the context in which it is used. We observed:
>
> > "This implies that a definition, like any other word in a statute, has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the legislature."
>
> 28. If the question is examined in this background, it would be noticed that the definition of "mineral" which has been bodily lifted from the Mines Act, 1952 and has been placed in the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 was deliberately introduced by Amending Act no. 13 of 1977 so that while carrying petroleum through the pipelines, any other minerals may also be carried through it. If, therefore, water is treated as a "mineral" it would be permissible for the ONGC to carry it through any other pipeline without any further notification or declaration under Section 3 or 6 of the Act. This interpretation which is in consonance with the scientific definition of a "mineral", serves the purpose of the Petroleum ad Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962. The contention of the learned counsel for the appellant that "water" should be understood in the same sense in which it is understood by a common man cannot, therefore, be accepted. This Act is an Act of Parliament intended to deal with the particular technology and the commodities involved therein. We are, therefore, of the view that in this Act, "water" has been used in both the senses, namely, that (i) it is a mineral; and (ii) the most common, readily and freely available substance on earth."

44) This Court is in complete agreement with the contention of learned Senior Counsel appearing for the respondent State. Entries 48 and 49 relate to 'land' and include everything above or below the surface and water is part of land and that the expression 'land' should be widely construed, to include water stored on land or flowing over land. In view of the above proposition of law it an safely be presumed that as "water" is covered under the definition of mineral, therefore, the State can derive legislative competence to levy tax on water from

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Entry 49 of List II of the Seventh Schedule to the Constitution of India.

45) Mr. Mohan Parasaran, learned Senior Counsel appearing on behalf of petitioner Tehri Hydro Development Corporation India Ltd. highlighted various provisions of the Act as under:

46) Section 2(i) of the Act, defines "Water Tax" as "the rate levied or charged for water drawn for generation of electricity and fixed under this Act".

47) Section 2(f) defines the term 'user' as any person, group of persons, local body, Government Department, company, corporation, society etc. drawing water or any other authority authorized under Chapter II of the Act to avail the facility to draw water from any source for generation of electricity.

48) Section 10 speaks about – User entitled to use water (non-consumptive use) for generation of electricity shall be issued a Registration Certificate after execution of an agreement between the user and the Commission under the Act.

49) Section 12(1) of the Act is the charging section. The same reads as under:

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"(1) The registered user shall be liable to pay water tax for the water drawn for electricity generation as per the provisions of the Act.

50) Section 17(i) of the Act says - The user shall be liable to pay Water Tax under the Act at such rates as the Government may by notification fix.

51) Placing reliance on the aforementioned provisions of the Act, Mr. Parasharan, learned Senior Counsel would submit that the levy under the Act is on non-consumptive use of water for the purpose of generation of electricity and these crucial facts are to be kept in mind while deciding the legislative competence of the State under Entries 45 and 49 of List II. According to him, Entry 45 of List II pertains to land revenue and Entry 49 pertains to tax on land and buildings and both cannot be used for the purpose of deriving legitimacy by the State to impose a tax on non-consumptive use of water.

52) The next argument advanced by Mr. Parasaran in regard to inter-state rivers is that the petitioner THDC has been drawing the water from the rivers Ganga and Bhagirathi since 2006 and 2011 in relation to the Tehri Hydro Power Project and the Koteshwar Hydro Electric Project, respectively, for generation of electricity and simultaneous inter-State sale and consumption of the same. It is stated that river Ganga is an inter-State river and river Bhagirathi is also a tributary of

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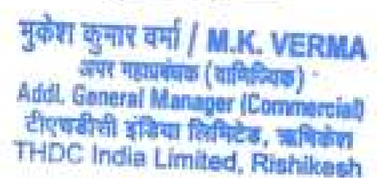
river Ganga. Learned Senior Counsel would submit that List II of the Seventh Schedule to the Constitution does not contemplate or mention any matter in any of it entries contained therein which deals with imposition of levy of taxes on usage or consumption of water, consumptive or otherwise. The sole entry contained in List II, is Entry 17 which contemplates the State legislature to make and frame laws in relation to water supplies, irrigation and canals drainage and water storage as well as water power, but the same does not contemplate any provision for imposing taxes on water. He would further submit that although legislative power includes all incidental and subsidiary power, the power to impose a tax is not such a power under our Constitution. Each of the Union and the State lists which are Lists I and II start by enumerating first the entries conferring general legislative powers as distinct from taxation powers. Items 1 to 81 of List I deal with the exclusive general legislative powers of Parliament while 82 to 92 enumerate the taxes which Parliament may impose. The same pattern of classification and conferment of general legislative as distinguished from taxing power is adopted in State List (List II). Entries 1 to 44 of this List deal with general legislative power while Items 45 to 63 deals with specific taxes which might be imposed exclusively by the State legislatures. Therefore, power to tax must be derived from a specific taxing entry, failing which there is legislative competence



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and it will be the power of the Central Government by virtue of Entry 97 of List I. In other words, power of the State to levy tax cannot be traced to any general entry (Entry 1 to Entry 44 of List II) and can be levied only if it is traceable to any taxing entries (Entry 45 to 63 of List II). Therefore, there is no question of the State having any power to impose a tax through the Act, in the absence of any specific taxing entry in List II.

53) In reply, learned Senior Counsel appearing for the respondent State placed reliance on a judgment of Hon'ble Apex Court in **Cauvery Water Disputes Tribunal**[24], wherein it has been held as under:

> "68. Shri Venugopal has in this connection argued that it is Entry 97 of the Union List which deals with the topic of the use, distribution and control of waters of an inter-state river. The use, distribution and control of the waters of such rivers, by itself is not a topic which is covered by Article 262. It is also, according to him, not a topic covered by Entry 56 which only speaks of regulation and development of inter-State rivers and river valleys meaning thereby the entirety of the rivers and river valleys and not the waters at or in a particular place. (emphasis supplied) Further, the regulation and development, according to him, has nothing to do with the use, distribution or allocation of the waters of the inter-State river between different riparian States. That topic should, therefore, be deemed to have been covered by the said residuary Entry 97.
>
> 69. With respect to the learned counsel, it is not possible to accept this interpretation of Entry 97. This is so firstly because, according to us, the expression 'regulation and development of inter-State rivers and river valleys" in Entry 56 would include the use, distribution and allocation of the waters of the inter-State rivers and river valleys between different riparian States. Otherwise the intention of the Constituent Assembly to provide for the Union to take over the regulation and development under its control makes no sense and serves no purpose. What is further, the River Boards Act, 1956 which is admittedly enacted under Entry 56 for the regulation and development of inter-State rivers and river valleys does cover the field of the use, distribution and allocation of the waters of the inter-State rivers and river valleys

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This shows that the expression "regulation and development" of the inter-State rivers and river valleys in Entry 56 has legislatively also been construed to include the use, distribution or allocation of the waters of the inter-State rivers and river valleys between the riparian States. We are also of the view that to contain the operation of Entry 17 to the waters of an inter-State river and river valleys within the boundaries of a State and to deny the competence to the State legislature to interfere with or to affect or to extend to the use, distribution and allocation of the waters of such river or river valley beyond its territory, directly or indirectly, it is not necessary to fall back on the residuary Entry 97 as an appropriate declaration under Entry 56 would suffice. The very basis of a federal Constitution like ours mandates such interpretation and would not bear an interpretation to the contrary which will destroy the constitutional scheme and the Constitution itself. Although, therefore, it is possible technically to separate the "regulation and development" of the inter-State river and river valley from the "use, distribution and allocation" of its water, it is neither warranted nor necessary to do so.

76. The above analysis of the relevant legal provisions dealing with the inter-State rivers and river valleys and their waters shows that the Act, viz., the Inter-State Water Disputes Act, 1956 can be enacted and has been enacted only under Article 262 of the Constitution. It has not been enacted under Entry 56 as it relates to the adjudication of the disputes and with no other aspect either of the inter-State river as a whole or of the waters in it."

54) It is contended that the Cauvery Water's case pertained to Article 262 and the Inter-State Water Disputes Act which is neither traceable to Entry 56 nor the Entry 97 of List I. The Act in question in that case pertained to Article 262 and was not under Entry 56. It is further contended that having considered the scope of Entry 56 and Entry 17 it was held by the Hon'ble Supreme Court that the State is competent to legislate on the use of water of inter-State river within its territory, provided there is no law of the Parliament otherwise under Entry 56 of List I.

55) Learned Senior Counsel for the respondent State would further submit that the

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River Bhagirathi is a State river, over which the power projects of petitioner THDC situate; it is not an inter-State river but originates and ends in the State of Uttarakhand and hence, the law has been made by virtue of the power of the State under Entry 17 of List II. According to him, since Bhagirathi is not an inter-State river, the State of Uttarakhand has the power to impose a tax on 'use of water meant for electricity generation' and since the tax is not on electricity generated, the same falls within the State's legislative competence. It is contended that since the power of the State under Entry 17 of List II is only subject to the Power of the Union under Entry 56 of List I and since no law has been framed by the Union under Entry 56 of List I vis-à-vis river Bhagirathi, the State of Uttarakhand is competent to levy the tax.

56) In the case in hand, there is no such Act of Parliament which may restrict the power of the State to tax use of water / water drawn. Firstly the nature of the tax imposed by the Act and the activity on which the incidence falls has to be determined in order to further determine the competence of the State legislature to tax. It is quite evident that tax law is an economic legislation. Tax sought to be levied is a purely revenue collecting device to enable the State to function and fulfill its aims and obligations towards the welfare of the people. Federal structure of the Constitution gives complete separation of the taxing powers of

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the State and the Union. Both are sovereign in their respective fields. Any attempt made to whittle down the powers of the State to tax, or subject it to assent, or approval of the Centre would not only be against the federal structure of our Constitution but would make the State appendages on the Centre. There is complete separation of taxing powers of the Centre and the State and, as such, the possibility of overlapping is totally absent. Any interpretation which recognizes any kind of approval or consent of the Centre, will defeat the Constitutional objective of the separation of taxing powers between the Centre and the States and make the States appendages of the Centre. It is to be borne in mind that tax is a separate matter from general regulatory entries. Regulatory entries are not for taxation. The term 'tax' is wide and includes all kinds of imposts including fee. It includes all kinds of compulsory extractions by the State. Hence, the submission advanced by learned Senior Counsel in this regard is totally misconceived.

57) Hon'ble Apex Court in *Kesoram's* judgment has held as under:

> 31. Article 245 of the Constitution is the fountain source of legislative power. It provides — 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. The legislative field between the Parliament and the Legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in

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List I in Seventh Schedule, called the 'Union List'. Subject to the said power of the Parliament, the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the 'Concurrent List'. Subject to the abovesaid two, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the 'State List'. Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The principles have been succinctly summarized and restated by a Bench of three learned Judges of this Court on a review of the available decisions in **Hoechst Pharmaceuticals Ltd.**[18] -. They are-

(1) the various entries in the three Lists are not 'powers' of legislation but 'fields' of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

(3) Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deduced from a general legislative entry as an ancillary power.

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(4) The entries in the List being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow pedantic sense. The words and expressions employed in drafting the entries must be given the widest possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere simplex enumeratio of broad categories. A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.

(5) Where the legislative competence of a Legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in Lists I or III. If it does, no further question need be asked and Parliament's legislative competence must be upheld. Where there are three Lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other Legislature is of no consequence. The Court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the Legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the Legislature which enacted it, an incidental encroaching in the field assigned to another Legislature is to be ignored. While reading the three Lists, List I has priority over

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> Lists III and II, and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter with in List II though it may incidentally affect any item in List I.

58) Thus, it is abundantly clear that the legislative field between the Parliament and the Legislature of any State is divided by Article 246 of the Constitution. Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in Seventh Schedule, called the 'Union List'. Subject to the said power of the Parliament, the Legislature of any State has power to make laws with respect to any of the matters enumerated in List III, called the 'Concurrent List'. Subject to the abovesaid two, the Legislature of any State has exclusive power to make laws with respect to any of the matters enumerated in List II, called the 'State List'. Under Article 248 the exclusive power of Parliament to make laws extends to any matter not enumerated in the Concurrent List or State List. The power of making any law imposing a tax not mentioned in the Concurrent List or State List vests in Parliament. This is what is called the residuary power vesting in Parliament. The various entries in the three Lists are not 'powers' of legislation but 'fields' of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. There is no overlapping anywhere in the taxing power and the Constitution gives independent

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sources of taxation to the Union and the States. In this batch of writ petitions, the question of repugnancy between law made by Parliament and a law made by the State Legislature does not arise. The same may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law. Nothing has been found which suggests that there is overlapping of power of taxation of the Union as well as the State.

59] Mr. D.S. Patni, learned Senior Counsel appearing on behalf of petitioner would submit that there is promissory estoppel against the State in view of the fact that they have agreed not to levy any charges or tax and have given assurance in this regard. Attention of this Court is drawn towards Clause 13 and 18.4 of the Restated Implementation Agreement (RIA) dated 8th February 2006, entered into between the Govt. of Uttarakhand, Govt. of U.P., U.P. Power Corporation Ltd. and Alaknanda Hydro Power Co. Ltd (formerly Duncans North Hydro Power Co. Ltd.) for the implementation of Shrinagar Hydro Electric Project in District Pauri Garhwal.

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60) Clause 13 of the RIA is in regard to 'Water Use Rights'. Clause 13.1 reads as under:

> "13.1 The GOU hereby grants to the Company the right, free of any and all charges during the term to utilize the water of Alaknanda river for the project and to generate electric energy at the site and for such reasonable purposes directly related and necessary for the generation of electricity in accordance with the conditions of this RIA and for the project subject to the compliance of the conditions of environment clearance. Such a right was earlier available to the company under the then signed Water Use Agreement (WUA), which now stands substituted by the provisions of this RIA. GOU shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this Project during the term of this RIA."

61) Clause 18 of the RIA is in respect of 'Must-run Project'. Clause 18.4 reads as under:

> "18.4 Payment of Water Use Charge -The parties agree that the Company shall have no payment liability for use of water. GOU will not charge for the use of water under this RIA at any time during the tenure of the RIA."

62) Mr. U.K. Uniyal, learned Senior Counsel appearing on behalf of U.P. Power Corporation Ltd. (UPPCL) has supported the contention of learned Senior Counsel for the petitioners. In addition to that, Mr. Uniyal submits that at the time of RIA entered into between the Govt. of Uttarakhand, Govt. of U.P., UPPCL and the petitioner AHPCL, it was unanimously decided that the Govt. of Uttarakhand shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this Project during the term of this RIA. A specific condition has also been laid in Clause 18.4 of the RIA that the company shall have no payment

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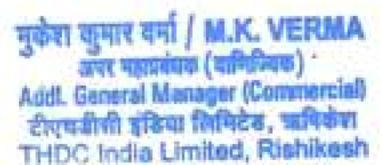
liability for use of water and Govt. of Uttarakhand will not charge for the use of water under the RIA at any time during the tenure of the RIA. Learned Senior Counsel would further submit that the purpose of giving the relaxation of non-imposition of tax for use of water was a kind of concession to the petitioner so that it may show its interest for generation of electricity in the State of Uttarakhand. Such a concession cannot be withdrawn by the State of Uttarakhand and it would be against the promise made with the petitioner. He would also submit that the imposition of tax on use of water for generation of electricity would enhance the cost of electricity which would ultimately affect the consumers. He submits that imposition of tax on use of water for generation of electricity would amount to imposing indirect tax on generation of electricity and the State cannot retreat from its assurance when all the parties to the RIA are bound by the terms and conditions of agreement. According to learned Senior Counsel, what has been argued on behalf of the petitioner AHPCL is correct and the enactment of the impugned Act is barred by principle of promissory estoppel.

63) In reply, to buttress his submission learned Senior Counsel appearing on behalf of the respondent State placed reliance on the following judgments to show that by way of withdrawal of exemption no fraud was practiced by the Govt.; nor any huge loss caused to the petitioner companies as



burden of tax would ultimately be shifted on the consumer.

- (i) Kasinka Trading & another Vs Union of India & another, (1995) 1 SCC 274
- (ii) Amrit Banaspati Co. Ltd. & another Vs State of Punjab & another, (1992) 2 SCC 411
- (iii) State of Punjab Vs Nestle India Ltd. & another, (2004) 6 SCC 465

64) Paragraph nos. 13 and 27 of the **Kasinka Trading**[12] are extracted hereunder:

> "13. The ambit, scope and amplitude of the doctrine of promissory estoppel has been evolved in this country over the last quarter of a century through successive decisions of this Court starting with Union of India v. Indo-Afgan Agencies Limited, AIR 1968 SC 718. Reference in this connection may be made with advantage to Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council, (1970) 1 SCC 582 : Motilal Padampat Sugar Mills Co. Ltd. v. State of UP : Jit Ram Shiv Kumar v. State of Haryana, (1981) 1 SCC 11 : Union of India v. Godfrey Philips India Ltd., (1985) 4 SCC 369: Indian Express Newspapers (Bom) Pvt. Ltd. v. Union of India, (1985) 1 SCC 641 : Pournami Oil Mills v. State of Kerala (1986) Supp. SCC 728 : Shri Bakul Oil Industries v. State of Gujarat, (1987) 1 SCC 31 : Asst. Commissioner of Commercial Taxes v. Dharmendra Trading Co., (1988) 3 SCC 570 : Amrit Banaspati Co. Ltd. v. State of Punjab (1992) 2 SCC 411 and Union of India V Hindustan Development Corpn. (1993) 3 SCC 499. In Godfrey Philips India Limited (supra) this Court opined:
>
> "We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have they have transpired, it would be inequitable to hold the Government or Public authority to the promise of representation made by it, the Court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or Public authority. The doctrine of promissory estoppel would be displaced in such a case,

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because on the facts, equity would not require that the Government or Public authority should be held bound by the promise or representation made by it."

Indeed, the submission on the fact situation is not controvertible but in the absence of any material placed before the High Court or even in this appeal to establish that the notification dated 29.08.1980 was issued for any oblique or extraneous consideration and was not "in public interest", it is not possible to find fault with that notification for the reasons we have already given while dealing with the first batch of cases. The appellants, who are in business, have to be prepared for tides in the business. In Pournami Oil Mills, 1986 Supp SCC 728, it was the incentive to set up new industry in the State with a view to boost the industrialization that exemption had been granted and it was in that fact situation that the doctrine of promissory estoppel was held available to the appellant therein. Again in Bakul Oil Industries, (1987) 1 SCC 31, it was the incentive to set up industries in a conforming area that the exemption had been granted and the Court held that the Government could withdraw an exemption granted by it earlier only if such withdrawal could be made without offending the rule of promissory estoppel and without depriving an industry entitled to claim exemption for the entire specified period for which exemption had been promised to it at the time of giving incentive. Both these cases therefore cannot advance the case of the appellant and are distinguishable on facts because the exemption notification under Section 25 of the Act which was issued in this case did not hold out any incentive for setting up of any industry to use PVC resins and on the other hand had been issued in exercise of the statutory powers, in public interest and subsequently withdrawn in exercise of the same powers again in public interest. In our opinion, no justifiable prejudice was caused to the appellants in the absence of any unequivocal promise by the Government not to act and review its policy even if the necessity warranted and the "public interest" so demanded. Thus, in the facts and circumstances of those cases, the appellants cannot invoke the doctrine of promissory estoppel to question the withdrawal notification issued under Section 25 of the Act."

65) Further, in paragraph nos. 4 and 10 of **Amrit Banaspati**[11], it has been held by Hon'ble Apex Court as under:

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"9. What, therefore, requires to be examined, is if any promise was made by the Government or its officials to the appellant that sales tax shall be refunded to it and if the appellant acting on it altered its position. For this it is necessary to narrate few facts even though both the learned Single Judge and Division Bench have dealt with it elaborately. Admittedly, a brochure was issued in December 1966 by the Government of Punjab announcing its 'New Policy' declaring that incentive and concession, one of them being refund of sales tax, would be available to those persons who set up selective large scale industries in the focal point. Whether this brochure was authorised or not and its legal effect on rights of parties shall be adverted to later. But it is undisputed that acting on it the appellant's representative met the Chief Minister of the State personally and found that he was interested in encouraging Vanaspati manufacturing units in the State, therefore, its Manager wrote a letter in June 1968 to the Chief Minister expressing willingness to set up the unit provided the concession were made available to it which as replied by the Director of Industries on July 2, 1968 assuring the appellant that the concession as announced shall be available and further informed the appellant that the Government was willing to consider such additional concession which the appellant may require for implementation of the scheme. It was followed by exchange of correspondence and various meetings between appellant's representative and officials of Government...

...It is, thus, obvious that there was representation to the appellant that it would be entitled to concession and incentives announced by the Government if it set up its unit in the focal point. Whether such representation resulted in binding agreement is different issue but the representation coming from the Industries Secretary and the Director of Industries in pursuance of Government Policy cannot be held to be unauthorised or beyond the scope of authority..."

10. But promissory estoppel being an extension of principle of equality, the basic purpose of which is to promote justice founded on fairness and relieve a promisee of any injustice perpetrated due to promisor's going back on its promise, is incapable of being enforced in a court of law if the promise which furnishes the cause of action or the agreement, express or implied, giving rise to binding contract is statutorily prohibited or is against public policy...

...A promise or agreement to refund tax which is due under the Act and realised in accordance with law would be a fraud on the Constitution and breach of

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faith of the people. Taxes like sales tax are paid even by a poor man irrespective of his earnings with a sense of participation in growth of national economy and development of the State. Its utilisation by way of refund not to the payer but to a private person, a manufacturer, as an inducement to set up its unit in the State would be breach of trust of the people amounting to deception under law."

66) Hon'ble Apex Court in the case of **Nestle India**[7] has held as under:

"40. The case of Kasinka Trading Vs Union of India, (1995) 1 SCC 274 cited by the appellant is an authority for the proposition that the mere issuance of an exemption notification under a provision in a fiscal statute such as Section 25 of the Customs Act, 1962, could not create any promissory estoppel because such an exemption by its very nature is susceptible to being revoked or modified or subjected to other conditions. In other words, there is no unequivocal representation. The seeds of equivocation are inherent in the power to grant exemption. Therefore, an exemption notification can be revoked without falling foul of the principle of promissory estoppel. It would not, in the circumstances, be necessary for the Government to establish an overriding equity in its favour to defeat the petitioner's plea of promissory estoppel. The Court also held that the Government of India had justified the withdrawal of exemption notification on relevant reasons in the public interest. Incidentally, the Court also noticed the lack of established prejudice to the promise when it said:

> "The burden of customs duty etc. is passed on to the consumer and therefore the question of the appellants being put to a huge loss is not understandable."

(See also Shrijee Sales Corpn. Vs Union of India, (1997) 3 SCC 398 and STO Vs Shree Durga Oil Mills, (1998) 1 SCC 572). We do not see the relevance of this decision to the facts of this case. Here the representations are clear and unequivocal."

67) Learned Senior Counsel for the petitioner THDC placed reliance on the judgment rendered by Five Judge Bench of Hon'ble Apex Court in **Jindal Stainless Limited**[8]. In paragraph nos. 24, 26 and

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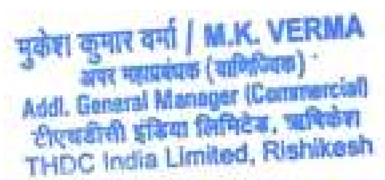
45 it has been observed by Dr. T.S. Thakur, CJ his Lordship then was] speaking for himself and Sikri and Khanwildar, JJ., as under:

> "24. Exercise of sovereign power, is, however, subject to constitutional limitations especially in the federal system like ours where the States also to the extent permissible exercise the power to make laws including laws that levy taxes, duties and fees. That the power to levy taxes is subject to constitutional limitations is no longer res integra. A Constitution Bench of this Court has in Synthetics and Chemicals Ltd. Vs State of U.P., (1990) 1 SCC 109 recognised that in India the Centre and the States both enjoy the exercise of sovereign power to the extent the Constitution confers upon them that power. This Court declared :
>
> "56. ...We would not like, however, to embark upon any theory of police power because the Indian Constitution does not recognise police power as such. But we must recognise the exercise of sovereign power which gives the State sufficient authority to enact any law subject to the limitations of the Constitution to discharge its functions. Hence, the Indian Constitution as a sovereign State has power to legislate on all branches except to the limitation as to the division of powers between the Centre and the States and also subject to the fundamental rights guaranteed under the Constitution. The Indian State, between the Centre and the States, has sovereign power. The sovereign power is plenary and inherent in every sovereign State to do all things which promote the health, peace, morals, education and good order of the people. Sovereignty is difficult to define. This power of sovereignty is, however, subject to constitutional limitations. This power, according to some constitutional authorities, is to the public what necessity is to the individual. Right to tax or levy impost must be in accordance with the provisions of the Constitution."
>
> 26. It would thus appear that even when Articles 246(2) and (3) confer exclusive power on the State Legislatures to make laws with respect to matters in the Seventh Schedule such legislative power is exercisable subject to constitutional limitations referred to above. What is significant is that the power of the State Legislatures to levy taxes is also subject to the limitations of Article 304(a) of the Constitution appearing in Part XIII thereof, which Part regulates trade, commerce and intercourse within the territory of



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India and comprises Articles 301 to 307. The provisions of these Articles have been the subject matter of a series of decisions of this Court including several Constitution Bench decisions to some of which we shall presently refer. The language employed in the provisions and the non obstante clauses with which the same start have all the same given rise to several contentions raised for determination by this Court over the past five decades or so. The fact that the present batch of cases had to be referred to a nine-Judge Bench to once again examine the very same issues as have been debated and determined in the previous judgments of this Court only shows that the task of interpreting the provisions is by no means easy and has in fact become more and more difficult on account of the pronouncements of this Court taking different views and many of which have been unanimous.".

68] In reply, Learned Senior Counsel appearing on behalf of the respondent State placed reliance on paragraph nos. 28, 29, 91 and 332 of the judgment (supra) as under:

"28. The power to levy taxes, being a sovereign power controlled only by the Constitution, any limitation on that power must be express. That proposition is well settled by the decisions of this Court in Umeg Singh Vs State of Bombay, AIR 1955 SC 540 and Firm Bansidhar Premsukhdas Vs State of Rajasthan, AIR 1967 SC 40. In Umeg Singh case this Court stated the legal position in the following words:

"12. ...The legislative competence of the State Legislature can only be circumscribed by express prohibition contained in the Constitution itself and unless and until there is any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally, there is no fetter or limitation on the plenary powers which the State Legislature enjoys to legislate on the topics enumerated in the Lists II and III of the Seventh Schedule to the Constitution. ...

13. The fetter or limitation upon the legislative power of the State Legislature which had plenary powers of legislation within the ambit of the legislative heads specified in the Lists II and III of the Seventh Schedule to the Constitution could only be imposed by the Constitution itself and not by any obligation

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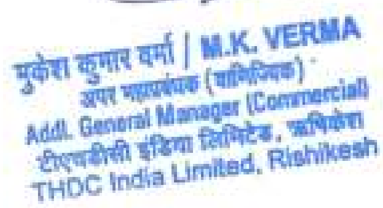
which had been undertaken by either the Dominion Government or the Province of Bombay or even the State of Bombay. Under Article 246 the State Legislature was invested with the power to legislate on the topics enumerated in Lists II and III of the seventh Schedule to the Constitution and this power was by virtue of Article 245(1) subject to the provisions of the Constitution. The Constitution itself laid down the fetters or limitations on this power e.g. in Article 303 or Article 286(2). But unless and until the court came to the conclusion that the Constitution itself had expressly prohibited legislation on the subject either absolutely or conditionally the power of the State Legislature to enact legislation within its legislative competence was plenary. Once the topic of legislation was comprised within any of the entries in the Lists II and III of the Seventh Schedule to the Constitution, the fetter or limitation on such legislative power had to be found within the Constitution itself and if there was no such fetter or limitation to be found there the State Legislature had full competence to enact the impugned Act no matter whether such enactment was contrary to the guarantee given or the obligation undertaken by the Dominion Government or the Province of Bombay or even the State of Bombay.

39. Again in Bansidhar Case (supra) this Court reiterated the legal position in the following words:

"7... It is well-established that Parliament or the State Legislatures are competent to enact a law altering the terms and conditions of a previous contract or of a grant under which the liability of the Government of India or of the State Governments arises. The legislative competence of Parliament or of the State Legislatures can only be circumscribed by express prohibition contained in the Constitution itself and unless and until there is any provision in the Constitution expressly prohibiting legislation on the subject either absolutely or conditionally, there is no fetter of limitation on the plenary powers which the Legislature is endowed with for legislating on the topics enumerated in the relevant lists. This view is borne out by the decision of the Judicial Committee in Thakur Jagannath Baksh Singh v. The United Provinces, [illegible] PCR 113, in which a similar complaint was made by the talukdars of Oudh against the United Provinces Tenancy Act (U.P. Act 17 of 1939). It was held by the Judicial Committee that the Crown cannot deprive itself of its legislative authority by the mere fact that in



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the exercise of its prerogative it makes a grant of land within the territory over which such legislative authority exists, and no court can annul the enactment of a legislative body acting within the legitimate scope of its sovereign competence. *If therefore, it be found that the subject-matter of a Crown grant is within the competence of a Provincial legislature nothing can prevent that legislature from legislating about it unless the Constitution Act itself expressly prohibits legislation on the subject either absolutely or conditionally.* Accordingly, in the absence of any such express prohibition, the United Provinces Tenancy Act, 1939, which in consolidating and amending the law relating to agricultural tenancies and other matters connected therewith in Agra and Oudh, dealt with matters within the exclusive legislative competence of the Provincial legislature under Item 21 of List II of the Seventh schedule to the Government of India Act, 1935, was intra vires the Provincial legislature notwithstanding that admittedly some of its provisions cut down the absolute rights claimed by the appellant taluqdar to be comprised in the grant of his estate as evidenced by the sanad granted by the Crown to his predecessor. The same principle has been reiterated by this Court in Umeg Singh and others v. The State of Bombay, AIR 1955 SC 540. It was pointed out that in view of Article 246 of the Constitution, no curtailment of legislative competence can be spelt out of the terms of clause 5 of the Letters of Guarantee given by the Dominion Government to the Rulers of 'States' subsequent to the agreements of Merger, which guaranteed, inter alia, the continuance of Jagirs in the merged 'States'. This principle also underlies the recent decision of this Court in Maharaja Shree Umaid Mills Ltd. v. Union of India, AIR 1963 SC 953, in which it was pointed out that there is nothing in Article 295 of the Constitution which prohibits Parliament from enacting a law altering the terms and conditions of a contract or of a grant under which the liability of the Government of India arises..." (emphasis supplied)

91. Suffice it to say that the interpretation of any provision of the Constitution will be true and perfect only when the Court looks at the Constitution holistically and keeps in view all important and significant features of the constitutional scheme constantly reminding itself of the need for a harmonious construction lest interpretation placed on a given provision has the effect of diluting or whittling down the effect or the importance of any other provision or feature of the Constitution. So interpreted Article 301 appearing in Part XIII does not, in our opinion, work as an impediment on the States' taxing powers except in situations where such taxes fall foul of

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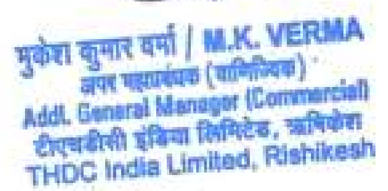
Article 304(a) of the Constitution. The contextual approach thus fully matches the textual interpretation which we have placed on Part XIII."

332. The above Constituent Assembly Debates and the history of Article 301 show that freedom envisaged in Article 301 is not freedom from taxation but only freedom from trade barriers. So long as the tax remains non-discriminatory, its validity cannot be judged under Article 301. Under Article 246(3) of the Constitution, a 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 of the Seventh Schedule. Article 246(3) is subject to clauses (1) and (2) of Article 246, i.e. matters enumerated in List I and III of the Seventh Schedule. As per Article 265, a tax can be imposed only under authority of law and there is no role of the executive. Taxation includes the imposition of any tax as defined under Article 366(28):

> "366(28) "taxation" includes the imposition of any tax or impost, whether general or local or special, and "tax" shall be construed accordingly."

It is a sovereign power of compulsory exaction as a part of any burden by public authority for public purposes enforceable by law. Imposing a tax is a compulsory exaction made for a public purpose without reference to any special benefit to the taxpayers."

69) Firstly, this Court has to deal with the issue – whether the Govt. of Uttarakhand is bound by promissory estoppel to enact the impugned Act? Having considered the rival submissions of learned counsel for the parties and after going through the dictum of Hon'ble Apex Court in **Kasinka Trading**[13], **Amrit Banaspati**[15] and **Nestle India Ltd.**[7], this Court is of the considered view that action of the State Government is not barred by the principle of promissory estoppel.



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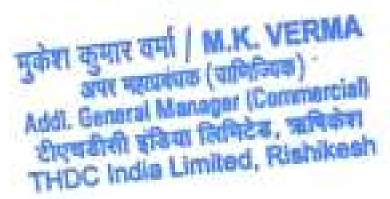
70) Therefore, this Court is of the view that the doctrine of estoppel is not available against the government in exercise of legislative, sovereign or executive power. If this is permitted to continue, the legislature can never be precluded from exercising its legislative function by resort to the doctrine of estoppel. This proposition is unexceptional, because the Government owes a duty to the public to act in a particular manner and the doctrine of estoppel cannot be invoked for preventing the Government from acting in discharge of its duty under the law. The rule of promissory estoppel cannot be pleaded to defeat the provisions of law. The doctrine of estoppel cannot be applied in teeth of an obligation or liability imposed by law, particularly when there is total absence of power of exemption from tax.

71) The second issue for consideration of this Court is – whether the State legislature is competent to enact the impugned Act, or not?

72) The petitioners in the present batch of writ petitions have challenged the constitutional validity and vires of the Act precisely on the ground that since the State Government itself entered into an RIA with the petitioner companies, State of U.P. and UPPCL and RIA has been executed between the parties, their action is barred by the principle of promissory estoppel. Also, the challenge is on the constitutional validity and vires of the Act as well as



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the legislative competence of the State. In so far as the argument of learned Senior Counsel for the AHPCL as well as learned Senior Counsel for UPPCL is concerned, detailed observations have been made while discussing the facts and law in this regard in the body of this judgment and it has been held that the action of the State Government in enacting the Act is not barred by the principle of promissory estoppel. In so far the legislative competence of the State is concerned, the contention of the petitioners is that it does not give any authority in view of Article 288 of the Constitution of India.

73) Article 200 of the Constitution of India provides as under-

> "200. Assent to Bills. –When a Bill has been passed by the Legislative Assembly of a State or, in the case of a State having a Legislative Council, has been passed by both Houses of the Legislature of the State, it shall be presented to the Governor and the Governor shall declare either that he assents to the Bill or that he withholds assent therefrom or that he reserves the Bill for the consideration of the President:
>
> Provided that the Governor may, as soon as possible after the presentation to him of the Bill for assent, return the Bill if it is not a Money Bill together with a message requesting that the House or Houses will reconsider the Bill or any specified provisions thereof and, in particular, will consider the desirability of introducing any such amendments as he may recommend in his message and, when a Bill is so returned, the House or Houses shall reconsider the Bill accordingly, and if the Bill is passed again by the House or Houses with or without amendment and presented to the Governor for assent, the Governor shall not withhold assent therefrom:
>
> Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position

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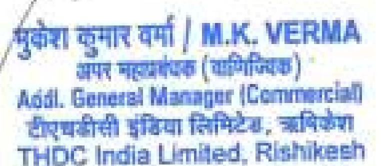

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which that Court is by this Constitution designed to fill."

74) Further, Article 288 of the Constitution of India stipulates as under:

> "**288. Exemption from taxation by State 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."

75) A perusal of the provisions contained in Article 288 of the Constitution of India would depict that the tax is not 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 the Parliament for regulating or developing any inter-State river or river valley. Rather, it is a tax on non-consumptive

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use of water meant for generation of electricity, which does not fall under Article 288(1) of the Constitution of India. So far as another contention of learned Senior Counsel appearing for the petitioner THDC that in view of provision contained in Article 288(2) of the Constitution of India the legislature of a State can impose any such tax only if the law has received the assent of the President of India is concerned, it is apparent that the Act is not in violation of Article 288(2) of the Constitution, rather the same is in conformity with the provisions contained under Entry 17 of List II of the Seventh Schedule to the Constitution of India. The bill passed by the State legislature under Entry 17 of List II has been accorded assent by the Hon'ble Governor of Uttarakhand under Article 200 of the Constitution before the bill took the shape of an Act. Furthermore, Article 163(2) of the Constitution stipulates - if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion. A plain reading of Article 200 of the Constitution would depict that as the matter relates to Entry 17 of List II under which States are empowered to make laws, thus after the approval of Bill by the State legislature, the Hon'ble Governor has accorded assent to the aforesaid Bill

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using his discretionary powers under this Article. Also, as the matter does not relate to the List I [Union List], therefore, there was no need for the consideration of the President on the aforesaid bill. Therefore, the submissions advanced by learned Senior Counsel for the petitioner regarding violation of Articles 200 and 288 of the Constitution by the State are misconceived.

76) It is apt to note here that there is no prohibition in the Constitution that the State legislature cannot enact any law for imposition of tax on water for non-consumptive use in the State of Uttarakhand, therefore, in absence of any provision in this regard, no fault can be attached to the Act in question.

77] Mr. Gourab Banerji, learned Senior Counsel appearing on behalf of the petitioner M/s Swasti Power Pvt. Ltd. has raised an argument that the respondent State cannot argue contrary to its pleadings. It is submitted that the respondent State has blatantly contradicted the submissions made by them in the counter affidavit filed by them. In the counter affidavit dated 11.06.2018, filed in Writ Petition no. 641 (M/S) of 2018, the respondent State at paragraph 28(e) has categorically stated that:

> "The said Act 2012, has been enacted as per provisions of entry 17 of List II of the Seventh Schedule to the Constitution which relates to legislative competence of the State to legislate on

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matters pertaining to State list (List II). Further, bill passed under Article 200(2) of the Constitution by the State Legislature has been given assent by the Hon'ble Governor under Article 200 and 163(2) of the Constitution to become it an Act."

Relying on said paragraph of the counter affidavit it is stated that the respondent State suddenly at the stage of final arguments has diverged from the submissions made by them in the counter affidavit and have raised arguments, which are completely contradictory to the submissions made by them in the counter affidavit. Such submissions are also contrary to the Statement and Objects of the Act and Legislative debate held on 14.12.2011 on the impugned Act. It is further submitted that at the stage of final argument the respondents have for the first time raised the argument that the impugned Act has been enacted under the provisions of Entry 17, 18, 45, 49 and 50 of List II, which is contrary to the submissions made by them in the counter affidavit. He would further state that the counter affidavit dated 11.06.2018 was filed by the respondent State through Mr. Anand Bardhan, Principal Secretary, Department of Irrigation, Government of Uttarakhand, who is duly appointed representative of the State. Therefore, the respondent State cannot build a new case at such a belated stage of final arguments, by totally contradicting the submissions made by its duly appointed representative by way of counter affidavit. The arguments advanced on behalf of the respondent State during the final

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arguments are also contrary to the legislative intent behind enactment of the impugned Act, as depicted in the Legislative debate on the impugned Act, whereby it is stated that the State is deriving legislative competence to enact the impugned Act from Entry 17 of List II. Thus, the respondent State should not be allowed to advance its arguments at such a belated stage contrary to the submissions made by it in the counter affidavit as well as the legislative intent behind impugned Act.

78) In **Goa Glass Fibre Limited**[2], Hon'ble Apex Court has held as under:

> "27. The Act stands totally on a different footing and the judgment of the High Court dated 19.04.2001/24.04.2001 has no bearing on it. The Act stands independent of the judgment of the High Court and its validity cannot be tested on these grounds. The petitioners have strongly relied upon the different stands allegedly taken by the State in the earlier proceedings and the present proceedings in support of their challenge to the constitutionality of the Act. This Court in Sanjeev Coke Mfg. Co. Vs Bharat Coking Coal Ltd. (1983) 1 SCC 147 has held that the validity of the legislation is not to be judged by what is stated in an affidavit filed on behalf of the State and that it should fall or stand on the strength of its provisions."

79) Much emphasis has been made by the petitioners on the counter affidavit filed by the respondents. In the counter affidavit initially filed by Mr. Anand Bardhan, Principal Secretary (Irrigation), Govt. of Uttarakhand, the source of drawing the power has been stated, but on later stage by filing another counter affidavit the State has drastically changed its stand. It is true that the

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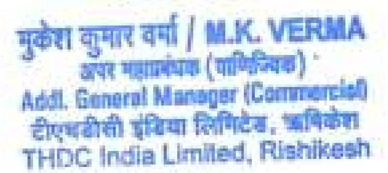
State has changed its defence by filing another affidavit but it should be kept in mind that in the matters where the validity of law has been assailed on certain grounds by the petitioners, it is the petitioners alone, who have to attack the validity of the enactment and they have to substantially prove that by raising the plea and on interpretation of the provisions of the law that enactment is beyond the competence of the State. Filing of improper counter affidavit or not raising a specific plea in the counter affidavit has no relevance at all. In other words, in a matter of challenge to the vires of an Act, counter affidavit has not much relevance. It is for the petitioners to attack the validity of the Act on legal sustainable grounds. The petitioners in the present case failed to make out any grounds in the absence of pleadings in this regard in the writ petitions filed by them.

80) Another argument advanced on behalf of petitioners M/s Swasti Power Pvt. Ltd. and THDC is that the impugned Act is violative of the fundamental rights of the petitioners enshrined under Article 14 and Article 19(1)(g) of the Constitution of India. It is stated that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purpose of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled namely (i) that the classification must be



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founded on an intelligible differentia which distinguishes persons or things that are grouped together from other left out of the group, and that differentia must have a rational relation to the object sought to be achieved by the statute in question. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. It is also contended that by means of imposing and levying tax on the water drawn for the purpose of generating electricity, the petitioners are being taxed and taxed twice, whereby it is being subject to double taxation viz. by payment of royalty in the form of grant of 12% free electricity of total saleable energy from the hydro power projects and thereafter payment of water tax in terms of the impugned Act.

81) So far as contention of learned Senior Counsel that the impugned Act is unconstitutional, insofar as it seeks to take away the fundamental rights guaranteed to the petitioner under Article 14 of the Constitution of India is concerned, the other petitioners in the present batch of writ petitions have taken a plea that their fundamental rights guaranteed under Article 14 of the Constitution is violated by the State under the impugned Act. There is nothing in the Act which suggests any discrimination, unreasonable classification or manifest violation of equality clause. Therefore, the contention in this regard raised on behalf of the

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petitioners has no force. So far as violation of Article 19(1)(g) of the Constitution is concerned, it is to be noted here that by issuance of the impugned Act only a tax on water has been introduced uniformly and rationally and none of the rights of the petitioners in regard to freedom to practice any profession, or to carry on any occupation, trade or business has been violated. The Act has been enacted for a specific purpose of recovering usage charges on water for generating electricity from water sources as defined under the Act. Entry 17 of the List II of the Seventh Schedule to the Constitution empowers the State Government to legislate on the charge / tax / cess / on use of water. Since Uttarakhand is mainly a hilly cash-starved State with limited revenue resources, therefore, a uniform tax has been introduced on all who uses the water of the State rivers viz. river Bhagirathi and Alaknanda in order to give sustenance to its economy. The Act nowhere imposes ban on use of water for generation of electricity except under provisions of the Act, rather it imposes tax on use of water (non-consumptive) for electricity generation. Furthermore, a perusal of the pleadings in this regard taken by the petitioners, would depict that nowhere it has been stated in what manner the impugned Act infringes the fundamental right of the petitioners. It is settled position in law that whoever states that provisions of any Act infringes his / her fundamental right, a heavy duty casts upon such person to demonstrate

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in what manner such infringement has been done. In absence of specific pleadings in this regard it would be presumed that the Act does not infringe upon the fundamental right of the petitioners in any way. Hence, the submissions of learned Senior Counsel have no force.

82) Mr. V.K. Kohli and Mr. D.S. Patni, learned Senior Counsel would submit that the enactment, promulgation and notification of the said Act, being arbitrary, manifesting arbitrariness in State action, are nothing but exercise of the colourable powers of the respondent State and the State has no power to levy tax on generation of electricity. Reliance has been placed on the judgment of Hon'ble Apex Court in **M.P. Cement Manufacturers' Association**[8]. Relevant paragraphs 14, 15, 16 and 17 of the judgment, relied by the petitioner, are excerpted hereunder:

> "14. A plain reading of Sub-Section (2) of Section 3 introduced by the amendment to the 1981 Adhiniyam 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. There is a conscious linguistic departure from the language used in Section 3 of the Electricity Duty Act, 1949 and indeed the language used in Section 3(1) of the same

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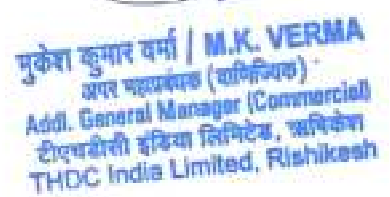
Act where the cess is levied on the total units of electrical energy sold or supplied by distributors of electrical energy. When dealing with producers under sub-Section (2) of the same section, the cess is required to be paid "on the total units of electrical energy produced". If, as is contended by the respondents, the incidence of levy under Section (1) and sub-section (2) were identical, the same language should have been used in both sub-sections. The deliberate change in language reflects an intention to alter the subject matter of levy as far as producers were concerned.

15. Our interpretation of sub-section (2) of Section 3 is buttressed by and in keeping with the language and effect of the proviso to the said sub-section. It has been held that the normal function of the proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. The proviso to Section 3(2) excepts "electrical energy produced" from payment of the cess in five cases. This would show that the general application of Section 3(2) to which an exception was being carved by the proviso was in respect of the production of electrical energy. Were it not for the exception in the proviso to Section 3(2), what would be subjected to tax would be electrical energy produced by the five categories mentioned under the proviso. Although in categories (i), (ii), (iii) and (v) the exemption is granted with reference to the utilisation of the electrical energy produced, under exception (iv) significantly, all electrical energy produced by a Rural Electrical Co-operative Society registered under the M.P. Co-operative Societies Act, 1960 is exempted. The difference of language between the proviso to sub-section (2) of Section 3 and the proviso to sub-section (1) of Section 3 is also telling. Under the proviso to sub-section (1), the exception is of electrical energy sold or supplied to specified authorities.

16. That the intention of the Legislature was to levy cess on the production of electricity is also borne out from the Statement of Objects and Reasons which accompanied the Act which replaced the Ordinance. It says:

> "With a view to impose cess on the electricity generated by the producers from their captive power plants/diesel generating sets for self consumption or for sale at the rate of 20 paise per unit on all generated electricity units, it has



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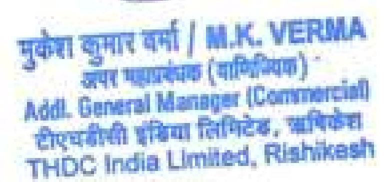
> been decided to amend the Madhya Pradesh Upkar Adhiniyam, 1981 (1 of 1982) suitably."
>
> 17. There can, in the circumstances, be no doubt that the levy was sought to be imposed on the generation of electricity by the amendment, a levy which the State admittedly was incompetent to impose."

83] Now the question which arises for consideration of this Court is – whether the impugned Act is *mala fide* or in colourable exercise of the State's legislative powers when it overrides the promise made by it in the RIA agreement or otherwise, signed with the petitioners prior to commencement of the Act?

84] Hon'ble Apex Court in **K.C. Gajapati Narayan Deo**[22] while examining the scope and meaning of doctrine of colourable legislation has held as under:

> "9. It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of 'bona fides' or 'mala fides' on the part of the legislature. The whole doctrine resolves itself into the, question of competency of a particular legislature to enact a particular law. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power. A distinction, however, exists between a legislature which is legally omnipotent like the British Parliament and the laws promulgated by which could not be challenged on the ground of incompetency, and a legislature which enjoys only a limited or a qualified jurisdiction.
>
> If the Constitution of a State distributes the legislative powers amongst different bodies, which



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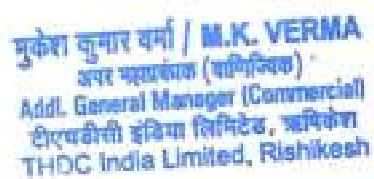
have to act within their respective spheres marked out by specific legislative entries, or if there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colorable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears, on proper examination, to be a mere presence or disguise. As was said by Duff J. in Attorney-General for Ontario v. Reciprocal Insurers and Others, 1924 A C 328 at p. 337 (H):

> "Where the law making authority is of a limited or qualified character it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what is that the legislature is really doing."

In other words, it is the substance of the Act that is material and not merely the form or outward appearance, and if the subject-matter in substance is something which is beyond the powers of that legislature to legislate upon, the form in which the law is clothed would not save it from condemnation. The legislature cannot violate the constitutional prohibitions by employing an indirect method. In cases like these, the enquiry must always be as to the true nature and character of the challenged legislation and it is the result of such investigation and not the form alone that will determine as to whether or not it relates to a subject which is within the power of the legislative authority. For the purpose of this investigation the court could certainly examine the effect of the legislation and take into consideration its object, purpose or design. But these are only relevant for the purpose of ascertaining the true character and substance of the enactment and the class of subjects of legislation to which it really belongs and not for finding out the motives which induced the legislature to exercise its powers.

It is said by Lefroy in his well known work on Canadian Constitution that even if the legislature avow



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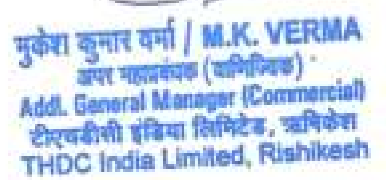
> on the face of an Act that it intends thereby to legislate in reference to a subject over which it has no jurisdiction, yet if the enacting clauses of the Act bring the legislation within its powers, the Act cannot be considered 'ultra vires'."

85) A bare reading of the Act would reveal that the nature of impugned tax is not on 'generation of electricity' but on the 'use of water' or say 'water drawn for generation of electricity'. The word 'water drawn' means the actual user of water for generation of electricity. The incidence of tax is on the activity of drawing of water or its user and not on generation. Perusal of various provisions of the Act establishes that the incidence of the tax, as envisaged in Sections 4, 5, 8, 9, 10, 12, 17, 18 and 19 clearly falls on the water drawn / usage for generating electricity. Generation of electricity only identifies the kind of user, i.e. user meant for generation of electricity. This is only to distinguish this usage from others which are not to be taxed. If this tax was intended to be on generation of electricity then the legislature could not have exempted other kinds of generations of electricity like solar or wind generation. This is also clarified by the use of word 'for' between the phrase "water drawn by the user" and "generation of electricity". This yet again reflects that the tax is on the activity of drawing of water, to use the same for generation of electricity. The same inference follows from the presence of the word "use" or "user" all over the Act as well as the definitions contained in Section 2(l),



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(i) and (h). So the competency of the legislature in enacting the law is fully proved in the present case. If the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. Whether a statute is constitutional or not is always a question of power. The substance of the Act is material and not the form or outward appearance. Once after investigation the court comes to the conclusion having considered the object, purpose or design of the Act it can certainly ascertain the true character and substance of the enactment and the motives which induced the legislature to exercise its powers goes into oblivion. Thus, from a bare perusal of the Act read along with the Statement of Object and Reasons it is abundantly clear that in the Act incidence of tax is on the activity of drawing of water or its user and not on generation.

86] Learned Senior Counsel appearing on behalf of the petitioners next contended that the respondent neither installed any flow measuring device within the premises for measuring the water drawn nor had it adopted any alternate method in measuring the quantity of water used; and the respondent neither did prescribe any specification for adjusting the expenditure incurred by the petitioner. As such, the impugned notice(s) was issued without complying with the procedure under Section 14 of the Act.

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87) Before further discussion it will be appropriate to reproduce Section 14 of the impugned Act. Section 14.1 of the Act for the procedure to assess the water drawn. It reads as under:

> "The Commission shall install or cause to be installed flow measuring device within, the premises of Scheme or at such other place where the Commission deems fit for purposes of measuring the water drawn for electricity generation or may adopt any indirect method for assessment of water drawn by the user."

88) Section 14.2 of the Act provides as under:

> "The Commission may either install or, require a user to install a flow measuring device as per the specifications approved by the Commission at his premises or at his location or at such other place as the Commission may direct and thereafter adjust the expenditure incurred by such user on such installation towards the Water Tax payable by the user."

89) So far as installation of the flow measuring device is concerned, Section 14 of the Act prescribes three alternatives:

(a) Commission may itself install it within the premises of the Scheme;
(b) Commission may cause the device to be installed by the user, with the cost being allowed to be adjusted against the tax to be paid; and
(c) It may adopt any indirect method for assessment of water drawn.

Thus, Sections 14.1 and 14.2 of the Act makes it is mandatory for the Commission to install a flow measuring device.

90) The claim of the petitioners with regard to the "flow measuring devices" not being installed by

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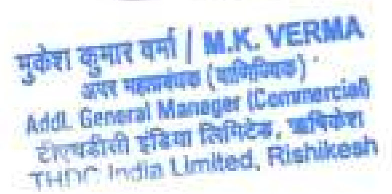
the Commission under Section 14.1 of the Act falls in the third alternative of adopting an indirect method for assessment of water drawn by the user. This method is left to the discretion of the Commission. When the petitioners failed to register and provide the requisite information about the water drawn in the past three years, or the current user, the Commission was left with no option but to make a best judgment assessment of the water drawn by the user and the tax due, based on the relevant available figures of the earlier years. On the basis of best judgment assessment, notices were sent to the users, disclosing all the factors relied upon in computation of the tax due. The petitioners were informed that the assessments are provisional and not final. These notices were issued by the Superintending Engineer, who was appointed as the Nodal Office in the order dated 30.10.2015. This order also contains appropriate delegation of power for further action. Thus, the procedure adopted by the respondent cannot be said to be unreasonable.

91) It is also the contention of learned Senior Counsel appearing on behalf of the petitioners that till date the State Commission, as required under Section 20 read with Section 2(b) of the Act has not been established and, therefore, the functions of registration of the units under Section 12 or the assessment of the water drawn by the user, the tax computation or its imposition under Sections 14, 17, 18 and 19 of the Act cannot be done.



92) Section 2(b) of the Act was amended by Amendment Act no. 4 of 2016, by means of which the "Commission", as constituted under Section 3 of the Uttarakhand Water Management and Regulatory Act, 2013 (as amended by Amendment Act no. 3 of 2016) was adopted or incorporated as "Commission" under the Act. Section 20(1) clearly contemplates a situation where Commission could not be established in time. In such a situation, the Principal Secretary / Secretary (Irrigation) was to discharge all the functions of the Commission under the Act. Order dated 30.10.2015 was issued in this regard under the proviso to Section 20(1) appointing the Principal Secretary (Irrigation), Govt. of Uttarakhand to discharge the functions of the Commission. These provisions clearly establish that there was an authority that was functional under the Act to discharge all the functions of the Commission. Thus, the assessment of water drawn by the units and their registration under Section 12; the assessment and the computation of tax and its recovery under Section 14 to 19 could be legally done even in the absence of the Commission.

93) Mr. U.K. Uniyal, learned Senior Counsel for UPPCL drew attention of this Court towards clause 17 of the RIA dated 8th February 2006, which deals with "Delivery of Electricity". Clause 17.1 of the RIA stipulates that Govt. of Uttaranchal (now Uttarakhand) shall be entitled to 12% of the Saleable Energy from the Project free of cost.

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GOUP/UPPCL and the Company agree that this 12% free of cost Saleable Energy will be supplied to the GOU by the Company in lieu of the 12% Saleable Energy previously required to be supplied free of cost by the Company to GOUP/UPSEB. It is vehemently argued that the Govt. of Uttarakhand is being provided 12% saleable energy by the petitioner free of cost as royalty in lieu of use of natural resources of the State.

94) The submission of learned Senior Counsel appearing for the UPPCL has no substance. In so far 12% saleable energy being provided to the State of Uttarakhand is concerned, the same has been provided in the power and benefit sharing formula of the Ministry of Energy, Govt. of India Notification dated 01.11.1990 for the compensation of distress caused due to setting up the hydro-electric project, whereas the levy of tax on use of water as per the Act is meant for the use of natural resources of the State of Uttarakhand. It has come on record that the State has levied the same tax on use of water for electricity generation even on its' own Public Sector Undertakings responsible for electricity generation and, as such, there is no violation of the provision of the contract in any way. Besides this, having considered the requirement of imposition of tax, law has been enacted by the State Government on use / drawal of water for generation of electricity for the betterment of this hilly state keeping in mind the fact that source of revenue are

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very meager, therefore, need for a uniform tax has been introduced on all who uses the water for the purposes of generation of electricity.

95) The other point raised by the learned Senior Counsel for the petitioners is that the impugned tax is not based on the quantity of water used but is based on flow rate of water on per cubic meter basis at different Head heights of a dam, used for the purpose of generation of electricity. It is contended that a perusal of the rates of tax in the impugned Act will show that the same is directly relatable to the Height of the Head. There is no mention of the volume of water stored and used for generation of electricity, as the basis for levy of tax. Learned Senior Counsel would further submit that the levy of tax is simply based on the premise 'higher the Head, the more will be the electricity generated for the same volume of water used'. Thus, the levy is not on use of water but on the amount of electricity generated, depending on the height of the Head and has no correlation to the 'use of water'. It is contended that the height of the Head is directly proportional to the number of units of electricity generated, higher the Head, more the units of electricity generated. Though such a ground has been taken in the writ petition, but the same is not happily worded. In so far as the variation on height of head is concerned, higher the head, more water flows from it resulting in higher number of units of electricity generated. This is in

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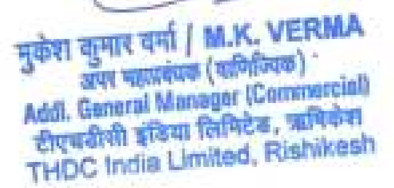
correlation with the use of water and cannot be read separately. It is a general principle that more the height of head more units of electricity will be generated. On the other hand, the water used from the lower head, having lesser height, will generate less units of electricity. Thus, the differentiation in taxation is just and reasonable. Therefore, the tax levied by the State is a tax on generation of electricity and not on use of water.

99) It is also apt to mention here that the nature and character of the levy, its pith and substance, the taxable event or the incidence of the tax can only be seen by reading the law as a whole. A plain reading of Sections 2(f), 2(g) and 2(i) read with Sections 4, 5, 8, 9, 10, 12, 14, 17, 18 and 19 of the Act would reveal that the tax is in relation to 'water drawn for generation of electricity', as such the levy is on the activity of drawing of water by its user. It says that only such user of water has to be taxed, who is drawing water, only and only for the purposes of generation of electricity. The moment water is drawn the tax is levied. It is a tax primarily on the user for drawing water from any water source. One should not forget the intent of the legislature that the subject matter of tax is the 'user of water' which is resorted to for electricity generation, but the incidence of tax falls only on the drawing of water and not the generation of electricity. Thus, the State legislature has rightly made 'paise per cubic meter of water drawn' as a



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measure of tax and not 'units of electricity generated' while enacting the Act. The State legislature is well within its competence to levy tax on flow rate of water on per cubic meter basis based on different Head heights of different dams used for the purpose of electricity generation.

97) In **Bhanumati**[9], their Lordships of the Hon'ble Apex Court emphasized on the point how the Court should consider the challenge to the constitutional validity of a statute. Relevant paragraphs 82 to 86 are extracted hereunder:

"82. In **Bihar Distillery Ltd.**[9], this Court in SCC para 17 at p. [illegible] laid down certain principles on how to judge the constitutionality of an enactment. This Court held that in this exercise the Court should:

(a) try to sustain the validity of the impugned law to the extent possible. It can strike down the enactment only when it is impossible to sustain it;

(b) the Court should not approach the enactment with a view to pick holes or to search for defects of drafting or for the language employed;

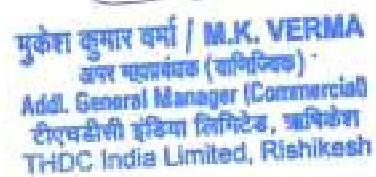
(c) the Court should consider that the Act made by the legislature represents the will of the people and that cannot be lightly interfered with;

(d) the Court should strike down the Act only when the unconstitutionality is plainly and clearly established;

(e) the Court must recognise the fundamental nature and importance of legislative process and accord due regard and deference to it.

This Court abstracted these principles from various judgments of this Court.

83. In State of Bihar (supra) this Court also considered the observations of Lord Denning in Seaford Court Estates Ltd. Vs. Asher, (1949) 2 KB 481 and highlighted that the job of a judge in construing a statute must proceed on the constructive task of finding the intention of Parliament and this must be done (a) not only from the language of the statute but also (b) upon consideration of the social conditions which gave rise to it (c) and also of the mischief to remedy which the statute was passed and if necessary (d) the judge must



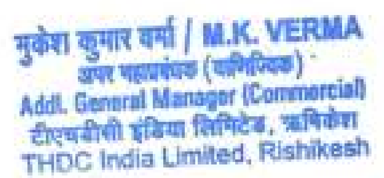
supplement the written word so as to give "force to life" to the intention of the legislature.

84. Reliance was also placed on another decision of this Court in **Dharam Dutt**[illegible]. This judgment is relevant in order to deal with the argument of the learned counsel for the appellants that in reducing the period for bringing the no-confidence motion from "two years" to "one year" and then in reducing the required majority from 2/3rd to simple majority, the legislature was guided by the sinister motive of some influential Ministers to get rid of a local leader who, as a Pradhan of Panchayat, may have become very powerful and competitor of the Minister of the State.

85. In Dharam Dutt (supra) this Court held that if the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. If the legislature has competence, the question of motive does not arise at all and any inquiry into the motive which persuaded Parliament into passing the Act would be of no use at all.

86. Reliance was also placed on the Constitution Bench judgment of this Court in **Mirzapur Moti Kureshi Kassab Jamat**[illegible]. Lahoti, C.J. speaking for the Bench laid down in SCC p. 562, para 39 of the Report that the legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in legislative process only when the statute is clearly violative of the right conferred on a citizen under Part III or when the Act is beyond the legislative competence of the legislature. Of course the Court must always recognise the presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies heavily on the party which assails it."

98] In view of foregoing discussion and keeping in mind the dictum of the Hon'ble Apex Court in *Bhanumati's* judgment it can safely be presumed that the Court should strike down the enactment only when there is no other possible way by which the enactment could be sustained. The Court should refrain itself from approaching the enactment with a view to pick holes or to search for defects of drafting or for the language employed. It should always be borne in mind that the Act made



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by the legislature represents the will of the people and it is in the interest of the public at large. Lastly, the Court must recognize the fundamental nature and importance of legislative process and accord due regard and deference to it. In other words, if the legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. If the legislature has competence, the question of motive does not arise at all and any inquiry into the motive which persuaded legislature into passing the Act would be of no use at all. One should not forget that the legislature is in the best position to understand and appreciate the needs of the people as enjoined in the Constitution. The Court will interfere in legislative process only when the Act is beyond the legislative competence of the legislature and it breaches the fundamental right or any other express provision of the constitution. Last but not the least, the Court must always recognise the presumption in favour of the constitutionality of the statutes and the onus to prove its invalidity lies heavily on the party which assails it. The Constitution does not by itself prescribe any standard tax assessment process, except that it should be fair, reasonable and transparent. As tax law is an economic legislation, the Court should practice judicial restraint in approach and grant greater latitude to the legislature. The purpose of enactment of a tax law by the State legislature is primarily for public interest, as the State needs tax, which is public

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money, and ultimately has to be used in the welfare of people at large. Pubic interest should not be sacrificed at the cost of individual interest.

99) It has been informed that the petitioners in the batch of present writ petitions were enjoying the interim order granted by a co-ordinate Bench of this Court vide order dated 31.05.2016, passed in WPMS no. 1500 of 2016. The same is excerpted hereunder:

> "Mr. D.S. Patni, Advocate for the petitioner.
>
> Mr. P.C. Bisht, Standing Counsel for the State of Uttarakhand / respondent nos. 1, 3, 4, 5, 7 and 8.
>
> Mr. Rakesh Thapliyal, Advocate for respondent no. 2.
>
> Mr. Sanjay Bhatt, Central Government Standing Counsel for respondent no. 6.
>
> Mrs. Bina Pandey, Standing Counsel for the State of U.P. / respondent nos. 10 and 11.
>
> Heard.
>
> Issue notice to respondent no. 9. Steps be taken within a week.
>
> List after the notice is served upon the said respondent.
>
> Also, heard on interim relief application.
>
> It is the submission of learned counsel for the petitioner that if, finally, the Court decides that the petitioner is liable to pay water tax, then the petitioner will certainly deposit the same in favour of the State Government.
>
> Interim relief application no. 5226 of 2016 is disposed of by directing respondent no. 7 not to take coercive measures for recovery of the water tax demand from the petitioner, which was issued by said authority vide letter dated 26.04.2016 (Annexure no. 8 to the writ petition).
>
> As prayed, six weeks' time is granted to the respondents to file counter affidavit(s)."

100) This court is of the opinion that such an interim order is not in coherence with the principle of law laid down by Hon'ble Apex Court in

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अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

(110)

catena of judgments. Therefore, interim orders granted earlier by this Court in favour of the petitioners, in the batch of writ petitions, stands vacated.

101) It has further been informed that the Nodal officer has made provisional assessment of water drawn by the petitioner companies and the tax due thereon, based on the relevant available figures of the preceding years as also on the basis of past usage of water and the current figures supplied by the Irrigation Department. The need for such exercise has arisen due to the denial of the relevant data by the petitioner companies, pertaining to the water drawn by them from the source.

102) Learned Senior Counsel appearing on behalf of the respondent State has placed a compilation before the Court showing that the petitioners herein have included the water tax imposed by the State Government while calculating the cost of electricity. The contention of the learned Senior Counsel for the respondent State has been denied by the learned Senior Counsel appearing for the petitioners. Be that as it may, the fact remains that since the validity of the Act has been upheld by this Court it makes no difference as to whether the petitioners have included water tax in the costing of the electricity generation or not.

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
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टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

(11)

103) Assessment was made provisionally subject to the objections of the petitioner companies. The petitioners did not raise any objection to the provisional assessment, rather they approached this Court straight away. On the one hand, the petitioners have challenged the constitutional validity and vires of the Act, on the other hand, they are challenging the validity of the notices issued to them. In so far validity of the notice is concerned, firstly it is a provisional assessment subject to the objections to be filed by the petitioners; secondly, the constitutional validity of the Act has been upheld by this Court. Thus, no fault can be attached to the provisional assessment and the notice of demand so issued to the petitioners.

104) In view of the above discussion, all the aforementioned writ petitions are hereby dismissed. No order as to costs.

(Lok Pal Singh, J.)

Dt. February 12, 2021.

22/02/2021
Section Officer
Copying Section

IN THE HON'BLE HIGH COURT OF U[illegible]ND,AT NAINITAL

WRIT PETITION NO. 187 OF 2016 (M/S)

(Under Article 226 of the Constitution of India)

DISTRICT – TEHRI GARHWAL

THDC India Ltd. through its CMD, having its Office at Pragatipuram, Rishikesh, Dehradun.

........Petitioner

VERSUS

1. State of Uttarakhand
Through The Chief Secretary
State of Uttarakhand

2. Uttarakhand Jal Sansthan,
Through its Managing Director,
State of Uttarakhand

3. Secretary, Department of Irrigation,
State of Uttarakhand

4. Secretary, Department of Industries
State of Uttarakhand

5. Principal Secretary, Department of Energy,
State of Uttarakhand

... Respondents

6. The Secretary to Government of India
Ministry of Power, Government of India
Sharam Shakti Bhawan, Rafi Marg,
New Delhi – 110 001

... Proforma Respondent

To,

The Hon'ble the Chief Justice and his other companion Judges of the aforesaid Court.

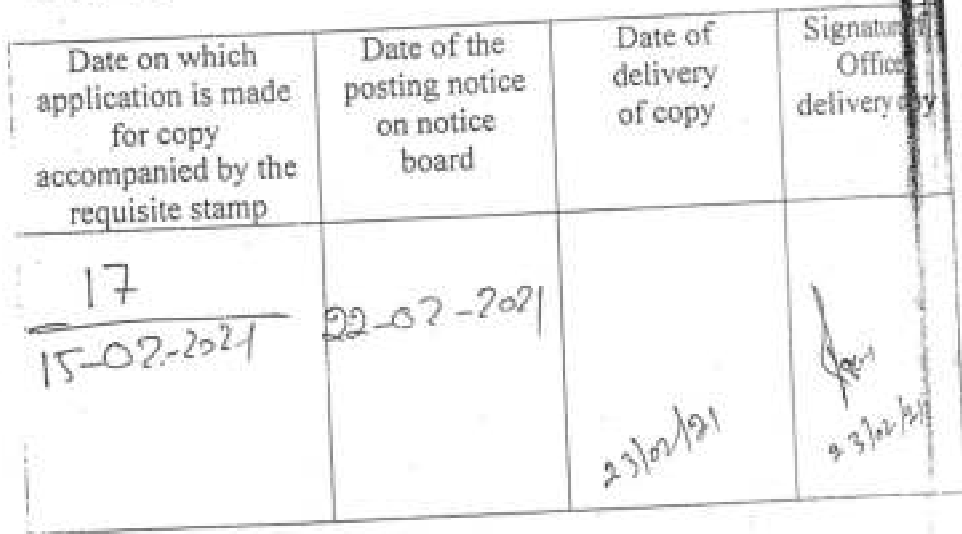
The humble petition of the above named petitioners most respectfully showeth as under:-

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

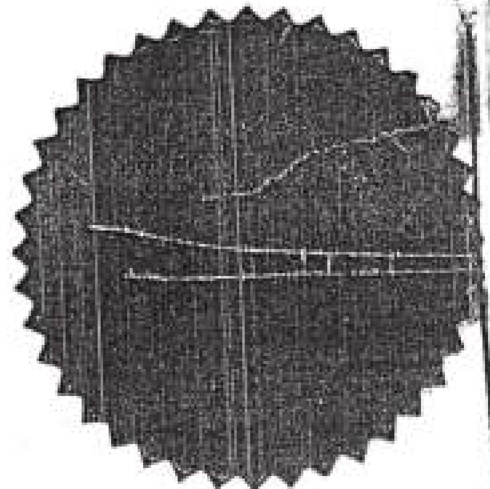
(113)

Advocate Name:- Shobhit Saharia

Copying fee: 36/-

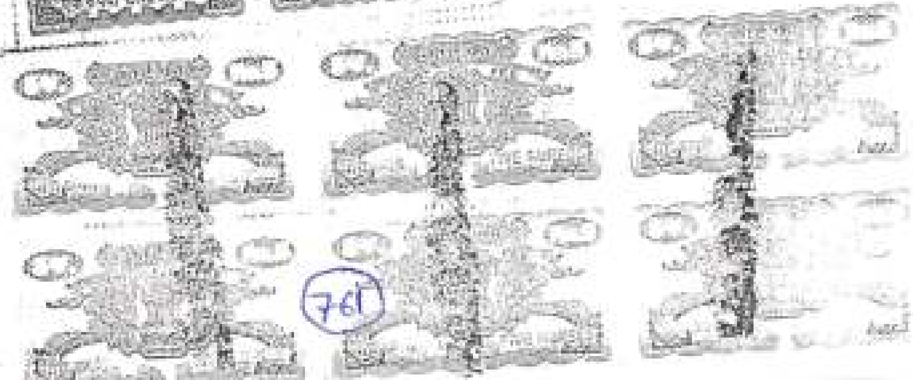


Date on which application is made for copy accompanied by the requisite stamp	Date of the posting notice on notice board	Date of delivery of copy	Signature of Officer delivery copy
17 / 15-02-2021	22-02-2021	23/02/21	23/02/21



22/02/2021

Sealed in My Presence



Addl. General Manager

THDC India

761

(114)

IN THE HON'BLE HIGH COURT OF UTTARAKHAND
AT NAINITAL

STAY APPLICATION NO............OF 2021

(Under Section 151 of C.P.C.)

IN

SPECIAL APPEAL NO...........Of 2021

(Under Chapter VIII Rule 5 of the High Court Rules)

DISTRICT:- TEHRI GARHWAL

THDC India Ltd., through its CMD, Ganga Bhawan, Pragatipuram, Rishikesh-249 201, Uttarakhand.
.... **Appellant**

Versus

State of Uttarakhand and others.
...........**Respondents**

To,

The Hon'ble Chief Justice and his other companion Judges of the aforesaid case.

That the Humble application of the appellants/ applicants is most respectfully showeth as under:

1. That the full facts and circumstances have been stated in the memo of accompanying appeal including the grounds, which shall form part of this application and it is prayed that the same may very kindly be read as part of the present Stay Application and the same are not being repeated for the sake of brevity.

2. That prima facie case and balance of convenience is in favour of the petitioner.

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

(115)

3. That appellant will suffer irreparably in case respondents are not restrained from initiating coercive recovery proceedings and a status quo is not maintained as was there through out the writ proceedings.

4. That petitioner being a Government Company and running one of the biggest earth & rock fill multipurpose Dam Project in the Continent. The main objective of this earth & rock fill Dam is not only for the generation of electricity but also for flood control, to fulfill the Irrigation & drinking water demand and also for holy Snan during the festive period in downstream area/regions etc. The tariff for per unit of generation is already high, thus Project will suffer irreparably in case the recovery proceedings with respect to impugned water tax are not stayed.

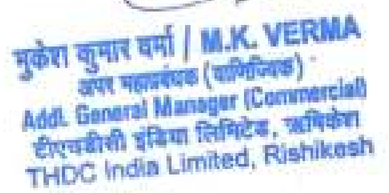
5. That in light of the above mentioned facts and circumstances, it is most humbly submitted that this Hon'ble Court may graciously be pleased to stay the effect and operation of impugned Judgment and order dated Judgment and order dated 12-2-2021 passed in Writ Petition No. 187 of 2016(MS), titled as THDC India Ltd. V. State of Uttarakhand and others, and the steps and proceedings initiated thereunder by the respondent State or otherwise the appellant/applicant shall suffer irreparable loss and injury.

PRAYER

It is therefore most respectfully prayed that this Hon'ble Court may graciously be pleased to stay the effect and operation of impugned Judgment and order dated Judgment and order dated 12-2-2021 passed in Writ Petition No. 187 of 2016(MS), titled as THDC India Ltd. V. State of Uttarakhand and others, and the steps and proceedings initiated thereunder by the respondent State or otherwise the appellant/applicant shall suffer irreparable loss and injury.

Date:

Shobhit Saharia
Advocate
Counsel for the Appellant



116

IN THE HON'BLE HIGH COURT OF UTTARAKHAND

AT NAINITAL

AFFIDAVIT

IN

STAY APPLICATION NO............OF 2021

(Under Section 151 of C.P.C.)

IN

SPECIAL APPEAL NO...........Of 2021

(Under Chapter VIII Rule 5 Of the High Court Rules)

DISTRICT:- TEHRI GARHWAL

THDC India Ltd., through its CMD, Ganga Bhawan, Pragatipuram, Rishikesh-249 201, Uttarakhand.

.... **Appellant**

Versus

State of Uttarakhand and others.

...........**Respondents**

Affidavit of Mukesh Kumar Verma,
Aged about 55 years,
S/o. Late Sh. RamKrishna Verma,
Presently posted as Addl. General Manager
(Commercial dept.), THDCIL, Rishikesh

Deponent

I, the deponent above named do hereby solemnly affirmed and state of Oath as under:-

1. That the deponent is presently posted as Addl. General Manager (Commercial dept.), THDCIL- Rishikesh, he is competent and duly

मुकेश कुमार वर्मा | M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

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authorized to file the instant affidavit in support of the stay application filed in the above noted Special Appeal and as such he is well acquainted with the facts deposed to below.

I, the deponent above named do hereby solemnly affirm on oath and verify that the contents of Paragraph No. ....1 to 5.............................of the Application are personal knowledge and those of Paragraph No...of the Application are based on perusal of records and those of Paragraph No...of the Application are based on legal advice, which I believe to be true and no part of this affidavit is false and nothing material has been concealed.

So Help Me God.

Deponent

I, Ajay Vaish S/o Late Shri Brij Behari Lal Vaish age 52 years, Sr. Manager (Commercial dept.), THDCIL-Rishikesh, do hereby identify the deponent from the papers which he produced before me and I am satisfied that he is the same person making this affidavit.

Identifier

Solemnly affirmed before me on this ...31..... day of March'2021 at about...11:30...a.m./p.m. by the deponent, who has been identified by the aforesaid person.

I have satisfied myself by examining the deponent that the deponent has understood the contents of this affidavit, which has been read over and explained to him by me.

(Oath Commissioner/Notary)

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

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(118)

IN THE HON'BLE HIGH COURT OF UTTARAKHAND AT NAINITAL

AFFIDAVIT OF SERVICE

IN

SPECIAL APPEAL NO..........Of 2021

(Under Chapter VIII Rule 5 of the High Court Rules)

District: - Tehri Garhwal

THDC India Ltd. ....Appellant

VS

State of Uttarakhand & Others .....Respondent

2021 AFFIDAVIT 7141 HIGH COURT OF UTTARAKHAND ₹20/-

Affidavit of Sanjay Singh Bisht , aged about 34 years, S/o Late Sri Tej Singh , R/O- Ashdale Compound ,Sukhatal, Mallital, Nainital

..........Deponent

I, the deponent above named do hereby solemnly affirmed and state of Oath as under:-

1. That the deponent is a registered clerk of appellant counsel and is also authorized to file the instant affidavit of service only on behalf of the appellant, as such he is well acquainted with the facts deposed to below.
2. That a copy of special appeal was already to be served upon the respondents.

I, the deponent above named do hereby solemnly affirm on oath and verify that the contents of Paragraph

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

1,2 ....of the Affidavit are personal knowledge and those of Paragraph No...of the Affidavit are based on perusal of records and those of Paragraph No...of the Affidavit are based on legal advice, which I believe to be true and no part of this affidavit is false and nothing material has been concealed.

So Help Me God

Deponent

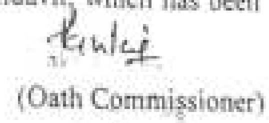
I, Shobhit Saharia, Advocate, High Court of Uttarakhand, Nainital, do hereby identify the deponent from the papers which she produced before me and I am satisfied that he is the same person making this affidavit.

Advocate

Reg. No. U.P. 10113/2000, Bar No. S-224

Solemnly affirmed before me on this 05th day of April, 2021 at about 12.11 a.m./p.m. by the deponent, who has been identified by the aforesaid Advocate.

I have satisfied myself by examining the deponent that the deponent has understood the contents of this affidavit, which has been read over and explained to him by me.



(Oath Commissioner)

7141
5-4-21

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

ANNEXURE-13

SL. No	Date	Office Notes, reports, orders or proceedings or directions and Registrar's order with Signatures	COURT'S OR JUDGES'S ORDERS
	12.07.2021		SPA No. 134 of 2021 **Hon'ble Raghvendra Singh Chauhan, CJ.** **Hon'ble Alok Kumar Verma, J.** Mr. Alok Mehra, learned counsel for th appellant. Mr. C.S. Rawat, the learned Chief Standing Counsel for the State of Uttarakhand, accepts notice on behalf of respondent Nos. 1 to 4. Mr. Rakesh Thapliyal, the learned Assistant Solicitor General for the Union of India, accepts notice on behalf of respondent No. 6. Mr. Jitendra Chaudhary, the learned counsel, accepts notice on behalf of respondent No. 7. Issue notice to respondent No. 5. Rule made returnable within four weeks.

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

The learned counsel for respondent Nos. 1 to 3, 6 & 7 seek four weeks' time to file their counter affidavits.

The time, so prayed for, is hereby granted.

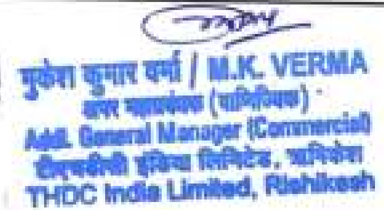
Meanwhile, the operation of the order dated 12.02.2021, passed by the learned Single Judge in Writ Petition (M/S) No. 123 of 2017, is hereby stayed.

The Registry is directed to tag this file with the files of SPA Nos. 131 and 149 of 2021.

(Alok Kumar Verma, J.) (Raghvendra Singh Chauhan, CJ)

12.07.2021 12.07.2021

Rathour



SL. No	Date	Office Notes, reports, orders or proceedings or directions and Registrar's order with Signatures	COURT'S OR JUDGES'S ORDERS
	02.08.2021		SPA No. 139 of 2021 **Hon'ble Raghvendra Singh Chauhan, CJ.** **Hon'ble Alok Kumar Verma, J.** Mr. D.S. Patni, learned Senior Counsel, assisted by Mr. Siddhant Manral and Ms. Rangoli Purohit, learned counsel for the appellant. Mr. Pradeep Joshi, the learned Additional Chief Standing Counsel, accepts notice on behalf of respondent Nos. 1 & 2. Mr. Vinay Kumar, the learned counsel, accepts notice on behalf of respondent No. 3. Issue notice to respondent No. 4. Rule made returnable within four weeks. The learned counsel for the respondents seek four weeks' time to file their counter-affidavits. The time, so prayed for, is hereby granted. The operation of the order dated 12.02.2021, passed by the learned Single Judge in Writ Petition (M/S) No. 641 of 2018, is hereby stayed. The Registry is directed to tag this file with

			the files of SPA Nos. 149, 136, 137, 140, 141, 142, 143, and 149 of 2021. **(Alok Kumar Verma, J.) (Raghvendra Singh Chauhan, CJ)** 02.08.2021 02.08.2021 Rathour

ANNEXURE-14

जलकर

ज०वि० आकार–पत्र 69

(नियम 236 देखिए)

उपस्थिति–पत्र (Citation to appear)

(देखो धारा 280 उ0प्र0ज0वि0 और मू0व्य0 ऐक्ट, 1950 ई0)

क्रम–संख्या 217723

सेवा में प्रबन्ध निदेशक टी० एच० डी० सी० इण्डिया लि०

खाता–खतौनी ---- गांव (मौजा) ---- परगना टिहरी ---- की किश्त के हिसाब में ---- रु0 की बकाया धनराशि 50296,90,000-00 + सूद 10% आपके द्वारा देय है, इसलिए यदि आप पूरा बकाया तथा इस उपस्थिति–पत्र का तलबाना शीघ्र ही न चुका सके तो एतद्द्वारा यह अपेक्षित है कि आप स्वयं दिनांक 24/06/2022 ई0 को इस न्यायालय में उपस्थित हों।

मेरे द्वारा तथा इस न्यायालय की मुहर के साथ आज दिनांक 10/06/2020 ई0 को जारी किया गया।

मुहर

हस्ताक्षर
तहसीलदार
टिहरी गढ़वाल

आपको यह ज्ञात हो कि यदि आप उल्लिखित समय और दिनांक पर उपस्थित नहीं होंगे तो आपकी गिरफ्तारी तथा निरोधन के लिए आपकी सम्पत्ति की कुर्की तथा नीलाम के लिए अधिपत्र जारी हो सकता है।

सेट)।

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

1

0063391

280 देखिये)

क्रम संख्या RE

सेवा में,

श्री टी०एच०डी०सी० इण्डिया लिमिटेड

खाता खतौनी .... मौजा (गांव) कोटेश्वर बांध

परगना नरेन्द्रनगर ...... की किस्त के हिसाब में 319,83,560001-
+ 6,18,024

रु० की बकाया मालगुजारी आदि देय है, इसलिए यदि आप पूरी बकाया तथा इस उपस्थिति-पत्र का खर्चा शीघ्र ही चुका सकें तो एतद्द्वारा यह अपेक्षित है कि आप स्वयं दिनांक

23.6.2022 को अधोहस्ताक्षरी के समक्ष उसके कार्यालय में उपस्थित हों।

मेरे द्वारा तथा मेरे कार्यालय की मुहर के साथ

दिनांक 9.6.2022 को जारी किया गया।

मुहर

अध्यक्ष के हस्ताक्षर

भूमि प्रबन्धक समिति का नाम

आपको यह ज्ञात हो कि यदि आप उल्लिखित समय और दिनांक पर उपस्थित नहीं होंगे तो आपकी गिरफ्तारी तथा निरोधन के या आपकी संपत्ति की कुर्की के लिए कलेक्टर का वारन्ट जारी किया जा सकता है।

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

प्रेषक,

अध्यक्ष,
उत्तराखण्ड जल संसाधन प्रबन्धन और नियामक आयोग
देहरादून।

CGM (Design) Rishikesh
Pl. look into this matter and notify Surface water CRA intimation OC/DLRA
to the Mo. Th.
28.5.22

प्रेषित

जिलाधिकारी
टिहरी गढवाल।

R.N.-2748 31/5/22 16/06

पत्रांकः– 116 /उ0ज0सं0प्र0नि0आ0/डब्लू–2 जलकर/ दिनांक 25 मई ,2022

सन्दर्भः–इस कार्यालय का पत्रांक–83/ उ0ज0सं0प्र0नि0आ0/डब्लू–2 जलकर/दिनांक 27 अप्रैल, 2022

विषयः– आयोग द्वारा अधिरोपित जलकर के अवशेष देयकों एवं जल उपयोग के शेष आंकडों के सम्बन्ध में।

महोदय,

कृपया इस कार्यालय के उपरोक्त सन्दर्भित पत्रांक, जो अध्यक्ष एवं प्रबन्ध निदेशक, टी0एच0डी0सी0 इण्डिया लिमिटेड, गंगा भवन, प्रगतिपुरम, बाइ पास रोड, ऋषिकेश को सम्बोधित एवं आपको भी पृष्ठांकित है, का अवलोकन करने का कष्ट करें, जिसमें अधोहस्ताक्षरी द्वारा सम्बन्धित प्रतिष्ठान को उनके जनपद टिहरी गढवाल स्थित टिहरी एवं कोटेश्वर जलविद्युत परियोजनाओं द्वारा जल विद्युत उत्पादन हेतु उपयोग किए गए जल पर जलकर अधिरोपित करते हुए बीजकों का भुगतान एवं शेष वांछित आंकडे 15 कार्यदिवस के अर्न्तगत उपलब्ध कराने हेतु निर्देश दिये गए थे, जो आतिथि तक अप्राप्त हैं। अवगत कराना है कि प्रश्नगत प्रकरण में आयोग द्वारा उक्त परियोजनाओं पर आतिथि तक निम्नवत जलकर अधिरोपित किया गया है, जिसका भुगतान होना शेष है। यह भी सूचनीय है कि सम्बन्धित परियोजना अधिकारियों द्वारा संलग्न तालिकानुसार जल उपयोग के आंकडे इस कार्यालय को उपलब्ध नहीं कराए जाने की दशा में परियोजनाओं द्वारा अब तक उपयोग किए गए अधिकतम जल उपयोग के आंकडे को आधार मानते हुए अंकित माह के बीजकों का जलकर अधिरोपित किया गया है। इस प्रकार सम्बन्धित परियोजना पर कुल ₹ 822,80,46,000.00 (रू0 आठ सौ बाइस करोड अस्सी लाख छियालीस हजार मात्र) का जलकर भुगतान हेतु अवशेष है।

क्र0 सं0	स्थापित वाले प्रतिष्ठान का नाम	परियोजना का नाम	पूर्व में अधिरोपित जलकर की राशि	वांछित जल उपयोग के आंकडों का विवरण	वांछित जल उपयोग के आंकडे(माह में)	अधिकतम जल उपयोग के अनुसार प्रतिमाह दर	वांछित जल उपयोग के आंकडों के आधार पर राशि	कुल योग (4+7)	अभ्युक्ति
1	2	3	4		5	6	7	8	9
1	टी0एच0डी0सी0 इंडिया लि0	टिहरी बांध	329,35,50,000.00	11/2015 से 03/2016,01/2017 से 03/2017,10/2020 से 12/2020, 01/2022 से 03/2022 तक	14 माह	12,40,10,000.00	173,61,40,000.00	502,96,90,000.00	
2	तदैव	कोटेश्वर बांध	267,82,600.00	10/2020 से 12/2020, 01/2022 से 03/2022 तक	06 माह	8,66,78,900.00	52,00,73,400.00	319,83,56,000.00	
								822,80,46,000.00	

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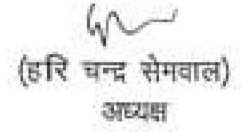
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

अतः कृपया अपने स्तर से सम्बन्धित प्रतिष्ठान के विरूद्ध अवशेष धनराशि ₹ 822,80,46,000.00 मात्र की वसूली करते हुए कृत कार्यवाही से इस कार्यालय को अवगत कराने का कष्ट करें।



(हरि चन्द्र सेमवाल)
अध्यक्ष

पत्रांकः– /उ0ज0सं0प्र0नि0आ0/डब्लू–2 जलकर/ दिनांक मई ,2022

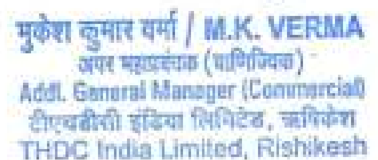
प्रतिलिपि निम्नलिखित को सूचनार्थ एवं आवश्यक कार्यवाही हेतु प्रेषित हैः–

1. सचिव सिंचाई उत्तराखण्ड शासन, देहरादून।
2. प्रमुख अभियन्ता, सिंचाई विभाग, उत्तराखण्ड, देहरादून।
3. मुख्य अभियन्ता(स्तर–।।), सिंचाई विभाग, उत्तराखण्ड, हरिद्वार।
4. सचिव, उत्तराखण्ड जल संसाधन प्रबंधन और नियामक आयोग, सिंचाई भवन, यमुना कॉलोनी, देहरादून।
5. अध्यक्ष एवं प्रबन्ध निदेशक, टी0एच0डी0सी0 इण्डिया लि0, गंगा भवन, प्रगतिपुरम, बाइ पास रोड, ऋषिकेश।

(हरि चन्द्र सेमवाल)
अध्यक्ष

संख्या...02.../बु.रा.वे./दिनांक 4/06/2022
तहसीलदार/नायब तहसीलदार टिहरी
कृपया बकाया की भांति शीघ्र वसूली करें
डिप्टी कलेक्टर,
टिहरी गढ़वाल

संग्रह अमीन...टिहरी
कृ0 वसूली की कार्यवाही सुनिश्चित करते हुये तत्काल अवगत करायें।
तहसीलदार
टिहरी, टि0ग0
08/06/22



Annexure - 15

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

THE HON'BLE THE CHIEF JUSTICE SRI VIPIN SANGHI
AND
THE HON'BLE SRI JUSTICE RAMESH CHANDRA KHULBE

Stay Application IA No. 05 of 2022

Misc. Application IA No. 06 of 2022

In

SPECIAL APPEAL NO. 149 OF 2021

12th JULY, 2022

Between:

T.H.D.C. India Limited .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

Stay Application IA No. 01 of 2021
In
SPECIAL APPEAL NO. 131 OF 2021

Between:

N.H.P.C. Limited .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

Misc. Application IA No. 03 of 2022
In
SPECIAL APPEAL NO. 134 OF 2021

Between:

M/s Jaiprakash Power Ventures Ltd. .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

Stay Application IA No. 01 of 2021
In
SPECIAL APPEAL NO. 136 OF 2021

Between:

Alaknanda Hydro Power Co. Ltd. .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

Stay Application IA No. 01 of 2021
In
SPECIAL APPEAL NO. 137 OF 2021

Between:

Alaknanda Hydro Power Co. Ltd. .... Appellant

and

State of Uttarakhand & others ...... Respondents

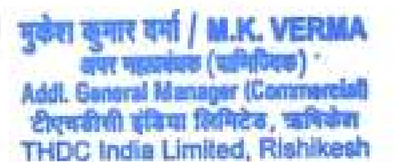
with

Misc. Application IA No. 02 of 2022
In
SPECIAL APPEAL NO. 139 OF 2021

Between:

M/s Swasti Power Pvt. Limited .... Appellant

and



State of Uttarakhand & others ...... Respondents

with

Stay Application IA No. 01 of 2021
In
SPECIAL APPEAL NO. 140 OF 2021

Between:

Alaknanda Hydro Power Co. Ltd. .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

Stay Application IA No. 01 of 2021
In
SPECIAL APPEAL NO. 141 OF 2021

Between:

Alaknanda Hydro Power Co. Ltd. .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

Stay Application IA No. 01 of 2021
In
SPECIAL APPEAL NO. 142 OF 2021

Between:

M/s Swasti Power Pvt. Limited .... Appellant

and

State of Uttarakhand & others ...... Respondents

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

with

Stay Application IA No. 01 of 2021
In
SPECIAL APPEAL NO. 143 OF 2021

Between:

Alaknanda Hydro Power Co. Ltd. .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

Misc. Application IA No. 02 of 2022
In
SPECIAL APPEAL NO. 363 OF 2021

Between:

Bhilangana Hydro Power Ltd. .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

SPECIAL APPEAL NO. 367 OF 2021

Between:

U.P. Power Corporation Ltd. .... Appellant

and

State of Uttarakhand & others ...... Respondents

with

Misc. Application IA No. 02 of 2022
In
WRIT PETITION (M/S) NO. 1739 OF 2021

मुकेश कुमार वर्मा / M.K. VERMA
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

Between:

M/s L&T Uttaranchal Hydropower Ltd. .... Petitioner

and

State of Uttarakhand & others ...... Respondents

Counsel for the appellant(s)	:	Mr. Sanjay Jain, Mr. Shobhit Saharia, Mr. D.S. Patni, learned Senior Counsel assisted by Mr. Dharmendra Barthwal and Mr. Siddhant Manral, Mr. Abdhesh Chaudhary with Mr. Alok Mahra, Mr. Aditya Singh and Mr. Vikas Bahuguna, learned counsel
Counsel for the respondent(s)	:	Mr. Dinesh Dwivedi, learned Senior Counsel assisted by Mr. Abhishek Atrey and Mr. Prateek Dwivedi, learned counsel along with Mr. Anil K. Bisht, learned Additional Chief Standing Counsel for the State of Uttarakhand
	:	Mr. Xitij Kaushik, learned counsel for the Uttarakhand Jal Sansthan
	:	Mr. U.K. Uniyal, learned Senior Counsel with Mr. Nived Veerapaneni and Mr. Manish Kumar Singh, learned counsel for the UPPCL
	:	Mr. Rajesh Sharma and Mr. Saurav Adhikari, learned Standing Counsel for the Union of India

The Court made the following:

ORDER: (per Hon'ble The Chief Justice Sri Vipin Sanghi)

Stay Application IA No. 05 of 2022 & Misc. Application IA No. 06 of 2022 both in Special Appeal No. 149 of 2021

The appellant T.H.D.C. India Ltd. has preferred the present applications to seek stay of the effect and operation of citations dated 09.06.2022, 10.06.2022. The

M.K. VERMA
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

orders dated 27.04.2022 and 24.05.2022, issued qua them, during pendency of the Special Appeal.

2) The present appeal is directed against the common judgment rendered by the learned Single Judge in a batch of writ petitions, including the Writ Petition (M/S) No. 187 of 2016, preferred by the appellant T.H.D.C. India Limited. The learned Single Judge, by the common impugned judgment dismissed the said writ petitions, wherein the writ petitioners challenged the constitutional validity and *vires* of the Uttarakhand Water Tax on Electricity Generation Act, 2012 (hereinafter referred to as 'the Act') on the ground of legislative competence of the State Legislature to enact the said Act. When the writ petitions were preferred, the learned Single Judge granted interim orders in favour of the writ petitioners restraining the respondents from taking coercive measures for recovery of water tax demanded from them under the provisions of the aforesaid Act. The writ petitioners gave an assurance to pay the tax demands in case they fail in their challenges. Since the writ petitions were dismissed by the learned Single Judge, the learned Single Judge vacated the interim orders. It appears that in one of the present appeals, i.e., Special Appeal No. 134 of 2021, the Division Bench stayed the operation of the impugned

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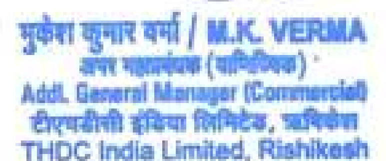
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

judgment and order dated 12.02.2021, vide its order passed on 12.07.2021.

3) The grievance of the appellant T.H.D.C. India Ltd. is that, despite the stay of the operation of the impugned judgment and order, the respondents have issued communications dated 27.04.2022 and 24.05.2022 directing the appellant T.H.D.C. India Ltd. to deposit the water tax, which is to the tune of Rs. 800 crores and more. Consequent upon the orders passed by the District Collector, the Tehsildar has issued recovery citations on 09.06.2022 and 10.06.2022 against T.H.D.C. India Ltd. Consequently, the present application has been preferred by T.H.D.C. India Ltd. effectively to seek the stay of recovery of the tax which has accrued under the Act.

4) We have heard Mr. Sanjay Jain, the learned A.S.G., who has appeared for the appellant T.H.D.C. India Ltd. on the one hand, and Mr. Dinesh Dwivedi, learned Senior Counsel, who has appeared on behalf of the respondent-State, on the other hand.

5) The first submission of Mr. Jain is that the State legislature had no competence to frame the said Act. He submits that under Article 265 of the Constitution, no tax can be levied or collected except by authority of law. Since the said Act, according to the appellant, is un-



constitutional, the State has no authority to collect water tax under the said Act, which is sought to be collected from the Hydro Electric Power generating companies operating in the State, including T.H.D.C. India Ltd.

6) Mr. Jain submits that Article 246 of the Constitution delineates the matters over which the Parliament and State Legislatures have competence to legislate. List I of the VII Schedule enumerates matters on which the Parliament alone can legislate. Similarly, List II enumerates matters on which only the State Legislature can legislate. List III is the Concurrent List on which both Legislatures can legislate. However, Laws made by the Parliament take primacy over laws made by the State Legislatures in respect of matters enumerated in the Concurrent List. He submits that the scheme of arrangement of the matters in List I and II would show, that the taxing entries have been separately set out. He points out that in List I, the taxing entries starts from entry 82 upto 96. Item 97 is the residuary entry, according to which, the Parliament exclusively can legislate on – "*any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists*".

(emphasis supplied)

7) Mr. Jain submits that, similarly, perusal of List II would show that the taxing entries begin from entry 45

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THDC India Limited, Rishikesh

onwards. Mr. Jain has drawn our attention to the entries on which the learned Single Judge has placed reliance to hold that the Act is constitutionally valid, and that the State Legislature had the legislative competence to enact the Act in question. The entries he has particularly highlighted are entries 17, 18, 45, 49 and 50. These entries read as follows:

> "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, right 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.

8) Mr. Jain has submitted that while the State Legislature has the competence to frame laws on the subject of 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 (which relate to regulation and development of inter-State rivers and river valleys to the extent to which such

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regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest), there is no corresponding taxing entry in respect of water. He points out that in contradiction, in respect of the subject matter of land, that is to say - right 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, entry 45 empowers the State Legislature to frame laws on the subject of 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.

9) The submission of Mr. Jain is that since taxation of water is not enumerated as a separate entry in List II, by virtue of entry 97 of List I, the power to frame a law on taxation on water vests only with the Union, and not with the State Legislature. Mr. Jain submits that a perusal of the impugned judgment would show that the learned Single Judge was himself not clear as to which entry in List II of the VII Schedule empowered the State Legislature to enact the Act in question. He submits that the learned Single Judge has held that the power to tax drawal of water is derived from a combined reading of entries 17,

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18, 45, 49 and 50. He submits that this approach of the learned Single Judge is completely erroneous, as it is not permissible to infer the statutory power / competence on a combined reading of the legislative entries, and the legislative power should have its source in a particular legislative entry in the VII Schedule. He further submits that reliance placed by the learned Single Judge on the two decisions of the Supreme Court, namely, ***State of West Bengal Vs Kesoram Industries Ltd. and others, (2004) 10 SCC 201*** and ***Ichchapur Industrial Cooperative Society Ltd. Vs Competent Authority, Oil and Natural Gas Commission, (1997) 2 SCC 42***, was completely misplaced. He submits that the reasoning adopted by the leaned Single Judge, to say that since water flows over land, it would be covered by entry 18, and would be taxable by reference to entry 45, is erroneous. He further submits that the learned Single Judge by placing reliance on ***Ichchapur Industrial Cooperative Society Limited*** (supra) has considered water to be a mineral and, therefore, taxable by the State under entry 50 of the II List. He argues that water cannot be considered as mineral in the context of the Constitutional entry in entry 17 of the List II of the VII Schedule, and the Supreme Court held water to be a mineral in the context of the definition of the expression

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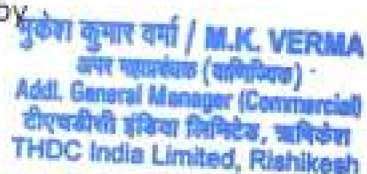
'mineral' as contained in the Mines Act, 1952, and for the purpose of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962.

10) He further submits, on instructions, that that the appellant T.H.D.C. India Ltd. has not collected even a single paisa towards the water tax leviable under the impugned Act and, therefore, to require the appellant to pay the same at this stage, when the appeal is pending consideration would be very harsh, and it would also lead to shut down of its operation by the appellant T.H.D.C. India Ltd. to the huge detriment of the public at large. He submits that the appellant has been constituted by the Central Government and the State Government, and they have 75-25 per cent share in the appellant Company. He further submits that 12% of the power generated by the appellant's Hydro Electric plant is given free of cost to the State of Uttarakhand. He further submits that the appellant is in the process of starting two other hydro-electric projects in the State of Uttarakhand, and if the recovery of the staggering amount of Rs. 800 crores is made from the appellant at this stage, all its operations and development activities would come to a grinding halt.

11) On the other hand, the submission of Mr. Dinesh Dwivedi, learned Senior Counsel appearing for the respondent-State, is that the writ petitions preferred by



the writ petitioners having been dismissed, and the writ petitioners having failed in the first round, there is no justification for grant of stay of recovery of tax under the impugned Act. He submits that there is a presumption of Constitutionality and validity in respect of a law frame by the competent Legislature, and that presumption is reaffirmed by the judgment rendered by the learned Single Judge. He submits that stay of recovery of tax has been frowned upon by the Supreme Court, and in this regard he drew attention of this Court to the judgment of the Supreme Court in ***Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs Dunlop India Ltd. and others, (1985) 1 SCC 260***. He has particularly relied upon paragraphs 5 and 7 of the said judgment to submit that mere existence of a *prima facie* case is not sufficient for the Court to grant stay of recovery of tax. He submits that the Supreme Court particularly observed that in respect of an indirect tax, which could be passed on to the consumers, there would be no justification for stay of recovery of tax. Paragraph Nos. 5 and 7 are excerpted as under:

> "5. We repeat and deprecate the practice of granting interim order which practically give the principal relief sought in the petition for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, the public interest and a host of other relevant considerations. Regarding the practice of some clever

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THDC India Limited, Rishikesh

litigants of resorting to filing writ petitions in far-away courts having doubtful jurisdiction, we had this to observe: [SCC para 2, P. 648 : SCC (Cri) pp. 350-51]

> "..... Having regard to the fact that the registered office of the Company is at Ludhiana and the principal respondents against whom the primary relief is sought are at New Delhi, one would have expected the writ petition to be filed either in the High Court of Punjab and Haryana or in the Delhi High Court. The writ petitioners however, have chosen the Calcutta High Court as the forum perhaps because one of the interlocutory reliefs which is sought is in respect of a consignment of beef tallow which has arrived at the Calcutta Port. An inevitable result of the filing of writ petitions elsewhere than at the place where the concerned offices and the relevant records are located is to delay prompt return and contest. We do not desire to probe further into the question whether the writ petition was filed by design or accident in the Calcutta High Court when the office of the Company is in the State of Punjab and all the principal respondents are in Delhi. But we do feel disturbed that such writ petitions are often deliberately filed in distant High Courts, as part of a manoeuvre in a A legal battle, so as to render it difficult for the officials at Delhi to move applications to vacate stay where it becomes necessary to file such applications".

In Union of India v. Jain Shudh Vanaspati Ltd., C.A. No. 11450 of 1983, Chandrachud, CJ., A. P. Sen, R. N. Misra, JJ. allowed an appeal against an interim order making the following observations:

> "After hearing learned counsel for the rival parties, we are of the opinion that the interim order passed by the High Court on November 29, 1983 is not warranted since it virtually grants to the respondents a substantial part of the relief claimed by them in their writ petition. Accordingly, we set aside the said order".

We have come across cases where the collection of public revenue has been seriously jeopardised and budgets of Governments and Local Authorities affirmatively prejudiced to the point of precariousness consequent upon interim orders made by courts. In fact instances have come to our knowledge where Governments have been forced to explore further sources for raising revenue, sources which they would rather well leave alone in the public interest, because of the stays granted by courts. We have come across cases where an entire Service is left in a stay of flutter and unrest because of interim orders passed by courts, leaving the work they are supposed to do in a state of suspended animation. We have come across cases where buses and lorries are being run under orders of court though they were either denied permits or their permits had been cancelled or suspended by Transport

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Authorities. We have come across cases where liquor shops are being run under interim orders of court. We have come across cases where the collection of monthly rentals payable by excise contractors has been stayed with the result that at the end of the year the contractor has paid nothing but made his profits from the shop and walked out. We have come across cases where dealers in food grains and essential commodities have been allowed to take back the stocks seized from them as if to permit them to continue to indulge in the very practices which were to be prevented by the seizure. We have come across cases where land reform and important welfare legislations have been stayed by courts. Incalculable harm has been done by such interim orders. All this is not to say that interim orders may never be made against public authorities. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violations of the law and injustices are perpetrated or are about to be perpetrated, it is the bounden duty of the court to intervene and give appropriate interim relief. In cases where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen's faith in the impartiality of public administration, a Court may well be justified in granting interim relief against public authority. But since the law presumes that public authorities function properly and bona fide with due regard to the public interest, a court must be circumspect in granting interim orders of far-reaching dimensions or orders causing administrative, burdensome inconvenience or orders preventing collection of public revenue for no better reason than that the parties have come to the Court alleging prejudice, inconvenience or harm and that a prima facie case has been shown. There can be and there are no hard and fast rules. But prudence, discretion and circumspection are called for. There are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of the public interest. There are many such factors worthy of consideration. We often wonder why in the case indirect taxation where the burden has already been passed on to the consumer, any interim relief

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should at all be given to the manufacturer, dealer and the like !

7. Now coming to the facts of the present case, the respondent, Dunlop India Limited is a manufacturer of tyres, tubes and various other rubber products. By a notification dated April 6, 1984 issued by the Government of India, Ministry of Finance (Department of Revenue) in exercise of the powers conferred by Rule 8 (1) of the Central Excise Rules, 1944, tyres, falling under Item No. 16 of the First Schedule to the Central Excise and Salt Act, 1944, were exempt from a certain percentage of excise duty to the extent that the manufacturers had not availed themselves of the exemption granted under certain other earlier notifications The Department was of the view that the Company was not entitled to the exemption as it had cleared the goods earlier without paying central excise duty, but on furnishing bank guarantees under various interim orders of courts. The Company claimed the benefit of the exemption to the tune of Rs. 6.05 crores and filed a writ petition in the Calcutta High Court and sought an interim order restraining the central excise authorities from the levy and collection of excise duty. The learned Single Judge took the view that a prima facie case had been made out in favour of the Company and by an interim order allowed the benefit of the exemption to the tune of Rs. two crores ninety three lacs and eighty five thousand for which amount the company was directed to furnish a bank guarantee, that is to say, the goods were directed to be released on the Bank Guarantee being furnished. An appeal was preferred by the Assistant Collector of Central Excise under clause 10 of the Letters Patent and a Division Bench of the Calcutta High Court confirmed the order of the learned Single Judge, but made a slight modification in that the Collector of Central Excise was given the liberty to encash 30% of the Bank Guarantee. The Assistant Collector of Central Excise has preferred this appeal by special leave. By our interim order dated November 15, 1984, we vacated the orders granted by the learned Single Judge as well as by the Division Bench. We gave two weeks' time to the respondent-Company to file a counter. No counter has, however been filed. Shri F.S. Nariman, learned counsel, however appeared for the respondent. We do not have the slightest doubt that

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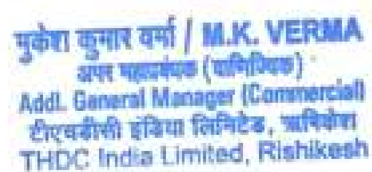
> the orders of the learned Single Judge as well as Division Bench are wholly unsustainable and should never been made. Even assuming that the Company had established a prima facie case, about which we do not express any opinion, we do not think that it was sufficient justification for granting the interim orders as was done by High Court. There was no question of any balance of convenience being in favour of the respondent-Company. The balance of convenience was certainly in favour of the Government of India. Governments are not run on mere Bank Guarantees. We notice that very often some courts act as if furnishing a Bank Guarantee would meet the ends of justice. No governmental business or for that matter no business of any kind can be run on mere Bank Guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest. We are very sorry to remark that these considerations have not been borne in mind by the High Court and interim order of this magnitude had been granted for the mere asking. The appeal is allowed with costs."

12) Mr. Dwivedi further submits that the appellants have not pleaded, and have not produced any material before the Court, to satisfy this Court that they have, as a matter of fact, not recovered the water tax levied by the State under the impugned legislation from their customers, and that they have not passed it on to their customers. In this regard he has drawn the attention of the Court to the observation made by the learned Single Judge in paragraph 102 of the impugned judgment.



13) Mr. Dwivedi has also referred to, and relied upon, Article 288 of the Constitution to submit that the said Article recognizes the fact that the State Legislature has the legislative competence to enact a law for tax on water or electricity. He submits that Article 288(1) relates to such laws of the State in force immediately before the commencement of the Constitution, whereas Article 288(2) relates to laws which the Legislature of a State may frame to impose such tax. His submission is that so far as the impugned Act is concerned, since the same does not relate to storing, generation, consumption, distribution and sale of water, and it only relates to drawal of water for the purpose of electricity generation, there was no requirement to obtain the assent of the President.

14) In his rejoinder, Mr. Jain has submitted that the appellant would file an affidavit to state that the appellant has not recovered any water tax from its customers. He submits that the electricity tariff is fixed under the Electricity Act by the appropriate Commission, which in the case of the Central Government, is the Central Electricity Regulatory Commission. He submits that the tariff was fixed by the Commission for a period of five years, in the year 2014, whereas the impugned Act came into force on 15.08.2015, and the Notification prescribes the rates on which tax would be collected, was notified by the

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Government of Uttarakhand is of 07.11.2015. The appellant had preferred the writ petition on 22.01.2016, and the learned Single Judge granted stay against coercive action for recovery of tax under the impugned Act on 18.05.2016. He submits that, therefore, there is no occasion for the appellant to collect the said tax.

15) Mr. U.K. Uniyal, learned Senior Counsel, also appeared on behalf of the appellant U.P. Power Corporation Ltd., in Special Appeal No. 367 of 2021, and advanced his submissions on the same line as Mr. Jain. He further submits that no order has been issued by the State Electricity Regulatory Commission and, therefore, there is no question of the appellant's affecting recovery of water tax from the consumers.

16) To this, the response of Mr. Dwivedi is that the appellants, who are generating electricity by operating their hydro-electric plants, are selling the same on the prescribed tariff and, therefore, it would not be correct to say that no tariff fixation has been undertaken by the concerned Authority / Commission.

17) The other appellants and the petitioner in Writ Petition (M/S) No. 1739 of 2021 have not addressed separate arguments, and have relied on the submissions

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advanced by Mr. Sanjay Jain, the learned A.S.G. and Mr. U.K. Uniyal, learned Senior Counsel.

18) We have considered the submissions advanced on behalf of the appellants as well as the respondents, and given our due consideration to the same.

19) The appeals raise important and interesting question of law, i.e., whether taxation on drawal of water for the purpose of electricity generation can be levied under a State legislation by resort to entries 45, or 49 or 50, or more than one of them?

20) The effect of Article 288 of the Constitution, which has also been relied upon by Mr. Dwivedi, would also require to be considered. The decisions of the Supreme Court in ***State of West Bengal Vs Kesoram Industries Ltd. and others, (2004) 10 SCC 201*** and ***Ichchapur Industrial Cooperative Society Ltd. Vs Competent Authority, Oil and Natural Gas Commission, (1997) 2 SCC 42***, and their applicability to the interpretation of the legislative entries in the Constitution would also require consideration.

21) It is argued by Mr. Dwivedi, that there is presumption of legislative competence when a law is framed. The appellants have had one round before the learned Single Judge, who has not found favour with their

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argument in respect of their challenge to the impugned legislation. At this stage, to grant a complete stay of recovery of tax from the appellants would, therefore, not be called for in the light of the observations made by the Supreme Court in ***Dunlop India Ltd.*** (supra).

22) The appellant's / writ petitioner's claim is that they have not affected recovery of water tax, and that they have not passed it on to their consumers. This is disputed by the respondent-State.

23) We, therefore, direct that each of the appellants / writ petitioner shall file their respective affidavits clearly stating, whether, or not, they have recovered and passed on the water tax levied by the State under the impugned legislation to their customers. They shall also place on record with their affidavits their applications made to the appropriate Commission for determination of tariff, and the orders passed thereon by the appropriate Commission to show, whether, or not, the said tax has been passed on by the appellants to their consumers. The affidavits shall be filed not later than two weeks. The appellants / petitioner, who have collected the water tax levied under the impugned legislation from their customers, shall pay and deposit the entire tax with the respondents in terms of the demands raised. The arrears shall be deposited within four weeks, without prejudice to the rights and contentions

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of the parties. They shall also, henceforth, continue to pay the water tax payable under the impugned legislation during pendency of the present appeals, subject to final decision of these appeals / writ petition.

24) In respect of the appellants / writ petitioner who establish by filing their affidavits, that they have not, in fact, collected water tax, and not passed on the said liability to their customers, there shall be stay of recovery of water tax till 31st of July, 2022. However, they shall commence paying the water tax dues levied under the impugned legislation from 1st of August 2022, onwards subject to final orders. All the applications stand disposed of in the aforesaid terms. This order shall bind all the parties in the aforementioned Special Appeals and Writ Petition.

VIPIN SANGHI, C.J.

R.C. Khulbe, J.

Dt: 12th JULY, 2022
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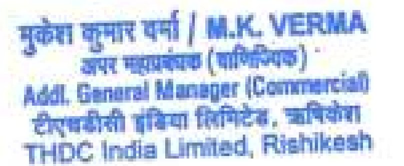

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टीएचडीसी इंडिया लिमिटेड

THDC INDIA LIMITED

(भारत सरकार एवं उ. प्र. सरकार का संयुक्त उपक्रम)
(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./ 18
Date: 02-08-2022

To,

Managing Director,
Uttarakhand Power Corporation Ltd.,
Urja Bhawan, Kanwali Road,
Dehradun-248001 (UK)

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

Sir,

As you are aware that Government of Uttarakhand has passed "The Uttarakhand water tax on Electricity Generation Act, 2012 (UK Act No. 09 of 2013)" on 25.01.2013, which came into force from 15.08.2015 and fixation of rates of water Tax on 07.11.2015.

THDCIL challenged this Act before Hon'ble High Court of Uttarakhand at Nainital vide writ petition No. 187 of 2016 (M/s) on 22.01.2016 and interim relief/ Stay application was filed on 16.05.2016. High Court of Uttarakhand granted interim relief on 18.05.2018 that "No coercive measure shall be taken for recovery of water tax during the pendency of the writ petition". Writ petition No. 187 of 2016 filed by THDC was dismissed vide order dated 12.02.2021.

Thereafter, THDCIL filed special appeal number 149 of 2021 for Challenging a High court order dated 12.02.2021 along with interim relief application on 06.04.2021.

Chairman UK Jal Sansadhan Prabandhan & Niyamk Aayog raised demand notice dated 24.05.2022 for Rs. 822,80,46,000.00 Citation Notice was issued by Tehsildar Gaza and Tehsildar Tehri on 09.06.2022 and 10.06.2022 respectively. THDCIL filed Stay application on 28.06.2022 on the above Citation Notice.

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Addl. General Manager (Commercial)
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THDC India Limited, Rishikesh

Division bench of High Court of Uttarakhand passed interim order dated 12.07.2022 in interim relief application, staying recovery of water Tax due till 31.07.2022 and ordered to pay water tax from 01.08.2022. Copy of order dated 12.07.2022 attached herewith.

As per Clause no. 6.2 of PPA dated 21.04.2004 and PPA dated 12.03.2009 for Tehri HPP (1000 MW) & KHEP (400 MW) respectively, In addition to the energy charge tariff set out, UPCL shall also be liable to pay to THDC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess including environmental cess, leavy, fees or other imposition etc. levied or to be levied in future by Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per approval / order of CERC from time to time. Accordingly, Bills will be issued from 01.08.2022 for payment of water tax.

This is for your kind information please.

Regards,

(for and on behalf of)

02/08/2022

(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.

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(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./ 19
Date: 02-08-2022

To,

Chairman & Managing Director,
Uttar Pradesh Power Corporation Limited,
Shakti Bhawan, 14 Ashok Marg,
Lucknow – 226001 (UP)

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

Sir,

As you are aware that Government of Uttarakhand has passed "The Uttarakhand water tax on Electricity Generation Act, 2012 (UK Act No. 09 of 2013)" on 25.01.2013, which came into force from 15.08.2015 and fixation of rates of water Tax on 07.11.2015.

THDCIL challenged this Act before Hon'ble High Court of Uttarakhand at Nainital vide writ petition No. 187 of 2016 (M/s) on 22.01.2016 and interim relief/ Stay application was filed on 16.05.2016. High Court of Uttarakhand granted interim relief on 18.05.2018 that "No coercive measure shall be taken for recovery of water tax during the pendency of the writ petition". Writ petition No. 187 of 2016 filed by THDC was dismissed vide order dated 12.02.2021.

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As per Clause no. 6.2 of PPA dated 16.10.2003 and PPA dated 25.07.2007 for Tehri HPP (1000 MW) & KHEP (400 MW) respectively, In addition to the energy charge tariff set out, UPPCL shall also be liable to pay to THDC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess including environmental cess, leavy, fees or other imposition etc. levied or to be levied in future by Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per approval / order of CERC from time to time. Accordingly, Bills will be issued from 01.08.2022 for payment of water tax.

This is for your kind information please.

Regards,

(for and on behalf of)

(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.

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(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./ 20
Date: 02-08-2022

To,

Chairman & Managing Director,
Punjab State Power Corporation Limited,
The Mall,
Patiala – 147001 (Punjab)

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Regards,

(for and on behalf of)

(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

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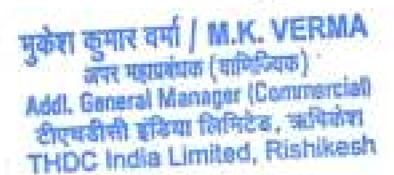

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CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./ 24
Date: 02-08-2022

To,

Principal Secretary (Power),
Power Development Department (PDD),
Govt. of J&K, Civil Secretariat,
Jammu -180001 (J&K)

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

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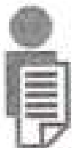


मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

Division bench of High Court of Uttarakhand passed interim order dated 12.07.2022 in interim relief application, staying recovery of water Tax due till 31.07.2022 and ordered to pay water tax from 01.08.2022. Copy of order dated 12.07.2022 attached herewith.

As per Clause no. 6.2 of PPA dated 26.08.2004 and PPA dated 25.11.2010 for Tehri HPP (1000 MW) & KHEP (400 MW) respectively, In addition to the energy charge tariff set out, PDD shall also be liable to pay to THDC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess including environmental cess, leavy, fees or other imposition etc. levied or to be levied in future by Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per approval / order of CERC from time to time. Accordingly, Bills will be issued from 01.08.2022 for payment of water tax.

This is for your kind information please.

Regards,

(for and on behalf of)

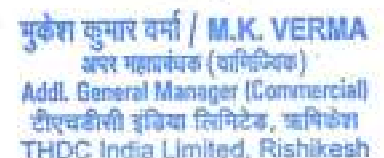
(Mukesh Kumar Verma)

Addl. General Manager (Commercial)

THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.



टीएचडीसी इंडिया लिमिटेड
THDC INDIA LIMITED
(भारत सरकार एवं उ. प्र. सरकार का संयुक्त उपक्रम)
(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./ 22
Date: 02-08-2022

To,

The Managing Director,
Rajasthan Urja Vikas Nigam Limited
Vidyut Bhawan, Jiyoti Nagar,
Jaipur- 302005 (Rajasthan)

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

Sir,

As you are aware that Government of Uttarakhand has passed "The Uttarakhand water tax on Electricity Generation Act, 2012 (UK Act No. 09 of 2013)" on 25.01.2013, which came into force from 15.08.2015 and fixation of rates of water Tax on 07.11.2015.

THDCIL challenged this Act before Hon'ble High Court of Uttarakhand at Nainital vide writ petition No. 187 of 2016 (M/s) on 22.01.2016 and interim relief/ Stay application was filed on 16.05.2016. High Court of Uttarakhand granted interim relief on 18.05.2018 that "No coercive measure shall be taken for recovery of water tax during the pendency of the writ petition". Writ petition No. 187 of 2016 filed by THDC was dismissed vide order dated 12.02.2021.

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Division bench of High Court of Uttarakhand passed interim order dated 12.07.2022 in interim relief application, staying recovery of water Tax due till 31.07.2022 and ordered to pay water tax from 01.08.2022. Copy of order dated 12.07.2022 attached herewith.

As per Clause no. 6.2 of PPA dated 27.07.2005 and PPA dated 22.11.2007 for Tehri HPP (1000 MW) & KHEP (400 MW) respectively, In addition to the energy charge tariff set out, JVVN, AVVN & JdVVN shall also be liable to pay to THDC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess including environmental cess, leavy, fees or other imposition etc. levied or to be levied in future by Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per approval / order of CERC from time to time. Accordingly, Bills will be issued from 01.08.2022 for payment of water tax.

This is for your kind information please.
Regards,

(for and on behalf of)

22/08/2022

(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

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(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./23
Date: 02.08.2022

To,

The Chairman,
Haryana Power Utilities (DHBVNL & UHBVNL),
Shakti Bhawan, Sector 6,
Panchkula – 134 109 (Haryana)

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

Sir,

As you are aware that Government of Uttarakhand has passed "The Uttarakhand water tax on Electricity Generation Act, 2012 (UK Act No. 09 of 2013)" on 25.01.2013, which came into force from 15.08.2015 and fixation of rates of water Tax on 07.11.2015.

THDCIL challenged this Act before Hon'ble High Court of Uttarakhand at Nainital vide writ petition No. 187 of 2016 (M/s) on 22.01.2016 and interim relief/ Stay application was filed on 16.05.2016. High Court of Uttarakhand granted interim relief on 18.05.2018 that "No coercive measure shall be taken for recovery of water tax during the pendency of the writ petition". Writ petition No. 187 of 2016 filed by THDC was dismissed vide order dated 12.02.2021.

Thereafter, THDCIL filed special appeal number 149 of 2021 for Challenging a High court order dated 12.02.2021 along with interim relief application on 06.04.2021.

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As per Clause no. 6.2 of PPA dated 14.05.2004 and PPA dated 08.02.2006 for Tehri HPP (1000 MW) & KHEP (400 MW) respectively, In addition to the energy charge tariff set out, HPGCL shall also be liable to pay to THDC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess including environmental cess, leavy, fees or other imposition etc. levied or to be levied in future by Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per approval / order of CERC from time to time. Accordingly, Bills will be issued from 01.08.2022 for payment of water tax.

This is for your kind information please.

Regards,

(for and on behalf of)

(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

टीएचडीसी इंडिया लिमिटेड

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(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./24
Date: 02.08.2022

To,

Chief Executive Officer,
BSES Rajdhani Power Ltd.,
BSES Bhawan, Nehru Place,
Behind Nehru Place Bus Terminal,
New Delhi-110019

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

Sir,

As you are aware that Government of Uttarakhand has passed "The Uttarakhand water tax on Electricity Generation Act, 2012 (UK Act No. 09 of 2013)" on 25.01.2013, which came into force from 15.08.2015 and fixation of rates of water Tax on 07.11.2015.

THDCIL challenged this Act before Hon'ble High Court of Uttarakhand at Nainital vide writ petition No. 187 of 2016 (M/s) on 22.01.2016 and interim relief/ Stay application was filed on 16.05.2016. High Court of Uttarakhand granted interim relief on 18.05.2018 that "No coercive measure shall be taken for recovery of water tax during the pendency of the writ petition". Writ petition No. 187 of 2016 filed by THDC was dismissed vide order dated 12.02.2021.

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सुरेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
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THDC India Limited, Rishikesh

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As per Clause no. 8.5 of PPA dated 30.03.2012 and PPA dated 30.03.2012 for Tehri HPP (1000 MW) & KHEP (400 MW) respectively, Other Taxes Levies Duties, Royalty, Cess etc.: Statutory taxes, levies royality, cess or any other kind of imposition(s) imposed/ charged by any Government (Central/ State) and or any other local bodies/ authorities on generation of electricity including auxiliary consumption or any other type of consumption including water, environment protection, sale or on supply of power/ electricity and / or in respect of any of its installations associated with the station payable by THDC to the authorities concerned shall be borne and additionally paid on pro-rata basis by the BRPL to THDC. Accordingly, Bills will be issued from 01.08.2022 for payment of water tax.

This is for your kind information please.

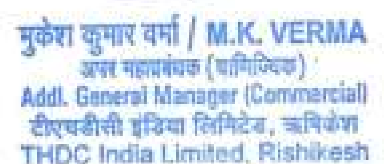
Regards,

(for and on behalf of)

(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.



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(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./ 25
Date: 02.08.2022

To,

Secretary (Engineering),
Engineering Dept.,
Chandigarh Administration,
1st Floor, UT Secretariat,
Sector 9-D,
Chandigarh-160009

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

Sir,

As you are aware that Government of Uttarakhand has passed "The Uttarakhand water tax on Electricity Generation Act, 2012 (UK Act No. 09 of 2013)" on 25.01.2013, which came into force from 15.08.2015 and fixation of rates of water Tax on 07.11.2015.

THDCIL challenged this Act before Hon'ble High Court of Uttarakhand at Nainital vide writ petition No. 187 of 2016 (M/s) on 22.01.2016 and interim relief/ Stay application was filed on 16.05.2016. High Court of Uttarakhand granted interim relief on 18.05.2018 that "No coercive measure shall be taken for recovery of water tax during the pendency of the writ petition". Writ petition No. 187 of 2016 filed by THDC was dismissed vide order dated 12.02.2021.

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मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

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As per Clause no. 6.2 of PPA dated 12.12.2003 and PPA dated 11.08.2009 for Tehri HPP (1000 MW) & KHEP (400 MW) respectively, In addition to the energy charge tariff set out, CED shall also be liable to pay to THDC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess including environmental cess, leavy, fees or other imposition etc. levied or to be levied in future by Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per approval / order of CERC from time to time. Accordingly, Bills will be issued from 01.08.2022 for payment of water tax.

This is for your kind information please.

Regards,

(for and on behalf of)

(Mukesh Kumar Verma)

Addl. General Manager (Commercial)

THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.

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THDC INDIA LIMITED

(भारत सरकार एवं उ. प्र. सरकार का संयुक्त उपक्रम)
(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./27
Date: 02-12-2022

To,

Chief General Manager (Commercial)
MPPMCL, 3rd Floor, Block No. 11
Shakti Bhawan, Rampur
Jabalpur-482008 (MP)

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

Sir,

As you are aware that Government of Uttarakhand has passed "The Uttarakhand water tax on Electricity Generation Act, 2012 (UK Act No. 09 of 2013)" on 25.01.2013, which came into force from 15.08.2015 and fixation of rates of water Tax on 07.11.2015.

THDCIL challenged this Act before Hon'ble High Court of Uttarakhand at Nainital vide writ petition No. 187 of 2016 (M/s) on 22.01.2016 and interim relief/ Stay application was filed on 16.05.2016. High Court of Uttarakhand granted interim relief on 18.05.2018 that "No coercive measure shall be taken for recovery of water tax during the pendency of the writ petition". Writ petition No. 187 of 2016 filed by THDC was dismissed vide order dated 12.02.2021.

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प्रधान कार्यालय : गंगा भवन, प्रगतिपुरम, बाई पास रोड, ऋषिकेश-249 201
Corporate Office : GANGA BHAWAN, PRAGATIPURAM, BYPASS ROAD, RISHIKESH - 249201
पंजीकृत कार्यालय :- भागीरथी भवन (टॉप टैरिस) भागीरथीपुरम, टिहरी - गढ़वाल - 249124
Regd. Office : Bhagirathi Bhawan (Top Terrace), Bhagirathipuram, Tehri-garhwal-249124
टेलीफैक्स- 0135-2439463, Telefax : 0135-2439463. Website Address : www.thdc.gov.in
("हिन्दी को राजभाषा बनाना, भाषा का प्रश्न नहीं अपितु देशाभिमान का प्रश्न है")

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

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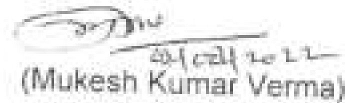
This is for your kind information please.

Regards,

(for and on behalf of)



(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.

टीएचडीसी इंडिया लिमिटेड
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(A Joint Venture of Govt. of India & Govt. of U.P.)
CIN : U45203UR1988GOI009822

Letter No.: THDCIL/RKSH/COMM./ 26
Date: 02.08.2022

To,

Chief Executive Officer,
TATA Power Delhi Distribution Ltd. (erstwhile "NDPL")
33 KV Grid Sub-Station Building,
Hudson Lane, Kingsway Camp,
Delhi-110009

Sub: Water Tax on Non-consumptive use of water for Electricity Generation in Uttarakhand States.

Sir,

As you are aware that Government of Uttarakhand has passed "The Uttarakhand water tax on Electricity Generation Act, 2012 (UK Act No. 09 of 2013)" on 25.01.2013, which came into force from 15.08.2015 and fixation of rates of water Tax on 07.11.2015.

THDCIL challenged this Act before Hon'ble High Court of Uttarakhand at Nainital vide writ petition No. 187 of 2016 (M/s) on 22.01.2016 and interim relief/ Stay application was filed on 16.05.2016. High Court of Uttarakhand granted interim relief on 18.05.2018 that "No coercive measure shall be taken for recovery of water tax during the pendency of the writ petition". Writ petition No. 187 of 2016 filed by THDC was dismissed vide order dated 12.02.2021.

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Addl. General Manager (Commercial)
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As per Clause no. 6.2 of PPA dated 23.03.2011 Tehri HPP (1000 MW) & KHEP (400 MW), In addition to the energy charge tariff set out, NDPL shall also be liable to pay to THDC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess including environmental cess, leavy, fees or other imposition etc. levied or to be levied in future by Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per approval / order of CERC from time to time. Accordingly, Bills will be issued from 01.08.2022 for payment of water tax.

This is for your kind information please.

Regards,

(for and on behalf of)

(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Limited, Rishikesh

Copy to:

1. Secretary (CERC): for kind information please.

Annexure - 17

असाधारण
EXTRAORDINARY
भाग III- खण्ड 4
PART III-Section 4
प्राधिकार से प्रकाशित
PUBLISHED BY AUTHORITY

No. 83 NEW DELHI, WEDNESDAY, MARCH 12, 2014

CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

No.L-1/144/2013/CERC Dated the 21st February, 2014

NOTIFICATION

In exercise of powers conferred under section 178 of the Electricity Act, 2003 (36 of 2003) read with section 61 thereof and all other powers enabling it in this behalf, and after previous publication, the Central Electricity Regulatory Commission hereby makes the following regulations, namely:

CHAPTER - 1

PRELIMINARY

1. Short title and commencement.

(1) These regulations may be called the Central Electricity Regulatory Commission

(b) In case the energy shortfall occurs after ten years from the date of commercial operation of a generating station, the following shall apply.

Explanation : Suppose the specified annual design energy for the station is DE MWh, and the actual energy generated during the concerned (first) and the following (second) financial years is A1 and A2 MWh respectively, A1 being less than DE. Then, the design energy to be considered in the formula in clause (5) of these regulations for calculating the ECR for the third financial year shall be moderated as (A1 + A2 – DE) MWh, subject to a maximum of DE MWh and a minimum of A1 MWh.

(c) Actual energy generated (e.g. A1, A2) shall be arrived at by multiplying the net metered energy sent out from the station by 100 / (100 – AUX).

(7) In case the energy charge rate (ECR) for a hydro generating station, computed as per clause (5) of this regulation exceeds ninety paise per kWh, and the actual saleable energy in a year exceeds { DE x (100 – AUX) x (100 – FEHS) / 10000 } MWh, the Energy charge for the energy in excess of the above shall be billed at ninety paise per kWh only:

Provided that in a year following a year in which total energy generated was less than the design energy for reasons beyond the control of the generating company, the energy charge rate shall be reduced to ninety paise per kWh after the energy charge shortfall of the previous year has been made up.

(8) In case of the hydro generating stations located in the State of Jammu and Kashmir, any expenditure incurred for payment of water usage charges to the State

Water Resources Development Authority, Jammu under Jammu & Kashmir Water Resources (Regulations and Management) Act, 2010 shall be payable by the beneficiaries as additional energy charge in proportion of the supply of power from the generating stations on month to month basis:

Provided further that the provisions of this clause shall be subject to the decision of the Hon'ble High Court of Jammu & Kashmir in OWP No. 604/2011 and shall stand modified in accordance with the decision of the High Court.

32. Pumped Storage Hydro Generating Stations:

(1) The fixed cost of a pumped storage hydro generating station shall be computed on annual basis, based on norms specified under these regulations, and recovered on monthly basis as capacity charge. The capacity charge shall be payable by the beneficiaries in proportion to their respective allocation in the saleable capacity of the generating station, i.e., the capacity excluding the free power to the home State:

Provided that during the period between the date of commercial operation of the first unit of the generating station and the date of commercial operation of the generating station, the annual fixed cost shall be worked out based on the latest estimate of the completion cost for the generating station, for the purpose of determining the capacity charge payment during such period.

(2) The capacity charge payable to a pumped storage hydro generating station for a calendar month shall be:

Annexure-18

No. 23/43/2018-R&R
Government of India
Ministry of Power
***

Shram Shakti Bhawan, New Delhi,
Dated, the 27th August, 2018

To

The Chairperson,
Central Electricity Regulatory Commission,
Chanderlok Building, Janpath,
New Delhi

Subject: Direction to the Central Electricity Regulatory Commission under section 107 of the Electricity Act, 2003 for allowing pass-through of any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, after the award of bids, under "Change in Law" unless otherwise provided in the PPA.

Sir,

Para 6.2 (4) of Tariff Policy 2016 provides that after the award of bids, if there is any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, the same may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through subject to approval of Appropriate Commission.

2. It has been brought to the notice of this Ministry that Generating Companies are facing difficulties in getting pass-through of changes in cost due to any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality under "Change in Law" by Appropriate Commission. The difficulty is mainly because of considerable time being consumed in the approval process resulting into severe cash flow problems to the Generating Companies. This has also resulted in stress in the Power Sector.

3. Now, in order to address the above issue and ensure sustainability of the electricity market in the larger public interest, the Central Government, in exercise of the powers conferred under section 107 of the Act, hereby issues this direction to the Central Electricity Regulatory Commission:

a) Any change in domestic duties, levies, cess and taxes imposed by Central Government, State Governments/Union Territories or by any Government instrumentality leading to corresponding changes in the cost, may be treated as "Change in Law" and may unless provided otherwise in the PPA, be allowed as pass through

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

b) Central Commission will only determine the per unit impact of such change in domestic duties, levies, cess and taxes, which will be passed on.

c) A draft Order for determination of per unit impact under change in law shall be circulated by Central Commission to all the States/Beneficiary on 14th Day of filing of petition. Any objection/ representation shall be submitted by them within 21 days of filing of petition.

d) The order for pass through giving the calculation for per unit impact will be issued within 30 days of filing of petition.

e) The impact of such Change in law shall be effective from the date of change in law.

f) Where CERC has already passed an order to allow pass through of changes in domestic duties, levies, cess and taxes in any case under Change-in-law, this will apply to all cases ipso facto and no additional petition would need to be filed in this regard.

4. This issues with the approval of Minister of State (Independent Charge) for Power and New and Renewable Energy, Government of India.

Yours faithfully,

(D. Chattopadhyay)
Under Secretary to the Govt. of India
Tel: 2373 0265

Copy to:

1. All Joint Secretaries/Directors/Deputy Secretaries, Ministry of Power
2. PS to MOS(I/C) for Power & NRE
3. PPS to Secy(P), PPS to AS(SNS),PPS to CE(R&R), PS to Director (R&R)
4. Technical Director, NIC, Ministry of Power with the request to upload this communication on MoP's website.

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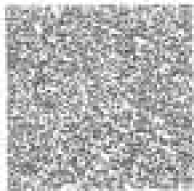

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BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI – 110 001

PETITION NO.

IN THE MATTER OF:

THDC India Ltd. **- PETITIONER**

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

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VERSUS

Punjab State Power Corporation Limited and Ors. **- RESPONDENTS**

AFFIDAVIT

I, Mukesh Kumar Verma, Son of Late Shri Ram Krishna Verma, aged about 56 years, working as Addl. General Manager (Commercial), in THDC India Limited, the Respondent in the above matter do solemnly affirm and state as under:

1. That, I am working as Addl. General Manager (Commercial) in THDC India Limited, the Respondent and I am conversant with the facts in the above matter.

2. I say that I have read the reply and have understood the contents of the same. I say that the contents thereof are based on the information available with the Respondent in the normal course of business and believed by me to be true.

3. I say that the annexures attached to the reply are true and correct copies of their originals.

मुकेश कुमार वर्मा / M.K. VERMA
DEPONENT
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

VERIFICATION

I, the deponent above named do hereby verify that the contents of my above affidavit are true to my knowledge, no part of it is false and nothing material has been concealed there from.

Verified at Rishikesh on this 13 day of Sept' 2022.

DEPONENT

मुकेश कुमार वर्मा / M.K. VERMA
अपर महाप्रबंधक (वाणिज्यिक)
Addl. General Manager (Commercial)
टीएचडीसी इंडिया लिमिटेड, ऋषिकेश
THDC India Limited, Rishikesh

This affidavit signed ... verified before me ... Mukesh Kumar Verma ... 13/9/22

PROOF OF DISPATCH

Intimation regarding filing of Petition has been sent through e-mail.

(Mukesh Kumar Verma)
Addl. General Manager (Commercial)
THDC India Ltd., Rishikesh

मुकेश कुमार वर्मा / M.K. VERMA
Addl. General Manager (Commercial)
THDC India Ltd., Rishikesh