

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th Floor, Cuffe Parade, Mumbai 400005
Tel. 022 22163964/65/69 Fax 22163976

Email: mercindia@merc.gov.in

Website: www.merc.gov.in

CASE No. 168 of 2020

Case of Maharashtra State Power Generation Company Limited seeking removal of difficulties with regards to payment of Rs. 130.46 Crore against demand of Service Tax liability claimed by Water Resource Department (WRD), Government of Maharashtra (GoM) for the period of FY 2009-10 to FY 2014-15.

Coram

**I.M. Bohari, Member
Mukesh Khullar, Member**

Maharashtra State Power Generation Co. Ltd.Petitioner

V/s

Water Resource Department, Government of Maharashtra Respondent

Maharashtra State Electricity Distribution Company Limited. Impleaded Respondent

Appearance

For the Petitioner	: Shri Vijay Rathod, MSPGCL
For the Respondent	: Shri Santosh Gupta, WRD, GoM
For Impleaded Respondent	: Shri Paresh Bhagwat, MSEDCL

ORDER

Date: 24 November 2020

1. Maharashtra State Power Generation Company Limited (**MSPGCL**) has filed this Petition being Case No. 168 of 2020, on 31 July, 2020 seeking removal of difficulties with regard to payment of Rs. 130.46 Crore against demand of Service Tax liability claimed by Water Resource Department (**WRD**), Government of Maharashtra (**GoM**) for the period of FY 2009-10 to FY 2014-15.

2. **Main Prayers of MSPGCL are as follows:**

“

- a) *Consider the submission made in context of service tax amount of Rs 130.46 Crore to be paid to GoM, WRD for the period FY 2009-10 to 2014-15 and allow the same*
- b) *Allow MSPGCL to approach Hon'ble commission once WRD, GoM communicates MSPGCL regarding the decision by Principal commissioner, CGST, South Mumbai, in the matter of e-reply for the service tax claim for the period FY 2015-16 to FY 2017-18 (Q1).*
- c) *Condone any shortcomings/deficiencies in the petition and allow MSPGCL to submit additional information/data at a later stage as may be required.”*

3. **MSPGCL in its Petition has stated as under:**

3.1 The Water Resource Department (**WRD**), Government of Maharashtra (**GoM**) handed over 27 Hydro Power Stations to MSPGCL for operation and maintenance on lease rent. The Commission vide Orders in Case No. 17 of 2007 and in Case No. 5 of 2012 approved the lease rents payable to GoM for these Hydro Stations.

3.2 WRD, GoM had not charged Service Tax in their hydro lease Invoices. To levy the Service Tax on the invoices was the responsibility of WRD as a service provider. However, WRD never charged the taxes in their invoices, and therefore, MSPGCL did not include the Service Tax in its Annual Revenue Requirement (ARR) while filing the Tariff Petitions. As per Service Tax department, Service Tax was applicable on lease rent and it was applicable on forward charge basis.

3.3 It is direct responsibility of MSPGCL for paying GST on hydro lease rent that came into effect after issue of Notification dated 25 January, 2018 issued by the Department of Revenue, Ministry of Finance, Govt. of India. Under the said Notification, GST on rent of immovable property leased out by the State Government is covered in Reverse Charge Mechanism.

3.4 In 2017, the Service Tax Department had issued a Notice to WRD, GoM, demanding Service Tax on hydro lease rent collected from FY 2009-10 to FY 2014-15. The Commissioner of Central GST & Central Excise, Mumbai issued an Order to WRD, GoM on 27 November 2017 to pay Service Tax including penalty and interest for non-payment.

3.5 The WRD, GoM had filed an appeal against this Order to Customs Excise and Service Tax Appellate Tribunal (CESTAT). WRD, GoM had deposited Rs. 12.98 Crore at the time of filing the Appeal. The matter is sub-judice before the CESTAT.

- 3.6 WRD, GoM has also communicated to MSPGCL that similar claim is raised by Service Tax Department for pending Service Tax on the lease rent amount for the period FY 2015-16 to first quarter of FY 2017-18. However, WRD, GoM has filed its representation to the Principal Commissioner, CGST, South Mumbai, against this claim for some computational errors and once the claim for the Service Tax for the period FY 2015-16 to first quarter of FY 2017-18 is finalized by the Tax Authorities, the same will be communicated to MSPGCL. Therefore, presently WRD, GoM has requested for payment of Service Tax only for the period FY 2009-10 to FY 2014-15.
- 3.7 Recently, the Government of India introduced an Amnesty Scheme for Indirect Taxes i.e. Sabka Vishwas - Legacy Dispute Resolution (**SVLDR**) Scheme, 2019 w.e.f. 1st September 2019. As per this amnesty scheme, it was provided that, voluntary disclosure of unpaid / disputed tax liability will be allowed without any interest and penalty. The WRD, GoM had applied for this scheme with respect to the Service Tax payable on Hydro Lease Rent.
- 3.8 Accordingly, Designated Committee consisting of Principal Commissioner and Joint Commissioner, Service Tax finalized the amount to be paid as Rs. 130.46 Crore for the period FY 2009-10 to FY 2014-15 and ordered to pay Rs 117.48 Crore deducting the amount Rs 12.98 Crore deposited earlier.
- 3.9 WRD vide its letter dated 22 April 2020 requested MSPGCL to pay Rs. 130.46 Crore which includes Rs 117.48 Crore as amount to be paid under SVLDR Scheme and Rs. 12.98 Crore as amount deposited earlier by WRD while filing appeal before CESTAT against the Order of Commissioner, CGST, Mumbai. It was also informed that, date of payment under SVLDR Scheme is extended up to 30 June 2020.
- 3.10 As the amount of Service Tax was not approved to MSPGCL in its approved ARR for the period, MSPGCL was not in a position to pay amount demanded by WRD, GoM unless the Commission approves such Service Tax as part of MSPGCL's ARR.
- 3.11 Subsequently, WRD vide letter dated 13 July 2020 conveyed to MSPGCL that it has paid Rs. 117.48 Crore under SVLDR Scheme 2019 before the due date 30 June 2020.
- 3.12 Therefore, MSPGCL requests the Commission to allow this expenditure as additional ARR for FY 2020-21 to enable MSPGCL to pay the required amount Rs 130.46 Crore. It is also submitted that, the matter regarding the Service Tax claim for FY 2015-16 to first quarter of FY 2017-18 is pending before the Principal commissioner, CGST, South Mumbai and it is decided and final amount to be paid is issued by Principal Commissioner, CGST, South Mumbai, MSPGCL will approach the Commission separately for approval of additional liability, if any.
- 3.13 MSPGCL submits that the claim by WRD, GoM is a claim as per change in interpretation of Service Tax applicability as per Service Tax Department or Tax Authority. This event is covered under the part (c) of the definition of "Change in Law"

stipulated in MYT Regulations 2019, therefore, this claim may be treated as “Change in Law”.

4. WRD, GoM in its reply dated 10 September, 2020 has stated that:

4.1 Total 27 hydro projects have been handed over by WRD, GoM to MSPGCL on lease rent. The Commission vide its Orders had determined the lease rent for the Hydro Projects. While determining the Tariff/ lease rent, the Commission had considered the principles of leasing, i.e. the capital cost is recovered through depreciation over the life of the project and debt is serviced during the tenor of debt and computed the lease rent payable for the life of the project by considering the interest expenses on the debt part of the project cost, return on equity on the equity employed in the project.

4.2 WRD had not factored the liability of Service Tax on the following grounds:

a) MSPGCL is a State Government owned company and WRD, GOM is Department of the State Government. Further, Hydro Projects were leased out without any commercial/business motives and that both the parties (MSPGCL and WRD) are “State” within the meaning of Article 12 of Constitution of India.

b) There is a provision under Section 66 D of Finance Act 1994 about services which are covered in the negative list. In the said negative list, provision exists regarding Government services excluding services mentioned at (i) to (iv) therein. The service mentioned in Section 66 D (k) is “transmission or distribution of electricity by an electricity transmission or distribution Utility”.

c) Therefore, WRD had not considered the Service Tax in its invoices to MSPGCL.

4.3 However, the Directorate General of Central Excise Intelligence (DGCEI) gathered information that the WRD, GoM had given 27 HEPs on lease basis to MSPGCL for Operation and Maintenance. On the basis of said information, the Commissioner, Central Goods Service Tax & Central Excise (CGST&CX), Mumbai South adjudicated the demands for the period FY 2009-10 to 2014-15 and confirmed the demand for the Service Tax liability vide Order dated 27 November, 2017.

4.4 Being aggrieved by above said Order dated 27 November 2017, WRD, GoM has preferred an Appeal before the Custom, Excise and Service Tax Appellate Tribunal (CESTAT) Mumbai.

4.5 However, during the pendency of the said Appeal, WRD, GoM, in order to finally resolve the issues, exercised the option of settlement under the “Sabka Vishwas (Legacy Dispute Resolution) Scheme 2019. Major benefits of the scheme were (i) Relief to the extent of 50% discount on the Tax charged, (ii) No interest (iii) No Penalty. However, it is provided that the exact amount was to be decided by the Designated Committee of Central GST and Central Excise. Considering the benefits of the scheme, WRD, GOM, has opted for “SVLDR Scheme 2019” on 15 January 2020.

- 4.6 The Designated Committee comprising of the Principal Commissioner and Joint Commissioner of Central GST, after hearing the matter issued the final settlement amount of Rs. 117,48,39,025.02 after deducting the amount deposited earlier with CESTAT.
- 4.7 In view of the SVLDR Scheme, the Appeal preferred before the CESTAT was required to be withdrawn. Therefore, WRD, GoM submitted an application before the CESTAT on 9 July 2020 requesting to allow to withdraw the said Appeal.
- 4.8 The CGST&CX, South Mumbai had also issued the Notice dated 2 April 2018 for the period from FY 2015-16 up to first quarter of FY 2017-18 demanding Rs. 345,22,42,000. The WRD has submitted its representation to Principal Commissioner, CGST&CX, Mumbai on 7 June, 2018 and on 15 January, 2020 pointing out some computational errors and requested for correction in their computation of demand. Therefore, WRD has opted SVLDR Scheme 2019 for the period FY 2009-10 to 2014-15 and has paid the amount accordingly.
- 4.9 It is also submitted that WRD has also tried for exemption of the Service Tax as provided under section 93 of the Finance Act 1994 that was being levied on account of “renting of immovable property” which is included under declared service as per provision under section 66(a) of the said Act of 1994. Accordingly, Government of Maharashtra submitted proposal dated 5 February 2018 to Government of India for completely exempting Service Tax by issuing notification and further by inserting new section in chapter V of the Finance Act, 1994. This issue was perused by Government of Maharashtra and WRD level.
- 4.10 However, the Deputy Commissioner, Service Tax Wing, Govt of India, Ministry of Finance, Dept of Revenue, Central Board of Indirect Taxes and customs, New Delhi vide their letter No. F. No. 137/26/2016-ST (part III)/ 62/10-5 dated 10 May, 2019 conveyed that exemption cannot be considered for individual case.
- 4.11 Further, even after every attempt of demonstration of the WRD, GoM, the Commissioner, CGST & CX, South Mumbai, being the competent Authority in its Order dated 27 November 2017 has held that Service Tax is liable to be paid in view of provision under Section 66 E (a) i.e. renting of immovable property.
- 4.12 As such, the issue of applicability of Service Tax in the present matter was first time decided in the year 2017. It is also not in dispute that an appeal is preferred before the CESTAT against the said Order dated 27 November, 2017 passed by the Commissioner, CGST &CX, South Mumbai. The issue of Service Tax involved in the matter was a continuous cause of action as, in the meantime WRD had availed all the possible endeavors seeking exemption from payment of the Service Tax and/or to reduce the tax liability to a reasonable extent. Hence, it is not barred by limitation.

- 4.13 Therefore, this is a fit case wherein the “Change in Law” as defined under Regulation 2.15 of the MYT Regulations, 2019 can be applied being “Uncontrollable Factor” in the light of provisions under Regulation 9 of the MYT Regulations of 2019.
- 4.14 The Commission may exercise its powers under Regulation 106 of the MYT Regulations 2019 and may remove the difficulty and thereby may allow the additional amount of Rs 130.46 Crore in MSPGCL’s ARR.
5. **MSEDCL in its reply dated 2 September 2020 has stated as under:**
- 5.1 WRD was responsible for collection of Tax from MSPGCL and payment of Service Tax from time to time.
- 5.2 The Commission vide its Order in Case No. 17 of 2007 and case No. 5 of 2012 had not considered Service Tax liability while approving lease rent payable by MSPGCL to WRD as there was no such submission by the WRD, GoM at that time.
- 5.3 The Service tax liability claimed is for the period from FY 2009-10 to 2014-15 i.e. after about 5-10 years from the date on which it was first due. Thus, as per the Limitation Act 1963 and the amendments thereof, such dues are not payable by the party. This aspect may be considered while allowing the claim of Rs. 130.46 Crore towards Service Tax liability on lease rent collected from FY 2009-10 to FY 2014-15 as Change in Law.
- 5.4 MSEDCL further submits that the Commission may allow this expenditure as additional ARR for FY 2020-21 to enable MSEDCL to pass on the same to consumer as per provisions of the MYT Regulations, 2019.
- 5.5 Any penalty and interest imposed by the Commissioner, Central GST & Central Excise, on WRD, GoM shall not be passed on to MSEDCL.
6. At the hearing on 9 November 2020 MSPGCL, WRD, GoM and MSEDCL reiterated their respective submissions.

Commission’s Analysis and Ruling:

7. The Commission notes that the present Petition has been filed by MSPGCL for allowing Rs. 130.46 crore towards service tax claimed by WRD, GoM on lease rent paid for the period of FY 2009-10 to FY 2014-15. MSPGCL has stated that as WRD had not claimed such service tax earlier, same was not included in ARR of respective years. MSPGCL has requested to allow the recovery of such amount from MSEDCL considering Change in Law provision under MYT Regulations 2019.
8. WRD, GoM has stated that it had not levied any service tax on lease rent approved by the Commission as the said transaction was within departments of State Government and hence as per its understanding, service tax was not applicable. However, in the year 2017,

Tax Authorities issued notice to WRD claiming service tax for the period of FY 2009-10 to FY 2014-15. WRD filed appeal against the said levy of service tax and also followed-up with the Central Government for complete waiver of service tax. However, these efforts did not fructify in favour of WRD. During the pendency of appeal against levy of service tax, WRD has exercised option of amnesty scheme declared by Government of India, which has substantially reduced the amount payable against service tax claims for those years, Accordingly, WRD has decided to withdraw the appeal and has also paid final amount Rs. 130.46 crore approved under amnesty scheme. WRD has requested the Commission to allow recovery of such amount from MSPGCL.

9. MSEDCL has contended that service tax liabilities of FY 2019-10 to FY 2014-15 is sought to be recovered after 5-10 years. Such delayed claim is barred by Limitation Act. It has also contended that any penalty or interest imposed by Tax Authorities should not be passed on to MSEDCL. It further requested that in case Commission allows such claim, then MSEDCL should also be allowed to recover it from its consumers.
10. Having heard the parties and after considering documents placed on record, the Commission frames following issues for its consideration:
 - a. Whether service tax claims for period of FY 2009-10 to FY 2014-15 are barred by the Limitation Act?
 - b. If maintainable, whether the claim made by MSPGCL qualifies for Change in Law” and relief can be granted in the present matter?
 - c. What would be the recovery mechanism for the amount allowed as a pass through?

The Commission is addressing these issues in subsequent paragraphs.

11. **Issue a: Whether service tax claims for period of FY 2009-10 to FY 2014-15 are barred by the Limitation Act?**

11.1 MSEDCL has objected to the maintainability of the claims towards service tax liabilities of FY 2009-10 to FY 2014-15 being sought to be recovered after 5-10 years. It has contended that such delayed claim is barred by Limitation Act. WRD has opposed such contention and has submitted that claim for these years was first time raised in November 2017 by Tax Authorities and thereafter it had been continuously contesting such claim but finally has paid the amount under amnesty scheme in June 2020. Therefore, WRD has contended that its claims are within the limitation period.

11.2 In this regard, the Commission notes that contention of MSEDCL are misplaced. This is not the case wherein expenses have been incurred in FY 2009-10 to FY 2014-15 and now being sought to be recovered in the year 2020. It is admitted fact that no service tax was levied during that period and hence not included in ARR of

these years. Tax Authorities have for the first time made such a claim in the year 2017. Therefore, the issue of applicability of Limitation Act, if any, would have applicable from that time. This Commission cannot go into correctness or otherwise of such claim by Tax Authorities in terms of it being time barred by Limitation Act.

11.3 It is also a fact that post raising of service tax claim by Tax Authorities, WRD filed appeal against said levy and has also followed-up with the Central Government for complete waiver of service tax. However, those efforts did not fructify in its favour. Therefore, during the pendency of the said appeal, WRD has exercised option of amnesty scheme and paid final amount of Rs. 130.46 crore duly approved under amnesty scheme in June 2020. Therefore, although service tax claim is for the period of FY 2009-10 to FY 2014-15, it is actually incurred in June 2020 and that too after exhausting all options of contesting such claim.

11.4 In view of the above facts, the Commission is of the opinion that expenses being sought to be recovered in the present matter is within the period of limitation and hence maintainable.

12. Issue b: If maintainable, whether the claim made by MSPGCL qualifies for Change in Law” and relief can be granted in the present matter?

12.1 The Commission notes that MSPGCL and WRD have claimed recovery of such amount under Change in Law Provisions of MYT Regulations, 2019 which is reproduced below:

“2.(15) "Change in Law" means occurrence of any of the following events:

- a. enactment, bringing into effect or promulgation of any new Indian law; or*
- b. adoption, amendment, modification, repeal or re-enactment of any existing Indian law; or*
- c. change in interpretation or application of any Indian law by a competent court, Tribunal or Indian Governmental Instrumentality, which is the final authority under law for such interpretation or application; or***
- d. change of any condition or covenant by any competent statutory authority in relation to any consent or clearances or approval or Licence available or obtained for the Project; or*
- e. any change in taxes or duties, or introduction of any taxes or duties levied by the Central or any State Government.” [emphasis added]*

- 12.2 It is a fact that Service Tax was in force in year FY 2009-10 onwards but WRD has not levied the same on lease rent invoices because as per its own interpretation Service Tax was not applicable for transaction between two Government Departments viz. WRD and MSPGCL. Said interpretation of WRD was finally changed by the Service Tax Department which is the Government Instrumentality which ruled that Service Tax is applicable on lease rent invoice as per the provisions of Section 66 E (a) of the Finance Act 1994. (i.e. renting of immovable property).
- 12.3 Therefore, the Commission is inclined to accept the submission of MSPGCL and WRD that these claims fit within subclause 'c' of "Change in Law" definition under MYT Regulations, 2019.
- 12.4 It is also a fact that WRD contested the service tax claim raised by Tax Authorities. As per the Commissioner, Central Goods Service Tax & Central Excise (CGST&CX), Mumbai's Order dated 27 November 2017, the total liability of dues with penalty for FY 2009-10 to FY 2014-15 was as under:
- a) Principal amount: Rs. 208,78,71,800
 - b) Penalty amount: Rs. 173,01,90,704
 - c) Interest on Principal amount at appropriate rate: amount is not specified in the Order; however, liability of interest is stated.
 - d) Other penalties: Rs. 30,000
 - e) Total amount liability: Rs. 381,80,62,504 and interest amount.
- 12.5 Although, WRD initially filed appeal against above claim but finally decided to participate in amnesty scheme. The Commission notes that the final settlement under the amnesty (SVLDR) scheme was Rs. 130,46,45,783/-. Therefore, SVLDR Scheme has benefited in terms of following to the WRD:
- a) Waived off Penalty amount: Rs. 173,01,90,704
 - b) Total interest amount is waived off
 - c) Principal amount waived off: Rs.78,32,26,017
 - d) Total benefit in SVLDR: Rs. 251,34,16,718 and interest amount waived off
- 12.6 It is important to note that under amnesty scheme no penalty or interest has been levied and the original claim has been reduced by more than Rs 251 crore. Hence, the Commission allows Rs. 130.46 crore paid by WRD towards Service Tax liabilities for FY 2009-10 to FY 2014-15 as expenses to WRD recoverable from MSPGCL.
- 12.7 The Commission also notes that dispute relating to claim of the recovery of Service Tax for the period FY 2015-16 to FY 2017-18 is pending before Tax adjudicating Authorities. Whenever such claims are finalized, WRD can recover the same from MSPGCL. However, while doing so, WRD should not pass on any penalty or interest amount to MSPGCL.

13. Issue c: What would be the recovery mechanism for the amount allowed as a pass through?

13.1 It is an admitted fact that such claims were never part of the ARR and hence Tariff approved by the Commission. Therefore, MSPGCL and MSEDCL have requested that, if recovery of such expense is allowed to WRD, then Commission should also allow them to pass such expenses to end consumers.

13.2 Said amount of Rs. 130.46 crore is for the period of FY 2009-10 to FY 2014-15 i.e. for 6 years. Allowing recovery of such expenses immediately may cause adverse impact on end consumers. Therefore, to avoid such burden on end consumers, the Commission deems it fit to allow this amount as Change in Law and rules that the recovery of such expense to be included in its ARR during the upcoming Mid Term Review (MTR).

13.3 Accordingly, MSPGCL may claim the amount of Rs. 130.46 crore in its MTR Petition.

14. Hence, the following Order:

ORDER

- 1. The Case No. 168 of 2020 is allowed.**
- 2. The amount of Rs 130.46 Crores qualifies for compensation under Change in Law provisions.**
- 3. MSPGCL may claim the amount of Rs. 130.46 crore in its upcoming MTR Petition.**

**Sd/-
(Mukesh Khullar)
Member**

**Sd/-
(I. M. Bohari)
Member**


(Abhijit Deshpande)
Secretary


MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
॥ आदित्यं हृदयम् ॥