VERDICTUM.IN

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CWP No. 2916 of 2023 a/w CWP Nos. 2262, 2263, 2277, 2600, 2721, 2739, 2855, 2864, 2869, 2913, 2917, 2918, 3083 to 3087, 3107, 3114 to 3117, 3129, 3130, 3246, 3247, 3249, 3260, 3300, 3410, 3897, 3898, 4105, 4111, 4163, 4239, 5410 and 7295 of 2023.
Reserved on: 20.12.2023
Decided on : ___.03.2024

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1. CWP No. 2916/2023

N.H.P.C. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

2. CWP No. 2262/2023

Malana Power Company Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

3. CWP No. 2263/2023

A.D. Hydro Power Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

4. CWP No. 2277/2023

Nanti Hydro Power Pvt. Ltd. .....Petitioner

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Versus

State of H.P. & ors. .....Respondents

5. CWP No. 2600/2023

Everest Power Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

6. CWP No. 2721/2023

Sandhya Hydro Power Projects Balargha Pvt. Ltd.
.....Petitioner

Versus

State of H.P. & ors. .....Respondents

7. CWP No. 2739/2023

Bonafide Himachalies Hydro Power Developers Association
.....Petitioner

Versus

State of H.P. & ors. .....Respondents

8. CWP No2855/2023

N.T.P.C. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

9. CWP No. 2864/2023

Bhakra Beas Management Board & anr. .....Petitioners

Versus

High Court of H.P.

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State of H.P. & ors. .....Respondents

10. CWP No. 2869/2023

S.J.V.N. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

11. CWP No. 2913/2023

M/s Surya Kanta Hydro Energies Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

12. CWP No. 2917/2023

M/s Himshakti Projects Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

13. CWP No. 2918/2023

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

Versus

State of H.P. & ors. .....Respondents

14. CWP No. 3083/2023

M/s Gangdari Hydro Power Pvt. Ltd. .....Petitioner

Versus

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15. CWP No. 3084/2023

M/s Greenko Astha Projects (India) Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

16. CWP No. 3085/2023

M/s Greenko Tarela Power Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

17. CWP No. 3086/2023

M/s. Technology House (India) Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

18. CWP No. 3087/2023

M/s Greenko Tejassarnika Hydro Energies Pvt. Ltd.
.....Petitioner

Versus

State of H.P. & ors. .....Respondents

19. CWP No. 3107/2023

M/s Greenko Sri Sai Krishna Hydro Power Energies Pvt. Ltd.
.....Petitioner

Versus

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20. CWP No. 3114/2023

M/s Greenko Sumez Hydro Energies Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

21. CWP No. 3115/2023

M/s Greenko AT Hydro Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

22. CWP No. 3116/2023

M/s Greenko Cimaron Constructions Pvt. Ltd.
.....Petitioner

Versus

State of H.P. & ors. .....Respondents

23. CWP No. 3117/2023

M/s Greenko Him Kailash Hydro Power Pvt. Ltd.
.....Petitioner

Versus

State of H.P. & ors. .....Respondents

24. CWP No. 3129/2023

M/s Greenko Anubhav Hydel Power Pvt. Ltd.
.....Petitioner

Versus

State of H.P. & ors. .....Respondents

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25. CWP No. 3130/2023

JSW Hydro Energy Ltd & anr. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

26. CWP No. 3246/2023

Taranda Hydro Power Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

27. CWP No. 3247/2023

Panchhor Hydro Power Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

28. CWP No. 3249/2023

M/s Ramesh Hydro Power Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

29. CWP No. 3260/2023

M/s Kanchanjunga Power Company Pvt. Ltd. .....Petitioner

Versus

State of H.P. & Anr. .....Respondents

30. CWP No. 3300/2023

Tissa Hydro Power Pvt. Ltd. .....Petitioner

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Versus

State of H.P. & ors. .....Respondents

31. CWP No. 3410/2023

I.A. Hydro Energy Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

32. CWP No. 3897/2023

Rajpur Hydro Power Plant Ltd. .....Petitioner

Versus

State of H.P. & Anr. .....Respondents

33. CWP No. 3898/2023

M/s Goodwill Energy Enterprises .....Petitioner

Versus

State of H.P. & Anr. .....Respondents

34. CWP No. 4105/2023

Himachal Sorang Power Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

35. CWP No. 4111/2023

M/s Greenko Budhil Hydro Power Pvt. Ltd. .....Petitioner

Versus

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State of H.P. & ors. .....Respondents

36. CWP No. 4163/2023

M/s Luni Power Company Pvt. Ltd. .....Petitioner

Versus

State of H.P. & Anr. .....Respondents

37. CWP No. 4239/2023

Punjab State Power Corporation Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

38. CWP No. 5410/2023

GMR Bajoli Holi Hydro Power Pvt. Ltd. & Anr.
.....Petitioners

Versus

State of H.P. & ors. .....Respondents

39. CWP No. 7295/2023

Prodigy Hydro Power Pvt. Ltd. .....Petitioner

Versus

State of H.P. & ors. .....Respondents

Coram
The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

The Hon'ble Mr. Justice Satyen Vaidya, Judge.

Whether approved for reporting? ***Yes***

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For the petitioner(s): Mr. Tushar Mehta, Sr. Advocate (through VC) with Mr. Vijay Kumar Arora and Mr. Avneesh Arputtham, Advocates, for the petitioner in CWP No. 2916 of 2023.

Ms. Shalini Thakur and Dr. Seema Jain (through VC) Advocates for the petitioners in CWP Nos. 2262 and 2263 and Ms. Shalini Thakur, Advocate, for the petitioner in CWP No. 2721 of 2023.

Mr. S. Ganesh, Sr. Advocate (through VC) and Mr. Rajnish Maniktala, Senior Advocate with Mr. Naresh Kumar Verma, Advocate, for the petitioner (s) in CWP Nos. 2277, 2600, 3246, 3247, 3249, 3300, 4105 and 4111 of 2023.

Mr. Vikas Chauhan, Mr. Vishwajeet Tyagi, Mr. Tarun Johri and Mr. Sarthak Mehta, Advocates, for the petitioner(s) in CWP Nos.2739, 2917 and 2918 of 2023.

Mr. K.D. Shreedhar, Senior Advocate with Mr. Sameer Thakur, Ms. Sneh Bhimta and Mr. Adarsh Tripathi, Advocates, for the petitioner(s) in CWP Nos. 2855, 2913, 3083 to 3087, 3107, 3114 to 3117 and 3129 of 2023.

Mr. N.K. Sood, Senior Advocate with Mr. Aman Sood, Advocate, for the petitioner(s) in CWP Nos. 2864 and 3410 of 2023 alongwith Ms. Vandana Gupta, Sr. Law Officer and Ms. Amandeep Kaur, Law Officer.

Dr. Abhishek Manu Singhvi (through VC) and Mr. R.L. Sood,

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Senior Advocates with Mr. H.S. Chandoke, Mr. Anant Garg and Mr. Janesh Gupta, Advocates, for the petitioner in CWP No.3130 of 2023.

Mr. Sujit Ghosh (through VC), Mr. Nishant Kumar, Mr. Virender Sharma, Ms. Anshika Agarwal (through VC) and Ms. Mannat Waraich, Advocates, for the petitioner in CWP No.3260 of 2023.

Mr. Tushar Mehta, Sr. Advocate (through VC) Mr. K. D. Shreedhar, Sr. Advocate with Ms. Shradha Karol, Mr. Vaibhav Singh Chauhan and Ms. Sneh Bhimta, Advocates, for the petitioner(s) in CWP No. 2869 of 2023.

Ms. Shradha Karol and Mr. Vaibhav Singh Chauhan, Advocates, for the petitioner in CWP Nos.3897, 3898 and 4163 of 2023.

Mr. Anand Sharma, Senior Advocate with Mr. Karan Sharma, Advocate, for the petitioner in CWP No. 4239 of 2023.

Mr. Ankur Sehgal and Janesh Gupta, Advocates, for the petitioner in CWP No. 5410 of 2023.

For the respondents: Mr. Dushyant Dave, Senior Advocate, with Mr. Anup Rattan, Advocate General, Mr. I.N. Mehta and Mr. Yashwardhan Chauhan, Senior Additional Advocate Generals, Mr. Navlesh Verma, and Ms. Sharmila Patial, Additional Advocate Generals and Mr. J.S. Guleria, Deputy Advocate General, for the respondents-State, in all the matters.

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Mr. Balram Sharma, Deputy Solicitor General ofIndia and Mr. Rajinder Thakur, Central Government Counsel, for the respondent- Union of India.

Mr. Anand Sharma, Senior Advocate with Mr. Karan Sharma, Advocate, for respondent No. 14 in CWP No. 2855 of 2023 and for respondent No. 6 in CWP No. 2869 of 2023.

Ms. Sunita Sharma, Sr. Advocate, with Ms. Lalita Sharma, Advocate, for respondent No.6 in CWP Nos.2917 & 2918 of 2023 and for respondent No.8 in CWP No.2869 of 2023.

Mr. Nitin Thakur, Advocate, for respondent No. 7 in CWP No.2855 of 2023 and for respondents No.11 to 13 in CWP No.2869 of 2023.

M/s Satish Mukherjee, Abhishek Kumar, Nived, Shubham Mudgil and Mr. Janesh Gupta, Advocates, for respondent No.11 in CWP No.2855 of 2023.

Mr. Shivom Vashishta, Advocate, for respondent No.14 in CWP No.2855 of 2023 and respondent No.6 in CWP No.2869 of 2023.

Justice Tarlok Singh Chauhan

Since, somewhat identical issues of fact and law are involved in these batch of writ petitions, therefore, they have been decided by this common judgment.

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Case of the Petitioner(s):

1.1. The petitioners are power generation companies engaged in the production of the electricity by using river water. They own, operate and maintain the hydropower projects. The petitioners after entering into agreements with the Government of Himachal Pradesh are running the projects. The petitioners seek to assail the legislative competence, the constitutional validity and the vires of the Himachal Pradesh Water Cess on Hydropower Generation Act, 2023 (hereinafter to be referred to as the "Act"), *inter alia*, on the following grounds:

(i) The State lacks legislative competence/power as per Article 265 of the Constitution of India.

(ii) The legislative powers of the Union Government or the State Government have been so demarcated and specified by way of Seventh Schedule under List-I known as Union List, List-II known as State List, List-III known as Concurrent List. Thus, the State Government has legislative powers under Article 265 of Constitution of India to levy any cess only if the same finds mention in List-II. However,

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none of entries under List-II or the State List empowers the State Government to levy cess/tax on water usage for the purpose of generation of electricity, as has been done by the State Government.

(iii) Entry 53 of List-II empowers the State Government to levy tax/cess in respect of electricity, however, that entry is not applicable and does not empower the State Government to levy cess on water usage for the purpose of generation of hydro electricity.

(iv) The State cannot take recourse to entry No.17 of list-II for defending its impugned Act as the same firstly does not empower the State Govt. to levy a tax or cess on water and secondly, even for the sake of arguments, if entry No. 17 of List Il so empowers the State Government, the impugned Act cannot become operative in view of the non-compliance of the provisions of Article 288 of Constitution of India.

(v) The State Government by way of provisions of the Act has vested with itself non-consumptive usage of water of inter-state rivers, which amounts to

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encroaching upon the legislative powers of the Union Government, as under List-I of the Seventh Schedule by way of entry No.56, it is only the Union Government, which has the legislative powers with respect to interstate rivers and river valleys.

(vi) The Hydroelectric Power Projects of the petitioners are Central Sector Hydroelectric Power Projects built over inter-state rivers, namely, Ravi and Beas and its tributaries, with the sanction of the Union Government and, therefore, any restriction imposed by the State Government in the usage of water flowing from the said rivers by way of seeking sanction for non consumptive usage of river water and further by way of levy of cess on such non-consumptive use of inter-state river water for generation of electricity, is wholly illegal and invalid being beyond the legislative competence/power of the State Government.

(vii) The Govt. of India, Ministry of Power taking note of the fact that some of the States have imposed taxes/duties on generation of electricity in the

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guise of water tax/cess, vide letter dated 25.04.2023 had called upon all the Chief Secretaries of the State Governments and Union Territories not to levy such tax/duty/cess being contrary to the constitutional provisions and the same be promptly withdrawn.

(viii) Section 10 of the Act and Rule 7 of Himachal Pradesh Water Cess from Hydro Power Generation Rules, 2023 (for short "the Rules") have impact of taking away the rights that have been crystallized or vested on the petitioners. The impugned Act has a retrospective effect. Even though, the Legislature is entitled to make an enactment with retrospective effect, but it cannot take away the rights that have already been vested in the petitioners.

(ix) The provisions of the Act go to show that two conditions are required to be fulfilled for levy of cess. One is that water is drawn from the source and another is that drawl of such water is for generation of electricity. If one of the conditions is lacking, the levy of cess is not attracted. So, in "pith and substance" levy of cess is on generation

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of electricity. The State lacks the competence to levy cess or tax on generation of electricity because this field is reserved for Parliament under entries No. 84 and 97 of List-I of Seventh Schedule. This colourable exercise of power by the State is unconstitutional.

(x) The impugned Act is also bad in law as it is violative of Article 300A of Constitution of India.

(xi) The impugned Act is also hit by Article 288 of Constitution of India as it was not reserved for the consideration of the Hon'ble President and Presidential ascent has not been obtained before enforcing the impugned Act.

(xii) Since, majority of the rivers and their tributaries, over which the Hydro Power Projects have been constructed, are inter-State, therefore, they are covered by entry 56 of list-I of Seventh Schedule of the Constitution. Thus, the State Govt. is not competent to make any law regarding inter-State rivers.

(xiii) The impugned Act is repugnant to Section 62 read with section 79 of Electricity Act, 2003 as the said

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Central Act of 2003 provides for the fixation of tariff for electricity is to be vested with the Central Electricity Regulatory Commission.

(xiv) The State of Himachal Pradesh lacks the legislative competence to levy tax/cess on water use for the generation of hydro electricity since the said levy directly relates to the power generated and transferred outside the State of Himachal Pradesh.

(xv) No public purpose or objective sought to be achieved has been provided in the impugned Act and it has far-reaching effects on the general public and is therefore, liable to be struck down on this ground as well.

(xvi) The levy of tax/cess on use of water is contrary to Articles 14 & 19 of the Constitution of India as the said levy is arbitrary and; because extremely high rates have been notified, it would render the projects of petitioners totally unviable.

(xvii) The impugned Act is framed as taxing the drawl of water, whereas, in essence, it is taxing the generation of electricity which is impermissible in law.

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(xviii) The Act seeks to charge the water cess based the head of the turbine. Thus, the water cess sought to be charged is directly relatable to the head. The levy of cess under the Act is based on the premise of higher the head, the more will be electricity generated for the same value of the water used. Therefore, the impugned Act seeks to levy cess on the generation of the electricity/hydropower and not drawl of the water alone.

(xix) There is no entry in List-II which empowers the State to levy a tax on the generation of the electricity and hence, impugned enactment is void abinitio.

(xx) Tax is imposed on "user" who is the person, who draws the water for generation of the electricity. Therefore, taxable event is not mere drawl of water but the drawl of water for the generation of electricity.

(xxi) The Act is unconstitutional since the charging section does not lay down any guidelines, limitations or safeguards. Therefore, such legislative architecture suffers from the vice of the

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excessive delegation and thereby violative of Article 14 plainly and is thus void.

(xxii) Since, there is no provision providing for an opportunity of personal hearing, thereby the Act not only violates the principles of natural justice but is violative and ultra vires of the Article 14 of the Constitution of India.

(xxiii) The impugned Act is otherwise illegal as Section 30 thereof is in contradiction to Section 28.

(xxiv) The Act otherwise is liable to be struck down in absence of there being any provision for having a judicial member when admittedly the power to determine the cess has been assigned or given to a Commission exercising quasi judicial functions.

(xxv) The impugned Act of the State is also contrary to the principles of promissory estoppel as at the time of investment of thousand of crores of rupees in the setting up of the Hydro Power Projects in the State of Himachal Pradesh, the implication upon the petitioners was to provide 12% or 13% of the power generated free of cost to the home state, but at all material times, the entire basis of investment

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in the State of Himachal Pradesh was that the basic and fundamental resource for hydroelectric power generation i.e. water would be freely available to the petitioners and now the State Government cannot turn around and is bound by the principles of promissory estoppel.

Defence of the State:

2.1. Since water is a State's subject matter and comes under entry 17 of List-II, therefore, the State has legislative competence to make law and hence there is no violation of article 265 of the Constitution of India.

2.2. Cess has not been levied on generation of electricity under entry No. 53, but has been levied for usage charges on water under entry No. 17 of list-II.

2.3. Further, under entries No. 17, 18, 45, 49 and 50 of List-II, the State can also impose tax on water. As such cess is not on electricity generation or on electric units, as alleged.

2.4. Levy of cess on usage of water for hydropower generation is not in violation of Article 288 of the Constitution of India as the issue in the instant case is not about sale and purchase of water and electricity. Tax is not in respect of the water or electricity stored, generated, consumed distributed or

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sold by any authority established by any existing law or for any law made by the Parliament for regulating or developing inter-State river or river valley as such it does not come under entry No. 56 of List-I, rather it is a cess on non-consumptive use of water meant for usage of water by the hydropower projects, which does not fall under article 288(1) of the Constitution of India and there is no violation of any provisions of The Rivers Boards Act, 1956 and the Inter-State River Water Disputes Act, 1956.

2.5. Cess has been levied by the Act for usage/drawn storage under entry No. 17 of List-II, i.e. for development, management, maintenance and conservation of water resources of the State by creating additional revenue sources on this account, as such directions, as contained in communication dated 25.4.2023 (supra), being not mandatory, are not required to be adopted by the State.

2.6. The Act has come into force w.e.f. 10.3.2023, whereunder existing and forthcoming hydropower projects/ registered users are liable to pay water cess under Section 10(1) and Section 10(2) of the Act for the water usage/water drawn w.e.f. 10.3.2023. Most of the projects have been commissioned since long back and debt servicing period of

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these projects have been completed as such there will be no impact on the viability of project due to levying of water cess.

2.7. The Act does not violate Article 300A of the Constitution of India. The petitioners have no absolute and exclusive right over the water use for generation of the hydropower. The provisions of the agreements signed between the Government of Himachal Pradesh and Hydropower Projects allow it to build, own, operate & maintain the projects, therefore, the petitioners cannot claim exclusive and absolute right on water.

2.8. The Act does not violate rights of the petitioners under Articles 14, 19 and even 300A of the Constitution of India.

2.9. The Act levies cess on usage of water (non-consumptive use) on hydropower projects and is not in violation of Articles 200 and 288(2) of the Constitution of India, rather it is in conformity with the provisions as laid down under entries No. 17, 18, 45, 48, 49 and 50 of List-II of Seventh Schedule.

2.10. The State Government is absolutely competent to legislate charges on usage of water under entry No. 17 of List-II from natural water resources situated within the territory of

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the State Government and the Act does not create any dispute with regard to inter-State rivers water.

2.11. Levy of cess under the Act on usage of water on hydropower projects has been charged for development, maintenance, management and conservation of water resources of the State by creating additional financial resources for this purpose.

2.12. All the provisions contained in the impugned Act, more particularly, Sections 2, 10, 15, 16 and 17 are made in light with the objective of the impugned Act for its implementation. The provisions of the Act do not violate the fundamental rights of the petitioners under Articles 14, 19(1)(g), 246 and 265 of the Constitution of India.

Stand of the Union of India:

3.1. The Union of India has filed short affidavits and one of such affidavits is found in ***CWP No.5410/2023, titled as GMR Bajoli Holi Hydro Power Ltd. Vs State of H.P.,*** wherein it has questioned the competence of the State legislature in enacting the Act. It would be relevant to reproduce paragraphs 2 to 11 of the same, which read as under:

> *"2. That the powers to levy taxes/duties are specifically stated in the VII Schedule. List -II of the VII Schedule*

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lists the powers of levying of taxes/duties by the States in entries-45 to 63. No taxes/duties which have not been specifically mentioned in this list can be levied by the State Governments under any guise whatsoever-as Residuary powers are with the Central Government.

3. That, Entry-53 of List-II (State List) authorizes the States to put taxes on consumption or sale of electricity in its jurisdiction. This does not include the power to impose any tax or duty on the generation of electricity. This is because electricity generated within the territory of one State may be consumed in other States and no State has the power to levy taxes/duties on residents of other States.

4. That State Legislature under the List II of the Seventh Schedule of The Constitution of India, does not have the Legislative power or the Constitutional mandate to make or promulgate any law pertaining to imposition of tax on the water drawn by any person much less for non-consumptive usage of water drawn for generation of electricity.

5. That Article 248 of The Constitution of India, 1950, states as

under

"248. Residuary power of Legislation

(1) Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List.

(2) Such power shall include the power of making any law imposing a tax not mentioned in either of those Lists."

A reading of the above Article manifests, that the Constitution of India envisaged that in respect of any

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matter which is not enumerated in the State List, the Parliament has the exclusive power to make any laws in respect of the said matter. The same includes the power of imposing a tax not mentioned in the State List or in the concurrent List. This ground is further cemented by the provisions of entry 97 List I (Union List) Schedule VII - "Any other matter not numerated in List II or III including any tax not mentioned either of those lists).

6. That no item provided either in the State List or the Concurrent List, is pertaining to taxation or taxes on usage of water or otherwise, therefore the State Government of Himachal Pradesh does not have the Legislative competence or mandate to make or frame any laws pertaining to imposition of taxes on the water drawn for the purposes of generation of electricity in the State of Himachal Pradesh. Hence the provisions of Chapters 3 to 5 seeking to levy and impose Water Tax on generation of electricity are unconstitutional. Hence enactment of the said Act and its consequent promulgation and notification is contrary to the provisions of Article 245, 246 and 286 of The Constitution of India, besides other Articles of The Constitution of India mentioned first hereinabove.

7. That the State of Himachal Pradesh has imposed taxes / duties on generation of electricity under the guise of levying a cess on the use of water for generating electricity. However, though the State may call it a water Tax/cess, it is actually a tax on the generation of electricity - the tax is to be collected ultimately from the consumers of electricity who may happen to be residents in other State.

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8. That Article -286 of the Constitution explicitly prohibits States from imposing any taxes /duties on supply of goods or services or on both where the supply takes place outside the State.

9. That the power to make a law imposing tax upon the electricity sold outside the State, i.e. inter-State sales, has been vested exclusively under Entry 92A of List-I read with Article 286 of The Constitution of India, 24. Government, GOVT Purchase which contemplates taxes on to the Union the sale or of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or Commerce.

10. That Entry 54 of List-II of Schedule-VII of The Constitution of India contemplates enacting a law by the State Government in regard to imposition of tax on sale or purchase of goods other than newspaper subject to Entry 92A of List-I, which entry in List 1 empowers solely the Union to make laws for levy of tax on Inter State Sale of Electricity. Additionally none of the above two entries in List II contemplate levy of Cess/ Tax on electricity generated.

11. That Articles-287 and 288 prohibit the imposition of taxes on consumption or sale of electricity consumed by the Central Government or sold to the Central Government for consumption by the Government or its agencies. As per Entry-56 of the Union List of the Constitution of India, regulations of issues related to Inter-State Rivers come under the purview of the Centre. Most of the Hydro-Electric Plants in the State are located/proposed to be developed on inter- State Rivers. Any imposition of tax on the non-consumptive use of

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water of these rivers for electricity generation is in violation of provisions of the Constitution of India."

Question arising for determination:

4.1. In order to better appreciate the arguments and deliberations, this Court deems it fit to formulate points that arise for consideration in these petitions and thereafter deliberate and decide them. The arguments have been addressed by the respective counsel(s) appearing for the parties, some of which are overlapping and repetitive in essence.

4.2. From the pleadings of the parties and arguments that have been addressed in detail, some of the key challenges may be noted and shall henceforth be referred to as points for consideration:

1. **It is misnomer that the tax is levied on water, whereas it is on generation of electricity, and therefore, not a water tax.**
2. **The State Legislature is not competent to legislate the Act.**
3. **In the Act, there is no taxing provision. Tax has been imposed by way of notifications by the concerned Secretary to the Government of Himachal Pradesh. It is an executive act. It is not a tax levied by a statute. The act of levying of tax is an excessive delegation by the State Legislature.**

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4. The principle of promissory estoppel would apply in the instant case; therefore, the State is estopped to charge such a tax.

Arguments of Mr. Tushar Mehta, learned Senior Advocate for the Petitioners:

5.1. Learned Senior Counsel for the petitioners would urge that in order to enable the State Legislature to levy any tax, the field of legislation should explicitly fall within the purview of Articles 246 & 248(2) of the Constitution. The taxing entry should be distinct. Learned counsel would also argue that cess is a misnomer as it is a tax for all intents and purposes.

5.2. In order to buttress his arguments, he would refer to Sections 2(c),2(h),2(i)2(g),3,10,12,15,17 and 34 of the 'Act'. The learned counsel for the petitioners has also made a reference to the notification dated 16.2.2023, which prescribes different rates of cess depending upon the available head i.e. height, to urge that the cess is nothing but a tax as it provides for different slabs of cess. In support of his arguments, learned Senior Counsel has referred to the judgment of the Hon'ble Supreme Court in ***Union of India and Another vs. Mohit***

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Mineral Private Limited[1], wherein difference between tax, fee and cess has been culled out.

5.3. During the course of the arguments, various constitutional provisions have also been referred to by the learned counsel for the petitioner, like Articles 245, 246, 248, 265, 286, Entry No. 42, 56, 84, 92A, 97 of List I, Entry 7, 17, 18, 45, 48,49, 53 of List II and entry No. 38 of List –III.

5.4. It is urged that Article 286 deals with supply of goods outside the State and as per the settled law 'electricity' is a 'good' and is normally supplied by the petitioners' projects outside the State. The word used in the article is 'supply of goods' and 'not generation of goods' and thus the State lacks competence to enact the law. Even under entry 56 of List-I, this power is exclusively vested with the Union of India and as per entry 84 only the goods manufactured can at best be taxed and even the Parliament cannot impose tax on 'generation of electricity'.

5.5. It is then argued that taking the case of the State at its best, that it was under the residuary powers that the tax has been imposed, even then such power is not vested with the State and rather is expressly and exclusively vested with the Union of India under entry 97 of List–I. The reliance

[1] ***2019 (2) SCC 599***

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placed upon by the State on entry No. 17 of List-II is of no avail as tax entry has to be specific in any one of the lists and cannot be inferred. Under this provision the State can only regulate the water but cannot tax it; for it is not a taxing entry. The State cannot even fall back on entry No. 51 as it does not pertain to nor does it contain a reference to 'electricity'.

5.6. Now, as regards entry No. 38 of list-III, which is the concurrent list, the State can only regulate electricity, but cannot tax it. For this, there has to a specific provision contained in the Constitution itself. The State can also not be permitted to fall back on entry No. 47, as there has to be *quid pro quo* for being termed as a 'fee' not a 'tax'.

5.7. In order to buttress his arguments, further the learned Counsel has then referred to and placed reliance on the letter dated 25.04.2023 issued by the Union of India and has vehemently argued that the State is not competent to impose water tax and cess. The relevant portion of the letter reads as under:-

> "*It has come to the notice of the Government of India (GoI) that some State Governments have imposed taxes/duties on generation of electricity. This is illegal and unconstitutional. Any tax/duty on generation of electricity, which encompasses all types of generation viz. Thermal, Hydro, Wind,*

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Solar, Nuclear, etc. is illegal and unconstitutional. The Constitutional provisions are as follows:

(i) The powers to levy taxes/duties are specifically stated in the VII Schedule. List II of the VII Schedule lists the powers of levying of taxes duties by the States in entries-45 to 63. No taxes/duties which have not been specifically mentioned in this list can be levied by the State Governments under any guise whatsoever - as Residuary powers are with the Central Government.

(ii) Entry-53 of List-II (State List) authorizes the States to put taxes on consumption or sale of electricity in its jurisdiction. This does not include the power to impose any tax or duty on the generation of electricity. This is because electricity generated within the territory of one State may be consumed in other States and no State has the power to levy taxes/duties on residents of other States.

(iii) Some States have imposed taxes/duties on generation of electricity under the guise of levying a cess on the use of water for generating electricity. However, though the State may call it a water cess, it is actually a tax on the generation of electricity the tax is to be collected from the consumers of electricity who may happen to be residents in other State.

(iv) Article-286 of the Constitution explicitly prohibits States from imposing any taxes/duties on supply of

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goods or services or on both where the supply takes place outside the State.

(v) Articles-287 and 288 prohibit the imposition of taxes on consumption or sale of electricity consumed by the Central Government or sold to the Central Government for consumption by the Government or its agencies.

(vi) As per Entry-56 of the Union List of the Constitution of India, regulations of issues related to Inter-State Rivers come under the purview of the Centre. Most of the Hydro-Electric Plants in the States are located/ proposed to be developed on Inter-State Rivers. Any imposition of tax on the non-consumptive use of water of these rivers for electricity generation is in violation of provisions of the Constitution of India.

(vii) Hydro Power Projects do not consume water to produce electricity. Electricity is generated by directing the flow of water through a turbine which generates electricity on the same principle as electricity from wind projects where wind is utilized to turn the turbine to produce electricity. Therefore, there is no rationale for levy of "water cess" or "air cess".

(viii) The levy of water cess is against the provisions of the Constitution. Entry-17 of List-II, does not authorize the State to levy any tax or duty on water.

2. In light of the above constitutional provisions, no taxes/duties may be levied by any State under any guise on generation of electricity and if any taxes /

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duties have been so levied, it may be promptly This has the approval of the Hon'ble Union Minister of Power and New & Renewable Energy".

5.8. It is next urged by the learned Senior Counsel that before executing the projects, the projects have entered into power purchase agreements (PPAs), under which they are otherwise obliged to give 12% electricity free of cost to the State Government and 1% towards rehabilitation making them liable to give 13% of the electricity so generated free of cost to the State Government, therefore, the State Government is estopped from levying such tax.

Arguments of Dr. Abhishek Manu Singhvi, learned Senior Advocate for some of the petitioners:

6.1. Learned Senior Advocate, apart from endorsing the arguments as addressed by Mr. Mehta, learned Senior Advocate, would argue that the State has no source of power to enact the 'Act' and in terms of article 265, there can be no taxation without authority. He would further urge that taxation cannot be general but has to be under a specific entry under the Constitution of India and the enactment i.e., the impugned Act, in pith and substance, is a tax on 'generation of electricity' and not on 'drawl of water' and the enactment otherwise defies the very federal concept and structure of our

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Constitution and thus is liable to be struck down. He has also referred to the 'objects and reasons' of the 'Act' and would argue that even financial demands of the State have to be legitimate.

Arguments of learned Attorney General:

7.1. Learned Attorney General has contested the claim of the State in enacting the Act and apart from relying upon the reply filed on behalf of the Union of India has sought to draw support from the notification dated 16.02.2023 issued by the Ministry of Power, Government of India (as extracted above).

7.2. In addition thereto, he would argue that the Seventh Schedule of the Constitution of India provides for the substantive Regulatory Law and the taxing power separately. Taxing power can otherwise not be inferred much less imposed by implication. In particular, he has invited the attention of the Court to entry No. 17 of list-II to urge that this entry only regulates the power of the State Government with respect to water and not to impose tax thereupon. Entry No. 17 cannot be read expansively so as to include power to impose tax.

7.3. He then invited our attention to entry No. 53 of the same list i.e., List No.II to contend that both the aforesaid

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entries i.e., entries No. 17 and 53 have to be read independently and an equitable construction is not permissible in a taxing statute. Moreover, the tax even otherwise can be imposed by the State Government within confines of the State. Even as per entry No. 53 of List –II "sale of electricity" as envisaged thereunder cannot mean and be construed as generation of electricity. Like sale of coal will not include generation of electricity out of the use of coal.

Arguments of Mr. Surjit Ghosh, Advocate:

8.1. Shri Surjit Ghosh, Advocate, apart from adopting the arguments of both the aforesaid learned Senior Counsel(s), has assailed the provisions of the Act as being unconstitutional by referring to Section 15 urging that since this provision of law delegates the power to determine the rate of tax to the State Government without laying down any guidelines, limitation or safeguards, therefore, such legislative architecture suffers from the vice of excessive delegation and is thereby violative of Article 14 and is plainly void.

8.2. He further argues that the impugned Act fails to clearly lay down one of the critical components of taxing statute i.e. measure of tax and it is trite in law that in order to levy a tax so as to make both operative and valid, four

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essential components must be provided in the enacting statute creating the tax/impost, i.e.:

(i) the taxable event attracting the levy;

(ii) the person on whom the levy is imposed and who is obliged to pay the tax;

(iii) the rate at which the tax is imposed; and

(iv) the measure or value to which the rate will be applied for computing the tax liability.

Whereas in the instant cases, though three of essential components can be identified within the statute i.e. “taxable event”, “the person liable to pay tax”, and the “rate of tax”, however, the impugned Act fails to identify the value and equally critical component i.e. “measure of tax” which is the value on which the rate of tax will be applied for computing the taxing liability. Section 15 of the Act though provides that the ‘user’ shall be liable to pay the water cess at such rates as fixed by the Government, however, it fails to prescribe the value or base on which such rate will be applied.

8.3. He also argues that adjudication of disputes fails to contemplate an opportunity of personal hearing thereby being in violation of the principles of natural justice and thus ultra vires of Article 14.

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8.4. He would further contend that Section 30 of the impugned Act is in contradiction to Section 28 of the Act and is, therefore, bad in law.

8.5. Lastly, he would contend that absence of judicial member in quasi-judicial proceedings renders such quasi-judicial proceedings bad in law.

Arguments of Mr. Naresh K. Sood, Senior Advocate:

9.1. Learned counsel for the petitioner(s) in CWP Nos. 2864/2023 and 3410/2023, apart from adopting the arguments of all the aforesaid learned counsel(s), would argue that his client i.e. Bhakhra Beas Management Board, is a creation of the statute after coming into force the Punjab Re-organization Act and has also preferred a representation against the impugned levy and till and so long the said representation is not decided, the State cannot levy any cess.

Arguments of Mr. Anand Sharma, Senior Advocate:

10.1. Learned Senior Counsel for the petitioner urged to contend that the respondents had no power to impose cess on the project i.e. Shanan Power Project, as the same came into existence and is operating for nearly a century now.

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Arguments of Mr. K.D. Shreedhar and Mr. Rajnish Maniktala, Senior Advocates:

11.1. Learned Senior Counsels for the petitioners have fully supported the arguments of other learned Senior Counsels appearing for the petitioner(s) and have also addressed independent arguments assailing the competence of the State to enact the impugned Act. They have vehemently urged that the cess has not been imposed on the 'water drawn', but the same has been imposed on the 'generation of electricity' and before amendment of Entry-84 of List I of the Seventh Schedule, in the year 2016, 'electricity' was specifically held to be goods within the meaning of Entry-84 and consequently, it was only the Parliament, which could levy tax on generation of electricity. After the amendment of Entry-84, now the generation of electricity can only be taxed under Entry-97 i.e. conferring residual powers upon the Parliament under List I of Seventh Schedule and in order to buttress their arguments, they have placed strong reliance on the judgment of the Hon'ble Supreme Court in ***M.P. Cement Manufacturers Association*** *vs.* ***State of Madhya Pradesh***[2] which judgment

[2] ***(2004) 2 SCC 249***

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in turn has been followed by the High Court of Jammu and Kashmir in ***National Hydroelectric Power Corporation Limited*** *vs.* ***State of Jammu and Kashmir***[3] and by the Guahati High Court in ***Bharti Airtel Limited*** *vs.* ***State of Assam***[4]***.***

Arguments of Dr. Seema Jain, Advocate:

12.1. Learned counsel for the petitioner, apart from adopting the arguments of all the aforesaid counsel(s) for the petitioner(s), has separately addressed the arguments to contend that the State has no legislative competence to enact the law as there is no entry in the State List which may empower the State to impose a tax/cess on generation of electricity.

Arguments of Mr.Tarun Johri, Advocate:

13.1. In addition to adopting the arguments of the aforesaid learned counsel(s) for the petitioner(s), he would argue that since his client is an association of Small Hydro Power Developers, who have installed various projects with the capacity of 25 MW, the financial impact on substantial members of the petitioner due to levy of water cess under the said Act is approximately on an average 43% of total revenue

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[3] ***2005 (2) JKJ 5***
[4] ***2016 (4) Guahati Law Times 781***

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earned by such projects in a financial year, therefore, it would not only put his client in financial distress, but the State otherwise is estopped from enacting and implementing the impugned legislation.

14.1. All the other learned counsels appearing for the petitioners have adopted the aforesaid arguments and have also separately argued, but the same being only repetitive, need not be referred to.

Arguments of Learned Advocate General on behalf of State of Himachal Pradesh:

15.1. The learned Advocate General has sought to draw support to levy of water cess on the ground that the object of the Act is to conserve the water and its management as well as to generate revenue from alternate revenue resources as set out in the object of the Act.

15.2. He would contend that the petitioners are unnecessarily trying to confuse the issue by arguing that the cess has been imposed on generation of electricity and not the water drawn by their projects for non consumptive use of water. He has taken us through the provisions of the Act, more particularly, provisions those contained in Sections 2(c), 2(g), 2(h), 2(i), 2(j), 3, 5, 6, 7, 8, 10 and 12 thereof. He is at

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pains to argue that the petitioners are liable to pay cess on the 'water drawn' being its users.

15.3. Additionally, he would argue that the State Government has, in its reply, specifically clarified that it has imposed cess on 'water drawn' for 'use of hydropower generation'. The cess is levied under List–II of Seventh Schedule. It is the case of the State that entries No. 17 and 18 are general entries qua field of legislation of the Legislative Assembly of the State. Entries 45 to 50 provide for field of legislation for imposing cess/tax, whereas, entry No. 66 deals with fee.

15.4. The State has submitted the following points for the Court's consideration.

1. The presumption of constitutionality is in favour of the statute.
2. Entries in the list being fields of legislation must receive liberal construction.
3. The impugned Act is within the purview of entry 49 'Lands and Buildings' of List II as water is covered under entry "land" being in and over the land.

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4. The Act also falls within purview of entry 50 of List II, as the water is mineral and the State has right over the water flowing or stored within its jurisdiction, which right includes right to tax or impose tax.

5. The water being in and over the land, the income/revenue generated from water is the land revenue of the State under entry 45 of List II.

6. The mode of calculation will not determine the nature of the cess.

7. There are no structural defects qua delegation of power etc in statute so as to declare the Act as ultra vires to its provisions/constitution of India.

8. Lastly, the public interest would prevail over the private/individual interest.

Arguments of Mr. Dushyant Dave, learned Senior Advocate on behalf of the State of Himachal Pradesh:

16.1. On 13.12.2023, Mr. Dushyant Dave, learned Senior Advocate, appeared on behalf of the State and made additional arguments that:

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(1) Even as per the pleadings of the petitioner(s), the water being consumed for generation of electricity belongs to the State of Himachal Pradesh and the fact that the water belongs to the State and the consumption of water is in Himachal Pradesh has been unequivocally acknowledged by them. They have further claimed an unfettered right of use of water for the purpose of tapping the potential for generating hydro energy as stored in the river water.

(2) The State is not denying the petitioner(s) or any one of them from using water and since the water falls in the List-II of the Seventh Schedule, the State is well within its power to levy fee, cess or tax, as the case may, on such water or even its non-consumptive use as the water originate from the land. He also invited our attention to Sections 3 and 10 of the impugned Act to convince that the cess is on the "water drawn and not generation of

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electricity", and this, in fact, is the pith and substance of the entire Act.

(3) Once it is established on record that the impugned Act is a valid piece of legislation, then all the other prayers whereby the petitioners have sought a declaration that the impugned Act is beyond the legislative competence of the State in terms of Articles 245 and 246 of the Constitution, would fall like a pack of cards.

(4) The Act is neither retrospective nor retro-active and, therefore, the provisions of the Act have been made applicable to the existing projects sought to be declared unconstitutional, quashed and set aside, is clearly fallacious as the Act is prospective.

(5) Under Articles 245 and 246 of the Constitution, in particular, sub Article (3) of Article 246, the State has exclusive power to frame laws as regards List II of the Seventh Schedule i.e. State List and such entry must receive the widest interpretation. The State

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not only enjoys the exclusive power but also ancillary power under Entry 17, List II, which deals with land and nowhere impinges upon or touches Entry 56 of List-I i.e. Union List, as the tax is confined, as it does not deal with inter-State regulations, and such Act is confined to Himachal Pradesh only.

(6) The Parliament has not enacted any law prohibiting the State from using water.

(7) He then referred to List-II, Entry 18, to contend that land includes water on its sub-terrain or under land.

(8) He also referred to Entry 49, which empowers the State to impose tax on land and building i.e. land and anything connected to the land, which according to him, is the plenary power of the State Legislature.

(9) The Act stands no judicial scrutiny, as even Entry 66 which deals with fees could be invoked by the State as cess can be taxed as also a fee and going by the latest trend in law,

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even for a fee, there is no co-relationship required to be established.

(10) He thereafter invited our attention to the reply filed on behalf of the State to contend that the resources of the State are very limited because the State has its natural limitation, therefore, the State must be allowed to exploit its natural resources, for which the State not only has the constitutional powers but also has a duty to exploit water resources. Any other interpretation would be a narrow interpretation.

(11) According to him, the people of the State are the stakeholders and shareholders of the natural resources and the impugned legislation is of a paramount public importance.

(12) The mere fact that the hydropower would become more expensive, is no ground to test its constitutional validity, more particularly,

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when the rise in power would be passed on to the consumers.

(13) It is more than settled that the financial burden would be of no excuse much less a ground to strike down a valid piece of legislation.

(14) The Constitution framers gave two rights to the State, i.e. one under Article 45 of the Constitution; to levy revenue and other under Article 49 of the Constitution; to impose tax on land, and thereafter vide Entry 50 confers right on the State to levy tax on mineral rights subject to the limitation imposed by the Parliament by law relating to mineral development. The Mines and Minerals Act does not impose any restrictions on the use of minerals and water being a mineral is in the exclusive legislative domain of the State Government. Furthermore, Section 2 of the Mines and Minerals Act does not impose any restrictions on State Government to levy tax on minerals.

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(15) If there is a power under the Constitution, it could be traced under any of the Entries, given the fact that the land cannot be interpreted in any narrow and pedantic sense. The impugned piece of legislation is referable to Entries 17, 18, 45, 49, 50 and 60 and does not suffer from any constitutional vice.

(16) The petitioner in one of the cases i.e. NHPC made a profit of more than Rs. 3,000 crores and even other projects are earning hundreds of crores and, therefore, has no occasion to complain.

(17) After the imposition of General Sales Tax (GST), the State must have complete power to augment its resources and generate its income and any narrow interpretation will hit at the federal structure.

(18) The petitioners cannot complain that they will not participate in the progress of the State by making the State prosperous and

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will have to pay tax, which has been levied strictly in accordance with law.

16.2. Mr. Dave, in support of his contention, urged that the 'land' cannot be interpreted in a narrow and pedantic sense and referred to the following judgments of the Hon'ble Supreme Court:-

1. Navinchandra Mafatlal vs. The Commissioner of Income Tax, Bombay City, 1955 (1) SCR 829

2. The Calcutta Gas Company (Proprietary) Ltd. vs. The State of West Bengal and Ors. 1962 Suppl. (3) SCR 1

3. Raja Jagannath Baksh Singh vs. State of Uttar Pradesh & Anr. AIR 1962 (SC) 1563

4. Khyerbari Tea Co. Ltd. & Anr. vs. The State of Assam, 1964 (5) SCR 975.

5. The Anant Mills Co. Ltd. vs. State of Gujarat and Ors. 1975 (2) SCC 175

6. The Government of Andhra Paradesh and Anr. vs. Hindustan Machine Tools Ltd. 1975 (2) 274

7. M/s Hoechst Pharmaceuticals Ltd. & Ors. vs. State of Bihar & Ors. 1983 (4) SCC 45

8. Ichchapur Industrial Coop. Society Ltd. vs. Competent Authority, ONGC and Anr. 1997 (2) SCC 42

9. R. S. Rekhchand Mohota Spinning & Weaving Mills Ltd. vs. State of Maharashtra, 1997 (6) SCC 12

10. W. B. vs. Kesoram Industries Ltd. & Ors. 2004 (10) SCC 201

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11. Government (NCT of Delhi) vs. Union of India & Anr. 2018 (8) SCC 501.

16.3. According to Mr. Dave, the object of the Act is to levy tax on the water drawn and consumed and in support of such contention, placed reliance on the judgment of Hon'ble Supreme Court in **Khyerbari Tea Co. Ltd. & Anr. vs. The State of Assam[5].**

16.4. He would then contend that legislature can levy tax and then prescribe machinery for the same. The tax collected from the producers does not mean that it is a tax on producers and for this purpose has placed reliance on the Judgment of the Hon'ble Supreme Court in **The Anant Mills Co. Ltd. vs. State of Gujarat and Ors[6], The Government of Andhra Paradesh and Anr. vs. Hindustan Machine Tools Ltd.[7]** and **M/s Hoechst Pharmaceuticals Ltd. & Ors. vs. State of Bihar & Ors.[8]**

16.5. He relied upon the judgment of the Hon'ble Supreme Court in **Ichchapur Industrial Coop. Society Ltd.**

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[5] **1964 (5) SCR 975**.

[6] **1975 (2) SCC 175.**
[7] **1975 (2) SCC 274.**
[8] **1983 (4) SCC 45**.

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vs. Competent Authority, ONGC and Anr.[9] to canvass that 'water' is a 'mineral' and it was so held by the Hon'ble Supreme Court.

16.6. According to Mr. Dave, the issue in question as to whether land includes water has been authoritatively decided by three-judge Bench of the Hon'ble Supreme Court in **R. S. Rekhchand Mohota Spinning & Weaving Mills Ltd. vs. State of Maharashtra,**[10] and such tax could be recovered as arrears of the land revenue under Entry 45 and in support of such contention strong reliance has been placed upon Sections 42, 43, 44, 63(1)(d)(e) and Section 103 of the H.P. Land Revenue Act. According to Mr. Dave, the cess is on water and generation of electricity is only a measure.

16.7. He further relied upon the judgment of the Hon'ble Supreme Court in **State of W. B. vs. Kesoram Industries Ltd. & Ors.**[11] to canvass that mere fact that the tax would be a burden on the consumer, is no ground to assail the same.

16.8. He would further argue that while interpreting the provisions of the Act, the federal structure is required to be borne in mind. The financial independence of a State is as important as its political independence or it will lose its

[9] **1997 (2) SCC 42**
[10] **1997 (6) SCC 12**
[11] **2004 (10) SCC 201**

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independence. In support of such contention, reliance is placed on the judgment of the Hon'ble Supreme Court in **Government (NCT of Delhi) vs. Union of India & Anr.**[12].

Discussions:

17. Before giving point-wise findings to the four questions raised in these petitions, the well settled proposition of interpretation of law which will be necessary while examining the statute needs to be noticed.

Interpretation of Law:

18. A Constitution Bench of the Hon'ble Supreme Court in ***Navinchandra Mafatlal vs. The Commissioner of Income Tax, Bombay City***[13] after placing reliance on the observations made by the then Chief Justice Gwyer in ***The United Provinces vs. Atiqa Begum***[14] held that the entries in the Seventh Schedule of the Constitution should not be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. While construing an entry, the widest possible construction according to the ordinary meaning must be put upon the words used therein. The cardinal rule of interpretation, however, is that

[12] **2018 (8) SCC 501**
[13] ***1955 (1) SCR 829***
[14] ***1940 F.C.R. 110***

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words should be read in their ordinary, natural and grammatical meaning subject to this rider that in construing words in a constitutional enactment conferring legislative power the most liberal construction should be put to the words so that the same may have effect in their widest amplitude.

19. In ***Calcutta Gas Co.((Proprietary) Ltd. vs. State of W.B.***[15] the Constitution Bench of the Hon'ble Supreme Court observed that it may now be taken as well settled that every attempt should be made to harmonize the apparently conflicting entries not only of different Lists but also of the same List and to reject that construction which will rob one of the entries of its entire content and make it nugatory.

20. In ***Raja Jagannath Baksh Singh*** *vs.* ***State of U.P.***[16], the Constitution Bench of the Hon'ble Supreme Court held that while interpreting the words used in the Constitution, it is an elementary cardinal rule of interpretation that the words used in the Constitution which confer legislative power must receive the most liberal construction and if they are the words of wide amplitude, they must be interpreted so as to give effect to that amplitude. It would be out of place to put a narrow or restricted construction on words of wide amplitude in a

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[15] ***1962 Supp. (3) SCR 1***
[16] ***(1963) 1 SCR 220***

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Constitution. A general word used in an entry must be construed to extend to all ancillary or subsidiary matters which can fairly and reasonably be held to be included in it.

21. In ***Khyebari Tea Co. vs. State of Assam***[17], a Constitution Bench of the Hon'ble Supreme Court held that it is well settled that when a power is conferred on the Legislature to levy a tax, that power must itself widely be construed; it must include the power to impose a tax and select the articles, commodities for the exercise of such power and must likewise include the power to fix the rate and prescribe the machinery for the recovery of the tax. This power also gives jurisdiction to the legislature to make such provisions as, in its opinion, would be necessary to prevent the evasion of tax.

Point No. 1:

Nature and event of taxation under the impugned Act:

22. In order to appreciate the rival contentions, it would first be necessary to consider the nature and event of taxation under the impugned Act.

23. The Statement of Objects and Reasons read as under:-

"STATEMENT OF OBJECTS AND REASONS

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[17] ***(1964) 5 SCR 975***

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Himachal Pradesh has been blessed with the immense water resources of five major rivers Satluj, Beas, Ravi, Chenab and Yamuna. These rivers are endowed with immense water flow throughout the year which is being used for generation of hydropower. Further, for proper water conservation and water management, the State is spending huge amount of money on environment and social impact mitigation. The developmental activities in the vicinity of hydropower projects are increasing livelihood of the concerned people. Considerable potential has not been considered on hydropower development on this account of environmental and social aspects.

The State of Himachal Pradesh has very limited revenue generation resources and there always remain financial constraints in the State. Hence, there is an urgent need to improve the revenue generation in the State through alternate revenue resources. Flowing water in various rivers and its tributaries in the State can be useful source of revenue generation. The neighbouring State Uttrakhand and the Union Territory Jammu & Kashmir have already imposed the water cess on hydropower generation. On the same analogy the State Government has decided to introduce such policy and also opt to impose the water cess to increase the revenue of the State.

The water cess on hydropower generation will be imposed based on consumption of water and head available in the project, which is considered difference in the level at entry and exit of water conductor system. At present 172 hydropower projects, with installed capacity of 10,991 MW, have been commissioned in the State. In order to deal with the situation of serious financial constraints in

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the State, it has been decided to make the provision to create additional financial resources by imposing water cess on hydropower generation.

Since, the Himachal Pradesh Legislative Assembly was not in session and the issue to create alternate revenue resources of the State could not be prolonged, hence, keeping in view of the urgency and importance of the matter, the Governor, Himachal Pradesh, by invoking powers under clause (1) of article 213 of the Constitution of India promulgated the Himachal Pradesh Water Cess on Hydropower Generation Ordinance, 2023 (Ordinance No. 2 of 2023) on 15.02.2023 which was published in Rajpatra (e-Gazette) on the same day. Now, this Ordinance is required to be replaced by a regular enactment. This Bill seeks to replace the aforesaid ordinance with some modifications.

This Bill seeks to achieve the aforesaid objectives."

24. The Preamble to the Act provides to levy water cess on hydropower generation in the State of Himachal Pradesh.

25. The name of the 'Act' is The Himachal Pradesh Water Cess on Hydropower Generation Act, 2023. *Section 2* is the definition clause and some of its sub-sections, as are necessary for the determination of this lis, read as under:

> *(c)* "*Hydropower*" is to mean a renewable source of energy that generates power by using water drawn from any water source flowing within the territory of the State;

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(g) "*User*" is to mean any person, group of persons, local body, government department, company, corporation, society or anybody, by whichever name called drawing water from any source for generation of hydropower;

(h) "*Water*" is to mean natural resource flowing 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 or spring;

(i) "*Water Cess*" is to mean the rate levied or charged for water drawn for generation of hydropower and fixed under this Act; and;

(j) "W*ater Source*" is to mean a river and its tributaries, stream, nallah, canal, spring, pond, lake, water course or any other source from which water is drawn to generate hydropower.

26. Section 3 provides installation of scheme for usage of water and reads as under:

"**3. Installation of scheme for usage of water**.—(1) No user shall draw water from any source for hydropower generation except in accordance with this Act."

27. Section 8 deals with grant of registration certificate and reads as under:

"**8. Grant of registration certificate**.—An user intending to use water (non consumptive use) for generation of hydropower shall be issued a registration

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certificate after the execution of an agreement between the user and the Commission under this Act."

28. Section 10 deals with the duties, obligations and responsibilities of the registered user and reads as under:

"**10. Duties, obligations and responsibilities of the registered user**.—(1) The registered user shall be liable to pay water cess for the water drawn for hydropower generation as per the provisions of this Act.

(2) Where any user has constructed a hydropower scheme, for the purpose of generation of hydropower, prior to the commencement of this Act, such user shall, within a period of one month from the date of commencement of this Act, apply for registration and the Commission shall pass an order to register the user within a period of one month from the date of receipt of application in accordance with the provisions of this Act.

(3) If the user as mentioned in sub-section (2) fails to apply for registration within time stipulated therein, the Commission shall forthwith impose water cess without registration on the basis of data of water usage provided by the Directorate of Energy, Himachal Pradesh from the date of commencement of this Act alongwith suitable penalty which may extend to rupees ten lakh and in case of prolonged default with additional fine which may extend to rupees five thousand for every day.

(4) Every registered user shall be under an obligation to ensure the safety of the life and property of inhabitants of the area by the operation of the scheme.

(5) Every registered user shall be bound to allow the Commission or any other officer authorised by the Commission to have an access at any time to the scheme

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for their satisfaction with regard to compliance of the provisions of this Act."

29. Section 12 provides for assessment of water drawn by the user, which reads as under:-

> "**12. Assessment of water drawn by user**.—(1) The Commission shall install or cause to be installed flow measuring device as per the specifications approved by the Commission within the premises of scheme or at such other place where the Commission deems fit for measuring the water drawn for hydropower generation or may adopt any indirect method for assessment of water drawn by the user.
> (2) The expenditure incurred on such installation shall be payable by the user."

30. Chapter IV deals with "Water Cess" and Section 15 is the charging section which reads as under:-

> "**15. Fixation of water cess**.—(1) The user shall be liable to pay the water cess at such rates as the Government may, by notification fix in this behalf.
> (2) The State Government may review, increase, decrease or vary the rates of the water cess fixed under this section from time to time in the manner it deems fit."

31. The procedure for assessment has been provided in Section 17 which reads as under:

> "**17. Procedure for assessment**.—(1) The assessment of water drawn by the user for hydropower generation and computation of water cess thereof, shall be carried out by the Commission.

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(2) The user shall pay the water cess as assessed under sub-section (1) within such time as may be specified by the Commission.

(3) If any user fails to pay water cess due on him, penalty shall be imposed on the user as determined by the Commission. The user has to pay water cess along with penalty within extended time as may be prescribed."

32. It would be noticed that in the Statement of Objects and Reasons of the impugned Act, it was stated that "*the State Government has decided to introduce such policy and also opt to impose water cess to increase the revenue of the State. The water cess on hydropower generation will be imposed based on consumption of water and head available in the project, which is considered difference in level at entry and exit of water conductor system*".

33. As per Section 10(i) of the Act every registered user is liable to pay water cess for the water drawn for hydropower generation. As per Section 12, the Commission shall install flow measuring devices within the premises of the scheme or may adopt any other indirect method for assessment of water drawn by the user.

34. As per Section 15, the "user" is liable to pay water cess at such rates that have been fixed by the Government as

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per the Notification and Section 16 provides for its recovery. Under Section 17 based on such assessment of water drawn by the user, computation on water cess is carried out.

35. It is more than settled that taxation under the List to the Seventh Schedule to the Constitution may with respect to an object or an event or may be with respect to both.

36. From the Preamble as also the various provisions of the impugned Act extracted above, it would be evidently clear that the impugned levy has not been imposed on "water" but on a single inextricable event that is "water drawn for hydropower generation".

37. Why we observe so is because there can be no electricity generation by a hydropower project without drawl of water. In absence of generation of electricity, no levy/cess is imposed.

38. What would further be noticed from the impugned Act is that it maintains complete silence on the measure of levy.

39. The tariff of the water cess has been set out in the notification dated 16.02.2023, which is extracted below:

> "Government of Himachal Pradesh
> Jal Shakti Vibhag
>
> No.JSV-B(A)3-1/2022 Dated Shimla-171002, the 16/02/2023.
>
> **Notification**

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The Governor, Himachal Pradesh, in exercise of powers vested in him under Section 17 (1) of the Himachal Pradesh Water Cess on Hydro Power Generation Ordinance, 2023 (Ordinance No. 2 of 2023), is pleased to order the imposition of Water cess on all Hydro Power Projects in the State of Himachal Pradesh for use of water for power generation on the following rates:-

Sr.No.	**Head**	**Tariff**
1.	For Hydroelectric project with head upto 30 mtr	Rs.0.10/m^3
2.	For Hydroelectric project with head above 30 mtr and upto 60 mtr.	Rs.0.25/m^3
3.	For Hydroelectric project with head above 60 mtr to 90 m.	Rs.0.35/m^3
4.	For Hydroelectric project with head above 90 mtr	Rs.0.50/m^3

This shall come into force with immediate effect.

BY ORDER

Amitabh Avasthi
Secretary (JSV) to the
Government of Himachal Pradesh."

40. It is clearly evident from the aforesaid Notification that the State Government has calibrated the cess keeping in view potentiality of the water i.e. the greater the height from which the water falls on the turbine, the greater the momentum resulting in electromagnetic field causing the generation of electricity. Therefore, it is not essentially the quantum of water but rather it is the head-height, which has been taken into consideration by the State while fixing the rate of levy.

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41. In other words, the power to tax is on generation of electricity and user of water is only incidental. The "*user of water*" is not being taxed and it is only the "*user of water for generation of electricity*", who is being taxed. Therefore, it is a tax on generation of electricity. If it was the quantum of water used, then the height from which the water would fall as a measure to determine the rate of cess would be wholly irrelevant. It is evidently clear from the aforesaid notification dated 16.02.2023 that the quantification is not based on the use of water, but is based on the height from which the water falls. The "*use of water*" in fact does not go by the text of the impugned Act. It is "*generation of electricity*" that is the "*bone*" and "*water drawn*" is only the "*flesh*". The taxable event is "*hydropower generation*" and not the "*usage of water*" because if there is no generation, then there is no "*tax*". Moreover, if the cess was on "*usage of water*", then how could the height, at which the water falls on the turbine, be made the taxable event?

42. It is settled principle of law that standard adopted as a measure of levy, although not determinative, is at least indicative of the nature of the tax. Weighed alongwith and in the light of other relevant circumstances, the method adopted by the legislature would be relevant in determining the character of

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the impost. To be regarded as valid basis, the measure of the levy must maintain a nexus with the essential character, as held by the Hon'ble Supreme Court in **State of West Bengal v. Kesoram Industries Ltd.**[18]. It shall be relevant to extract the relevant observations as contained in paras 33 and 38, which read as under:-

> *"We now proceed to enter a deeper dimension in the field of tax legislation by considering the problem of devising the measure of taxation. This aspect has been dealt with in detail in* ***Union of India and Ors. v. Bombay Tyre International Ltd.****,. Tracing the principles from the leading authority of Re.: a reference under the Government of Ireland Act 1920 and* ***Section 3*** *of the Finance Act (Northern Ireland) 1934, (1936) A.C. 352, passing through* ***Ralla Ram v. Province of East Punjab****, 1948 FCR 207, and treading through the law as it has developed through judicial pronouncements one after the ether, this Court has made subtle observations therein. It has been long recognized that the measure employed for assessing a tax must not be confused with the nature of the tax. A tax has two elements: first, the person, thing or activity on which the tax is imposed, and secondly, the amount of tax. The amount may be measured in many ways; but a distinction between the subject matter of a tax and the standard by which the amount of tax is measured must not be lost sight of. These are described respectively as the subject of a tax and the measure of a tax. It is true that the standard adopted as a measure of the levy may*

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18 **(2004) 10 SCC 201**

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be indicative of the nature of the tax, but it does not necessarily determine it. The nature of the mechanism by which the tax is to be assessed is not decisive of the essential characteristic of the particular tax charged, though it may throw light on the general character of the tax.

38. In the ***Hingir-Rampur Coal Co. Ltd. v. State of Orissa****, (1961) 2 (SCR) 537, the form in which the levy was imposed was held to be an impermissible test for defining in itself the character of the levy. It was argued that the method of determining the rate of levy was by reference to the minerals produced by the mines and, therefore, it was levy in the nature of a duty of excise. This Court held that the method thus adopted may be relevant in considering the character of the impost but its effect must be weighed alongwith and in the light of the other relevant circumstances.* ***Referring to Bombay Tyre International Ltd.*** *(supra), the* ***Court further held*** *that it is clear that when enacting a measure to serve as a standard for assessing the levy, the Legislature need not contour it along lines which spell out the character of the levy itself. A broader based standard of reference is permissible to be adopted for the purpose of determining the measure of the levy. Any standard which maintains a nexus with the essential character of the levy can be regarded as a valid basis for assessing the measure of the levy."*

43. Applying the aforesaid principles to the instant cases, it would be evident that the impugned levy varies in quantum with the quantum of electricity generated but not the

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quantum of water drawn and, thus, makes it clear that its character or nature is such that it is inextricable with electricity generation. Thus, we have no hesitation to answer Point No. 1 in favour of the petitioners by concluding that by the impugned Act cess is sought to be imposed on “generation of electricity” as against “water” and, therefore, it is a misnomer that tax is levied on “water” and not “generation of electricity”, and is, therefore, not a water tax.

This point is answered accordingly in favour of the petitioners.

Point No. 2.

44. At the outset, it is necessary to observe that normally it is the 'pith and substance' of the taxing legislation which assumes significance not to the question of *bonafides* or *malafides* but in examining the competence of the legislature because the State, while promulgating a statute, might purport to act within limits of its powers, yet in substance and in reality, it may be transgressing these powers, the transgression being veiled by what appears, on proper examination, to be a mere pretense or a disguise.

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Pith and Substance

45. In determining whether an enactment is a legislation with respect to the given power, what is relevant is whether in its "pith and substance", it is law upon the subject matter in question. Therefore, it is necessary here to subject the impugned Act to the test of "pith and substance" to ascertain its true intent and character, which is relevant in determining as to which list it would fall under and also to trace the State's competence to have promulgated the impugned Act arises. As per Article 265, no tax can be levied or collected except by authority of law.

Competence of the State to promulgate the impugned Act whether can be traced to Entry 49 of List-II to the Seventh Schedule of the Constitution as contended by the State:

46. Entry 49 of List II (State List) provides for "*Taxes on lands and buildings.*"

47. The State has relied on **Anant Mills Co. Ltd. vs. State of Gurajat & others**[19], in the said case the question was with regard to assessment of property tax of large premises like textile mills and factories. The property tax, in that context, comprised (a) water tax, (b) conservancy tax, and (c) a general tax. It was argued in that case that the State legislature has no

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19 **(1975) 2 SCC 175**

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competence under Entry 49 of List-II to enact a law for levying tax in respect of an area occupied by underground supply line. It was argued that the word land denotes the surface of land and not the underground strata. Rejecting the arguments, the Hon'ble Supreme Court observed that the word “land” includes not only the face of earth but everything under or over it and has in its legal significance an indefinite extent upwards and downwards giving rise to the maxim: *eujus est sulum, ejus est usque ad column*. Further, twin conditions to qualify a levy as tax on lands and buildings i.e.:

(i) Tax is directly imposed on lands and buildings; and

(ii) Tax bears a definite relation to land were specified.

48. However, we find that State's competence to levy tax on water drawn for hydropower generation in the instant case cannot be traced to Entry 49 of List-II, as the impugned levy does not satisfy the above mentioned twin conditions. The levy of tax on water drawn for hydropower generation is definitely not a tax, which is directly on lands and buildings i.e. the land on which the hydropower plant is situated or the power generating units. Rather, as evidenced by the impugned Act itself, it is a tax on a “user” and is levied pursuant to

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occurrence of an event/activity i.e. “for water drawn for hydropower generation”, which cannot be regarded as having any relation to land, much less a definite one.

49. Furthermore, as prescribed by the charging section i.e. Section 15 of the impugned Act, it is indicative that tax is on the registered user i.e. it is personal. Under Section 2(g) of the impugned Act, “user” is defined to mean “any person, group of persons, local body, government department, company, corporation, society or anybody, by whichever name called drawing water from any source for generation of hydropower”. Therefore, the tax is on persons (whether natural or juristic) and not on lands or buildings as units. Therefore, in such circumstances, the reliance placed by the State on the judgment in **Anant Mills (supra)** is clearly misplaced.

50. Even otherwise the expression “Land” cannot be logically interpreted to mean everything above and below it, as that would cover everything on the earth and subsume all other Entries in Seventh Schedule, as there are Entries in List-I and List-II, dealing with the subject on, above or below land. Some of the entries in List-I, which are connected to the land and buildings and which will be rendered otiose by the State Government wide interpretation are:

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(i) *Entry 7*. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war

(ii) *Entry 22*. Railways.

(iii) *Entry 23*. Highways declared by or under law made by Parliament to be national highways.

iv. *Entry 24*. Shipping and navigation on inland waterways, declared by Parliament by way to be national waterways, as regards mechanically propelled vessels; the rule of the road on such water ways.

v. *Entry 26*. Lighthouses, including lightships, beacons and other provision for the safety of shipping and aircraft.

vi. *Entry 29*. Airways; aircraft and air navigation; provision of aerodromes; regulation and organization of air traffic and of aerodromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

vii. *Entry 53*. Regulation and development of oilfields and mineral oil resources; petroleum and petroleum

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products; other liquids and substances declared by Parliament by law to be dangerously inflammable.

viii. *Entry 87*. Estate duty in respect of property other than agricultural land.

ix. *Entry 88*. Duties in respect of succession to property other than agricultural land.

x. *Entry 89*. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freight.

51. It is well settled that while the widest amplitude should be given to the language used in one entry, every attempt has to be made to harmonise its contents with those of other entries, so that the latter may not be rendered nugatory.

52. In this regard, reliance can be placed on the judgment of the Hon'ble Supreme Court in **Calcutta Gas Company (Proprietary) Ltd. vs. State of West Bengal and others**[20] , the relevant portion whereof reads as under:

> *"8……Before construing the said entries it would be useful to' notice some of the well settled rules of interpretation laid down by the Federal Court and this Court in the matter of construing the entries. The power to legislate is given to the appropriate Legislatures by Art. 246 of the Constitution. The entries in the three Lists are*

[20] **AIR 1962 SC 1044**

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only legislative heads or fields of legislation : they demarcate the area over which the appropriate Legislatures can operate. It is also well settled that widest amplitude should be given to the language of the entries. But some of the entries in the different List or in the same List may overlap and sometimes may also appear to be in direct conflict with each other. It is then the duty of this Court to reconcile the entries and bring about harmony between them....."

53. In **Rajendra Diwan vs. Pradeep Kumar Ranibala and Another[21],** the Hon'ble Supreme Court held as under:-

"50. While the widest amplitude should be given to the language used in one entry, every attempt has to be made to harmonise its contents with those of other entries, so that the latter may not be rendered nugatory."

Competence to promulgate the impugned Act whether can be traced to Entry 50 of List-II as contended by the State:

54. Entry 50 of List-II (State List) provides for "*Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.*"

55. The State's competence to impose impugned levy cannot be traced to Entry 50 of List-II as contended by it. Activity of non-consumptive drawl of water for generation of hydropower, where the water drawn is allowed to flow back to

[21] **(2019) 20 SCC 143**

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its source, being a single inextricable event cannot be brought under the purview of taxing mineral rights.

56. The State has placed reliance on the judgment of the Hon'ble Supreme Court in **Ichchapur Industrial Coop. Society Ltd. vs. Competent Authority, Oil & Natural Gas Commission[22],** to contend that water is a mineral, therefore, the rights in such mineral can be taxed by it.

57. Adverting to **Ichchapur's case (supra)**, it needs to be noticed that Hon'ble Supreme Court clarified that the term "Minerals" was being interpreted for the purposes of Petroleum & Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 (User Rights Acquisition Act) only considering the definition of the terms under the Mines Act, 1952. Further, the Hon'ble Supreme Court held that the User Rights Acquisition Act utilizes the device "Legislation by reference or incorporation", whereby the definition of Minerals" under Mines Act, 1952 could be deemed to have been bodily lifted and incorporated in the later act i.e., User Rights Acquisition Act (supra). However, the same ratio cannot be applied to the instant cases to hold that there is legislation by reference or incorporation under List-II of the Constitution insofar as definition of the term "Minerals" contained under Mines Act,

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[22] **(1997) 2 SCC 42**

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1952 is concerned. The Mines Act, 1952 was promulgated subsequent to the Constitution and the former cannot be interpreted with reference to definition clauses set out under the latter. Moreover, it is trite in law that judgments cannot be applied without appreciating their contest particularly, judgments must be read as whole, and the observations are to be considered in light of the questions which were before the Court leading up to the judgment as the decision takes its colour from the questions involved in a case in which it is rendered. (See: ***Haryana Financial Corporation and Anr. Vs. Jagdamba Oil Mills & Anr., (2002) 3 SCC 496, Paras 19 to 21, Hon'ble three Judge Bench***).

58. Therefore, the aforesaid judgment of the Hon'ble Supreme Court in **Ichchapur's case (supra)**, which considered the limited question as to whether water is mineral within the meaning of Mines Act, 1952 read with Section 2(ba) of the User Rights Acquisition Act, cannot be read as laying down a precedent for interpreting Entry 50 of List-II of Constitution of List-II. In fact, neither the dictionary meaning of the word, nor the meaning judicially ascribed to a word (i.e., in unrelated judgments), can be invoked while interpreting the entries under the lists to the Seventh Schedule to the Constitution.

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59. We may at this stage profitably refer to the observations of the Hon'ble Constitutional Bench of the Hon'ble Supreme Court in **Godfrey Phillips India Ltd. & Anr. vs. State of U.P. & Ors.[23],** wherein it was observed as under:-

> *42. But theoretically 'luxuries' is capable of covering each of the several meanings ascribed to the word. The question is how the word is to be construed in the Constitutional entry. Neither the dictionary meaning nor the meaning ascribed to the word judicially (for the reasons stated) resolve the ambiguity. The solution must be found in the language of the Entry taking into consideration the Constitutional scheme with regard to the imposition of taxes and the collection of revenues.*

60. In view of the above discussion, even Entry 50 of List-II cannot be held to countenance the States' taxation on water drawl for generation of electricity.

Competence to promulgate whether can be traced to Entry 45 of List-II:

61. Entry 45 of List II (State List) provides for "*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*".

62. In order to support its contention that the State has competence to enact the impugned Act, strong reliance is

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[23] **(2005) 2 SCC 515**

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placed on Entry 45 of List-II and also the judgment of the Hon'ble Supreme Court in **R.S. Rekchand Mohota Spg. & Wvg. Mills Ltd. vs. State of Maharashtra[24].**

63. Adverting to the facts of the aforesaid case, it was the the Government of Maharashtra that had by way of resolution dated 05.06.1973 (Resolution) under Section 70 of the Maharashtra Land Revenue Code, 1966 (Code) imposed water cess on use of flowing water from River 'Wana' for non-agricultural purpose, specifically industrial purpose.

64. In order to better appreciate the aforesaid case vis-a-vis, the facts and the law involved in the instant case, it would be necessary to have a comparative analysis of the said case with the present case and the same is set out in a table below:-

Code and Resolution	**Impugned Act and Notification**
A. Code **Section 70**-Rates for use of water "The State Government may authorise the Collector or the Officer in charge of a survey or such other officer as it deems fit, **to fix such rates as it may from time to time deem fit to sanction, for the use, by holders and other persons, of water,** the right to which vests in the Government and in respect of **which no rate is leviable under any law relating to irrigation in force in any part of the State.** Such rates shall be liable to revision at such periods as the State Government shall from time to time	**A. The Impugned Act** **Section 2(c)** defines "hydropower" as a renewable source of energy that generates power by using water drawn from any water source flowing within the territory of the State. **Section 2(g)** defines "user" as any person, group of persons, local body, government department, company corporation, society or anybody, by whichever name called drawing water from any source for generation of hydropower. **Section 2(h)** defines "ater" as natural

[24] **(1997) 2 SCC 12**

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determine, and **shall be recoverable as land revenue.** Provided that, the rate for use of water for agricultural purposes shall be one rupee only per year per holder.”	resource flowing 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 or spring. **Section 2(i)** defines “water cess” as the rate levied or charged for water drawn for generation of hydropower and fixed under this Act. **Section 10**- Duties, obligations and responsibilities of the registered user: (1) The registered user shall be liable to pay water cess for the water drawn for hydropower generation as per the provisions of this Act.... **Section 15** of the Act 2023 pertains to the Fixation of water cess: (1) The user shall be liable to pay the water cess at such rates as the Government may, by notification fix in this behalf. (2) The State Government may review, increase,, decrease or vary the rates of the water cess fixed under this section from time to time in the manner it deems fit.

B. Resolution **B. Notification**

Sr. No.	Non-Agriculture purpose	Rate	Unit		Sr. No.	Head	Tariff
1.	Industrial Purpose	(a) Rs.8/- for the first two years (b) Rs.10/- for the third and fourth year (c) Rs.12.50 for the fifth and	Per 10,000 ctf. Pg water -do- -do-		1.	For Hydroelectric Project with head upto 30 mtr	Rs.0.10/ m^3

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		subsequent year					
2.	Purpose for the Municipality	Rs.5/-	-do-		2.	For Hydroelectric Project with head above 30 mtr and upto 60 mtr	Rs.0.25/ m^3
3.	Purpose for the Railways	Rs.12.50	-do-		3.	For Hydroelectric Project with head above 60 mtr to upto 90 mtr	Rs. 0.35/m^3
4.	Domestic Use (i.e. for drinking water)	Nil			4.	For Hydroelectric Project with head above 90 mtr	Rs.0.50/ m^3

65. Now, in case the aforesaid comparison is adverted to, it would be noticed that in **Rekchand case (supra)**, the levy was imposed on drawl of flowing water by artificial contrivance for industrial purpose. The rates of such levy were specified under Resolution. It was on account of the definition of land under the Transfer of Property Act, 1882, which included right to water flowing therefrom, the said levy was sustained by the Hon'ble Supreme Court under Entry 45, List-II.

66. However, in the instant cases, the levy being imposed on electricity generation and supply, which are inextricable parts of the single event which is taxed under the Impugned Act i.e., “water drawn for hydropower generation”, which the State is not competent to do. It appears that the very definition of “water source” has been altered to include generation of electricity because the tax is not being imposed

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merely on the drawl of water but for the generation of electricity and the levy in turn is based, as is evident from the quantum of levy, which is based on the head height and not on the water drawn.

67. Further, a perusal of para 12 of **Rekchand's case (supra)**, makes it clear that there are references to other judgments of the Hon'ble Supreme Court, which concern Entry 49 of List-II and specify the twin conditions being:

> (i) tax is directly imposed on land; and
> (ii) nexus between the levy and the land to be satisfied in order to sustain a legislation under Entry 49, List-II.

68. As already held above, the State's competence to promulgate the impugned Act cannot be traced to Entry 49 of List-II. Therefore, **Rekchand's case (supra)** is not applicable in the present case and the State's competence cannot be traced to Entry 45 of List-II.

Competence to promulgate whether can be traced to Entries 17 & 18 read with 66 of List-II as a "tax":

69. Entries 17, 18 and 66 of List II (State List) provide 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.

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.

66. Fee in respect of any of the matters in this List, but not including fees taken in any court."

70. The State has relied on Entries 17 & 18 of List-II to demonstrate its competence to have legislated the Impugned Act. In this regard, it is a settled principle of law that taxation entries are distinct from general regulatory entries. Entries 1 to 44 in List-II are regulatory, whereas Entries 45 to 63 are taxing entries. Therefore, the legislative competence to impose any tax on water drawn for hydropower generation cannot be imposed by the State by referring to Entries 17 & 18 of List-II being regulatory entry.

71. Reference in this regard can conveniently be made to the judgment rendered by the Hon'ble Constitutional Bench of the Hon'ble Supreme Court in **M.P.V. Sundararamier & Co. vs. The State of Andhra Pardesh and another**[25], more particularly para 51 thereof, which reads as under:-

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25 **AIR 1958 SC 468**

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"51. In List 1, Entries I to 81 mention the several matters over which Parliament has authority to legislate. Entries 82 to 92 enumerate the taxes which could be imposed by a law of Parliament. An examination of these two groups of Entries shows that while the main subject of legislation figures in the first group, a tax in relation thereto is separately mentioned in the second. Thus, Entry 22 in List I is " Railways ", and Entry 89 is " Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights ". If Entry 22 is to be construed as involving taxes to be imposed, then Entry 89 would be superfluous. Entry 41 mentions "Trade and commerce with foreign countries; import and export across customs frontiers ". If these expressions are to be interpreted as including duties to be levied in respect of that trade and commerce, then Entry 83 which is " Duties of customs including export duties " would be wholly redundant. Entries 43 and 44 relate to incorporation, regulation and winding up of corporations. Entry 85 provides separately for Corporation tax. Turning to List II, Entries I to 44 form one group mentioning the subjects on which the States could legislate. Entries 45 to 63 in that List form another group, and they deal with taxes. Entry 18, for example, is " Land " and Entry 45 is "Land revenue ". Entry 23 is " Regulation of mines " and Entry 50 is " Taxes on mineral rights ". The above analysis- and it is not exhaustive of the Entries in the Lists-leads to the inference that 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

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> *distinction is also manifest in the language of Art. 248, Cls. (1) and (2), and of Entry 97 in List I of the Constitution. Construing Entry 42 in the light of the above scheme, it is difficult to resist the conclusion that the power of Parliament to legislate on inter-State trade and commerce under Entry 42 does not include a power to impose a tax on sales in the course of such trade and commerce."*

72. Similar reiteration of law can be found in a three-Judge Bench judgment of the Hon'ble Supreme Court in **M/s Hoechst Pharmaceuticals Ltd. & Ors. vs. State of Bihar and Ors.[26],** wherein after following the judgment of the aforesaid Constitution Bench, it was observed as under:-

> *"It would therefore appear that 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 ill a separate group. In M.P. Sundararamier & Co. v. The State of Andhra Pradesh & Anr.(1) This Court dealt with the scheme of the separation of taxation powers between the Union and the States by mutually exclusive lists. In List I, Entries 1 to 81 deal with general subjects of legislation; Entries 82 to 92A deal with taxes. In List 11, Entries 1 to 44 deal with general subjects of legislation; Entries 45 to 63 deal With taxes. This mutual exclusiveness is also brought out by the fact that in List Ill, the Concurrent Legislative List, there is no entry relating to a tax, but it only contains an entry relating to levy of fees in respect*

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[26] **(1983) 4 SCC 45**

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> *of matters given in that list other than court-fees. Thus, in our Constitution, a conflict of the taxing power of the Union and of the States cannot arise. That being so, it is difficult to comprehend the submission that there can be intrusion by a law made by Parliament under Entry 33 of List III into a forbidden field viz. the State s exclusive power to make a law with respect to the levy and imposition of a tax on sale or purchase of goods relatable to Entry 54 of List II of the Seventh Schedule. It follows that the two laws viz. sub-s. (3) of s. 5 of the Act and paragraph 21 of the Control order issued by the Central Government under sub-s. (1) of s. 3 of the Essential Commodities Act, operate on two separate and distinct fields and both are capable of being obeyed. There is no question of any clash between the two laws and the question of repugnancy does not come into play."*

73. In view of the above, considering the charging section, taxable event and nature of levying under the impugned Act as well as subjecting the impugned Act to the test of "*pith and substance*", it is absolutely clear that the impugned Act imposes tax on generation of electricity and not merely on water as a subject or on drawl of water, which the State is not competent to do. It also imposes an inter-State tax on inter-State supply of electricity for which again the State is not competent to do so.

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Competence to promulgate whether can be traced to Entries 17, 18 read with 66 of List II as a "fee":

74. It is also argued by the State in the alternative that the impugned levy can be justified as a "Fee" on the basis of Entries 17 and 18 of read with Entry 66 of List-II. However, we find that the State lacks competence to levy the impugned cess as a fee. The entire field of legislation concerning water power/hydropower projects, declared as such by Parliament under the Electricity Act, 2003, is occupied by Parliament. Therefore, the State lacks competence to levy any fee under the garb of water cess by relying upon Entries 17 & 18, and 66 of List-II.

75. Even otherwise, it is settled that levy can assume the nature of "Fee", if there are any services rendered by the State and, as such, there is *quid pro quo,* between the person paying fee and the public authority which imposes it. Such *quid pro quo,* although not required to be established with arithmetical exactitude, must at least be established broadly and reasonably with some amount of certainty, reasonableness or preponderance of probability that quite a substantial portion of the fee realised is spent for the benefit of the payers.

76. Moreover, a "Tax" recovered by a public authority goes into the consolidated fund, which is ultimately utilised for

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all public purposes, whereas “Fee” is not intended to be, and does not become, part of the consolidated fund. A “Fee” is earmarked and set apart for the purpose of services for which it is levied.

77. The cess collected pursuant to the impugned Act does not get into a separate earmarked fund. Moreover, while there was no services rendered by the State in the present case for the hydropower plants and in addition thereto, the services claimed to be rendered by the State is incapable of being distinguished from public service. Seen even from this perspective, the impugned levy cannot be termed as “Fee”.

78. The Scope of State's power to impose a tax on land has to be read in the context of Entry 18, List-II which defines Land as “Land, that is to say, rights 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.” This does not contemplate a river or flowing water as a part of land. Even the principle of leaning in favour of constitutionality of a provision will not be applicable as there is patent lack of legislative competence.

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79. The reliance of the State on the judgment of the Hon'ble Supreme Court in **State of West Bengal vs. Kesoram Industries**[27] is entirely misplaced as the said judgment by Hon'ble five-Judge Constitution Bench, to the extent relied upon by the State, has not attained finality, and has been referred to a Constitution Bench of Nine Hon'ble Judges of the Supreme Court.

80. Thus, once it is held that the cess sought to be imposed by the impugned Act is not on the "*water drawn*" but on the "*generation of electricity*", then, it is the Central Government alone which could levy tax on generation electricity.

81. In coming to such conclusion, we are duly supported by the judgment of the Hon'ble Supreme Court in **M.P. Cement Manufacturer's case (supra)**, wherein the Hon'ble Supreme Court was examining Entry 84 of List I and Entry 53 of List II of the Seventh Schedule in the following manner:-

> *"9. The two competing entries in the Seventh Schedule to the Constitution are Entry 84 of List-I and Entry 53 of List-II. They respectively read:*
> *List-I*
> *84. Duties of excise on tobacco and other goods manufactured or produced in India except-*

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27 **(2004) 10 SCC 201**

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(a) alcoholic liquors for human consumption.

(b) (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.

List II

53. Taxes on the consumption or sale of electricity."

82. Noticing that electricity is goods (**see CST vs. M.P. Electricity Board (1969) 1 SCC 200**), the Hon'ble Supreme Court observed that levy of State duty on production of electricity is covered with the phrase "*other goods manufactured*" in Entry 84 of List I and this is within the exclusive jurisdiction of the Parliament. Consequently, it was declared that the State has competence to levy tax only on the sale and consumption of electricity (**see Hoechst Pharmaceuticals Ltd. vs. State of Bihar, (1983) 4 SCC 45**). Proceedings on this basis, the Hon'ble Supreme Court posed the question whether the State Legislature was competent to levy cess on captive power generation, through amendment of the Madhya Pradesh Upkar Adhiniyam, 1981. After a detailed discussion, the Hon'ble Supreme Court held that the levy on generation of electricity is not within the legislative competence of the State.

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Point No. 2 is accordingly answered in favour of the petitioners.

Point No. 3.

Without prejudice, the impugned Act is unconstitutional for it suffers from vice of excessive delegation:

83. In order to appreciate the rival contention of the parties, it would be necessary to refer to the charging section, i.e. Section 15 of the impugned Act, which specifies that the user is liable to pay water cess at such rates, as the Government of Himachal Pradesh, may fix vide notification. In terms of sub Section 15(2) of the impugned Act, the State Government is empowered to review, increase, decrease or vary the rates of water fixed under Section 15 of the impugned Act from time to time in the manner it deems fit.

84. Notably, the power of fixation of rates has been delegated to the Government of Himachal Pradesh i.e., the executive by the State Legislature without any guidance. While fixation of rates can be left to a non-legislative body, the legislature must provide guidance for such fixation as held by the Hon'ble Supreme Court in **The Corporation of Calcutta and another vs. Liberty Cinema[28],** more particularly, paras 21 to 26, which read as under:-

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28 **AIR 1965 SC 1107**

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"21. It was then said that if S. 548 authorised the levy of a tax as distinct from a fee in return for services rendered, it was invalid as it amounted to an illegal delegation of legislative functions to the Corporation because it left it entirely to the latter to fix the amount of the tax and provided no guidance for that purpose. We wish to point out here that the contention now is that the section is invalid while the contention that we have just dealt with proceeded on the basis that the section was valid as it provided for the levy of a fee in return for services and as this necessarily implied a limit of the levy, namely, that it had to be commensurate to the amount of the costs of the services, no guidance for 491 fixing the amount of the fee to be levied was required to be provided. That argument only challenged the resolution on the ground that it fixed the amount of the fee at a figure much in excess of the costs for the services rendered.

22. Here again there is no dispute that a delegation of essential legislative power would be bad. It was so held by this Court first in re The Delhi Laws Act.(1) The principle there laid down has been summarised by Bose J. in Rajnarain Singh v. The Chairman, Patna Administration Committee, Patna(2), in these terms:

> *"In our opinion, the majority view was that an executive authority can be authorised to modify either existing or future laws but not in any essential feature. Exactly what constitutes an essential feature cannot be enunciated in general terms, and there was some divergence of view about this in the former case, but this much is clear from the opinions set out above: it cannot include a change of policy."*

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23. On the basis that s. 548 is a piece of delegated legislation, it has been contended on behalf of the Corporation that the rate of a tax is not an essential feature of legislation and the power to fix it was properly delegated to the Corporation as sufficient guidance for that purpose was given in the Act. It is not in controversy, and this indeed has been held by this Court, that if that is so, the section would be unexceptionable. The question first is whether the power to fix the rate of a tax can be delegated by the legislature to another authority; whether it is of the essence of taxing legislation. The contention of the Corporation that fixation of rates is not an essential part of legislation would seem to be supported by several judgments of this Court to some of which we now proceed to refer.

24. First, there is Pandit Benarsi Das Bhanot v. The State of Madhya Pradesh (3) . That case was concerned with a Sales Tax Act which by s. 6(1) provided that no tax would be payable on any sale of goods specified in a schedule to it. Item 33 of that Schedule read, "goods sold to or by the State Government". Section 6(2) of the Act authorised the State Government to amend the schedule by a notification. In exercise of this power the Government duly substituted by a notification for item 33 the following: "Goods sold by the State Government". The amendment of the schedule by the notification was challenged on the round that s. 6(2) was invalid as it was a delegation of the (1) [1951] S. C. R. 747 (2) [1955] 1 S. C. R. 290,301. (3) [1959] S. C. R. 427. 492 essential power of legislation to the State Government. Venkatarama Aiyar J. delivering the judgment of the majority of the Court sitting in a Constitution Bench, rejected this contention and after

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having read what we have earlier set out from the judgment of Bose J. in Rajnarain Singh's case(1), observed at p. 435:

> *"On these observations, the point for determination is whether the impugned notification relates to what may be said to be an essential feature of the law, and whether it involves any change of policy. Now, the authorities are clear that it is not unconstitutional for the legislature to leave it to the executive to determine details relating to the working of taxation laws, such as the selection of persons on whom the tax is to be laid, the rates at which it is to be charged in respect of different classes of goods, and the like."*

The Act was a statute imposing taxes for revenue purposes. This case would appear to be express authority for the proposition that fixation of rates of taxes may be legitimately left by a statute to a non-legislative authority, for we see no distinction in principle between delegation of power to fix rates simpliciter; if power to fix rates in some cases can be delegated then equally the power to fix rates generally can be delegated. No doubt Pandit Banarsi Das's case(1) was not concerned with fixation of rates of taxes; it was a case where the question was on what subject mater, and therefore on what persons, the tax could be imposed. Between the two we are unable to distinguish in principle, as to which is of the essence of legislation; if the power to decide who is to pay the tax is not an essential part of legislation, neither would the power to decide the rate of tax be so. Therefore we think that apart from the express observation made, this case

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on principle supports the contention that fixing of the rate of a tax is not of the essence of legislative power.

25. In regard to the observations in Pandit Benarsi Das's case(1) earlier quoted, it has been said that the authorities on which they appear to have been based do not support it. It has been contended that as the observations do not form part of the actual decision in the case, they need not be given that weight which they would otherwise have been entitled to. In the High Court this contention appears to have been accepted. The acceptance of the contention would result in by-passing a judgment of this Court and that is something which cannot in any case be supported. We are furthermore of opinion that the authorities to (1) [1955] 1 S. C. R. 290. (2) [1959] S. C. R. 427, 493 which Venkatarama Aiyar J. referred fully support his observations. The first case relied upon by him was Powell v. Appollo Candle Co. Ltd.(1). That case upheld the validity of a statute passed by the legislature of New South Wales which conferred power on the Governor of that Province to impose duty on certain articles in the circumstances prescribed. The Governor under this power imposed the tax and this was challenged. The Judicial Committee rejected the contention that the tax had not been, imposed by the Legislature which alone could do it in the view that "the duties levied under the Order in Council are really levied by the authority of the Act" see p. 291. Here, therefore, a power conferred on the Governor by the Legislature to levy a tax was upheld. It would follow that a power conferred to fix rates of taxes has equally to be upheld. The next case was Syed Mohamed v. State of Madras(2). There a power to an authority to determine who shall pay the tax was upheld. On the same principle

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a power to determine at what rate he will have to pay the tax has to be upheld. The last case was Hampton Jr. & Co. v. United States(3), in which the power conferred by a statute on the President to make an increase or decrease in the rate of customs duty was upheld. There it was said at p. 630,

"It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress and authorise such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise." This therefore is clear authority that the fixing of rates may be left to a non legislative body.

26. No doubt when the power to fix rates of taxes is left to another body, the legislature must provide guidance for such fixation. The question then is, was such guidance provided in the Act ? We first wish to observe that the validity of the guidance 1) 1 O. A. C. 282 (2) [1952] 3 S. T. C 367 (3) [1927] 72 L. ed. 624. 494 cannot be tested by a rigid uniform rule; that must depend on the object of the Act giving power to fix the rate. It is said that the delegation of power to fix rates of taxes authorised for

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> *meeting the needs of the delegate to be valid, must provide the maximum rate that can be fixed, or lay down rules indicating that maximum. We are unable to see how the specification of the maximum rate supplies any guidance as to how the amount of the tax which no doubt has to be below the maximum, is to be fixed. Provision for such maximum only sets out a limit of the rate to be imposed and a limit is only a limit and not a guidance."*

85. In addition to the above, it was necessary for the legislature to have laid down Legislative Policy, standard or guidelines in the Act or else it is bound to suffer from vice of excessive delegation as held by the Hon'ble Supreme Court in **Gwalior Rayon Silk Mfg (Wvg.) Co. Ltd. vs. The Asstt. Commissioner of Sales Tax and others[29],** wherein it was observed as under:-

> *"13. It may be stated at the outset that the growth of the legislative powers of the executive is a significant development of the twentieth century. The theory of laissez-faire has been given a go-by and large and comprehensive powers are being assumed by the State with a view to improve social and economic well-being of the people. Most of the modern socioeconomic legislations passed by the legislature lay down the guiding principles and the legislative policy. The legislatures because of limitation imposed upon by the time factor hardly go into matters of detail. Provision is, therefore, made for delegated legislation to obtain flexibility, elasticity, expedition and opportunity for experimentation. The*

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29 **(1974) 4 SCC 98**

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practice of empowering the executive to make subordinate legislation within a prescribed sphere has evolved out of practical necessity and pragmatic needs of a modern welfare state. At the same time it has to be borne in mind that our Constitution-makers have entrusted the power of legislation to the representatives of the people, so that the said power may be exercised not only in the name of the people but also by the people speaking through their representatives. The rule against excessive delegation of legislative authority flows from and is a necessary postulate of the sovereignty of the people. The rule contemplates that it is not permissible to substitute in the matter of legislative policy the views of individual officers or other authorities, however competent they may be, for that of the popular 'will as expressed by the representatives of the people. As observed on page 224 of Vol. 1 in Cooley's Constitutional Limitations, 8th Ed.

> *"One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency done the laws must be Made until the constitution Itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shalt be devoted, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which*

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atom the people have seen fit to confide this sovereign trust."

86. Furthermore, the impugned Act clearly fails to lay down one of the critical components of taxing statute i.e. measure of tax. It is trite in law that in order to make a levy of tax to be operative and valid, four essential components must be provided in enacting statute, creating the tax/impost i.e.:

(i) taxable event attractive the levy;
(ii) the person whom the levy is imposed and who is obliged to pay the tax;
(iii) the rate at which the tax is imposed and;
(iv) the measure of value to which the rate will be applied for computing the tax liability.

87. This was so held by the Hon'ble Supreme Court in **M/s Govind Saran Ganga Saran vs. Commissioner of Sales Tax and others**[30], wherein it was observed as under:-

"6. The components which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed, and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely

30 AIR 1985 SC 1041

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> *ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness ill the legislative scheme defining any of those components of the levy will be fatal to its validity."*

88. In the instant case, three essential components can be clearly identified within the impugned statute, which are taxable events, "the person liable to pay tax" and the "rate of tax". However, the impugned legislation fails to identify the fourth and equally critical component i.e. measure of tax, which is the value on which the rate of tax will be applied for computing the tax liability.

89. Section 15 of the impugned Act provides that the user shall be liable to pay water cess at such rates fixed by the Government, it fails to prescribe the value based on which such rates will be applied.

90. Here, we may note that it was in exercise of powers vested under Section 15(2) of the impugned Act that the State Government issued a Notification dated 26.08.2023 (supra), whereby the tariff structure on water cess was fixed on the basis of "Head". However, even the said notification failed to prescribe the measure of tax and instead proceeded to prescribe tariff rate without any indication or measure on which such tariff rate will be applied. Moreover, measure of tax being vague,

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based upon the "assessment" or water drawn, which would form the basis of the tax imposed is also vague and fraught with lack of adequate guidelines, as is evident from the combined reading of Section 12 with Section 17 of the impugned Legislation (supra).

91. That apart, even the Statement of Objects and Reasons as well as the preamble of the impugned Act does not lend any guidance for the delegate. The preamble of the impugned Act merely states that it is an act to levy water cess on hydropower generation in the State of Himachal Pradesh, the Statement of Objects and reasons merely states that the objective of the impugned Act is revenue generation. Therefore, on account of having delegated power to fix rates of impugned levy to Government of Himachal Pradesh without any legislative policy or guidance, the impugned Act is unconstitutional.

This point is accordingly answered in favour of the petitioners.

4. Promissory Estoppel:

92. In view of the aforesaid discussion, the question of promissory estoppel has been rendered academic and, therefore, need not be answered.

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Conclusion:

93. In view of the aforesaid discussion, all the writ petitions are allowed in the following terms:-

(i) The provisions of the Himachal Pradesh Water Cess on Hydropower Electricity Generation Act, 2023, are declared to be beyond the legislative competence of the State Government in terms of Articles 246 and 265 of the Constitution of India and, thus, ultra vires the Constitution.

(ii) Consequently, the Himachal Pradesh Water Cess on Hydropower Electricity Generation Rules 2023, are also quashed and set aside.

(iii) Sections 10 and 15 of the Himachal Pradesh Water Cess on Hydropower Electricity Generation Act, 2023, as have been made applicable to the existing projects, are also declared to be ultra vires the Constitution and are accordingly quashed and set aside.

(iv) The amount, if any, recovered by the respondents from the petitioners under the provisions of the

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Himachal Pradesh Water Cess on Hydropower Electricity Generation Act, 2023 and the Rules framed thereunder are ordered to be refunded within four weeks from today.

(v) The letter/notice issued by the State Government/Himachal Pradesh State Commission for Water Cess on Hydropower Generation pursuant to the impugned Act, Rules, seeking recovery of water cess from the petitioners, are declared as illegal and are accordingly quashed and set aside.

All pending miscellaneous applications shall also stand disposed of.

(Tarlok Singh Chauhan)
Judge

(Satyen Vaidya)
Judge

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