



2023:UHC:12252

Reserved

IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL

THE HON'BLE SRI JUSTICE ALOK KUMAR VERMA
27TH APRIL, 2026

SPECIAL APPEAL NO. 149 OF 2021

T.H.D.C. India Ltd through its CMDAppellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 131 OF 2021

N.H.P.C. Ltd. through its Senior Manager (Elec.)

.....Appellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 134 OF 2021

M/s Jaiprakash Power Ventures Limited

.....Appellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 136 OF 2021

Alaknanda Hydro Power Company Ltd.

.....Appellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 137 OF 2021

Alaknanda Hydro Power Company Ltd.

.....Appellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 139 OF 2021

M/s Swasti Power Pvt. LimitedAppellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 140 OF 2021

Alaknanda Hydro Power Company Ltd.Appellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 141 OF 2021

Alaknanda Hydro Power Company Ltd.Appellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 142 OF 2021

M/s Swasti Power Pvt. LimitedAppellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 143 OF 2021

Alaknanda Hydro Power Company Ltd.Appellant.

Versus

State of Uttarakhand & OthersRespondents.

With

SPECIAL APPEAL NO. 363 OF 2021

Bhilangana Hydro Power Ltd.Appellant.

Versus

State of Uttarakhand & OthersRespondents.

With
SPECIAL APPEAL NO. 367 OF 2021

Uttar Pradesh Power Corporation LimitedAppellant.

Versus

State of Uttarakhand & OthersRespondents.

With
WRIT PETITION (M/S) NO. 1739 OF 2021

Renew Jal Urja Private LimitedPetitioner.

Versus

State of Uttarakhand & OthersRespondents.

Present :-

Appellant(s):

Mr. Sanjay Jain, learned Senior Advocate assisted by Mr. Shobhit Saharia, learned counsel, Mr. Padmesh Mishra, learned counsel, Ms. Harshita Sukhija, learned counsel, Ms. Palak Jain, learned counsel and Mr. Nishank Tripathi, learned counsel for the appellant-THDC in SPA No.149 of 2021.

Mr. Tushar Mehta, learned Senior Advocate assisted by Mr. Anurag Bisaria, learned counsel with Mr. Avneesh Arputham, learned counsel for the appellant in SPA No.131 of 2021.

Ms. Devika Tiwari, learned counsel for the appellant in SPA No.134 of 2021

Mr. Saurabh Kirpal, learned Senior Advocate with Mr. D.S. Patni, learned Senior Advocate assisted by Mr. Dharmendra Barthwal, learned counsel, Mr. Kartik Nayyar, learned counsel with Mr. Kashish Bansal, learned counsel for the appellants in SPA No.136 of 2021, SPA No.137 of 2021, SPA No.140 of 2021, SPA No.141 of 2021 & SPA No.143 of 2021.

Mr. Ajit Tiwari, learned counsel for the appellant in SPA No.136 of 2021.

Mr. D.S. Patni, learned Senior Advocate assisted by Mr. Siddhant Manral, learned counsel for the appellant in SPA No.139 of 2021 & SPA No.142 of 2021.

Mr. Sujit Ghosh, learned Senior Advocate assisted by Mr. Nishant Kumar, learned counsel, Ms. Anshika Agarwal, learned counsel, Mr. Mannat Daraich, learned counsel, Mr. Chetan Pathak, learned counsel & Mr. Rohit Arora, learned counsel for the appellant in SPA No.363 of 2021.

Mr. U.K. Uniyal, learned Senior Advocate assisted by Mr. Abhishek Kumar, learned counsel, Mr. Nived V.V.N., learned counsel, Mr. Pragya Prakash Upadhyay, learned counsel, Mr. Neelabh Bisht, learned counsel with Ms. Aditi Singh, learned counsel for the appellant-UPPCL in SPA No.367 of 2021.

Ms. Kamakshi Sehgal, learned counsel with Mr. Ankur Saigal, learned counsel & Mr. Vikas Bahuguna, learned counsel for the petitioner in WPMS No.1739 of 2021,

Respondent(s)

Mr. Dinesh Dwivedi, learned Senior Advocate assisted by Mr. Prateek Dwivedi, learned counsel, Mr. Shivam Singh, learned counsel, Mr. T.S. Bisht, learned Deputy Advocate General and Mr. V.D. Bisen, learned Standing Counsel for the State of Uttarakhand.

Mr. Rajesh Sharma and Mr. Saurav Adhikari, learned Standing Counsel for the Union of India.

Mr. I.D. Paliwal, learned Standing Counsel for the State of U.P.

Reserved on: 17.06.2025

Delivered on: 27.06.2026

The Court made the following:

Opinion on Reference : (per Hon'ble Alok Kumar Verma, J.)

The aforesaid appeals were filed against the common judgment dated 12.02.2021, passed by the Coordinate Bench of this Court in a batch of writ petitions. The writ petitions were filed by the appellants challenging the constitutional validity and vires of "**The Uttarakhand Water Tax on Electricity Generation Act, 2012**" (in short, "Act"). The Coordinate Bench, by the common judgment, passed on 12.02.2021, dismissed all the writ petitions. The Writ Petition (M/S) No.1739 of 2021 was filed during the pendency of the said appeals. This writ petition has also been filed challenging the constitutional validity of the Act.

2. The Hon'ble Division Bench delivered a split verdict on 25.10.2023. Mr. Vipin Sanghi, the then Hon'ble Chief Justice and a member of the Division Bench, has dismissed the appeals and the writ petition, whereas the other member of the Bench, Hon'ble Mr. Ravindra Maithani, J., has struck down the Act as ultra vires the Constitution. Therefore, the present matter has been referred to this Court by the then Hon'ble Acting Chief Justice, in terms of Chapter VIII Rule 3 of the High Court Rules, vide Order dated 23.11.2023.

3. The Act has been challenged on various grounds. The main grounds for challenge are that the tax imposed by the Act is on electricity generation. The State Legislature is not competent to legislate the Act, which imposes a tax on generation/production of electricity.

4. The stand of the State of Uttarakhand is that the incident of tax in the Act is the drawal of water for use in electricity generation only. Initially, State of Uttarakhand indicated Entry 17 List II as the source of legislation, but subsequently, it stated Entry 45, 49, 50 of List II of the Seventh Schedule and Article 288 of the Constitution of India as the basis for enacting the Act.

5. Before discussing the issues involved, it would be appropriate to examine the relevant provisions (Chapter-1 to Chapter-5) of the impugned legislation.

**THE UTTARAKHAND WATER TAX ON ELECTRICITY GENERATION ACT, 2012
[UTTARAKHAND ACT NO. 09 OF 2013]**

to levy water tax on electricity generation in the State of
Uttarakhand

An

Act

be it enacted in the sixty-third Year of the Republic of India by the Uttarakhand State Legislative Assembly as follows:-

CHAPTER-I

PRELIMINARY

1. Short Title, Extent and Commencement.- (1) This Act may be called the Uttarakhand Water Tax on Electricity Generation Act, 2012.

(2) It extends to the whole State of Uttarakhand.

(3) It shall come into force from such date as the State Government may by notification in the Gazette appoint.

(4) The provisions of this Act shall have effect notwithstanding anything inconsistent contained in any other law for the time being in force.

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

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

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

(c) "*Electricity*" means electrical energy generated by way of water drawn from any water source flowing within the territory of the State;

(d) "*Government*" means Government of Uttarakhand:

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

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

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

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

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

CHAPTER-2

INTRODUCTION

3. General-(1) For the purpose of this Act, every water source in the State is, and shall remain, the property of the Government and any proprietary ownership, or any riparian or usage right, on such water resources vested in any individual, group of individuals or any other body, corporation, company, society or community shall, from the date of commencement of the Act, be deemed to have been terminated and vested with the Government. However, for rivers of interstate nature and rivers under the ambit of international treaties, the ownership right of Uttarakhand Government shall be limited to non-consumptive use of water.

(2) No person, group of persons, Government department, local authority, corporation, company, society or any other body shall draw water from any source for electricity generation except in accordance with the provisions of the Act.

CHAPTER-3

USAGE OF WATER BY INSTALLATION OF HYDROELECTRIC GENERATING UNIT

4. Installation of Scheme for usage of water- No person, group of persons, Government department local authority, corporation, company society or any other body, by whatever name called (hereinafter in this Chapter will be called the "user"), shall install a Scheme requiring usage of water (non consumptive use) of any water source for generating electricity except without being registered under the Commission in accordance with the provisions provided hereinafter in this Chapter.

5. Submission of Sanctioned Scheme for usage of water by the user- Any user intending to install a Scheme requiring usage of water (non consumptive use) for the purpose of generation of electricity shall submit Detailed Project Report of the scheme, duly sanctioned by authority competent to do so in this behalf to the Commission accompanied by such fee and charges as may be fixed by the Commission for registration.

6. Acceptance of the Scheme- After receipt of the scheme from a user, the Commission shall consider the acceptance of the scheme under this Act.

7. Information to the User - After the scheme is accepted by the Commission under section 6, the Commission shall register the scheme and inform the user to-

(a) Execute an agreement in such a form and manner with the Commission as may be prescribed; and

(b) Pay such fee and water Tax as fixed under chapter 4 of this Act.

8. Prohibition on installation of a Scheme- No user shall install a Scheme requiring usage of water without adhering to the requirements of section 10.

9. Registration for usage of water- No person shall install a Scheme, requiring usage of water or in any other way use the water, unless he/she is authorized to do so by a registration certificate, issued under section 10.

10. Grant of Registration Certificate- An user intending to use water (non consumptive use) for generation of electricity shall be issued a registration certificate after the

execution of an agreement between the user and the Commission under the Act.

11. Registered user not to do certain things.- No registered user shall without prior approval of Commission :-

- (a) Undertake any transaction to acquire by purchase or takeover or otherwise, the utility of any other user; or
- (b) Merge his utility with the utility of any other user;
- (c) No user shall at any time assign his registration or transfer his utility or any part thereof by sale, lease, exchange or otherwise without the prior approval of the Commission.

12. Duties, obligations and responsibilities of the Registered user- (1) The registered user shall be liable to pay water tax for the water drawn for electricity generation as per the provisions of the Act.

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

(3) If the user as mentioned in sub-section (2) fails to apply or register within time stipulated therein, the Commission shall forthwith impose suitable penalty which may be enhanced in case of prolonged default.

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

(5) Every registered user shall be bound to allow the authority or any other officer authorized by authority to have access at any time to the scheme for their satisfaction.

13. Control and safety provisions.- (1) The Commission may, by notice in writing given to the user require him to:-

(a) Cause periodic inspection carried out by an expert, to the satisfaction of the Commission and in accordance with the procedure and at such intervals, as the Commission may specify, for the Scheme;

(2) The user shall pay such fee and such other charges as the State Water Commission may fix in this behalf, to the State Water Commission for undertaking the following activities :-

(a) Periodical inspection of the scheme by the Commission or any other officer or expert empowered in the behalf;

(b) Any other activity performed or caused to be performed by the Commission under this section in relation to the scheme of the user.

CHAPTER-4

ASSESSMENT OF WATER DRAWN BY USER

14. Assessment of water drawn by user.- (1) The Commission shall install or cause to be installed flow measuring device within the premises of Scheme or at such other place where the Commission deems fit for purposes of measuring the water drawn for electricity generation or may adopt any indirect method for assessment of water drawn by the user.

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

15. Injuring the flow measuring device or any fitting- No person shall willfully injure or cause to be injured, any device or any of the fittings of the device.

16. Fraud in respect of flow measuring devices- No person shall fraudulently or dishonestly-

(a) alter the index of any flow measuring device or prevent any device from recording the actual quantity of water supplied; or

(b) extract or draw water before it has been recorded by the measuring device set up for the purpose of recording the same; or

(c) tamper the measuring device, install or use a tampered device; or

(d) use any other device or method which interferes with accurate or proper registration, calibration or metering of water supplied; or

CHAPTER-5

WATER TAX

17. Fixation of water tax. (1) - The user shall be liable to pay the Water Tax under the Act at such rates as the Government may by notification fix in this behalf.

(2) The State Government may review, increase, decrease or vary the rates of the Water Tax fixed under this section from time to time in the manner it deems fit.

18. Recovery of water Tax.- The Commission shall recover water tax as per the rates fixed by the State Government from every user whenever water is drawn by a user for generation of electricity.

19. Procedure for assessment.- (1) The assessment of water drawn by the user for electricity generation and computation of water tax there of, shall be carried out by the Commission.

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

(3) If any user fails to pay water Tax due on him, penalty shall be imposed on the user as determined by the Commission. The User has to pay Water Tax along with penalty within extended time as may be specified by the Commission. If the user again fails to pay Water Tax along with penalty within the extended time, the dues shall be recovered as arrears of land revenue.

Submissions on Behalf of Appellants

6. It has been argued on behalf of the appellants that the legislative competence to pass the Act cannot be traced from any of Entries in List II, particularly, Entries 17, 45, 49 or 50 and under Article 288 of the Constitution of India either independently or in a bouquet. It is excessive delegation. Apart from the said contentions, the main contentions raised by the appellants and the writ petitioner are as follows :-

7. Mr. Sanjay Jain, learned Senior Advocate appearing for the appellant in SPA No.149 of 2021, contended that the Act, in pith and substance, imposes a tax on electricity generation using hydropower. It is a colourable exercise of power. It is a settled legal position that the State Legislatures do not possess the legislative competence to impose a tax on generation of electricity. Article 288 of the Constitution of India is a special source of power outside the Seventh

Schedule and the same cannot be used as a tool to recognize a taxing power outside the scope of Articles 245, 246, 248 and Article 265 read with the Seventh Schedule. He has relied upon the judgments of the Hon'ble Supreme Court in **M.P.V. Sundararamier and Co. vs. State of A.P., AIR 1958 SC 468, Hoechst Pharmaceuticals Ltd. vs. State of Bihar, (1983) 4 SCC 45, State of W.B. vs. Kesoram Industries Ltd., (2004) 10 SCC 201, Jindal Stainless Ltd. vs. State of Haryana, (2017) 12 SCC 1 and Jalkal Vibhag Nagar Nigam vs. Pradeshia Industrial and Investment Corporation, 2021 SCC Online SC 960.**

8. Mr. Tushar Mehta, learned Senior Advocate appearing for the appellant in SPA No.131 of 2021, has contended that the Act imposes a tax on electricity as stated in the name of the Act itself and in pith and substance, the Act is taxing the generation of electricity by using water. Electricity is goods and there is no legislative competence with the State Legislature to impose tax on generation of electricity as it would be covered under List I of Seventh Schedule. He has relied upon the judgments of the Hon'ble Supreme Court in **Commission of Sales Tax, Madhya Pradesh vs. Madhya Pradesh Electricity Board (1969) 1 SCC 200, State of A.P. vs. N.T.P.C. and Others, (2002) 5 SCC 203, and M.P. Cement Manufacturers Association vs. State of M.P., (2004) 2 SCC 249.**

9. Ms. Devika Tiwari, learned counsel for the appellant in SPA No. 134 of 2021 has submitted that it is the settled position of law that taxes can be imposed using only taxing Entry and not general Entries. A taxing statute cannot be interpreted on any presumption and assumption. Article 288 provides power to the State to make law with respect to generation of electricity only when two riders imposed by Article 288 of the Constitution are fulfilled. She further submitted that taxation statutes are to be strictly interpreted in all tax matters. Reliance has been placed on the judgment of the Hon'ble Supreme Court in **Commissioner of Customs (Import), Mumbai vs. M/s Dilip Kumar and Company, 2018 (9) SCC 1.**

10. Mr. Saurabh Kirpal, learned Senior Advocate appearing for the appellants in SPA No.136 of 2021, SPA No.137 of 2021, SPA No.140 of 2021, SPA No.141 of 2021 and SPA No.143 of 2021, has submitted that State of Uttar Pradesh, State of Uttarakhand and the appellant entered into a Restated Implementation Agreement (RIA) dated 10.02.2006 wherein the appellant was to construct a Hydroelectric Power Plant for generation of electricity. As per the RIA, 12% of the Saleable Energy was to be provided to State of Uttarakhand free of cost and the rest of the Saleable Energy was to be purchased by State of Uttar Pradesh through UPPCL in terms of the Power Purchase Agreement

dated 28.06.2006 (PPA). In the RIA, it was stated that the State of Uttarakhand shall not impose any taxes, duties, levies or charge of any kind on electricity generated by this project during the term of this RIA and it was clearly stated in the RIA that the appellant would be entitled to use Alaknanda river for the said purpose.

11. Mr. Saurabh Kirpal, learned Senior Advocate contended that the Act is beyond the legislative competence of the State and as such the Act itself is not valid. The taxation is a distinct matter and there is a clear distribution between general subjects of legislation and taxation. He has relied upon the judgments of the Hon'ble Supreme Court in **M.P.V. Sundararamier and Co. vs. State of A.P., 1958 SCR 1422, M/s Hoechst Pharmaceuticals and Others vs. State of Bihar and Others, 1983(4) SCC 45, Synthetics and Chemicals Ltd. vs. State of U.P., (1990) 1 SCC 109 and State of W.B. vs. Kesoram Industries Ltd., (2004) 10 SCC 201.**

12. Mr. D.S. Patni, learned Senior Advocate appearing for the appellants in SPA No.139 of 2021 and SPA No.142 of 2021, submitted that the appellants had entered an Implementation Agreement (I.A.) with the State of Uttarakhand dated 16.10.2003. In the year, 2003, the State of Uttarakhand framed a policy known as, "The Policy on Hydro Power Development by Private Sector in the State of

Uttaranchal (upto 25 M.V.). The period of the project offered under the said policy was 40 years. Under the I.A., it was stated that the State of Uttarakhand shall not impose any entry tax of any kind on electricity generated by this Project during the term of the I.A. Further, under Clause 4.11 of the 2003 policy, it has been clearly stated that the Government will not levy any entry tax on power generation, transmission, equipment and building material for projects.

13. Mr. D.S. Patni, learned Senior Advocate, argued that the taxable event in the scheme of the Act is not mere drawal of water but it is drawal of water for generation of electricity and hence, the levy of tax is on generation of electricity. The taxation is a distinct matter and there is a clear distinction between general subjects of legislation and taxation. He has relied upon the judgment of the Hon'ble Supreme Court in **State of W.B. vs. Kesoram Industries Ltd., (2004) 10 SCC 201.**

14. Mr. Sujit Ghosh, learned Senior Advocate, appearing for the appellant in SPA No. 363 of 2021, has argued, inter alia, that Section 17 (1) of the Act, the charging section, provides, "the user is liable to pay water tax at such rates as the Government may by Notification fix". As per Section 17 (2) of the Act, the Government has also been conferred with the power to review, increase, decrease or vary the rate of tax from time to time in the manner it deems

fit. Further, from the scheme of the Act, the State Legislature does not exercise any control over the rate Notification that may be issued by the State Government. The rate of tax is an essential legislative function and forms one of the four pillars of valid taxation. Being an essential legislative function, it is impermissible for the State Legislature to abdicate such an essential legislative function to the Delegatee without retaining any control or offering any guideline. Such abdication, therefore, tantamount to excessive delegation and thus, bad in law. It is a settled position that the legislature cannot delegate its “essential legislative functions”. He has relied upon the judgment of the Hon’ble Supreme Court in **Union of India and Another vs. M/s Mohit Minerals Pvt. Ltd. Through Director (Civil Appeal No. 1390 of 2022)**.

15. Mr. U.K. Uniyal, learned Senior Advocate, appearing for the appellant in SPA No. 367 of 2021, argued, inter alia, that in pith and substance, the tax under the Act is a tax on generation of electricity. Power to tax may not be inferred or implied. Article 288 (1) of the Constitution is a savings clause. It does not pre-suppose that State Legislature has competence to make law. Article 288 (2) of the Constitution, although enabling provision, is subject to many conditions. Competence should be clear, precise and distinct. Merely by reading Article 288, State cannot derive

competence. Article 25 of the Amended Implementation Agreement dated 22.03.2003 states that JPVL shall utilize flowing water of the river to generate electricity. Such right to utilize water available upstream of the project has been granted by Government of Uttaranchal for non-consumptive use only without charging any royalty, duty, cess or levy of any kind of such use of water. Section 3 (1) of the Act effects unilateral termination by stating that any usage right vested in a company would be deemed to have been terminated, but the State is bound by promissory estoppel. A State cannot absolve itself from contractual duties / liabilities by enacting legislation.

16. Mr. Dinesh Dwivedi, learned Senior Advocate, appearing for the State of Uttarakhand, contended that Constitution is said to be a living organism where all the parts function cohesively together. Therefore, no one provision of the Constitution should be read in isolation. A liberal construction should be put upon the constitutional provisions. Controversy is to be resolved in favour of the legislature by giving most liberal interpretation to the Entries (**Indian Aluminium Co. and Others vs. State of Kerala and Others, (1996) 7 SCC 637**). Constitution is federal and therefore, an interpretation that preserves and promotes the federal structure, rather than diluting it, should be adopted (**Jindal Stainless Limited and Another vs. State of**

Haryana and Others, (2017) 12 SCC 1). Interpretation of a federal constitution is basically different from that of a statute. Both the taxing and the non-taxing Entries are to be interpreted similarly (**Indian Aluminium Co. and Others vs. State of Kerala and Others, (1996) 7 SCC 637**).

17. Mr. Dinesh Dwivedi, learned Senior Advocate, submitted that the State claims that the tax under the Act falls under Entries 17, 18, 45, 49 and 50. The tax under the Act is “in respect of water”. The levy can be reasonably and clearly traced to Entries 45, 49 and 50 of List II. He submitted that every legislative Entry is entitled to widest and most liberal construction, including the taxing Entries (**State of W.B. vs. Kesoram Industries Ltd. and Others, (2004) 10 SCC 201**). He further submitted that it has been settled that fountain source of power to impose a levy of any nature is contained in Article 245 and Article 246 of the Constitution. Any restriction on this plenary power of legislation to impose a tax, is one that is expressly contained in the Constitution. There are no other limitations because to impose a tax is a Sovereign Power that vests equally on the Union and the State Legislatures under our federal structure. The express restrictions are only contained in Articles 13, 14, 304 (a), 285 to Article 289 etc. There are no implied or other limitations that can be spelled out from other sources. The foundational source of all taxing powers are only Article 245 and Article

246 and any limitation on the taxing power of the State has to be expressly indicated. Article 288 of the Constitution is foremost among them. Though it is a limitation on the States legislative power it definitely recognizes the availability of power to impose taxes “in respect of water” [**Jindal Stainless Limited** (supra)]. There is no principle that a law has to relate only to one Entry on a source. A law can be made by the State simultaneously utilizing more than one legislative Entries. A tax law can, likewise, also be justified on the basis of more than one Entry including a non-taxing Entry, or, a general Entry [**Kesoram Industries Ltd.** (supra)].

18. Mr. Dinesh Dwivedi, learned Senior Advocate, argued that there is a presumption of validity of the statute made by the legislature. Statute is to be read as a whole. As per the Act, tax is on the use of water drawn from the “Source” defined under Section 2 (h), for electricity generation only. It is a tax on water drawn for use in electricity generation, by the “user” as defined under Section 2 (f). The incidence of Tax is on the “drawal of water for use” in electricity generation only. This is corroborated by Section 12 (1) and Section 14 which provide for measurement of “water drawn for electricity generation”. The Tax is to be paid by the “user” whenever water is drawn (Section 18 and Section 19). Thus, it is a Tax on the drawal and usage of

water. It is a Tax clearly “in respect of water”, its drawal for use by the user.

19. Mr. Dinesh Dwivedi, learned Senior Advocate, contended that there cannot be water without land. They are inseparably linked. It falls on the land or, generator attached to land to generate electricity. Therefore, in pith and substance, the tax is in respect of water / land. It is a tax on the drawal and use of water on land. The rate Notification dated 07.11.2015 also corroborates that the rate is on the per cubic meter of water used / drawn. These facts are also supported by the Statement of Objects and Reasons, the legislative history, and the legislative assembly debates.

20. Mr. Dinesh Dwivedi, learned Senior Advocate, has heavily relied on the judgments of the Hon’ble Supreme Court in **M/s R.S. Rekhchand Mohota Spinning and Ors Weaving Mills Ltd. vs. State of Maharashtra, (1997) 6 SCC 12** and **Ichchapur Industrial Cooperative Society Ltd. vs. Competent Authority, Oil and Natural Gas Commission and Another, (1997) 2 SCC 42.**

**Submissions on Behalf of Appellants and Writ
Petitioner in Rejoinder**

21. Learned counsel for the appellants and the writ petitioner contended that the general entry contained in Entry 17 of List II cannot be invoked to levy a tax on consumptive or non-consumptive use of water. Entries 45, 49 and 50 of

List II operate in a different paradigm, relating specifically to land, buildings and minerals and as such by no stretch of imagination can be construed to include water within the said field, whereas there is no specific field of legislation empowering the State Legislatures to impose a tax on water. Ministry of Power has specifically written to State Governments on 25.04.2023 and 25.10.2023 stating that any such water tax is unconstitutional. They submitted that the impugned tax cannot be levied because the State is promissorily estopped from levying tax in the light of the respective agreements.

22. Mr. U.K. Uniyal, learned Senior Advocate, appearing for the appellant in SPA No. 367 of 2021, contended that State is not competent to impose a tax on the drawal and usage of water. In this regard, reliance is placed on Entry 92 A of List I. He has relied upon the judgment of the Hon'ble Supreme Court in **In re: The Punjab Termination of Agreement Act, 2004, (2017) 1 SCC 121.**

23. Mr. Ankur Saigal, learned counsel appearing for the petitioner in WPMS No. 1739 of 2021, submitted that a scrutiny of List I and List II shows that there is no overlapping anywhere in the taxing power and the Constitution gives independent source of taxation to Union as

well as the State (**Hoechst Pharmaceuticals vs. State of Bihar, (1983) 4 SCC 45**).

24. The parties have placed reliance on the several judgments of the Hon'ble Supreme Court.

25. The function of the Judiciary begins when the function of the Legislature ends. The ultimate interpretation of a statute is the province of the Court.

26. Interpretation of statutes is of two types. They can be distinguished as "literal" and "functional". The Primary Rule of Interpretation of Statutes is called "Literal Interpretation" or "Literal Construction". It is also known as "Plain Rule of Interpretations". The literal rule of interpretation really means that there should be no interpretation. In other words, the Court should read the statute as it is, without distorting or twisting its language.

27. A statute is an edict of the Legislature. Therefore, the first and primary rule of interpretation of a statute is that the intention of the Legislature must be found in the words used by the Legislature itself. Each word, phrase or sentence is to be construed in the light of general purpose of the Act itself. The purpose of the statute should always be kept in mind while interpreting of the statute. The literal rule of interpretation, which follows the legal maxim "verbis legis non est recelendum", is that words should be read in their ordinary, natural and grammatical meaning. It is trite saying

that the object of interpretation a statute is to ascertain the intention of the Legislature, enacting it. The object of interpretation and of construction is to discover the intention of the law makers in every case. This object can, obviously, be best achieved by first looking at the language used in the relevant provisions. Other methods of extracting the meaning can be resorted to only if the language used is contradictory, ambiguous or leads really to absurd results.

28. The Statement of Objects and Reasons (SOR), legislative history and debates in Legislative Assembly are external aids to interpretation. They are not substantive parts of a statute and cannot override its clear language. The SOR, legislative history and debates are relevant only when the statutory language is ambiguous or vague.

29. Now, I come back to the present reference before me.

30. The question is whether the tax is one on “drawal of water” for use in electricity generation, or on generation of electricity?

31. The then Hon’ble Chief Justice held that the nature of impugned tax, in pith and substance, is a tax on drawl / use / consumption of water for electricity generation, and not a tax on electricity generation, whereas Hon’ble Mr. Justice Ravindra Maithani held that the impugned tax is on electricity generation.

32. Before proceeding further in the reference, it would be appropriate to clarify at this stage that this reference is not a rehearing, an appeal or a revision. This reference is referred to this Court to concur with the opinion of one of the two Judges of the Hon'ble Division Bench for a majority view being obtained on the point of difference. Therefore, it is my duty to give reasons for my views and for the said purpose, in the first instance, it is necessary to analyze the relevant provisions of the Act.

33. The nomenclature of a levy is not conclusive for deciding its true character, nature or validity with reference to the legislative competence. The doctrine of pith and substance determines the true character, nature, intent, content and effect of a tax law if it overlaps between Union and State Lists.

34. The subject of the Act is provided in Section 2 (c), i.e. electrical energy which is generated by way of water drawn.

35. The "User" has been defined under Section 2 (f). "User" means a person, who draws water from any source for generation of electricity. It means a "User" is liable to pay tax only if he draws water from any source for the generation of electricity.

36. Section 2 (i) defines "Water Tax" to mean a levy imposed for water drawn for generation of electricity.

37. Section 3 and Section 4 of the Act also pertain to use of water for generation of electricity.

38. Section 12 levies tax on the water drawn for electricity generation.

39. The charging section is the foundational provision in any taxing statute, serving as the “backbone” that imposed a tax liability on a subject, person or transaction. Tax becomes payable by virtue of the charging provision. Therefore, charging sections are construed strictly. The charging provisions are independent of machinery provisions (collection). In the impugned legislation, the liability to pay tax is founded in the charging section. As per the charging section, tax is imposed on the “User” and “User” is a person, who draws water for generation of electricity. Consequently, the mere drawing of water from any source does not attract tax under the Act. But, if the drawal of water is for the generation of the electricity, then it is a taxable event under the Act.

40. Mr. Dinesh Dwivedi, learned Senior Advocate, appearing for the State of Uttarakhand, argued that tax is not imposed on electricity units generated. It is measured by the volume of the water used for the purpose. He has based his submission on the Notification dated 07.11.2015, which is in relation to the measure of tax. On the other hand, it was argued on behalf of the appellants and the writ petitioner that

the said notification suggests that it is a tax on generation of electricity.

41. The task before the Court is to identify the nature of the levy. It is well settled law that the nature of tax and its measure are distinct. Measure of tax is not the sole test. Measure of tax is only an indicia for determining the character and nature of tax. In **Goodyear India Ltd. and Others vs. State of Haryana and Another, 1990 (2) SCC 71**, the Hon'ble Supreme Court held, "It is well-settled that while determining nature of a tax, though the standard or the measure on which the tax is levied may be a relevant consideration, it is not the conclusive consideration. One must have regard to such other matters as decided by the Privy Council in *Governor General in Council vs. Province of Madras*, (supra) not by the name of tax but to its real nature, its pith and substance which must determine into what category it falls."

42. Dealing with the said submissions of the parties in Paragraph Nos. 176 to 181 of the judgment, brother Ravindra Maithani, J. held that the name of the Act, the taxable event, the user and the measure of the tax all suggest that definitely the tax in the instant case is on electricity generation.

43. The tax imposed by the Act has also been challenged by the appellants and the writ petitioner on the ground that it is bad due to excessive delegation.

44. Mr. Dinesh Dwivedi, learned Senior Advocate, appearing for the State, argued that the power given under 17 of the Act to fix “such rates” is not unlimited. The law defines all the elements of taxation and then delegates the power to fix “such rates” to the State Government, the highest executive which is responsible to the legislative and through it to the people. Limitation inheres in this.

45. The fixing of a specific rate of tax is not always an essential function of legislative body. The fixing of rates may be left to a non-legislative body and that when it has been so left to such a body, the Legislature must provide guidance to such fixation. Even if it assumed that there is some legislative guidance for fixing of tax rate but absence of any minimum or maximum limits for fixing of tax rates given an unbounded leeway to the executive to impose as tax rates. The such unfettered power to fix tax rates by non-legislative body hits by the doctrine of excessive delegation. After noticing the judgments referred by the parties, brother Ravindra Maithani, J. observed, “In fact, the reading of the Act, as a whole, does not give any guidelines for imposing tax under Section 17 of the Act. The delegation of imposing tax on the Executive by Section 17 of the Act is without any guidelines. It is naked delegation of power to the State authority”, and held that it is excessive delegation.

46. Having carefully analyzed the matter, I find it difficult to agree with the submissions made on behalf of the State that the nature of tax is a tax on drawal of water for electricity generation; not a tax on electricity generation and limitation inheres in Section 17 of the Act. I am in agreement with the conclusion of brother Ravindra Maithani, J. that Section 17 of the Act makes excessive delegation of power for fixing rates by the State Government and it delegates such power without any policy guidelines and the impugned tax under the Act is on the generation of electricity.

47. Prior to Government of India Act, 1935, the Indian Councils Act, 1861 was enacted to make better Provision for the Constitution of the Council of the Governor-General of India, and for the Local Government of the several Presidencies and Provinces of India; and for the temporary Government of India in the event of a Vacancy in the Office of Governor-General. The Government of India Act, 1935 established a federal system in India by creating separate entities. The 1935 Act established the tripartite structure – List I. Federal Legislative List, List II. Provincial Legislative List, and List III. Concurrent Legislative List – to manage legislative allocation. The framers of the Constitution of India adopted the 1935 structure but modified it to suit India's unique needs.

48. The constitutional provisions on the subject of distribution of legislative powers between the Union and the States are defined primarily under its Article 245 and Article 246. Article 245 of the Constitution defines the ambit or territorial limits of legislative powers; subject to the constitutional provisions. The power of Parliament and Legislatures of States to legislate upon Entries in the Union List, State List and Concurrent List flows from Article 246 of the Constitution of India. Article 246 of the Constitution of India demarcates the powers of the Parliament and the Legislature of State by classifying their powers into three lists, i.e. List I – Union List, List II – State List, and List III – Concurrent List. The Constitution (one Hundred and First Amendment) Act, 2016 added Article 246 – A, providing concurrent power of both Parliament and State Legislatures to levy GST, creating a unified indirect tax regime, which modified the traditional division of List I and List II. The opening words of Article 245 (1) say the legislative powers of both the Parliament and State Legislatures are subject to the other provisions of the Constitution.

49. Entries in the three Lists are not powers of legislation but field of legislation. These entries are mere legislative heads and demarcate the area over which the appropriate legislatures are empowered to enact law. The power to legislate is given to the appropriate legislature by

Article 246 and other articles (**T.M.A. Pai Foundation vs. State of Karnataka, (2002) 8 SCC 481**).

50. Article 245 is the fountain source of legislative power (**State of West Bengal vs. Kesoram Industries Ltd. and Others, (2004) 10 SCC 201**). It is well settled that the Entries in the Constitution only demarcate the legislative fields of the respective legislatures and do not confer legislative powers as such. (**Goodyear India Ltd. and Others vs. State of Haryana and Another, 1990 (2) SCC 71**).

51. Now, after noticing the judgments referred by the parties, I proceed to examine the competence of State Legislature in enacting the Act. First of all, it will be examined as to whether the Act can be enacted under Entries 17, 18, 45, 49, 50 of List II of Seventh Schedule or under Article 288 of the Constitution of India and the power to levy tax can be traced by reading the Constitution as a whole (Article 245).

52. “Taxation” is defined under Article 366 (28) of the Constitution of India:-

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

53. Article 265 of the Constitution provides that not only levy but also the collection of a tax must be under the authority of some law.

“Article 265. **Taxes not to be imposed save by authority of law.** – No tax shall be levied or collected except by authority of law.”

54. “Authority of law” means, the tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax. (**Balaji vs. Income-Tax Officer, AIR 1962 SC 123.**

List II – State List

Entry 17 is as follows :-

“17. Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of Entry 56 of List I.”

Entry 18 is as follows :-

“18. Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization.”

Entry 45 is as follows :-

“45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.”

Entry 49 is as follows :-

“49. Taxes on lands and buildings.”

Entry 50 is as follows :-

“50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.”

Article 288

55. 288. Exemption from taxation by States in respect of water or electricity in certain cases. - (1)
Save in so far as the President may by order otherwise provide, no law of a State in force immediately before the commencement of this Constitution shall impose, or authorise the imposition of, a tax in respect of any water or electricity stored, generated, consumed, distributed or sold by any authority established by any existing law or any law made by Parliament for regulating or developing any inter-State river or river-valley.

Explanation.—The expression “law of a State in force” in this clause shall include a law of a State passed or made before the commencement of this Constitution and not previously

repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular areas.

(2) The Legislature of a State may by law impose, or authorise the imposition of, any such tax as is mentioned in clause (1), but no such law shall have any effect unless it has, after having been reserved for the consideration of the President, received his assent; and if any such law provides for the fixation of the rates and other incidents of such tax by means of rules or orders to be made under the law by any authority, the law shall provide for the previous consent of the President being obtained to the making of any such rule or order.

56. Mr. Dinesh Dwivedi, learned Senior Advocate, appearing for the State, contended that every legislative Entry is entitled to widest and most liberal construction, including the taxing entries. He further argued that water is part of land, therefore, the State Legislature is empowered to enact the Act under Entry 49 of List II.

57. Mr. Dinesh Dwivedi, learned Senior Advocate, has relied upon the judgment of the Hon'ble Supreme Court in **M/s R.S. Rekhchand Mohota Spinning and Ors Weaving Mills Ltd. vs. State of Maharashtra, (1997) 6 SCC 12.** According to him, the expression "land" would include "water".

58. In the said case, the fact before the Hon'ble Supreme Court was that a part of a parcel of land was incidentally adjacent to a flowing river and the landowner was consuming the water therefrom claiming an easementary right, which consumption was subjected to land cess under the Maharashtra Land Revenue Code. The question before the Hon'ble Supreme Court was, "whether the appellant has a natural right to use water from the flowing river and whether the water used by it is exigible to land cess". The Hon'ble Supreme Court held that though the landowner has a natural right to use water from the flowing river, however, since the title over the river was that of the State, it was permissible for the State to levy land cess on the consumption of water. It is discernible from a reading of the judgment that it was confined to answering the said limited question. The Hon'ble Supreme Court did not examine the legislative power of the State to impose land cess on water in any context other than that in the Maharashtra Land Revenue Code.

59. In **Union of India vs. H.S. Dhillon, (1971) 2 SCC 779**, the Hon'ble Supreme Court held that in order to trace competence to Entry 49 List II, one of the prerequisites is, "It must be a tax on units, that is lands and buildings separately as units". It is not a personal tax but a tax in property.

60. Mr. Dinesh Dwivedi, learned Senior Advocate, argued that the State Legislature is competent to impose the tax under Entry 50 of List II. He has heavily relied upon the judgment of the Hon'ble Supreme Court in **Ichchapur Industrial Cooperative Society Ltd. vs. Competent Authority, Oil and Natural Gas Commission and Another, (1997) 2 SCC 42.**

61. The said case was in context of water as a mineral under the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962 (in short, "Act 1962"). The Hon'ble Supreme Court discussed the provisions of the Act, 1962 as well as the definition of "mineral" under the Mines Act, 1952 and observed that water is a mineral. The Hon'ble Supreme Court defined the word "water" as mineral in view of the provisions of the Act, 1962. The Hon'ble Supreme Court has not made any universal declaration that water is mineral. Therefore, benefit of this judgment cannot be given to the State.

62. Mr. Dinesh Dwivedi, learned Senior Advocate, contended that Article 288 of the Constitution of India indicates the existence of States' power to impose a tax on the drawal / use of water meant for electricity generation.

63. Article 288 of the Constitution of India is not a source of legislative competence. Article 288 of the Constitution applies only to such entities, which are clearly

defined under this Article. Article 288 of the Constitution merely makes provisions for water or electricity in special context. The law is settled that the legislative competence may not be implied or inferred to. Article 288 (2) is an enabling provision, but, the conditions of this provision in relation of the Act are also not fulfilled.

64. I have conducted an in-depth study of the judgments referred to by the State. The State cannot take advantage of the referred judgments in the present matter because it is well-settled that Taxation is a distinct matter and there is a clear distinction between general subjects of legislation and taxation. State has no power to levy water tax on generation of electricity as there is no Entry under List II of Schedule VII to levy water tax. Taxation is regarded as a distinct matter and is separately set out.

65. In **State of West Bengal vs. Kesoram Industries Ltd., (2004) 10 SCC 201**, the Hon'ble Supreme Court held, "Taxation is considered to be a distinct matter for purposes of legislative competence. There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. The power to tax cannot be deducted from a general legislative entry as an ancillary power".

66. It has been found in the earlier analysis that the Act imposes a tax on the generation of electricity. The State Legislature is not competent to levy tax on the generation of electricity. Therefore, I am in full agreement with the conclusion of brother Ravindra Maithani, J. that the Act is ultra vires the Constitution.

67. The case of the appellants is that the impugned tax cannot be levied on the ground that the State is promissory estopped from levying the same in the light of the respective agreements entered with by the State with the appellants.

68. Brother Ravindra Maithani, J. observed that since the State of Uttarakhand is bound to exempt the appellants from payment of any water tax for the period for which the agreement is in force, during that period, no demand of water tax could be made. It is barred by the doctrine of promissory estoppel.

69. On the other hand, Hon'ble the then Chief Justice observed that it is well settled that there is no estoppel against the law. The competence and the power of the State Legislature to enact legislation, including for the purpose of taxation, cannot be interdicted on the plea of promissory estoppel. The agreement were entered into between the appellants with the State Government, the exemption limb, and not with the State Legislature. Moreover, the water tax imposed under the impugned legislation is a tax, and not an

additional royalty which is sought to be exempted. Therefore, he has rejected the said plea of the appellants.

70. In **Basantkumar Radhakisan Bora vs. Board of Trustees of the Port of Bombay, 1991 (1) SCC 761** and in **M/s Hero Motocorp Ltd. vs. Union of India and Others, 2022 LiveLaw (SC) 852**, the Hon'ble Supreme Court held that there can be no promissory estoppel against the legislature in the exercise of its legislative functions.

71. The contentions of the appellants are that State cannot impose any tax. They are stopped from doing so with the help of doctrine of Promissory Estoppel and any departure from the promise may be termed as unconscionable departure.

72. The case of the appellants is not based on any fraud and they also failed to show any extraordinary facts / circumstances that would allow the Court to apply the doctrine of Promissory Estoppel to override a change made by the Legislature (legislative function).

73. In the aforesaid circumstances, I concur with the conclusion of the Hon'ble the then Chief Justice.

74. The reference is answered accordingly.

(ALOK KUMAR VERMA, J.)

Dated: 27.04.2026

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