HIGH COURT OF GUJARAT (*D.B.*)

RELIENCE INDUSTRIES LTD AND ORS
Versus
STATE OF GUJARAT AND ORS

Date of Decision: 22 January 2013

Citation: 2013 LawSuit(Guj) 2378

Hon'ble Judges: Akil Kureshi, Sonia Gokani

Case Type: Special Civil Application

Case No: 4690 of 2012, 4691 of 2012, 4683 of 2012, 7142 of 2012, 7145 of 2012, 6907 of 2012, 2846 of 2012, 8033 of 2012, 8754 of 2012, 8231 of 2012, 10851 of 2012, 16657 of 2012, 15160 of 2012

Subject: Civil, Constitution, Electricity

Acts Referred:
Constitution Of India Art 254, Art 248(2), Art 48A, Art 21, Art 110
Electricity Act, 2003 Sec 4, Sec 3

Final Decision: Application dismissed

Advocates: Mihir Thakore, Amrita M Thakore, Kamal B Trivedi, Sangita Vishen, Saurabh Soparkar, Amar N Bhatt, K S Nanavati, Kunal Nanavati, Maulik R Shah, Nanavati Associates, Bijal Chhatrapati, A M Hava, Shamik Bhatt

Cases Referred in (+): 19

Akil Kureshi, J.

[1] Rule. Learned AGP Ms. Sangita Vishen waives rule on behalf of the respondent. Considering the controversy involved and the fact that this Court had previously, by interim orders prevented the respondents from recovering any Cess under the Gujarat Green Cess Act, 2011, instead of admitting the petitions, we have heard learned advocates for the parties for final disposal thereof at this stage itself.

[2] Petitions arise in common background. All the petitioners have challenged virus of the Gujarat Green Cess Act, 2011 ('Act' for short) and the Gujarat Green Cess Rules, 2011 ('Rules' for short) on various grounds. Facts, as arising in Special Civil Application No.4690 of 2012, which has been treated as the lead matter may be recorded.

Essential facts are undisputed. The petitioner No.1 is a company registered under the Companies Act, 1956. The Company has its petrochemical plants situated at Hazira. In the said plant, for its captive consumption, the petitioner has set up a power plant with an aggregate capacity of 360 MW electricity. The petitioner has a refinery situated at Moti Khavdi, Jamnagar. This also houses a captive power plant with generating capacity of approximately 450 MW. Likewise, the petitioner has several other units located in different parts of the State engaged in different manufacturing activities. All such production units contain captive power plants with different generating capacities.

[3] The State Legislature has enacted the said Act, which after it received the assent of the Governor, was published in the Official Gazette on 30th March 2011. Section 3 of the Act provides for levy and collection of cess on generation of electricity except by way of renewable energy. It is this provision which is at the center of the controversy. While challenging the entire act as ultra virus of the constitution, the thrust of the contention of the petitioner is that the State legislature lacks competence to levy any tax on generation of electricity. The State Government has filed its reply and canvased that the State intends to promote generation of electricity through renewable sources. In order to do so, the Government has introduced various incentive schemes to ensure that entrepreneurs are attracted to set up power plants in wind energy and power sector. It is pointed out that under the Solar Power Policy, the State Government grants various incentives to the investors to set up their solar power plants in the State. Likewise, under the Wind Energy Policy, the State Government grants similar benefits to the developers of the wind farms. It is pointed out that the rate at which such electricity produced through solar power or wind farms is considerably higher than the conventional sources. Resultantly, the State Government ensures that such power generating companies enter into power purchase agreement with the Gujarat Urja Vikas Nigam Limited ('GUVNL' for short) so that they do not face any difficulty in selling such highcost power. In the result, the State would have to bear the substantial burden since GUVNL will not be able to pass on such a higher cost of procurement of power to the ultimate consumers. The respondents have also contended that such steps are in tune with Article 21 of the Constitution of India pertaining to 'protection of life and personal liberty' and under Article 48A of the constitution pertaining to protection and improvement of environment and safeguarding of forests and wild life.

[4] In nutshell, the case of the petitioners is that Section 3 of the Act provides for levy and collection of cess on generation of electricity, which is exclusively the Union subject contained in Entry 84 to List I of Seventh Schedule. The State therefore has no competence to enact any law pertaining to such subject. It is also the case of the petitioners that Entry 53 in List3, pertaining to the State List, refers to tax on consumption or sale of electricity. According to the petitioners, if the provisions to

Section 3 of the Act and all other provisions are perused closely, it cannot be held that the State has imposed tax on consumption and sale of electricity. The case of the petitioners also is that what is charged under the Act is a tax and not a fee, since the cess is collected not for any regulatory mechanism nor any benefit or advantage; directly or even indirectly flows to the payers of the cess, the charge is not a fee. On that ground, the petitioners contend that even if the cess is not a tax on generation of electricity, the same cannot be supported through any of the entries contained in List II, the State List or ListIII, the Concurrent List, in absence of any direct entry empowering the State to levy any tax found therein. It is also the case of the petitioners that electricity is a subject on which the Union legislature has already framed a legislation. Referring to the Electricity Act, 2003, the petitioners contend that the field being occupied by the Union legislation, the State legislature thereafter would have no competence to frame any law touching upon the same subject.

[5] On the other hand, broadly speaking, the stand of the respondents is that what is charged under the act is a "Fee" and not a "Tax". That such cess is collected not for generation of electricity but is merely computed in terms of generation of electricity. The respondents seek to support the legislation with reference to Entry 6 in List II pertaining to public health and sanitation; hospitals and dispensaries, read with Entry 66 pertaining to fees in respect of any of the matters contained in the said list. Alternatively, the respondents contend that the legislation can be supported by Entry 38 to List III viz., Electricity read with Entry 47 pertaining to fees in respect of any of the matters contained in the list. These are broadly the contours of the matters. Learned counsel Shri Mihir Thakore leading the charge on behalf of the petitioners raised following contentions in support of the challenge :

> [a] Under section 3 of the Act the State seeks to collect tax on generation of electricity. He invited our attention to various provisions of the Act, to which we would refer at the later stage, to contend that no other conclusion is possible. In this respect, our attention was drawn to the decision of the Supreme Court in case of M.P Cement Manufacturers Association v. State of Madhya Pradesh & Ors., 2004 2 SCC 249wherein the Court had an occasion to consider the amendments made in the M.P Upkar Adhiniyam, 1981 containing similar provisions. Counsel submitted that competence to levy tax on generation of electricity is only with the Union in terms of Entry 84 of the Union List which pertains to duty of excise on tobacco and other goods manufactured or produced in India. Counsel submitted that by virtue of decisions of the Apex Court in case of The HingirRampur Coal Company Limited & Ors. v. The State of Orissa & Ors., 1961 AIR(SC) 459 and C.S.T v. M.P Electricity Board, 1969 1 SCC 200 , it is well settled that electricity is "goods" and any tax on its generation must be treated as "excise duty".

[b] Counsel further submitted that what is collected under Section 3 of the Act is "tax" and not "fee". He drew our attention to several authorities on the point, to which reference will be made at a later stage. His contention was that the cess being in the nature of "tax", unless there was a specific entry authorizing the State to collect the same, the State legislature was not competent to enact any law with respect to the same. He submitted that if the cess is treated as a tax, any reference to Entry 6 read with Entry 66 to List II, or Entry 38 read with Entry 47 to List III, would be redundant. Counsel further submitted that in any case, even if it is assumed that the cess is a "Fee" and not "Tax", the same cannot be sustained with reference to Entry 6 of the said List which pertains to public health and sanitation, hospitals and dispensaries.

[c] Counsel lastly submitted that even if the cess is treated to be a fee, collection thereof cannot be and would not be authorized by virtue of Entry 38 to List III pertaining to "Electricity" read with Entry 47, since the said subject appears in the Concurrent List and the Union legislature has already enacted the Electricity Act 2003 providing for range of issues pertaining to generation, transmission, distribution, trading and use of electricity. In that view of the matter, the Electricity Act, 2003 is a complete code providing for all aspects touching the electricity. That being so, according to the counsel, the field being occupied by the Union legislation, the State legislature would thereafter be not competent to enact any law pertaining to the said subject matter. On the other hand, learned Advocate General opposed the petitions contending that the cess levied under Section 3 of the Act is a "Fee" and not "Tax". This aspect of the matter did not arise before the Supreme Court in case of M.P Cement Manufacturers' Association [Supra]. He further submitted that the distinction between fee and tax is getting narrow. Traditional concept in a fee of quid pro quo is no longer adhered to with the same vigour. He cited several decisions on the subject, reference of which will be made at a later stage. Learned Advocate General further submitted that the impugned legislation has been enacted in exercise of legislative powers enjoyed by the State legislature under Entry 6 to List II read with Entry 66; and alternatively, under Entry 38 read with Entry 47 of List III. He submitted that such entries must be given widest possible amplitude. He also contended that the Electricity Act 2003 operates in a different field. No provisions are made in the Electricity Act 2003 with respect to encouraging generation of electricity through renewable sources to protect the environment. He submitted that there is no repugnancy between the Electricity Act 2003 and the State Act. It is only in case of real and direct conflict between the Union Act and the State Act should repugnancy apply to nullify the State legislation.

[6] From the above discussion, following questions arise for our decision :

[1] Whether the said Act provides for levy of cess on generation of Electricity ?

[2] Whether under the said Act, the cess collected is a tax or fee?

[3] Even if the cess is in the nature of fee, is the State legislature competent to provide for such levy under Entry 6 read with Entry 66 to List II ?

[4] Even if the levy is considered a fee, is the State legislature competent to enact the law under Entry 38 to List III read with Entry 47 thereof in view of the Electricity Act 2003 having been enacted by the Parliament. In other words, does the said Act trench upon a field occupied by the Union legislation ? Before taking up above questions for our decision, we may have a look at the relevant provisions contained in the said Act.

[7] The statement of objects and reasons of the said Act reads as under :

"The Finance Minister in his Budget speech on 25th February, 2011 for the year 2011-12 in the Gujarat Legislative Assembly, had observed that the conventional energy affects the environment and as such it is essential to promote "clean and green energy" in the State of Gujarat and for the purpose generation of clean and green energy should be given fillip and for providing funding for purchase of non-conventional energy and protection of environment, the State Government intends to set-up "Green Energy Fund" and for that purpose has proposed to levy cess on the generation of electricity except generated through renewable sources. This Bill seeks to achieve the aforesaid object."

[8] With above objective in mind, the said Act was enacted. Preamble to the Act provides that the Act was enacted to provide for levy of cess on generation of electricity; other than renewable energy for creation of a fund for protecting environment and promoting the generation of electricity through renewable sources in the State of Gujarat and for the matters connected therewith and incidental thereto.

Section 2 (a) of the Act defines "Cess" to mean, "a Green cess" levied on generation of electricity in the State as defined under Section 3 of the said Act.

Section 2(d) defines term "electricity" to mean, "the electrical energy generated."

Section 2(f) defines the term "generating company".

Section 2(g) defines the term "generation of energy" .

Section 2 (k) defines, "renewable energy" as under:"

2 (k) "renewable energy" means the electricity generated from the solar, wind, bioenergy, liquidsolid wastes, hydro power plants or by the use of baggass or agrowastes or electricity generated from such other sources as the State Government may by notification in the Official Gazette, specify".

Section 3 of the Act pertains to levy of Green Cess, which is a charging section and reads as under :

" 3. [1] There shall be levied and collected a Cess for the purposes of this Act, on generation of electricity except on generation of renewable energy by the generating company at the generating station or at the captive generating plant or the stand by generating plant.

[2] Such cess under subsection

(1) shall be levied and payable on the electricity generated in the State of Gujarat irrespective of the fact whether such electricity is consumed within the State or not.

[3] Such cess under subsection

(1) shall be levied in such manner and at such rate not exceeding twenty paise per unit of the electricity generated as may be prescribed.

[4] The State Government may by notification in the Official Gazette, exempt from payment of the cess, the generating company having aggregate installed capacity of not more than one thousand kilowatts.

[5] The cess levied under subsection

(1) shall be payable by the generating company."

Section 4 of the Act pertains to crediting of proceeds of the Consolidated Fund of the State and provides as under :

" 4. The proceeds of the cess, interest and penalty recovered under this Act shall first be credited to the Consolidated Fund of the State, and after deduction of the expenses of collection and recovery there from shall, under appropriation duly made by law in this behalf, be entered in and transferred to a separate fund called the Green Energy Fund, for being utilized exclusively for the purposes of this Act."

Section 5 of the Act pertains to establishment of Green Energy Fund and reads as under :

"5. (1) There shall be established a fund called "Green Energy Fund" for the purpose of this Act.

(2) The Fund shall be under the control of the State Government and there shall be credited therein (a) any sums of money paid under Section 4; (b) the sums by way of any grant by the State Government."

Section 6 pertains to management of fund and reads as under :"

6. [1] The Fund shall be utilized for (a) promoting the generation of electricity through renewable energy, (b) purchase of nonconventional energy, and (c) taking initiatives for protecting environment in the State.

[2] The State Government shall have the power to administer the Fund and shall take such decisions as may be required for the proper utilization of the Fund.

[3] The State Government shall also have the power to allocate and disburse such sums from the Fund as it considers necessary to the concerned Departments responsible for achieving the objects of this Act."

Section 7 requires any person generating electricity in the State to obtain a registration certificate from the Collector of Green Cess. Chapter IV of the Act contain Sections 8 and 9 pertaining to cess authorities to be created under the Act. Remaining provisions contained in the said Act are procedural in nature pertaining to maintenance of books of account, for recovery of unpaid cess and for penalties provided under the Act, etc. We are not directly concerned with these provisions and we may therefore omit reference to them. We may record that in exercise of powers under Section 20 of the said Act, the State Government has framed the rules called, "The Gujarat Green Cess Rules, 2011". We are, however, not interested in any of the provisions of the said Rules, since the outcome of none of the questions framed depend upon the contents of the said Rules.

We may now take up questions formulated by us for determination. Regarding Question No.1

Any discussion on this question inevitably must start with the decision of the Apex Court in case of M.P Cement Manufacturers' Association [Supra]. It was a case wherein, validity of the amendment made by the State legislature to Madhya Pradesh Upkar Adhiniyam, 1981 was called in question. Such amendment provided for collection of Cess @ 20 paise per unit on the captive power producers on the total units of electrical energy produced. The case of the petitioners before the High Court was that the State legislature was incompetent to make any such provisions,

since any taxing legislation on the production of electricity is covered exclusively by Entry 84 of List I of the Seventh Schedule to the Constitution. The High Court dismissed the writ petitions preliminary on the ground that the levy imposed by the impugned amendment was on sale and consumption of electricity and that merely because the words used in the charging section is "production", it does not cease to be a cess on the consumption of electrical energy. The issue was thereupon carried to the Supreme Court. The Apex Court in the decision in case of CST v. M.P Electricity Board [Supra] held that "Electricity" being goods, levy of excise duty on the production of electricity would fall within the ambit of Entry 84 of List I and therefore, be within the exclusive jurisdiction of the Parliament. The State legislature would have competence to levy tax only on sale and consumption of electricity. The Supreme Court examined the provisions made in the Act and the changes sought to be brought about by the impugned amendment and held and observed as under :

14. A plain reading of Sub-Section (2) of Sub- Section 3 introduced by the amendment to the 1981 Adhiniyam makes it clear that the levy of cess was "on the electrical energy produced". The phrase "whether for sale or supply" merely clarified that all electricity produced irrespective of its destination would be liable to cess at the specified rate. The use of the word "whether" after the phrase "energy produced" means that the cess would apply on units produced whichever of the alternatives mentioned after the word "whether", namely, sale or supply or consumption is the case. There is no reason to assume that the words used did not reflect the intention of the Legislature. The imposition envisaged was on the production of electricity units. The charge was on generation and not on the sale or consumption of electricity. There is a conscious linguistic departure from the language used in Section 3 of the Electricity Duty Act, 1949 and indeed the language used in Section 3(1) of the same Act where the cess is levied on the total units of electrical energy sold or supplied by distributors of electrical energy. When dealing with producers under sub-Section (2) of the same section, the cess is required to be paid "on the total units of electrical energy produced". If, as is contended by the respondents, the incidence of levy under Section (1) and sub-section (2) were identical, the same language should have been used in both sub-sections. The deliberate change in language reflects an intention to alter the subject matter of levy as far as producers were concerned.

15. Our interpretation of sub-section (2) of Section 3 is buttressed by and in keeping with the language and effect of the proviso to the said sub-section. It has been held that the normal function of the proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would

be within the purview of the enactment2. The proviso to Section 3(2) excepts "electrical energy produced" from payment of the cess in five cases. This would show that the general application of Section 3(2) to which an exception was being carved by the proviso was in respect of the production of electrical energy. Were it not for the exception in the proviso to Section 3(2), what would be subjected to tax would be electrical energy produced by the five categories mentioned under the proviso. Although in categories (i), (ii), (iii) and (v) the exemption is granted with reference to the utilization of the electrical energy produced, under exception (iv) significantly, all electrical energy produced by a Rural Electrical Co-operative Society registered under the M.P. Co-operative Societies Act, 1960 is exempted. The difference of language between the proviso to sub-section (2) of Section 3 and the proviso to sub-section (1) of Section 3 is also telling. Under the proviso to sub-section (1), the exception is of electrical energy sold or supplied to specified authorities.

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

"With a view to impose cess on the electricity generated by the producers from their Captive Power Plants/Diesel Generating Sets for self consumption or for sale at the rate of 20 paise per unit on all generated electricity units, it has been decided to amend the Madhya Pradesh Upkar Adhiniyam, 1981 (No. 1 of 1982) suitably."

17. There can, in the circumstances, be no doubt that the levy was sought to be imposed on the generation of electricity by the amendment, a levy which the State admittedly was incompetent to impose.

We are of the opinion that the situation in the present case is substantially similar; if not identical, as arising in the case before the Supreme Court in case of M.P Cement Manufacturers' Association case. In the State Act impugned before us also, the charge is on generation of electricity. The very statement of objects and reasons provide that it was proposed to levy cess on generation of electricity; except generated through renewable sources. The preamble of the Act reiterates this position by providing that the Act was enacted to provide for levy of cess on generation of electricity other than renewable energy for creation of a fund for protecting the environment and other stated purposes. Term "cess" as defined in Section 2 (a) of the Act is to mean, "a Green Cess levied on generation of electricity in the State". Section 2 (d) defines, "Electricity" to mean the electrical energy generated. Section 2 (f) defines the term, "Generating Company" and

section 2 (g) defines, "generation of energy". Section 2 (k) which defines, "renewable energy" describes the term to mean, "the electricity generated from the solar, wind, bioenergy, liquidsolid wastes, etc., or electricity generated from such other sources as the State Government may notify."

Section 3, which is crucial for our purpose and which provides for levy of Green Cess makes this position abundantly clear. Subsection (1) thereof provides that there shall be levied and collected a cess for the purpose of this Act on generation of electricity; except on generation of renewable energy, by the generating company. Subsection (2) of Section 3 further amplifies this aspect by providing that such cess under subsection (1) shall be levied and payable on the electricity generated in the State, irrespective of the fact whether such electricity is consumed within the State or not. Subsection (3) of Section 3 of the Act provides for the rate at which such cess shall be levied. It is specified that the cess under subsection (1) shall be levied in such a manner and at such rate not exceeding twenty paise per unit of the electricity generated; as may be prescribed. Subsection (4) of Section 3 empowers the State Government, by issuing a notification in the official gazette, to exempt any generating company from payment of cess, if the Company has installed capacity of not more than one thousand kilowatts. Subsection (5) of Section 3 further provides that the cess levied under subsection (1) shall be payable by the generating company. Provisions of the Said Act noted above read in conjunction with the statement of objects and reasons and preamble to the Act makes it abundantly clear that what is charged under Section 3 is cess on generation of electricity and not on any other activity. If such subsection (3) of Section 3 was the only provision under consideration and there were other provisions contained in the said Act indicating that the charge is on sale or consumption of electricity and not on generation, we would have certainly examined the contention of learned Advocate General that mere computation of the cess on generation would not be the conclusive evidence that the charge is on generation and not on consumption. However, in the present case, there are several other provisions of the Act which makes this position sufficiently clear. It is undoubtedly true that subsection (3) of Section 3 of the Act provides for levy of the Cess at the rate that may be prescribed but which would not exceed twenty paise per unit of the electricity generated. Had this been the sole provision linking collection of the cess to generation of electricity, a further question of ascertaining the real charge would arise. In the present case, however, there is more than sufficient clarity leading to a definite conclusion that the cess is charged on generation of electricity. Subsection (1) of Section 3 itself provides collection of cess on generation of electricity. Subsection (4) thereof empowers the Government to exempt generating companies having installed capacity of less than one

thousand kilowatts from payment of the cess. Subsection (5) of Section 3 makes it further clear that the cess levied under subsection (1) shall be paid by the generating companies. We have not a slightest confusion in our mind that under the said Act and in particular Section 3 thereof, what is sought to be collected is a cess on generation of electricity and not for consumption or sale thereof. Regarding Question No.2

This brings us to the second question. Ordinarily, our conclusion on first Question should have settled the issue by virtue of decision of the Supreme Court in case of M.P Cement Manufacturers' Association [Supra]. Learned Advocate General however contended that the said case proceeded on the basis that what was collected by the State legislature was a tax. The Supreme Court therefore, on the basis of its finding that the tax was on generation of electricity held that the State legislature lacks competence, looking to Entry 84 of List I. In the present case, however according to the learned Advocate General, cess is in the nature of a fee, an argument never advanced before the Supreme Court. The levy can be sustained on the basis of any of the entries made in ListII ie., State List or ListIII ie., Concurrent List of the Seventh Schedule to the Constitution of India.

Learned counsel Shri Mihir Thakore however vehemently contended that the decision of the Supreme Court cannot be distinguished on the ground that a particular aspect was not argued or not considered. He submitted that the binding decision of the Supreme Court cannot be watered down or ignored merely because before the Supreme Court, such a question was not agitated. In this context, he relied on the decision in case of Ballabhadas Mathurdas Lakhani & Ors. v. Municipal Committee, Malkapur, 1970 2 SCC 267, in which it was observed that the decision of the Supreme Court was binding on the High Court and the Court could not ignore it because they thought that relevant provisions were not brought to the notice of the Court. Counsel also relied on the decision of Apex Court in case of Director of Settlements, A.P & Ors. v. M.R Apparao & Anr., 2002 4 SCC 628wherein the Apex Court observed that the decision of the Supreme Court cannot be assailed on the ground that certain aspects were not considered by, or that relevant provisions were not brought to the notice of the Supreme Court.

On the other hand, learned Advocate General contended that the ratio of a decision is what the Court decides and not what the parties presented before the Court as contentions. He relied upon the decision of the Apex Court in case of Haryana Financial Corporation & Anr. vs. Jagdamba Oil Mills & Anr., 2002 3 SCC 496wherein the Apex Court observed that, "Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are not to be read

as Euclid's theorems nor as provisions of the statute. These observations must be read in the context in which they appear. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for Judges to embark upon lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes, their words are not to be interpreted as statutes."

8. For the same purpose, reference was also made to the decision of the Apex Court in case of Sushil Suri v. Central Bureau of Investigation & Anr., 2011 5 SCC 708.

Before we consider question No. 2, we would have to decide whether in view of submissions, is it open for us to do so. In the case of M.P Cement Manufacturers' Association [Supra], the Supreme Court held that the State legislature was not competent to provide for a levy of tax on generation of electricity and therefore, the amendment impugned before the Court was bad in law. This is the ratio of the decision. Before the Supreme Court, it was not even argued that the levy was in the nature of a fee. Any conclusion of the Supreme Court therefore must be seen in such light. An issue which never came up for consideration before the Court cannot be said to be closed by virtue of any decision rendered therein. In the present case, there is a distinction between argument or contention which ought to have been raised, or provision of law which ought to have been brought to the notice of the Court as against an issue which was never the subject matter of the controversy. Simple question before the Supreme Court was whether the tax collected by the Madhya Pradesh State under the State legislation on generation of electricity and hence was valid. The Supreme Court ruled that the tax was a charge on generation of electricity and was therefore not competent for the State legislature to levy. Before the Supreme Court, the question never arose whether the cess was in the nature of fee or tax. We would therefore render our opinion on such issue with the aid of several decisions cited by the learned counsel for both the sides on this aspect.

[9] A levy or impost provided by the legislature whether is a tax or a fee has occupied the mind of the Courts on several occasions. In the context, different Courts have spoken at considerable length on what is a tax, what is a fee and what is the essential difference between the two. In the case of Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt, 1965 AIR(SC) 282the Seven Judge Bench of the Apex Court noted with approval the definition of term "Tax"coined in a decision of the High Court of Australia as under :

"A tax is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered."

[10] It was observed that though levying of fees is a particular form of exercise of taxing power of the State, our Constitution has placed fee under separate category for the purpose of legislation. It was noticed that certain kinds of fees are collected for licence and certain for services rendered. In paragraph 44, the Apex Court explained what is the fee, in the following terms :

"44. Coming now to fees, a fee is generally defined to be a charge for a special service rendered to individuals by some government agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. .... These are undoubtedly some of the general characteristics but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

In paragraph 45 of the judgment, the Supreme Court explained the difference between a tax and a fee as under :"

45. We regards the distinction between a tax and a fee, it is argued in the first place on behalf of the respondent that a fee is something voluntary which a person had got to pay if he wants certain services from the government; but there is no obligation on his part to seek such services and if he does not want the services, he can avoid the obligation. The example given is of a licence fee. If a man wants a licence that is entirely his own choice and then only he has to pay the fees but not otherwise. We think that a careful examination will reveal that the element of compulsion or coerciveness is present in all kinds of imposition, though in different degrees and that it is not totally absent in fees. This therefore, cannot be made the sole or even a material criterion for distinguishing a tax from fees.

It is difficult we think to conceive of a tax except, it be something like a poll tax, the incidence of which falls on all persons within a State. The house tax has to be paid only by those who own houses, the land tax, by those who possess lands, municipal taxes or rates will fall on those who have properties within a municipality. Persons who do not have houses, lands or per ties within municipalities would not have to pay these taxes, but nevertheless these impositions come within the category of taxes and nobody can say that it is choice of these people to own lands or houses or specified kinds of properties, so that there is no compulsion on them to pay taxes at all. Compulsion lies in the fact that payment is enforceable by law

against a man inspite of his unwillingness or want of consent and that element is present in taxes as well as in fees. Of course, in some cases whether a man would come within the category of a service receiver may be a matter of his choice but that by itself would not constitute a major test which can be taken as the criterion of this species of imposition. The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of a common burden, while a fee is a payment for a special benefit or privilege. Fees confer a special capacity although the special advantage as for example in the case of registration fees for documents or marriage licences, in secondary to the primary motive of regulation in the public interest vide Fiodlay Shriaras on Science of Public Finance. Vol.I Page 202. Public interest seems to be at the basis of all impositions, but in a fee it is some special benefit which the individual receives. As Seligman says, it is the special benefit accruing to the individual which is the reason for payment in the case of fees; in the case of a tax, the particular advantage if it exists at all is an incidental result of State action, vide Seligman's Essays on Taxation p.408."

[11] In paragraphs 46 & 47, the Apex Court observed as under :

"46. If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should, on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services. As indicated in article 1 10 of the Constitution ordinarily there are two classes of cases where Government imposes fees upon persons. In the first class of cases, Government simply grants a permission or privilege to a person to do something, which otherwise that person would not be competent to do and extracts fees either heavy or moderate from that person in return for the privilege that is conferred.

A most common illustration of this type of cases is furnished. by the licence fees for motor vehicles. Here the costs incurred by the Government in maintaining an office or bureau for the granting of licences may be very small and the amount of imposition that is levied is based really not upon the costs incur. red by the Government but upon the benefit that the individual receives. In such cases, according to all the writers on public finance, the tax element is predominant and if the money paid by licence holders goes for the upkeep of roads and other matters of general public utility, the licence fee cannot but be regarded as a tax.

47. In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered. If the money thus paid is set apart and appropriated specifically for the performance of such work and is not merged in the public revenues for the

benefit of the general public, it could be counted as fees and not a tax. There is really no generic difference between the tax and fees and as said by Seligman, the taxing power of a State may manifest itself in three different forms known respectively as special assessments, fees and taxes."

[12] It can thus be seen that this judgment recognizes that a fee can either be regulatory in nature, or for rendering some services requiring some corelation of quid pro quid between the fee paid and the service rendered to the payer. This question once again came up before the Constitution Bench of the Supreme Court in case of The HingirRampur Coal Company Limited & Ors. vs. The State of Orissa & Ors., 1961 AIR(SC) 459In context of distinction between a Tax and a Fee, it was observed as under :

"...It is true that between a tax and a fee there is no generic difference. Both are compulsory exactions of money by public authorities; but whereas a tax is imposed for public purposes and is not, and need not, be supported by any consideration of service rendered in return, a fee is levied essentially for services rendered and as such there is an element of quid pro quo between the person who pays the fee and the public authority which imposes it. If specific services are rendered to a specific area or to a specific class of persons or trade or business in any local area, and as a condition precedent for the said services or in return for them cess is levied against the said area or the said class of persons or trade or business the cess is distinguishable from a tax and is described as a fee. Tax recovered by public authority invariably goes into the consolidated fund which ultimately is utilized for all public purposes, whereas a cess levied by way of fee is not intended to be, and does not become, a part of the consolidated fund. It is earmarked and set apart for the purpose of services for which it is levied. There is, however, an element of compulsion in the imposition of both tax and fee. When the Legislature decides to render a specific service to any area or to any class of persons, it is not open to the said area or to the said class of persons to plead that they do not want the service and therefore they should be exempted from the payment of the cess. Though there is an element of quid pro quo between the taxpayer and the public authority there is no option to the taxpayer in the matter of receiving the service determined by public authority. In regard to fees there is, and must always be, corelation between the fee collected and the service intended to be rendered. Cases may arise where under the guise of levying a fee Legislature may attempt to impose a tax; and in the case of such a colourable exercise of legislative power courts would have to scrutinize the scheme of the levy very carefully and determine whether in fact there is a corelation between the service and the levy, or whether the levy is either not corelated with service or is levied to such an excessive extent as to be a

presence of a fee and not a fee in reality. In other words, whether or not a particular cess levied by a statute amounts to a fee or tax would always be a question of fact to be determined in the circumstances of each case. The distinction between a tax and a fee is, however, important, and it is recognized by the Constitution. Several Entries in the Three Lists empower the appropriate Legislatures to levy taxes; but apart from the power to levy taxes thus conferred each List specifically refers to the power to levy fees in respect of any of the matters covered in the said List excluding of course the fees taken in any Court."

[13] In the context of requirement of quid pro quo for charging the fees, it was observed that

"It is true that when the Legislature levies a fee for rendering specific services to a specified services to a specified area or to a specified class of persons or trade or business, in the last analysis such services may indirectly form part of services rendered is distinctly and primarily meant for the benefit of a specified class or area the fact that in benefiting the specified class or area the State as a whole may ultimately and indirectly be benefited would not detract from the character of the levy as a fee. Where, however, the specific service is in essence is directly a part of it, different consideration may arise. In such a case it is necessary to enquire what is the primary object of the levy and essential purpose which it is intended to achieve. Its primary object and the essential purpose must be distinguished from its ultimate or incidental results or consequences. That is the true test in determining the character of the levy."

[14] In case of Sudhir Thirtha Swamiar & Ors. v. The Commissioner of Hindu Religious & Charitable Endowments, Mysore & Anr., 1963 AIR(SC) 966, the Constitution Bench of the Supreme Court, in context of requirement of establishment of quid pro quo for charging a fee, observed as under :

"A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to each individual who obtains the benefit of the service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax. It is true that ordinarily a fee is uniform and no account is taken of the varying abilities of different recipients. But absence of uniformity is not a criterion on which alone it can be said that it is of the nature of a tax. A fee being a levy in consideration of

rendering service of a particular type, corelation between the expenditure incurred by the Government and the levy must undoubtedly exist, but a levy will not be regarded as a tax merely because of the absence of compulsion in the collection thereof, nor because some of the contributories do not obtain the same degree of service as others may."

[15] In case of Kewal Krishan Puri & Anr. v. State of Punjab & Anr., 1980 1 SCC 416 the Apex Court, referring to and relying on the decision in case of Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sir Shirur Mutt [Supra] and the decision of Constitution Bench in case of The HingirRampur Coal Company Limited & Ors. [Supra] in paragraph 23 of its decision, culled out various principles for satisfying the test for a valid levy of fee as under:

" From a conspectus of the various authorities of this Court we deduce the following principles for satisfying the tests for a valid levy of market fees on the agricultural produce bought or sold by licensees in a notified market area:

(1) That the amount of fee realized must be earmarked for rendering services to the licensees in the notified market area and a good and substantial portion of it must be shown to be expanded for this purpose.

(2) That the services rendered to the licensees must be in relation to the transaction of purchase or sale of the agricultural produce.

(3) That while rendering services in the market area for the purpose of facilitating the transactions of purchase and sale with a view to achieve the objects of the marketing legislation it is not necessary to confer the whole of the benefit on the licensees but some special benefits must be conferred on them which have a direct, close and reasonable correlation between the licensees and the transactions.

(4) That while conferring some special benefits on the licensees it in permissible to render such service in the market which may be in the general interest of all concerned with the transactions taking place in the market.

(5) That spending the amount of market fees for the purpose of augmenting the agricultural produce, its facility of transport in villages and to provide other facilities meant mainly or exclusively for the benefit of the agriculturists is not permissible on the ground that such service in the long run go to increase the volume of transactions in the market ultimately benefitting the traders also. Such an indirect and remote benefit to the traders is in no sense a special benefit to them.

(6) That the element of quid pro quo may not be possible, or even necessary, to be established with arithmetical exactitude but even broadly and reasonably it must be established by the authorities who charge the fees that the amount is being spent for rendering services to those on whom falls the burden of the fee.

(7) At least a good and substantial portion of the amount collected on account of fees, may be in the neighbourhood of twothirds or threefourths, must be shown with reasonable certainty as being spent for rendering services of the kind mentioned above.

[16] In case of Sreenivasa General Traders & Ors. vs. State of Andhra Pradesh & Ors., 1983 4 SCC 353, it was observed that a levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual who obtains benefit of the service. It was observed as under :

'32. There is a generic difference between a tax and a fee. Both are compulsory exactions of money by public authorities. Compulsion lies in the fact that payment is enforceable by law against a person in spite of his unwillingness or want of consent. A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered by the authority to each individual who obtains the benefit of the service. It is now increasingly realized that merely because the collections for the services rendered or grant of a privilege or licence are taken to the consolidated fund of the State and not separately appropriated towards the expenditure for rendering the service is not by itself decisive. Presumably, the attention of the Court in the Shirur Mutt case was not drawn to Article 226 of the Constitution. The Constitution nowhere contemplates it to be an essential element of fee that it should be credited to a separate fund and not to the consolidated fund. It is also increasingly realized that the element of quid pro quo in the strict sense not always a sine qua none for a fee. It is needless to stress that the element of quid pro quo is not necessarily absent in every tax."

[17] In case of Krishi Upaj Mandi Samiti & Ors. vs. Orient Paper & Industries Limited, 1995 1 SCC 655, the Apex Court laying various principles on the subject, in paragraph 21 portion thereof, relevant for for our purpose reads as under :

" 21. Thus what emerges from the conspectus of the aforesaid decisions is as follows :

(5) The distinction between a tax and a fee lies primarily in the fact that a tax is levied as a part of the common burden while a fee is a payment for a special benefit or privilege. Fees confer a special capacity although the special advantage is secondary to the primary motive of regulation in the public interest. Public interest seems to be at the basis of all impositions but in a fee it is some special benefit which is conferred and accruing which is the reason for imposition of the levy. In the case of a tax, the particular advantage if it exists at all, is an incidental result of State action. A fee is a sort of return or consideration for services rendered and hence it is primarily necessary that the levy of fee should on the face of the legislative provision be corelated to the expenses incurred by Government in rendering the services. As indicated in Article 110(2) of the Constitution ordinarily there are two classes of cases where Government imposes fees upon persons. The first is of grant of permission or privilege and the second for services rendered. In the first class of cases, the cost incurred by the Government for granting of permission or privilege may be very small and the amount of imposition levied is based not necessarily upon the costs incurred by the Government but upon the benefit that the individual receives. In such cases, the tax element is predominant. If the money paid by privilege holders goes entirely for the expenses of matters of general public utility, the fee cannot but be regarded as a tax. In the other class of cases, the Government does some positive work for the benefit of persons and the money is taken as the return for the work done or services rendered.

(6) There is really no generic difference between tax and fee and the taxing power of the State may manifest itself in three different forms, viz., special assessments, fees and taxes. Whether a cess is tax or fee, would depend upon the facts of each case. If in the guise of fee, the legislature imposes a tax it is for the Court on a scrutiny of the scheme of the levy, to determine its real character. In determining whether the levy is a fee, the true test must be whether its primary and essential purpose is to render specific services to a specific area or classes. It is of no consequence that the State may ultimately and indirectly be benefited by it. The amount of the levy must depend upon the extent of the services sought to be rendered and if they are proportionate, it would be unreasonable to say that since the impost is high it must be a tax. Nor can the method prescribed by the legislature for recovering the levy by itself alter its character. The method is a matter of convenience and though relevant, has to be tested in the light of other relevant circumstances.

(7) It is not a postulate of a fee that it must have relation to the actual service rendered. However, the rendering of service has to be established. The service, further, cannot be remote. The test of quid pro quo is not to be satisfied with close

or proximate relationship in all kinds of fees. A good and substantial portion of the fee must, however, be shown to be expended for the purpose for which the fee is levied. It is not necessary to confer the whole of the benefit on the payers of the fee but some special benefit must be conferred on them which has a direct and reasonable corelation to the fee. While conferring some special benefits on the payers of the fees, it is permissible to render service in the general interest of all concerned. The element of quid pro quo is not possible or even necessary to be established with arithmetical exactitude. But it must be established broadly and reasonably that the amount is being spent for rendering services to those on whom the burden of the fee falls. There is no postulate of a fee that it must have a direct relation to the actual services rendered by the authorities to each individual to obtain the benefit of the service. The element of quid pro quo in the strict sense is not always a sine qua non for a fee. The element of quid pro quo is not necessarily absent in every tax. It is enough if there is a broad, reasonable and general corelationship between the levy and the resultant benefit to the class of people on which the fee is levied though no single payer of the fee receives direct or personal benefit from those services. It is immaterial that the general public may also be benefited from some of the services if the primary service intended is for the payers of the fees." In case of Vam Organic Chemical Limited & Anr. V. State of U.P & Ors., 1997 2 SCC 715, the Apex Court observed as under :" The High Court has taken the view that in the case of regulatory fees, like the licence fees, existence of quid pro quo is not necessary although the fee imposed must not be, in the circumstances of the case, excessive. The High Court further held that keeping in view the quantum and nature of the work involved in supervising the process of denaturation and the consequent expenses incurred by the State, the fee of 7 paise per litre was reasonable and proper. We see no reason to differ with this view of the High Court."

[18] In case of State of West Bengal v. Kesoram Industries Limited & Ors., 2004 10 SCC 201, the Apex Court has observed as under :

"146. As stated earlier also, the impugned cess can be justified as fee as well. The term cess is commonly employed to connote a tax with a purpose or a tax allocated to a particular thing. However, it also means an assessment or levy. Depending on the context and purpose of levy, cess may not be a tax; it may be a fee or fee as well. It is not necessary that the services rendered from out of the fee collected should be directly in proportion with the amount of fee collected. It is equally not necessary that the services rendered by the fee collected should remain confined to the persons from whom the fee has been collected. Availability of indirect benefit and a general nexus between the persons bearing the burden of levy of fee and the

service rendered out of the fee collected is enough to uphold the validity of the fee charged. The levy of the impugned cess can equally be upheld by reference to Entry 66 read with Entry 5 of List II."

[19] The above observations made in case of Kesoram Industries {Supra] were noted with approval in a recent decision in case of Vijaylashmi Rice Mill & Ors. vs. Commercial Tax Officer, Palkol & Ors., 2006 6 SCC 763, wherein the Apex Court observed as under :

"28. No doubt, as stated above, there has to be a broad correlation between the total amount of fees generated by the impugned cess and the total value of the services rendered, but there is no specific averment in the writ petition that there is no such broad correlation. It is true that if, say, Rs. 100 Crores revenue is generated every year by this case, it is not necessary that this entire amount of Rs. 100 Crores must be spent for the purposes mentioned in Section 9, and it will suffice if a substantial part of this Rs. 100 crores is spent for such purpose. At the same time we would like to clarify that if, say Rs. 100 crores is generated by the cess in question and only Rs. 1 crore or Rs. 10 lakhs is spent for the purpose mentioned in Section 9, obviously there would not be in such a case a broad correlation between the fees being realised and the service rendered."

[20] In case of Dewan Chand Builders & Contractors v. Union of India & Ors., 2012 1 SCC 101, the Court examined once again whether certain levy was a tax or a fee.

From the above decisions, it can be safely culled out that though the nature of tax and fee both being a compulsory exaction of charge from the members of the public, there is an essential difference between the two in its character. It is equally true that the distinction between fee and tax is getting narrowed over the passage of time. Nevertheless, there is a clear distinction and the difference between the two still exists and not completely obliterated. A fee can either be regulatory in nature not requiring corelation with quid pro quo or may be for rendering some services in which case, some corelation of a benefit flowing to the cess payer must be demonstrated. Even this traditional concept of quid pro quo over a passage of time is getting narrowed and the Courts no longer insist on adherence to the strict requirement of either entire or even substantial position of the fee charged from the persons, being utilized for the benefit of a class of such fee payers. If there is some benefit direct or even indirect flowing from collection of such fee to the payers thereof, in a given situation, Courts have held that the requirement of quid pro quo, as now understood in the modern context, stands satisfied. Nevertheless, when we are referring to a fee charged not for sustaining any regulatory mechanism but otherwise, the requirement of establishing even such semblance of

satisfaction of quid pro quo is not totally done away with. Any conclusion to the contrary would effectively obliterate any distinction between the tax and fee. Though we are conscious that over a period of time, the Courts have shown more leniency in accepting the State's stand that a certain portion of the fee collected is diverted for the indirect benefit of fee payers, the requirement of quid pro quo is established, nevertheless, in a case where the entire fund so collected is used for the purpose of general public or for the general public good, it cannot be stated that the requirement of quid pro quo should be taken to have been satisfied merely because like any other person, the payer of the fee would also benefit out of such general public spending by the Government out of the fee so collected.

[21] Even in the last two decisions cited by the learned Advocate General and relied upon with some vehemence viz., in case of Vijayalashmi Rice Mill & Ors. [Supra] and Dewan Chand Builders & Contractors [Supra], no legal proposition to the contrary emerges. In case of Vijayalashmi Rice Mill [Supra], rice millers of the Andhra Pradesh State had challenged levy of cess on sale and purchase of paddy. In the context of the petitioners' contention that there was no quid pro quo in the levy of the cess and hence it cannot be said to be a fee, the Apex Court observed in paragraph 19 that, "..in the present case, there was no averment by the petitioner in the writ petition that there is no broad correlation between the amount realised as a cess and the amounts spent for the purposes mentioned in Section 9 of the Act namely, to provide and accelerate rural development including the construction of rural roads and bridges and storage facilities for storing agricultural produce and for maintaining and strengthening of the public distribution system." It was in this context that the Apex Court held that there was a broad correlation between the total amount of fees generated by the impugned cess and the total value of services rendered. It was observed that no factual averment has been made that no such broad correlation between the amount of cess realized and the total value of services rendered to the people living in the rural areas. The Court, however, while upholding the levy, kept open for the petitioners to to file a fresh petition making specific averment that there is no broad correlation between the amount of cess realized and the value of services rendered in accordance with Section 9 of the Act. This case, therefore, was decided largely on the aspect of a broad correlation between the cess collected and the services rendered being established.

[22] In case of Dewan Chand Builders & Contractors [Supra], levy of fee in the nature of a cess under the Building & Other Construction Worker's [Regulation of Employment & Conditions of Service] Act, 1996 was challenged on the ground that there was no quid pro quo established. The Act provided for collection of cess for the welfare of building construction workers. It envisaged a network of authorities at the Central and State levels to ensure that the benefit of the legislation is made available to every

building and construction worker. For such purpose, Section 3 of the said Act provides for a levy and collection of the cess at a specified percentage of the cost of construction incurred by employer. In this context, the Court examined the question whether imposition was a Tax or a Fee and held that

> "31. There is no doubt in our mind that the Statement of Objects and Reasons of the Cess Act, clearly spells out the essential purpose the enactment seeks to achieve ie., to augment the Welfare Fund under the BOCW Act. The levy of cess on the cost of construction incurred by the employers on the building and other construction works is for ensuring sufficient funds for the Welfare Boards to undertake social security schemes and welfare measures for building and other construction workers. The fund, so collected, is directed to specific ends spelt out in the BOCW Act. Therefore, applying the principle laid down in the aforesaid decisions of this Court, it is clear that the said levy is a "fee" and not "tax". The said fund is set apart and appropriated specifically for the performance of specified purpose; it is not merged in the public revenues for the benefit of the general public and as such the nexus between the cess and the purpose for which it is levied gets established, satisfying the element of quid pro quo in the scheme. With these features of the Cess Act in view, the subject levy has to be construed as "fee" and not a "tax". Thus, we uphold and affirm the finding of the High Court on the issue."

[23] In this case, thus, the Supreme Court on the basis of the provisions in the Act under challenge came to the conclusion that the element of quid pro quo was established. This decision, therefore also, cannot be cited as an authority to the proposition that with the changing times, the requirement of establishment of quid pro quo is done away with.

[24] We may in the context peruse the provisions contained in the Act. The Act, as already noted, provides for collection of a cess on generation of electricity energy; except on generation of renewable energy. Section 4 of the Act provides that the proceeds of the cess, interest and penalty recoverable under the Act shall be first credited to the Consolidated Fund of the State and after deducting expenses, be entered in and transferred to a separate fund called the Green Energy Fund, and would be utilized exclusively for the purposes of the Act. Section 5 of the Act envisages establishment of a fund called, "Green Energy Fund" which shall be created from the combination of the sums of money collected under Section 4 and the sums by way of any grant, that may be made by the State Government. Section 6 pertains to management of the fund. Subsection (1) thereof provides that the fund shall be utilized for promoting generation of electricity through renewable energy; purchase of nonconventional energy and taking initiatives for protecting environment in the State.

[25] Few things immediately become clear from the above provisions. Firstly, the cess collected under Section 3 is not regulatory in nature. Such cess is not provided for granting any licence or for providing some other similar regulatory mechanism for generating electricity. It is true that Section 7 requires the generating companies to obtain a registration. This registration however is for regulating the collection of green cess and not other way around ie., the cess is not collected for grant of registration. Further, the cess so collected is not to be appropriated permanently in the Consolidated Fund of the State but becomes part of the Green Energy Fund, which fund is to be utilized for the purposes specified under Section 6 (1) of the Act.

[26] The requirement that the cess collected should not form part of the State Fund and that the same should be utilized for specific purpose is thus satisfied. But, question still remains whether in absence of fees being regulatory in nature, the element of quid pro quo is established. In this context also, provisions of the Act are amply clear. Section 6 [1] of the Act specifies the purpose for which the fund, which includes fee, interest, penalties, etc. collected under the Act, shall be utilized. Such purposes are [a] promoting generation of electricity through renewable energy; [b] purchase of nonconventional energy; and [c] taking initiatives for protecting environment in the State. It can be seen that all these three purposes seek to achieve a laudable goal. None of the purposes are such which can be stated to be for the benefit of the payers of the fee. In the present class of cases we are concerned with the industries engaged in generation of electricity other than renewable sources. Such industries are required to pay cess at the prescribed rate on its total generation of electricity. Such cess so collected is to be utilized for promoting generation of electricity through nonrenewable energy; purchase of nonconventional energy and taking initiatives for protecting the environment. These objectives, beside being laudable in nature, also have a direct beneficial effect on the general members of public. Such general benefits flowing to all the members of the public, however, can by no stretch be stated to have any direct or even indirect special benefit to the class of industries paying such fees. Had there being some benefit, if not direct even indirect flowing to the petitioners out of the cess so collected and fund so created, the question of satisfaction of element of quid pro quo could be examined further. In the present case, however, unequivocally we come to the conclusion that the Green Cess Fund so created out of collection of the cess would in no manner benefit or result into any advantage to the petitioners viz., the payers of the cess other than like any member of the public. Essential requirement of the element of quid pro quo is thus totally missing. In that view of the matter, we have no hesitation in holding that the cess is not a fee but a tax. In other words, if it is sought to be projected as a fee, it is impermissible to collect the same in absence of any iota of element of quid pro quo. Regarding Question - 3

[27] In view of our conclusion to Question No.2, this question would essentially loose its significance. However, when an alternate contention is raised on behalf of the petitioners, we would like to deal with the same. We may recall, stand of the State is that the cess is in the nature of fee and the State legislation is authorized under Entry 6 read with Entry 66 to List II of the Seventh Schedule. Entry 6 of List II reads as under :

"Public Health and sanitation; hospitals and dispensaries."

[28] Entry 66 of List II authorizes State legislature to make legislation charging fees in respect of any of the matters in the List, but not including fees taken in any court. Question is even if the cess is in the nature of fee, can legislation be framed having regard to Entry 6 of List II to Second Schedule. Entry 6, as noted above, pertains to public health and sanitation as well as hospitals and dispensaries. In the present case, the entire legislation is for collection of Green Cess from the generators of electricity through nonrenewable sources and for diverting and utilizing such funds for promoting generation of electricity through renewable sources; for purchase of nonconventional energy and for protection of environment. We do not see how such purpose can have direct corelation to the public health and sanitation. Learned Advocate General strongly urged that protection of environment is directly related to "public health". Environment covers wide areas and subjects. Study of environment would include ecology, environmental force, balance of ecology and variety of other subjects. It may be that protection of environment may have impact on public health. However, it cannot be stated that protection of environment is a subject related to public health. Public health is one of the elements of protection of environment and any degeneration of environment would certainly impact the public health. However, the term environment has much wider connotation and touches health, as one of the aspects of the subject. Subject of environment has much wider purview.

[29] Encyclopedia Britannica discusses the concept of environmental biology under the heading of ecology and describes it as the study of the relationships between organisms and all the facts, including other organisms, that make up their environment. It is further explained that the ecological studies may focus on the relationship between individual organisms and the physical and chemical features of their environment. Ordinarily, the tolerance of an organism to a range of factors is measured in the laboratory. Attempts are then made to relate these results to the distribution of the organism in natural conditions. Likewise, environmental geology is described as a scientific study dealing with those aspects of the Earth that directly influence and are affected by human activities. It includes the protection of man against geologic hazards such as earthquakes, landslides, floods, volcanic eruptions and climatic changes, the management of natural resources and landuse planning. It is

equally concerned with human activities that result in the degradation of the environment, such as the polluting of air and water through the disposal of toxic wastes. As a multidisciplinary field of study, environmental geology not only draws on the skills of specialists in the other Earth sciences but also on those of civil engineers, chemists and sociologists. From the above discussion, it can be seen that the field of environment would cover within its purview wide range of scientific activities and researches. Study of environment and environmental facts may have some bearing on public health, however, the issue of public health cannot be seen as a part of the topic of environment. Regarding question No.4 This brings us to the last question ie., could the legislation be framed under Entry 38 to ListIII to the Seventh Schedule read with Entry 47 thereof. For the purpose of this question, once again, we propose to proceed on the hypothesis that the cess is a fee and not a tax. The question still arises whether by virtue of the Electricity Act, 2003 the State Legislature could survive on the basis of any entry in the Concurrent ListIII. We may recall, the contention of the petitioners was that in wake of the Central Act occupying the filed of Electricity, the State Legislature was no longer competent to frame any law on the same subject. It was the case of the petitioners that even in absence of any direct conflict between the two legislations, only on the premise that the Union legislation occupies the field, the State legislature would be rendered incompetent to enact any law on the subject.

[30] The concept of repugnancy between the Union Legislation and the State Act pertaining to an entry contained in List III to Seventh Schedule emerges from Article 254 of the Constitution. Clause [1] of Article 254 provides that if any provision of a law made by the legislature of a State is repugnant to any provisions of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters, enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or as the case may be, the existing law, shall prevail and the law made by the legislature of the State shall, to the extent of repugnancy be void.

[31] In case of M. Karunanidhi v. Union of India, 1979 AIR(SC) 898Constitution Bench of the Supreme Court held and observed as under:" 35. On a careful consideration, therefore, of the authorities referred to above, the following propositions emerge :

[1] That in order to decide the question of repugnancy it must be shown that the two enactments contain inconsistent and irreconcilable provisions, so that they cannot stand together or operate in the same field.

[2] That there can be no repeal by implication unless the inconsistency appears on the face of the two statutes.

[3] That where the two statutes occupy a particular field, but there is room or possibility of both the statutes operating in the same field without coming into collision with each other, no repugnancy results.

[4] That where there is no inconsistency but a statute occupying the same field seeks to create distinct and separate offences, no question of repugnancy arises and both the statutes continue to operate in the same field."

[32] In case of State of W.B v. Kesoram Industries Limited & Anr. [Supra], the Apex Court culled out principles of interpretation of entries under the Seventh Schedule with the special focus on taxing statutes. It was held as under :

(8) The primary object and the essential purpose of legislation must be distinguished from its ultimate or incidental results or consequences, for determining the character of the levy. A levy essentially in the nature of a tax and within the power of State Legislature cannot be annulled as unconstitutional merely because it may have an affect on the price of the commodity. A State legislation, which makes provisions for levying a cess, whether by way of tax to augment the revenue resources of the State or by way of fee to render services as quid pro quo but without any intention of regulating and controlling the subject of the levy, cannot be said to have encroached upon the field of 'regulation and control' belonging to the Central Government by reason of the incidence of levy being permissible to be passed on to the buyer or consumer, and thereby affecting the price of the commodity or goods... ..

.. .. .. Legislation by the Union in the field covered by Entries 52 and 54 would not like a magic touch or a taboo denude the entire field forming subject matter of declaration to the State Legislatures. Denial to the State would extend only to the extent of the declaration so made by Parliament. In spite of declaration made by reference to Entry 52 or 54, the State would be free to act in the field left out from the declaration. The legislative power to tax by reference to Entries in List II is plenary unless the entry itself makes the field 'subject to' any other entry pr abstracts the field by any limitations imposable and permissible. A tax or fee levied by State with the object of augmenting its finances and in reasonable limits does not ipso facto trench upon regulation, development or control of the subject. It is different if the tax or fee sought to be levied, by State can itself be called regulatory, the primary purpose whereof is to regulate or control and augmentation of revenue or rendering service is only secondary or incidental.

(9) The heads of taxation are clearly enumerated in Entries 83 to 92B in List I and Entries 45 to 63 in List II. List III, the Concurrent List, does not provide for any

head. of taxation. Entry 96 in List I, Entry 66 in List II and Entry 47 in List III deal with fees. The residuary power of legislation in the field of taxation spelled out by Article 248(2) and Entry 97 In List I can be applied only to such subjects as are not included in Entries 45 to 63 of List II. It follows that taxes on lands and buildings in Entry 49 of List II cannot be levied by the Union. Taxes on mineral rights, a subject in Entry 50 of List II can also not be levied by the union though as stated in Entry by itself the union may impose limitations on the power of the State and such limitations, if any, imposed by the Parliament by law relating to mineral development and to that extent shall circumscribe the States power to legislate. Power to tax mineral rights is with the States; the power to lay down limitations on exercise of such power, in the interest of regulation, development or control, as the case may be, is with the union. This is the result achieved by homogeneous reading of Entry 50 in List II and Entries 52 and 54 in List I. So long as a tax or fee on mineral rights remains in pith and substance a tax for augmenting the revenue resources of the State or a fee for rendering services by the State and it does not impinge upon regulation of mines and mineral development or upon control of industry by the Central Government, it is not unconstitutional."

[33] In case of Deep Chand & Ors. vs. State of Uttar Pradesh & Ors., 1959 AIR(SC) 648the Apex Court, in reference to repugnancy between the Union Law and the State Law, examined the contentions on the following principles and observed that Article 254 [1] lays down a general rule and Clause [2] engrafts an exception. If there is repugnancy between the law made by the State and that made by the Parliament with respect to one of the matters enumerated in the Concurrent List, the law made by Parliament shall prevail to the extent of the repugnancy and the law made by the State shall, to the extent of such repugnancy, be void. If the Legislature of a State makes a provision repugnant to the provisions of the law made by the Parliament, it would prevail if the Legislation of the State has received the assent of the President. The Supreme Court further examined whether even in absence of an intention, a conflict may arise between the State and the Central Acts exercising power over the same subject matter.

[34] In the present case, we need to examine whether the Central law ie., the Electricity Act, 2003 and the State Act operate in the same field. It is not even the case of the petitioners that there is direct conflict in the provisions made in the two Statutes. Their stand, however, is that the Electricity Act, 2003 is a complete Code on the subject of Electricity and that any law framed by the State Legislature on the same subject would not be valid. We have already noticed relevant provisions made in the State Act from by the State. We will refer to some of them shortly hereafter. At this stage, we may take note of the provisions contained in the Electricity Act, 2003. The

statement of objects and reasons for enactment of the Electricity Act 2003 provides that the electricity supply industry in India is governed by the three enactments viz., the Indian Electricity Act, 1910; the Electricity [Supply] Act, 1948; and the Electricity Regulatory Commission Act, 1998. It is further provided that performance of the State Electricity Boards had deteriorated on account of various factors. Some of the States; starting with the State of Orissa, have undertaken reforms through their own Reform Acts unbinding the State Electricity Boards into separate Generation, Transmission and Distribution Companies. With the policy of encouraging private sector participation in generation, transmission and distribution and the objective of distancing the regulatory responsibilities from the Government to the Regulatory Commission, the need for harmonizing and rationalizing the provision of all the three Acts in existence and to provide for a new selfcontained comprehensive legislation has arisen. With these objects, the Electricity Act, 2003 was framed. Preamble to the Act provides that to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies, regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto, the said act was enacted. Section 4 of the Electricity Act, 2003 provides for preparation of national electricity policy and plan for development of the power system based on optimal utilization of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy. PartIII of the Electricity Act, 2003 pertains to Generation of Electricity. PartIV provides for Licensing procedures. PartV pertains to transmission of electricity. Part VI pertains to distribution of electricity. Part VII pertains to Tariff. Part IX pertains to Central Electricity Authority which may be constituted under Section 70 of the Act. Part X pertains to Regulatory Commissions and envisages constitution of Central Commission; State Commission and Joint Commission. Section 86, which is contained in PartX of the Act of 2003, pertains to functions of the State Commission. Subsection [1] thereof inter alia provides that the State Commission shall discharge the following functions viz., [e] promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee; [g] levy fee for the purposes of this Act. From the above provisions, it can be seen that the Electricity Act, 2003 is meant to be a Code integrating various provisions contained in earlier three Acts covering generation, transmission and supply of electricity viz., The Indian Electricity Act, 1910; the Electricity (Supply) Act, 1948 and the Electricity

Regulatory Commission Act, 1998. The Act also aims to make provisions for delinking the State Electricity Boards from the task of distribution and supply of electricity and envisages a greater participation from the private entrepreneurs in generation, transmission and supply of electricity either for captive consumption or for sale. The entire focus of the Electricity Act, 2003 thus is on generation, transmission and supply of electricity through the State agencies as well as through private participation. Various provisions have been made to facilitate such tasks. It is not necessary to take a detailed look at other provisions contained in the said Act. A bird's eye view, as we have tried to take hereinabove, should be sufficient for our purpose.

[35] In contrast, the State Act is a specific legislation for the purpose of levy of cess on generation of electricity other than renewable energy for creation of a fund for protecting the environment and promoting generation of electricity through renewable sources. As we have already noticed, the State Act makes detailed provisions for the purpose of collection of cess on generation of electricity; except on generation of renewable energy. Such cess so collected would form part of the fund created under Section 5 of the Act. The fund so created would be used for promoting generation of electricity through renewable energy; purchase of nonconventional energy and taking initiatives for protecting environment in the State. Quite apart from the fact that none of the provisions contained in the Electricity Act, 2003 are in direct conflict with the State Act, we are also of the opinion that the two Acts operate in different fields. Sum total of the entire discussion above is that the State Act ultra vires the Constitution and the same is therefore, declared void. Resultantly, the Cess levied under the State Act would also stand vitiated. We are informed that in certain cases, by the time this Court granted interim protection against further collection of cess, the petitioners had paid either under protest or otherwise, cess as provided under the said Act. The petitioners have therefore prayed for refund of such cess already paid. By virtue of our declaration that the Act is void and that the levy is illegal, natural corollary would be that the petitioners would be entitled to refund of the cess already paid. This, however, would be subject to verification that the burden of cess has not already been passed on to the ultimate consumers. In Mafatlal Industries Limited & Ors. v. Union of India & Ors., 1997 5 SCC 536, even in the context of a statute being declared unconstitutional, it was held that the concept of unjustified enrichment would apply. Relevant observations of the Supreme Court reads thus :

> "108. The discussion in the judgment yields the following propositions. We may forewarn these propositions are setout merely for the sake of convenience reference and are not supposed to be exhaustive. In case of any doubt or ambiguity in these propositions, reference must be had to the discussion and propositions in the body of the judgment.

[i] xx xx

[ii] xx xx

[iii] A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition

(ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be. Whether the claim for restitution is treated as a constitutional imperative or as a statutory requirement, it is neither an absolute right nor an unconditional obligation but is subject to the above requirement, as explained in the body of the judgment. Where the burden of the duty has been passed on, the claimant cannot say that he has suffered any real loss or prejudice. The real loss or prejudice is suffered in such a case by the person who has ultimately borne the burden and it is only that person who can legitimately claim its refund. But where such person does not come forward or where it is not possible to refund the amount to him for one or the other reasons, it is just and appropriate that that amount is retained by the State ie., by the people.

There is no immorality or impropriety involved in such a proposition.

The doctrine of unjust enrichment is a just and salutary doctrine. No person can seek to collect the duty from both ends. In other words, he cannot collect the duty from his purchaser at one end and also collect the same duty from the State on the ground that it has been collected from him contrary to law. The power of the Court is not meant to be exercised for unjustly enriching a person. The doctrine of unjust enrichment is, however, inapplicable to the State. State represents the people of the country. No one can speak of the people being unjustly enriched.

"Under the circumstances, petitions are disposed of with a further direction that the cess already paid by the petitioners would be refunded after verifying that the burden thereof has not already been passed on to the ultimate consumers. For the purpose of considering refund of cess already paid by the petitioners after verifying the question of unjust enrichment, the Collector of Electricity Duty and the Chief Electrical Inspector would be the competent authority to take a decision as provided above. He shall also grant refunds as found due and payable. This shall be done preferably within four months from the date of receipt of copy of this order with simple interest @ 8 per cent after three months of the collection till the actual

payment. It is clarified that any further action taken for collection of cess under the Act would be invalid. At this stage, learned AGP Ms. Vishen for the respondents prayed that this judgment be stayed for a period of eight weeks to enable the respondents to prefer appeals. We notice that this Court had granted interim relief against any further recovery of the cess under the Act. So far as cess already collected, we have granted four months time to the respondents to carry out the direction for refund. In that view of the matter, no useful purpose will be served in staying this judgment. Request is therefore, rejected.