IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 5343 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI Sd/-
and
HONOURABLE DR.JUSTICE A. P. THAKER Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	Yes
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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TORRENT POWER LTD.
Versus
UNION OF INDIA

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Appearance:
MR SN SOPARKAR, SENIOR ADVOCATE with MR UCHIT N SHETH(7336) for the PETITIONER(s) No. 1
for the PETITIONER(s) No. 2
MR JAIMIN A GANDHI(8065) for the RESPONDENT(s) No. 3
MR ANKIT SHAH(6371) for the RESPONDENT(s) No. 1,2,4.

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE DR.JUSTICE A. P. THAKER

Date : 19/12/2018

ORAL JUDGMENT

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this petition under Article 226 of the Constitution of India, the petitioners seek the following substantive reliefs:-

"46. .....
A. This Hon'ble Court may be pleased to issue a writ striking down and declaring the clarification issued in para 4 (1) of the impugned Circular No.34/8/2018-GST dated 1.3.2018 (annexed at Annexure A) by the Government of India as ultra vires the provisions of the GST Acts as well as the notifications issued thereunder:

B. This Hon'ble Court may be pleased to declare that charges such as application fee, meter rent, testing fee, etc collected by the Petitioners towards activities directly and closely connected with the transmission or distribution for electricity are exempt from tax under Entry 25 of Notification No.12/2017 dated 28.6.2017;

C. In the alternative this Hon'ble Court may be pleased to declare that charges such an application fee, meter rent, testing fee, etc collected by the Petitioners are part of composite supply of which principal supply is the actual supply of electricity and therefore the entire composite supply is exempt from tax under Entry 25 of Notification No.12/2017 dated 28.6.2017;

D. Without prejudice to the above and in the alternative this Hon'ble Court may be pleased to declare that the clarification issued in para 4(1) of the impugned Circular No.34/8/2018-GST dated 1.3.2018 (annexed at Annexure A) by the Government of India would at the most be applicable prospectively and for the period prior to 1.3.2018 the learned Respondents will be bound by the previous circular dated 7.12.2010.

E. This Hon'ble Court may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ or order directing the learned Respondents to drop proceedings sought to be initiated on the basis of the impugned circular by issuing summons dated 28.3.2018 (annexed at Annexure L);"

2. The facts giving rise to the present petition are that the petitioner No.1 is a public limited company (hereinafter referred to as "the petitioner company") and the petitioner No.

2 is the executive director and authorized signatory of the first petitioner. The petitioner company is, *inter alia*, engaged in the business of generation, transmission and distribution of electricity in the State of Gujarat and is duly registered under the Goods and Service Tax Acts. The petitioner company has distribution licence in the cities of Ahmedabad, Surat, Gandhinagar and the Dahej SEZ. It also has a distribution franchisee for Bhivandi in the State of Maharashtra and for Agra in the State of Uttar Pradesh.

2.1 It is the case of the petitioners that the consumers, who are interested in availing services of the petitioner company, are required to apply for a connection from it. In terms of section 43 of the Electricity Act, 2003, (hereinafter referred to as “the Electricity Act”), every distribution licensee such as the petitioner company is mandatorily required to supply electricity to the owner or occupier of any premises within one month after the receipt of the application. The first proviso to section 43 of the Electricity Act further provides that where the supply of electricity requires extension of distribution mains or commissioning of new sub-stations, the distribution licensee shall supply electricity to such premises immediately after such extension or commissioning, or within such period as may be specified by the appropriate commission. At the time of making an application, the consumer is required to pay registration charges to the petitioners.

2.2 Section 43 (2) of the Electricity Act provides that it shall be the duty of the distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises of the consumer. The proviso thereto says that no

person shall be entitled to demand or continue to receive the supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission. The petitioners collect charges as well as deposit for extending the electricity connection line to the premises of the new consumer.

2.3 Once a line of connection is established, the petitioners start distribution of electricity to the consumer. The petitioners are required to charge price for distribution of electricity in accordance with tariffs as fixed by the appropriate commission from time to time and as per the conditions of the licence. Since the billing of such distribution would depend upon actual consumption of electricity, an electric meter is required to be placed at the premises of the customer. The petitioners collect monthly meter rent of such meter, in the bill for electricity consumption itself, as determined by the State Electricity Regulatory Commission.

2.4 Section 45 (3) of the Electricity Act specifically provides that charges for electricity may include charges for actual electricity supplied as well as rent or other charges in respect of any electric meter or electrical plant, provided by the distribution licensee. Apart from such rental or other charges in respect of electric meter, section 46 of the Electricity Act empowers the State Commission to authorize the distribution licensee to charge from a person, requiring supply of electricity, any expenses reasonably incurred in providing any electric line or electrical plant used for the purpose of such supply.

2.5 In exercise of such powers, the Gujarat Electricity Regulatory Commission has framed and notified the Gujarat Electricity Regulatory Commission (Licensee's Power to Recover Expenditure incurred in providing supply and other Miscellaneous Charges) Regulations, 2005 (hereinafter referred to as the "GERC Regulations"). Such regulations provide for the activity as well as quantum of charges that can be collected by the distribution licensee for such activity.

2.6 It is the case of the petitioners that the GERC Regulations empower the petitioners to recover the charges as well as fix the quantum charges for various kinds of activities, which are part of the distribution process such as registration, testing charges, disconnection charges etc. The meter rent is also stipulated in the GERC Regulations. The GERC has also framed an exhaustive electricity supply code, which enlists the obligations of the transmission and distribution companies, such as the petitioners. According to the petitioners, they are also entitled to recover some miscellaneous charges under such code. It is the case of the petitioners that, if at all there are any miscellaneous charges incurred by the petitioners during the course of transmission and distribution of electricity then the same are also recovered by the petitioners in accordance with GERC Regulations. Thus, all such activities of the petitioners in relation to transmission and distribution of electricity are governed by the provisions of the Electricity Act and the Regulations framed thereunder and, in fact, the petitioners are mandatorily required by law to provide all such services which are required for distribution of electricity.

2.7 It is the case of the petitioners that prior to the introduction of the negative list regime for service tax under the Finance Act, 1994, the petitioners as well as other transmission/distribution companies believed that since there is no specific clause in the charging provision of the Finance Act requiring payment of service tax, no service tax was required to be paid in respect of any amount collected from consumers relating to transmission and distribution of electricity. The Government of India issued Notification No. 11/2010-Service Tax on 27.2.2010, exempting taxable service provided to any person by any other person for transmission of electricity. Another Notification No. 32/2010-Service Tax was issued on 22.6.2010, exempting taxable service provided to any person by a distribution licensee/franchisee for distribution of electricity. In the meantime, the petitioners as well as other distribution/transmission companies received show cause notices proposing to impose tax under the Finance Act on various charges collected by such companies, in respect of the activities relating to transmission and distribution of electricity for the periods prior to the issuance of the exemption notifications dated 27.2.2010 and 22.6.2010. Representations came to be made to the Government for intervention since the entire sector of transmission/distribution companies *bona fide* believed that no taxes are required to be paid under the Finance Act on activities relating to transmission and distribution of electricity. Pursuant thereto, the Government of India issued trade notice on 20.7.2010 under section 11C of the Central Excise Act, 1944 read with section 83 of the Finance Act, whereby it was provided that service tax payable on the taxable services relating to transmission and distribution of electricity, which was not being levied in

accordance with the general trade practice, shall not be required to be paid for the period prior to issuance of exemption notifications dated 27.2.2010/22.6.2010.

2.8 A question arose as to whether the exemption for transmission and distribution of electricity would also include directly connected activities such as renting of meters. The Government of India issued circular dated 7.12.2010, wherein it is clarified that supply of electricity meters for hire to the consumers was an essential activity having direct and close nexus with the transmission and distribution of electricity and was, therefore, covered by the exemption for transmission and distribution of electricity.

2.9 On the basis of trade notice dated 20.7.2010, and the circular dated 7.12.2010, a show cause notice came to be issued to the petitioners proposing to impose service tax on different kinds of charges collected in connection with transmission and distribution of electricity, which came to be dropped by the adjudicating authority by observing that all such charges were in connection with transmission and distribution of electricity and therefore not taxable.

2.10 The negative list regime came to be introduced in the Finance Act, 1994 (hereinafter referred to as the “Finance Act”) with effect from 1.7.2012. Section 66D of the Finance Act provides for negative list of services, which would not be taxable under the Finance Act. Clause (k) of Section 66D of the Finance Act, which is relevant for the present purpose, reads as under:-

"(k) transmission or distribution of electricity by an electricity transmission or distribution utility:"

2.11 It is the case of the petitioners that service by way of transmission or distribution of electricity continued to be kept out of the tax net even post 1.7.2012, and, the petitioners, therefore, neither collected nor paid any tax under the Finance Act on charges collected in connection with transmission of electricity even post 1.7.2012.

2.12 With effect from 1.7.2017, the GST regime came to be introduced. Chapter-V of the Finance Act, which relates to levy of service tax was subsumed under the GST regime. The GST Act provided for levy of tax on goods and services. Section 11 of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as the "CGST Act") as well as the State Goods and Services Tax Acts (hereinafter referred to as the "SGST Acts") conferred power on the Government to grant exemption. In exercise of such powers, the Central Government has issued Notification No. 12/2017 dated 28.6.2017 providing for list of exempted services. Identical notifications have been issued under the State Goods and Services Tax Act by the respective State Governments. By virtue of Entry 25 of Notification No. 12/2017, transmission or distribution of electricity by an electricity transmission or distribution utility is taxed at nil rate. It is the case of the petitioners that as such the legal position as prevailing under the Finance Act was continued even under the Goods and Services Tax Acts and tax leviable on service of transmission or distribution of electricity by an electricity transmission or distribution utility was exempted from tax under the GST Acts. The petitioners, therefore,

neither collected nor paid tax under the GST Acts with effect from 1.7.2017 on the charges collected for activities directly connected with transmission and distribution of electricity in accordance with the provisions of the Electricity Act and the GERC Regulations. Thereafter, the Government of India has issued the impugned circular dated 1.3.2018, clarifying that the service by way of transmission or distribution by an electricity transmission or distribution utility is exempt from GST under Notification No. 12/2017-CT(R), Sl. No. 25. The other services such as (i) application fee for releasing connection of electricity, (ii) rental charges against metering equipment; (iii) testing fees for meters/transformers, capacitors, etc.; (iv) labour charges from customers for shifting of meters or shifting of service lines; and (v) charges for duplicate bill; provided by the DISCOMS to consumers are taxable. Thus, the new clarification seeks to make distinction between the charges collected for consumption of electricity and other charges collected towards activities connected with the transmission and distribution of electricity. It is case of the petitioners that by the impugned circulars, activities directly and closely connected with the transmission and distribution of electricity, have been declared to be taxable.

2.13 Subsequently, the Directorate General of Goods and Service Tax Intelligence, that is, the fourth respondent herein, issued summons to the petitioners on 28.3.2018 requiring them to submit details relating to charges as mentioned in the impugned circular right from the year 2012-13. Tax is proposed to be levied under the Finance Act as well as under the GST Acts on such charges. Being aggrieved, the petitioners have filed the present petition seeking the reliefs, noted herein

above.

3. Mr. S. N. Soparkar, Senior Advocate, learned counsel with Mr. Uchit Sheth, learned advocate for the petitioners, submitted that the impugned circular issued by the Government of India clarifying that the charges recovered for the activities directly connected with the distribution and transmission of electricity such as application fee, meter rent, testing fee, labour charges for shifting meters and shifting of service line, etc. (hereinafter referred to as “related services”) are taxable and not covered by the exemption notification, is contrary to the express words as well as intent of the entry providing for exemption under the GST Acts as well as contrary to the statutory provisions of the GST Acts and the rules framed thereunder. It was submitted that entry 25 of the exemption notification exempts from tax, the service of transmission or distribution of electricity. Such notification would cover all activities that are directly and closely connected to the distribution or transmission of electricity. It was pointed out that, in fact, the charges such as meter rent and other similar charges are specifically included in the charges for electricity as per the provisions of the Electricity Act, and that even other miscellaneous charges relating to the activity of transmission or distribution are required to be collected by the petitioners in accordance with the provisions of the Electricity Act and the GERC Regulations. Such activities are mandatorily required to be carried out by the petitioners for the purpose of supply and distribution of electricity and, in fact, it is not even possible to supply electricity without undertaking such activities. It was contended that, all charges, such as application fee, meter rent, testing fee etc. are

towards the service of transmission and distribution of electricity and, therefore, the clarification to the effect that they would not be covered by entry relating to exemption of transmission or distribution of electricity is contrary to express words as well as intent of the exemption notification and, therefore, bad and illegal.

3.1 It was contended that all the charges such as application fee, meter rent, testing fee etc. are towards transmission and distribution of electricity and, therefore, exempt by virtue of the inclusion of transmission and distribution of electricity in the negative list and by virtue of exemption notifications issued under the CGST Act, and, therefore, all such services are exempt from payment of service tax.

3.2 Alternatively, it has been contended that if the services relating to transmission and distribution of electricity are *per se* not covered by the exemption notifications, then such services would form part of composite supply of services of the petitioners involving more than one supply as contemplated under section 2 (30) of the CGST/SGST Acts and, would therefore by virtue of provisions of Section 8 (a) of the CGST/SGST Acts have to be treated as a supply of the principal supply, namely, transmission and distribution of electricity and taxed accordingly.

3.3 Insofar as the period of the negative list regime is concerned, it has been contended that if services relating to transmission and distribution of electricity are *per se* not covered by section 66D (k) of the Finance Act, the same would fall within the ambit of bundled services as contemplated

under sub-section (3) of section 66-F of that Act. It was submitted that if these services do not form part of the services of transmission and distribution then they fall within the ambit of section 66F (3), which provides for taxability of bundled service. It was submitted that, wherein an element of provision of one service is combined with an element or elements of provision of any other service or services, such services are considered to be a bundled service, and by virtue of clause (a) of sub-section (3) of section 66F, if various elements of such service are naturally bundled in the ordinary course of business, it is required to be treated as provision of the single service, which gives such bundle its essential character. It was submitted that, in this case, the ancillary/incidental services are elements of provision of services of transmission and distribution of electricity and, hence, they have to be treated as provision of such service, which gives the bundle its essential character.

3.4 It was submitted that the related services are part of main service of transmission and distribution and cannot be segregated for the purpose of GST. It was submitted that the fact that these services are being regulated by the GERC shows that they are composite services, and hence, exemption would also apply to such services.

3.5 Referring to the impugned summons dated 28.3.2018, it was submitted that the proposed period is from financial year 2012-2013 to financial year 2017-2018. It was submitted that the period prior to 1.7.2012 relates to the pre-negative list regime; the period from 1.7.2012 to 30.6.2017 relates to the negative list regime; and the period from 1.7.2017 onwards

relates to the GST regime.

3.6 Insofar as the first period is concerned, it was submitted that *vide* exemption notification dated 27.2.2010 and 22.6.2010, transmission as well as distribution of electricity respectively came to be exempted from the whole of the service tax leviable under section 66 of the Finance Act. It was submitted that these services, namely, the related services were also exempt by virtue of the exemption notifications issued in the past. It was submitted that if the respondents intend to revoke such exemption, it has to be done prospectively by a notification and not by a clarificatory circular. It was submitted that by virtue of section 173 read with section 174 (2) (c) of the CGST Act, all privileges and rights under that Act would continue and, therefore, what was covered by a notification cannot be withdrawn by a circular and, in any case, it cannot be done retrospectively. In support of his submission, learned counsel for the petitioners placed reliance upon the decision of the Bombay High Court in the case of ***Unit Trust of India v. P. K. Unny,*** *2001 (249) ITR 612*.

3.7 It was further submitted that principle of promissory estoppel would also apply in this case, inasmuch as the respondents had considered these very services to be covered by the exemption notifications, and hence, they cannot now be permitted to take a contrary stand to the prejudice of the petitioners. In support of such submission, learned counsel placed reliance upon the decision of the Supreme Court in the case of ***Union of India (UOI) and others v. Godfrey Philips India Ltd.,*** *AIR 1986 SC 806,* for the proposition that

the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of promissory estoppel.

3.8 Next, it was contended that insofar as the second phase from 1.7.2012 to 30.6.2017, namely, the negative list regime is concerned, by virtue of clause (k) of section 66D of the Finance Act, transmission or distribution of electricity by an electricity transmission or distribution utility came to be included in the negative list and, therefore, was not exigible to tax. It was submitted that since for pre-negative list period, the related services were considered to be part of the service of transmission and distribution, this position continued even during the negative list regime and keeping in view the same, the petitioners neither collected nor paid the tax under the Finance Act on charges collected in this regard nor did the respondents raised any such demand.

3.9 It was submitted that assuming for the sake of argument that related services are not covered by the service of transmission and distribution of electricity, even then, in view of the provisions of sub-section (3) of section 66F of the Finance Act, these services which are naturally bundled in the ordinary course of business with the services of transmission and distribution of electricity would be treated as a provision of the single service, which gives the bundle its essential character, namely, transmission and distribution of electricity. It was submitted that since all these services are bundled together in the ordinary course of business, they would,

therefore, continue to be exempted even under the negative list regime. On the question as to whether the services are naturally bundled, the attention of the Court was invited to the GERC Notification No. 9/2005 to point out that the charges are required to be levied for all these services are duly fixed by GERC. It was submitted that whether the services are bundled in the natural course, the test is direct and close nexus. It was submitted that in this case, under section 43 of the Electricity Act, these services are required to be mandatorily provided to the consumers, therefore, they are all activities which are directly connected with distribution and transmission of electricity and are covered by the exemption without any support of any notification or circular. It was contended that all the services, which are now sought to be taxed, are services which the petitioner is required to mandatorily provide at the rates which are prescribed by the GERC, a statutory authority constituted under the provisions of the Electricity Act and all these services are closely and directly connected with the transmission and distribution of electricity and, therefore, would clearly fall within the ambit of “bundled services” as contemplated under sub-section (3) of section 66F of the Finance Act and would, therefore, would be taxable in terms of the main service, namely, transmission and distribution of electricity.

3.10 Insofar as the third phase is concerned, it was submitted that this phase relates to the post-negative list regime, namely, the Goods and Services Tax Act regime. It was pointed out that by virtue of exemption notifications issued under section 11 of the CGST Act, 2017, transmission and distribution of electricity has been exempted from payment of service tax.

It was pointed out that, therefore, the related services would stand included in the service of transmission and distribution of electricity and, therefore, would be exempt from service tax. It was submitted, assuming for the sake of argument, that these services do not stand covered by the earlier exemption notification, even then section 8 of the CGST Act is parallel to section 66F (3) (a) and (b) of the Finance Act; inasmuch as the underlying theme is the same, though the language is different. It was pointed out that section 8 of the CGST Act provides that the tax liability on a composite or a mixed supply shall be determined in the manner provided under clause (a) and (b) thereof. Clause (a) of section 8 of the CGST Act provides that a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply. Referring to section 2 (30) of that Act, which defines composite supply, it was pointed out that the same comprises of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply. It was submitted that since all these services are naturally bundled along with the service of transmission and distribution of electricity, the same would clearly fall within the ambit of “composite supply” as envisaged under section 2 (30) of the Act.

3.11 Reference was made to the definition of “principal supply” as defined under section 2 (90) of the Act, which provides that “principal supply”means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part

of that composite supply is ancillary. It was submitted that, therefore, the distribution and transmission of electricity is the principal supply which constitutes the predominant element of the composite supply and the related/ancillary services form part of that composite supply. It was submitted that, therefore, even by virtue of the provisions of section 8 (a) of the CGST Act, the related/ancillary services to transmission and distribution of electricity would be covered by the exemption notification.

3.12 It was argued that for the purpose of determining the liability on a composite supply section 8(a) of the CGST Act requires there should be a principal supply; it prescribes a rate clause; but does not fix the rate but merely categorises the rate. The provision does not require that the principal supply should attract levy of tax. Referring to section 2(108) of the CGST Act, which defines “taxable supply”to mean a supply of goods or services or both which is leviable to tax under the Act, it was submitted that goods or services leviable to tax would include goods or services which are exempt.

3.13 It was submitted that the impugned circular which runs contrary to the parent Act is, therefore, bad in law inasmuch as it seeks to hold an element of composite supply as taxable though the principal supply is exempt. It was submitted that by virtue of notification issued under sub-section (1) of section 11 of the CGST Act, transmission and distribution of electricity by an electricity transmission or distribution utility is exempt. It was urged that when the notification under the parent Act exempts the principal supply, a circular cannot impinge upon the notification and seek to hold the composite supply taxable.

It was submitted that the circular cannot run contrary to the notification, and hence, the impugned clarification deserves to be set aside to the extent the same clarifies in respect of the services in question. It was submitted that once the impugned circular is set aside, the rigours of the summons, whereby the petitioner is called upon to furnish details with regard to the services in question would also be required to be set aside.

3.14 It was further contended that, in any case, the impugned circular cannot be given retrospective effect as is sought to be done in the present case. In support of such submission, learned counsel placed reliance upon the decision of the Supreme Court in the case of ***Suchitra Components Limited v. Commissioner of Central Excise,*** *(2009) 20 VST 726 (SC),* for the proposition that a beneficial circular has to be applied retrospectively, while an oppressive circular is to be applied prospectively. Thus, when the circular is against the assessee, they have a right to claim enforcement of the same prospectively. Reliance was placed on the decision of the Supreme Court in the case of ***Commissioner of Central Excise, Bangalore v. Mysore Electricals Industries Ltd.,*** *(2006) 204 ELT 517,* for a similar proposition of law.

3.15 It was, accordingly, urged that the impugned circular is required to be struck down as being *ultra vires* the provisions of the GST Acts and the reliefs, as prayed for in the present petition, deserve to be granted.

4. Vehemently opposing the petition, Mr. Ankit Shah, learned Senior Standing Counsel for the respondents No. 1, 2 and 4 raised a preliminary objection to the maintainability of

the petition on the ground that the petition is directed against a summons issued by the respondent authorities. Reliance was placed upon the decision of the Madras High Court in the case of ***Media Graphics v. Commissioner of Customs, Chennai,*** *2018 (359) ELT 172 (Mad.),* wherein the court had declined the prayer to set aside the summons. Reliance was also placed upon the decision of the Madras High Court in the case of ***K. Elumalai v. Commissioner of Customs, Chennai,*** *2017 (355) ELT 241 (Madras),* for the proposition that a writ petition challenging a summons is not maintainable. It was submitted that the respondent authorities have powers to issue summons and that the summons is, therefore, not illegal and, consequently, cannot be subject matter of challenge in a writ petition.

4.1 On the merits of the case, it was submitted that the exemption notifications, exempting the services in question from liability of service tax, were issued prior to the coming into effect of the negative list regime inasmuch as all these circulars and notifications are of the year 2010. It was submitted that, after the negative list regime came into force, except for the services mentioned under section 66D, all the services became taxable. According to the learned counsel, clause (k) of section 66D of the Finance Act exempts only transmission and distribution of the electricity and nothing else. It was submitted that, under section 66B of the Finance Act, services in the negative list are not chargeable to tax and that, sub-section (3) of section 66F of the Finance Act, operates only qua services which are chargeable to tax under section 66B, and hence, sub-section (3) of section 66 would not apply to services falling in the negative list and, therefore,

benefit of bundling under sub-section (3) of section 66F of the Finance Act would not be available in this case. It was submitted that the related/ancillary services are not included in the negative list under section 66D of the Finance Act, and hence, these services cannot be bundled with goods falling under section 66D. It was submitted that the previous notifications had been issued prior to the year 2012 and came to be rescinded by the notification dated 20.6.2012 and hence, the clarificatory circular dated 7.12.2010, which had been issued in the context of the earlier exemption notifications would not survive.

4.2 It was submitted that insofar as the GST regime is concerned, these services are not exempted by the notifications issued under section 11 of the GST Act, and hence, when on one service tax is leviable and the other service is exempted, section 8 of the CGST Act would not apply. It was contended that related/ancillary services are not exempted by virtue of any notification under section 11 of the CGST Act and that the impugned circular merely clarifies that these services are not exempted.

4.3 The learned senior standing counsel further placed reliance upon sub-section (22) of section 65B of the Finance Act, which defines “declared service” to mean any activity carried out by any person for another person for consideration and declared as such under section 66E. It was submitted that the services in question/related services would fall within the ambit of clause (e) of section 66E of the Finance Act. Reference was made to section 66E of the Finance Act which bears the heading “Declared services”and more particularly

clause (e) thereof, which is extracted herein below:

> *"66-E. The following shall constitute declared services, namely-*
> *(a) to (d) xxxx*
> *(e) agreeing to the obligation to refrain from an act, or to tolerate an act or situation, or to do an act;"*

However, on perusal of the averments made in the affidavit-in-reply, it appears that reference has been made to this provision in the context of the services provided to MEGA, in respect of which, the learned counsel for the petitioner has submitted that they would appear before the respondent authorities and respond to the summons. Therefore, it is not necessary to enter into the merits of this submission.

4.4 The learned Senior Standing Counsel submitted that the related services are not included in the negative list and cannot be considered as services bundled with the services of transmission and distribution of electricity and furthermore, would not fall within the ambit of composite services under section 8 of the CGST/SGST Acts by considering the services of transmission and distribution of electricity as principal supply and that the petition being devoid of merits, be dismissed and the petitioners be directed to respond to the impugned summons.

5. Mr. Jaimin Gandhi, learned standing counsel for the respondent No. 3, submitted that the only challenge in the petition is to the retrospective applicability of the circular dated 1.3.2018. It was submitted that since retrospective applicability can be interpreted even by the appellate authority, the petition deserves to be dismissed on the ground

of availability of an efficacious alternative remedy. It was submitted that the circular dated 7th December, 2010 issued in the context of exemption notifications No.11/2010-ST dated 27.02.2010 and No.32/2010-ST dated 22.06.2010 pertains only to charges for installation of electricity meters and hire charges but did not include the other related/incidental services, which are in dispute in this petition. It was submitted that with effect from 1st July 2012, the negative list came to be introduced and the service tax net was widened and the services, which were earlier not included, were brought within the tax net and consequently all services other than those placed in the negative list were exigible to tax including services which may be related/ancillary to services included in the negative list. It was submitted that by Notification No. 34/12-Service Tax dated 20.6.2012, the Central Government has rescinded the notifications dated 27.2.2010 and 22.6.2010, and hence, the circular dated 7.12.2010, which was merely a clarifying circular, stands automatically rescinded.

5.1 Reference was made to sub-section (1) of section 66F of the Finance Act, as amended in 2012, which provides that unless otherwise specified, reference to a service (hereinafter referred to as main service) shall not include reference to a service, which is used for providing main service. It was submitted that, therefore, the intention of the legislature is clear, viz., that it intended to expand the tax net which resulted in the introduction of the negative list regime. It was submitted that section 66F clarifies the intention of widening the tax net and, accordingly, with effect from 1.7.2012, the Legislature consciously discontinued the additional exemption provided to related/ancillary services by the circular dated

7.12.2010.

5.2 It was submitted that the exemption notifications issued under section 11 of the CGST/SGST Acts exempt the services of transmission and distribution of electricity only, and, hence, the related/ancillary services would not fall within the purview of such notifications. It was submitted that section 66F of the Finance Act cannot be read to expand the exemption provision and that merely because some services may be naturally bundled with exempted services, would not make such services exempt from liability to tax. It was submitted that while the purpose of the Electricity Act is to govern the supply and distribution of a commodity, the taxability would be governed by the taxing statute; therefore, merely because supply and distribution is governed by a statute, the same would not expand the scope of the exemption notification.

5.3 Next, it was submitted that it is settled law that exemption provisions are required to be interpreted strictly and in case of doubt the benefit goes to the State. In support of such submission, the learned counsel relied upon the decision of the Supreme Court in the case of ***Commissioner of Customs v. Dilipkumar and Company,*** *(2018) 95 taxman.com 327 (SC),* for the proposition that an exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause of the exemption notification. Reliance was also placed upon the decision of the Supreme Court in the case of ***Novopan India Limited v. Collector of Central Excise and Customs, Hyderabad,*** *1994 (Suppl.3) SCC 606,* for a similar proposition

of law. It was submitted that the exemption notifications exempt the services of transmission and distribution of electricity alone. The said notifications are to be construed strictly, and hence, related services which have not been specifically included within the purview of such notifications cannot be said to have been included therein.

5.4 Insofar as the retrospective applicability of the impugned circular is concerned, it was submitted that the circular simply clarifies the position as existing as well as the position, which existed earlier, and thus does not amount to levy of fresh tax with retrospective effect and is, therefore, valid. In support of such submission, learned standing counsel placed reliance on the decision of this court in the case of ***Katira Construction Ltd. v. Union of India,*** *(2013) 352 ITR 513 (Gujarat),* for the proposition that an explanation which simply clarifies the position which existed earlier does not amount to levy of fresh tax with retrospective effect and so it is valid. Reliance was placed upon the decision of the Supreme Court in the case of ***Commissioner of Income Tax, Ahmedabad, v. Gold Coin Health Food Pvt. Ltd.,*** *(2008) 304 ITR 308 (SC),* for the proposition that the declaration in the statute that law is clarificatory or not is not material. The court has to examine the scheme of the statute prior to the amendment and subsequent to the amendment to determine whether the amendment is clarificatory or substantive. It was, accordingly, urged that the exemption notification should be strictly interpreted and, in case of ambiguity, the benefit of doubt should go to the revenue.

5.5 The learned standing counsel further contended that even after the introduction of the GST Act regime, only the service of transmission and distribution of electricity are exempted with effect from 1.7.2017. It was submitted that no exemption has been granted for any allied activity including the service of renting meters. It was submitted that sub-section (30) of section 2 read with section 8 of the CGST Act deals with "composite services", which are not exemption provisions and cannot be interpreted so as to extend exemption to non-exempt service. Further, as per the definition of "composite supply", its constituent supplies should be so integrated with each other that one is not supplied in the ordinary course of business without or independent of the other. It was contended that the supply of the subject services may not necessarily be supplied so as to provide services of transmission and distribution of electricity. It was submitted that similar provisions were part of the Finance Act, 1994 and, hence, it is not a new concept under the CGST Act. Reliance was placed upon a decision of the Authority for Advance Rulings, Rajasthan in ***TP Ajmer Distribution Ltd., (****2018) 95 taxmann.com 61 (AAR-Rajasthan)*, to submit that the said authority has held that various services including meter renting services are chargeable under GST as per the impugned circular dated 1.3.2018.

5.6 It was, accordingly, urged that the petitioner is not entitled to exemption from payment of service tax in respect of the related/ancillary services and that the petition being devoid of merits deserves to be dismissed.

6. In rejoinder, Mr. S. N. Soparkar, learned counsel for the petitioner, submitted that the clarification issued vide circular dated 7.12.2010 was never rescinded. It was submitted that the exemption notifications were withdrawn as there was a shift from specific exemption to the negative list regime and now that such services were to be notified in the negative list, there was no requirement for any exemption, inasmuch as exemption is required provided the service is taxable. It was submitted that by virtue of section 8 of the CGST Act, if the principal supply is not taxable, the related/ancillary service will also be exempted. It was submitted that by virtue of legislative provision, one cannot look at individual items at all. If they have to be looked into, then under section 66F (3) of the Finance Act and section 8 of the CGST Act, the tax is at the rate of principal supply. It was submitted that a circular cannot go contrary to the exemption notification read with section 8 of the CGST Act. It was submitted even otherwise, by virtue of section 8 of the CGST Act and section 66F (3) of the Finance Act, the transaction is not required to be taxed. It was, accordingly, urged that the petition requires to be allowed in terms of the reliefs prayed for.

7. In the backdrop of the facts and contentions noted hereinabove, the first question that arises for consideration is as regards the maintainability of the petitioner. A preliminary contention has been raised that the petition is not maintainable as the same is directed against a summons issued by the respondent authorities. In this regard, a perusal of the impugned summons dated 28. 3.2018 clearly reveals that the same is based on the impugned circular dated 1.3.2018, inasmuch as the petitioner has been called upon to

produce (i) copy of balance sheets, Form 26AS and Profit and Loss Accounts for financial years 2012-13 to 2016-17; bifurcation of income head along with ledger account of each income head, namely, (i) application fee for releasing connection of electricity; (ii) rental charges against metering equipment; (iii) testing fee for meters/transformers, capacitors etc; (iv) labour charges from customers for shifting of meters or shifting of service lines; (v) charges for duplicate bill; [(vi) income from shifting of HT Lines received from MEGA. This part is not subject matter of challenge in the petition] (vii) revenue from power supply/transmission income for the financial year 2012-13 to the financial year 2017-18, which is clearly in terms of the impugned circular dated 1.3.2018, item-4 whereof clarifies that services by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST under Notification No.12/17-CT(R) No.25; the other services such as (i) application fee for releasing connection of electricity; (ii) rental charges against metering equipment; (iii) testing fee for meters/ transformers, capacitors etc; (iv) labour charges from customers for shifting of meters or shifting of service line; (v) charges for duplicate bill provided by DISCOMS to consumers are taxable. Thus, it is crystal clear, that the impugned summons, except to the extent the same relates to services provided to MEGA, has been issued on the basis of the impugned circular. It appears that the respondents for the entire duration of the negative list regime seem to have proceeded on the basis that these services stand included in the transmission and distribution of electricity and, therefore, have not raised any demand till date. However, now, taking shelter behind the impugned circular, the impugned summons has been issued seeking documents/details in connection with

services provided right from financial year 2012-13 to financial year 2017-18. In the opinion of this court, in view of the fact that the impugned summons is based upon the clarificatory circular, which is subject matter of challenge in the present petition, the contention that the petition challenging the summons is not maintainable does not merit acceptance, inasmuch as, it is not the summons per se which is subject matter of challenge, but the basis thereof, viz. the clarificatory circular dated 1st March, 2018 which is also subject matter of challenge, and the challenge to the impugned summons is only an ancillary relief sought in connection therewith. Besides, the clarificatory circular cannot be challenged before the statutory authorities who are bound by the same, and can be challenged only by way of a writ petition under article 226 of the Constitution of India.

8. Adverting to the merits of the case, from the affidavit-in-reply filed on behalf of the respondents, it is evident that it is in two parts; the first part is with respect to the taxability of the service provided to M/s. Metro Link Express for Gandhinagar and Ahmedabad (MEGA), which according to the respondents is a declared service falling within the ambit of clause (e) of section 66E of the Finance Act; the second part is with regard to the related/ancillary services of transmission and distribution of electricity, which, according to the petitioners, were exempted by virtue of notifications dated 27.2.2010 and 22.6.2010. It is clear that insofar as the taxability of the services provided to MEGA is concerned, this court is not required to enter into the merits thereof, as the learned counsel for the petitioners has submitted that to that extent, the petitioners shall respond to the summons.

9. As noticed earlier, the petitioners have filed the present petition, calling in question the summons dated 28.3.2018 issued by the respondent calling upon the petitioners to give evidence or make statement and to produce the documents and things mentioned in the schedule thereto. A perusal of the impugned summons reveals that the same relates to three phases; (i) prior to 1st July 2012, namely, the pre-negative list regime; (ii) from 1st July 2012 to 30th June 2017 that is negative list regime; and (iii) from 1.7.2017 onwards, namely, the CGST/SGST regime.

10. Insofar as the first phase is concerned, the respondents do not dispute that the related/ancillary services to transmission and distribution of electricity are exempt from payment of service tax. The dispute, therefore, relates to the period of the negative list regime and the CGST/SGST regime.

11. Insofar as the second phase, namely, the negative list regime is concerned, with effect from 1.7.2012, section 65B of the Finance Act, 1994 came to be amended and service tax became leviable on all services, other than those services specified in the negative list. Admittedly, transmission and distribution of electricity by an electricity transmission or distribution utility, finds place in the negative list and, is therefore, not exigible to service tax.

12. The first question that arises for consideration is whether services relating to transmission and distribution of electricity fall within the ambit of clause (k) of section 66D of the Finance Act and, are therefore, exempt. In this regard, it may be noted that prior to the coming into force of the negative list regime,

goods and services were exempted by virtue of notifications issued in exercise of powers under sub-section (1) of section 93 of the Finance Act. By virtue of Notification No. 11/2010 dated 27.2.2010, the Central Government exempted transmission of electricity from the whole of service tax leviable thereon under section 66 of the Finance Act; and by virtue of Notification No.32/2010-Service Tax dated 22.6.2010, distribution of electricity came to be exempted from the whole of service tax leviable thereon under section 66 of the Finance Act. Thus, what was exempt under those provisions was transmission and distribution of electricity, despite which, during the pre-negative list regime, the respondents have considered services related to transmission and distribution of electricity as exempted from service tax by virtue of those notifications. Insofar as electricity meters are concerned, *vide* circular No.131/13/2010-ST dated 7.12.2010, it was clarified that supply of electricity meters for hire to consumers being an essential activity, having direct and close nexus with transmission and distribution of electricity, the same is covered by the exemption for transmission and distribution of electricity extended under relevant notifications.

13. Thus, the reason for saying that supply of electricity meters for hire to consumers is covered by the exemption notification is that such service is an essential activity having direct and close nexus with transmission and distribution of electricity. This circular only provides an interpretation of when a service would stand included in another service, namely, when such service is an essential activity having direct and close nexus with the exempted activity. Therefore, the fact that the exemption notifications came to be rescinded would

have no bearing inasmuch as the circular only clarifies what according to the Government of India would stand included in another service. Such interpretation would not change merely because such exemption is now granted under some other provision.

14. It may be noted that insofar as the exemptions prior to the negative list regime as well as post the negative list regime are concerned, it is the transmission and distribution of electricity that has been exempted by virtue of notifications. During the negative list regime, transmission and distribution of electricity has been placed in the negative list. Therefore, in all the three phases, what was exempted was “transmission and distribution of electricity”. However, while for the pre-negative list phase, the respondents considered the services related to transmission and distribution of electricity as exempt under the exemption notifications, for the negative list regime and the GST regime, they seek to exclude such services from the ambit of transmission and distribution of electricity. From the affidavits-in-reply filed on behalf of the respondents, there is nothing to show as to how the very services, which stood included within the ambit of transmission and distribution of electricity now stand excluded. The sole refrain of the respondents is that in view of the fact that the exemption notification stands rescinded, the clarification also stands rescinded. What is lost sight of is that the clarification was only in respect of electric meters, whereas all related services were included within the ambit of transmission and distribution of electricity and given the benefit of the exemption notifications. Moreover, the clarificatory circular merely clarifies the stand of the Government as regards what

would stand included within the meaning of “transmission and distribution services” namely, essential activities having direct and close nexus with the transmission and distribution of electricity. The respondents having themselves considered the services in question as being covered by the exemption for transmission and distribution of electricity as such services were essential activities having a direct and close nexus cannot be now permitted to take a U-turn and seek to exclude such services without pointing out any specific change in the nature of the exemptions, except that they are provided under different statutory provisions. In the opinion of this court, the meaning of “transmission and distribution of electricity” does not change either for the negative list regime or the GST regime. If that be so, the services which stood included within the ambit of transmission and distribution of electricity during the pre-negative list regime cannot now be sought be excluded by merely issuing a clarificatory circular, that too, with retrospective effect. By the clarificatory circular, the respondents seek to give a different interpretation of the very same services as against the clarification issued for the pre-negative list regime.

15. Thus, from the very manner in which the respondents have treated the services related to transmission and distribution of electricity during the pre-negative list regime, such services would stand covered by the exemption granted to transmission and distribution of electricity by virtue of inclusion of such services in the list of negative services under section 66D (k) of the Finance Act as well as by virtue of exemption notification issued under the CGST Act.

16. Examining the issue from the alternative argument advanced on behalf of the petitioners, if related services are *per se* not covered within the ambit of transmission and distribution of electricity, the question that next arises for consideration is whether such services would fall within the ambit of bundled services as contemplated under section 66F (3) of the Finance Act and within the ambit of "composite service" as defined under section 2 (30) of the CGST/SGST Acts, and, therefore, liable to be taxed at the rate of the principal supply. Another question is whether section 66F (3) of the Finance Act would cover cases where the single service which gives such bundle its essential character is placed in the negative list and section 8 of CGST/SGST Acts would cover the cases of composite supply where exemption from service tax has been granted in respect of the principal supply.

17. Section 66F of the Finance Act lays down the principles of interpretation of specified descriptions of services or bundled services and reads thus:-

> *"66F. Principles of interpretation of specified descriptions of services or bundled services - (1) Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service.*
>
> *Illustration. - The services by the Reserve Bank of India, being the main service within the meaning of clause (b) of Section 66-D, does not include any agency service provided or agreed to be provided by any bank to the Reserved Bank of India. Such agency service, being input service, used by the Reserve Bank of India for providing to main service, for which the consideration by way of fee or commission or any other amount is received by the agent bank, does not get excluded from the levy of service tax by virtue of inclusion of the main service in*

clause (b) of the negative list in Section 66-D and hence, such service is leviable to service tax.

(2) Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

(3) Subject to the provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, namely:–

(a) if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character;

(b) if various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which results in highest liability of service tax.

Explanation.- For the purposes of sub-section (3), the expression "bundled service" means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services."

18. Insofar as sub-section (1) of section 66F is concerned, from the illustration provided thereunder, it is evident that while service by the Reserve Bank of India finds place in the negative list, by virtue of the illustration to sub-section (1) of section 66F, it is provided that any agency service provided by any bank to the Reserve Bank of India would not stand included in the main service, as such agency service is used by the Reserve Bank of India by way of input service for providing main service and in respect of such service the concerned bank receives consideration and would not get excluded from the levy of service tax by inclusion of the main service in the negative list. Thus, in terms of the illustration, an input service

would not be exempt from the levy of service tax merely because the main service is exempt. According to the respondents, this case at best would fall under sub-section (1) of section 66F of the Finance Act and would not be exempted from levy of service tax. It has also been contended that as services in the negative list are not chargeable to tax, section 66F would not apply to services falling in the negative list and, consequently, the benefit of bundling under section 66F (3) would not be available.

19. Sub-section (3) of section 66F of the Finance Act provides for the manner in which a bundled service is to be determined. Clause (a) thereof, which is relevant for the present purpose provides that if various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character. The explanation thereof defines “bundled service” to mean a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.

20. The facts of this case are required to be examined in the light of the above statutory provisions. In this case, we are concerned with transmission and distribution of electricity being the main services and application fee for releasing the connection for electricity; rental charges against metering equipment; testing fee for meters/transformers, capacitors etc.; labour charges from customers for shifting of meters or shifting of service lines; charges for duplicate bills provided by DISCOMS to consumers being related services. The question is

whether an element of provision of these services is combined with an element or elements of provision of the main service of transmission and distribution of electricity. As noticed earlier, the respondents have themselves treated such related/ancillary services as part of the main service of transmission and distribution of electricity for the pre-negative list regime. Apart, therefrom, considering this issue independently, reference may be made to certain provisions of the Electricity Act. Sections 43 and 45 of the Electricity Act, which are relevant for the present purpose, read as under:-

> *"**43. Duty to supply on request**: --- (1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:*
>
> *Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission:*
>
> *Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.*
>
> *Explanation.- For the purposes of this sub-section, "application" means the application complete in all respects in the appropriate form, as required by the distribution licensee, along with documents showing payment of necessary charges and other compliances.*
>
> *(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section*

(1):

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.

***45. Power to recover charges**: --- (1) Subject to the provisions of this section, the prices to be charged by a distribution licensee for the supply of electricity by him in pursuance of section 43 shall be in accordance with such tariffs fixed from time to time and conditions of his licence.*

(2) The charges for electricity supplied by a distribution licensee shall be -

(a) fixed in accordance with the methods and the principles as may be specified by the concerned State Commission;
(b) published in such manner so as to give adequate publicity for such charges and prices.

(3) The charges for electricity supplied by a distribution licensee may include –

(a) a fixed charge in addition to the charge for the actual electricity supplied;
(b) a rent or other charges in respect of any electric meter or electrical plant provided by the distribution licensee.

(4) Subject to the provisions of section 62, in fixing charges under this section a distribution licensee shall not show undue preference to any person or class of persons or discrimination against any person or class of persons.

(5) The charges fixed by the distribution licensee shall be in accordance with the provisions of this Act and the regulations made in this behalf by the concerned State

Commission."

21. On a plain reading of section 43 of the Electricity Act, it is evident that a licensee, on an application by the owner or occupier of any premises, is required to supply electricity to such premises. For the purpose of supplying electricity, it is the duty of the distribution licensee to provide electric plant or electric line for giving electric supply to the premises of the consumer. In case the distribution licensee fails to supply the electricity, it is liable to penalty under sub-section (3) of section 43. Thus, a statutory duty has been cast upon the licensee to provide electric plant or electric line for giving electric supply to the premises of the applicant. Electric line has been defined under sub-section (20) of section 2 of the Electricity Act to mean any line which is used for carrying electricity for any purpose and includes (a) any support for any such line, that is to say, any structure, tower, pole or other thing in, on, by or from which any such line is, or may be, supported, carried or suspended; and (b) any apparatus connected to any such line for the purpose of carrying electricity. Electric plant has been defined under sub-section (22) of section 2 of the Electricity Act to mean any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity but does not include - (a) an electric line; or (b) a meter used for ascertaining the quantity of electricity supplied to any premises; or (c) an electrical equipment, apparatus or appliance under the control of a consumer.

22. Thus, any line which is used for carrying electricity for any purpose as well as any apparatus connected to any such line for the purpose of carrying electricity is mandatorily required to be provided to the consumer by the licensee. Moreover, any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity, except for electric meter and any electrical equipment, apparatus or appliance under the control of a consumer fall within the ambit of electrical plant as defined under section 2(22) of the Electricity Act. Sub-section (2) of section 43 of the Electricity Act casts a duty upon the licensee to provide if required electric plant or electric line for giving electric supply to the premises. Therefore, providing electric line and electric plant are elements of service which are naturally bundled in the ordinary course of business, with the single service of transmission and distribution of electricity which gives the bundle its essential character. The only related service which does not fall within the ambit of the definitions of electric line and electric plant is the meter used for ascertaining the quantity of electricity supplied to any premises. However, insofar as installation of electricity meter and hire charges collected in respect of electricity meters are concerned, by the circular dated 7th December, 2010, the Government of India has clarified that supply of electricity meters for hire to the consumers is an essential activity having direct and close nexus with transmission and distribution of electricity and therefore, is covered by the exemption for transmission and distribution of electricity extended under the relevant notifications. Evidently therefore, all the services related to transmission and distribution of electricity are naturally

bundled in the ordinary course of business of the petitioner and are required to be treated as provision of the single service of transmission and distribution of electricity which gives the bundle its essential character.

23. Besides, a perusal of the GERC Regulations indicates that the services which are sought to be taxed now are the services, which the petitioner is required to mandatorily provide at the rate prescribed by GERC, a statutory authority constituted under the provisions of the Electricity Act. In the opinion of this court, all these services are essential activities which have a direct and close nexus with transmission and distribution of electricity. In terms of the earlier clarification dated 7.12.2010 issued vide Circular No.131/13-2010-ST, the Government of India had clarified that an activity, which is an essential activity having direct and close nexus with transmission and distribution of electricity would be covered by the exemption for transmission and distribution of electricity extended under the relevant notifications. Therefore, the taxability of the related/ancillary services are required to be given same treatment as is given to the single service, which gives such bundle its essential character, namely, transmission and distribution of electricity.

24. It has been contended on behalf of the respondents that sub-section (3) of section 66F of the Finance Act would not apply where the single service which gives the bundle of services its essential character is exempt from the levy of service tax. In the opinion of this court, there is nothing in the language employed in sub-section (3) to section 66F to read into it a requirement that such service should not be exempt

from tax. All that the sub-section provides is that taxability of bundled services shall be determined in the manner provided therein. The term taxability means liability to taxation. Thus the term taxability would take within its sweep not being taxable also inasmuch as liability to taxation would also mean not being liable to any tax. Thus, the liability to tax of a bundled service has to be determined in the manner provided under sub-section (3) of section 66F of the Finance Act. If the services are naturally bundled in the ordinary course of business, the bundle of services shall be treated as provision of the single service which gives the bundle its essential character and where the services are not naturally bundled in the ordinary course of business, the same is required to be treated as provision of the single service which results in highest liability of service tax. Accordingly, where the services are naturally bundled in the ordinary course of business and the single service which gives such bundle its essential character is exempt from tax, the entire bundle will have to be treated as provision of such single service.

25. Thus, insofar as the phase relating to the negative list regime is concerned, the services in question would fall within the ambit of bundled services as contemplated under sub-section (3) of section 66F of the Finance Act, and would have to be treated in the same manner as the service which gives the bundle its essential character, namely, transmission and distribution of electricity and, would therefore, be exempt from payment of service tax.

26. Insofar as the phase relating to the CGST/SGST Acts regime is concerned, section 8 of the CGST Act makes

provision for tax liability on composite and mixed supplies and postulates that the tax liability on a composite or a mixed supply shall be determined in the manner provided in clauses (a) and (b) thereunder. Clause (a) says that a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and clause (b) says that a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax. To fall within the ambit of clause (a) the supply has to be a composite one. Composite supply has been defined under section 2(30) of the CGST Act to mean a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is the principal supply. Thus, sections 8 read with section 2(30) of the CGST Act are more or less akin to section 66F (3)(a) of the Finance Act. Both require that to fall within the ambit thereof the services should be naturally bundled in the ordinary course of business. While clause (a) of section 66F(3) of the Finance Act uses the expression “shall be treated as provision of the single service which gives such bundle it essential character”; clause (a) of section 8 of the CGST Act uses the expression “shall be treated as a supply of such principal supply”. As to what is a principal supply is defined in section 2(90) of the CGST Act to mean the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary. In other words “principal supply” is the supply which gives the bundle its essential character. Reverting to the facts of the

present case, the principal supply of transmission and distribution of electricity is naturally bundled and supplied in conjunction with the related/ancillary services in the ordinary course of business, accordingly, in view of the provisions of clause (a) of section 8 of the CGST Act, the tax liability of such composite supply is required to be determined by treating the same as a supply of the principal supply namely, transmission and distribution of electricity.

27. It has been contended on behalf of the respondents that clause (a) of section 8 of the CGST Act would not be applicable where the principal supply is exempt from levy of service tax. In the opinion of this court, there is nothing in section 8 of the Act to read any such construction. What the section says is that the tax liability of a composite or a mixed supply shall be determined in the manner provided thereunder. In a given case, the tax liability may be nil, but that would not take such service out of the purview of section 8 of the Act, which would be attracted if the supply is either composite or mixed in nature, notwithstanding that the end result may be nil tax liability.

28. While on behalf of the petitioners it has been contended that the services rendered by them are in the nature of composite supply, on behalf of the respondents it has been contended that the same are in the nature of mixed supply within the meaning of such expression as contemplated in section 2(74) of the CGST Act and would, therefore, fall within the ambit of clause (b) of section 8 of that Act which provides that a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the

highest rate of tax. Mixed supply has been defined under section 2(74) of the CGST Act to mean two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply. The illustration thereunder reads thus:

> "*Illustration.- A supply of a package consisting of canned foods, sweets, chocolates, cakes, dry fruits, aerated drinks and fruit juices when supplied for a single price is a mixed supply. Each of these items can be supplied separately and is not dependent on any other. It shall not be a mixed supply if these items are supplied separately;*"

The above illustration gives an indication of the intent of the legislature, viz. it makes it clear that what is to be treated as "mixed supply" is a combination of supplies wherein each of the items forming part of the supply can be supplied separately and are independent of each other, but are supplied in conjunction with each other. Adverting to the facts of the present case, the related supplies cannot be supplied separately nor are the principal supply and related supplies independent of each other. The related supplies are dependent on the principal supply of transmission and distribution of electricity and vice versa, neither service can be provided independent of the other. The transmission and distribution of electricity cannot be done without the help of electric line, electric plant and electric meter, and nor can the related services be used for any purpose other than for transmission and distribution of electricity. The principal supply and the related/ancillary services go hand in hand and one cannot be provided independent of the other. The upshot of this discussion is that the services provided by the petitioner are in

the nature of composite supply and therefore, in view of the provisions of clause (a) of section 8 of the CGST Act, the tax liability thereof has to be determined by treating such composite same as a supply of the principal supply of transmission and distribution of electricity. Consequently, if the principal supply of transmission and distribution of electricity is exempt from levy of service tax, the tax liability of the related services shall be determined accordingly.

29. TO SUMMARISE:

- The preliminary contention regarding the petition not being maintainable is rejected.

- As per the circular dated 7th December, 2010, the reason for saying that supply of electricity meters for hire to consumers is covered by the exemption notification is that such service is an essential activity having direct and close nexus with transmission and distribution of electricity. This circular only provides an interpretation of when a service would stand included in another service, namely, when such service is an essential activity having direct and close nexus with the exempted activity. Therefore, the fact that the exemption notifications came to be rescinded has no relevance inasmuch as all that the circular clarifies is what according to the Government of India would stand included in another service. Such interpretation would not change merely because such exemption is now granted under some other provision.

- The meaning of “transmission and distribution of electricity” does not change either for the negative list regime or the GST regime. Accordingly, the services which stood included within the ambit of transmission and distribution of electricity during the pre-negative list regime cannot now be sought be excluded by merely issuing a clarificatory circular, that too, with retrospective effect. By the clarificatory circular, the respondents seek to give a different interpretation of the very same services as against the clarification issued for the pre-negative list regime.

- From the very manner in which the respondents have treated the services related to transmission and distribution of electricity during the pre-negative list regime, the related/ancillary services would stand covered by the exemption granted to transmission and distribution of electricity by virtue of inclusion of such services in the list of negative services under section 66D (k) of the Finance Act as well as by virtue of exemption notification issued under the CGST Act.

- Any line which is used for carrying electricity for any purpose as well as any apparatus connected to any such line for the purpose of carrying electricity is mandatorily required to be provided to the consumer by the licensee. The term “electrical plant” takes within its sweep any plant, equipment, apparatus or appliance or any part thereof used for, or connected with, the generation, transmission, distribution or supply of electricity, except for electric meter and any electrical equipment, apparat-

us or appliance under the control of a consumer. Sub-section (2) of section 43 of the Electricity Act casts a duty upon the licensee to provide, if required, electric plant or electric line for giving electric supply to the premises. Therefore, providing electric line and electric plant are elements of service which are naturally bundled in the ordinary course of business, with the single service of transmission and distribution of electricity which gives the bundle its essential character. The only related service which does not fall within the ambit of the definitions of electric line and electric plant is the meter used for ascertaining the quantity of electricity supplied to any premises. However, insofar as installation of electricity meter and hire charges collected in respect of electricity meters are concerned, by the circular dated 7th December, 2010 the Government of India has clarified that supply of electricity meters for hire to the consumers is an essential activity having direct and close nexus with transmission and distribution of electricity, and, therefore, is covered by the exemption for transmission and distribution of electricity extended under the relevant notifications. Therefore, all the services related to transmission and distribution of electricity are naturally bundled in the ordinary course of business of the petitioner and are required to be treated as provision of the single service of transmission and distribution of electricity which gives the bundle its essential character.

- The term “taxability” means liability to taxation. Thus, the term taxability would take within its sweep not being

taxable also inasmuch as liability to taxation would also mean not being liable to any tax. Thus, the liability to tax of a bundled service has to be determined in the manner provided under sub-section (3) of section 66F of the Finance Act. If the services are naturally bundled in the ordinary course of business, the bundle of services shall be treated as provision of the single service which gives the bundle its essential character and where the services are not naturally bundled in the ordinary course of business, the same is required to be treated as provision of the single service which results in highest liability of service tax. Accordingly, where the services are naturally bundled in the ordinary course of business and the single service which gives such bundle its essential character is exempt from tax, the entire bundle will have to be treated as provision of such single service.

- In respect of the period falling under the negative list regime, the services in question would fall within the ambit of bundled services as contemplated under sub-section (3) of section 66F of the Act, and would have to be treated in the same manner as the service which gives the bundle its essential character, namely, transmission and distribution of electricity and, would therefore, be exempt from payment of service tax.

- The services provided by the petitioner are in the nature of composite supply and therefore, in view of the provisions of clause (a) of section 8 of the CGST Act, the tax liability thereof has to be determined by treating such

composite same as a supply of the principal supply of transmission and distribution of electricity. Consequently, if the principal supply of transmission and distribution of electricity is exempt from levy of service tax, the tax liability of the related services shall be determined accordingly.

30. For the foregoing reasons, the petition succeeds and is, accordingly, allowed to the following extent:

Paragraph 4 (1) of the impugned circular No.34/8/2018-GST dated 1.3.2018 to the extent the same reads as under is hereby struck down as being ultra vires the provisions of section 8 of the Central Goods and Services Tax Act, 2017 as well as Notification No.12/2017- CT (R) serial No.25:

4.	(1) Whether the activities carried out by DISCOMS against recovery of charges from consumers under the State Electricity Act are exempt from the GST	(1) Service by way of transmission or distribution of electricity by an electricity transmission or distribution utility is exempt from GST under notification No.12/2017-CT (R), Sl. No.25. The other services such as,- i. Application fee for releasing connection of electricity; ii. Rental Charges against metering equipment; iii. Testing fee for meters/transformers, capacitors etc.; iv. Labour charges from customers for shifting meters or shifting of service lines; v. charges for duplicate bill; provided by DISCOMS to consumer are

		taxable.

The impugned summons dated 28.3.2018 is hereby set aside to the extent the petitioners are called upon to produce the documents listed at serial No.5 of the annexure thereto, except clause - (vi); income from shifting of HT lines received from MEGA. Consequently, the respondents shall drop the proceedings under the Finance Act, 1994 as well as under the CGST/SGST Acts sought to be initiated by virtue of the impugned summons to the extent the same is based upon item No.4 (1) of the impugned circular dated 1st March, 2018.

31. Rule is made absolute to the aforesaid extent with no order as to costs.

32. At this stage, learned standing counsel for the respondents has requested that the operation of this judgment be stayed for a period of eight weeks so as to enable the respondents to approach the higher forum. The request is considered and declined.

Sd/-
(HARSHA DEVANI, J)

Sd/-
(A. P. THAKER, J)

R.S. MALEK