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Mining - A 'Royal' consideration

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RECENTLY, a nine-member bench of the Supreme Court - [2024-TIOL-65-SC-MISC-CB](#) has finally settled the long-debated topic on the nature of 'royalty' payments against mining rights. The primary question before the Court was whether 'mining royalty is in the nature of tax'? The author attempts to decode the decision of the Hon'ble Supreme Court.

The controversy arose with *India Cements* - [2002-TIOL-2785-SC-MISC-CB](#) wherein the validity of levy of 'cess' by State on mining royalty was under challenge on the touchstone of Constitutionality. It is pertinent to highlight that validity of mining royalty was not under dispute here.

A seven-member bench of the Apex Court in India Cements held that the Centre has exercised its power under Entry-54 of Union List and implemented the MMDR Act Mines and Minerals (Development and Regulation) Act, 1957. Accordingly, the powers of State under Entry-23 of List-II is restricted, and levy of cess was held to be unconstitutional for want of legislative competence. **The Court also observed that mining royalty is a tax.**

Subsequently, a five-member bench of the Supreme Court in *Kesoram Industries* (2004) 10 SCC 201 [71] felt duty-bound to point out a typographic error in India Cements, where it was observed that 'royalty is a tax'. The Court clarified that what the seven-member bench would have intended was 'cess on royalty is a tax'. Further, the Court in Kesoram Industries held that royalty is not a tax.

The above two decisions have laid the foundation of various case laws, which had examined the validity of levy of cess imposed by different States.

Apparently, the Supreme Court in case of *Minerals Area Development Authority Civil Appeal Nos. 4056-4064 of 1999* took cognisance of the divergence between India Cements and Kesoram Industries and the matter was eventually referred to a nine-member bench. Apart from various questions, one of the questions to be decided was whether the mining royalty is in the nature of tax and whether the States have the Constitution liberty to impose tax in exercise of Entry-50 of List-II given that the Union has already exercised its powers under Entry-54 of List-I to implement MMDR Act.

The Hon'ble Supreme Court in its 8:1 majority verdict held that **royalty is not a tax** and the key findings-cum-reasoning is summarised below.

Constitutional Scheme

Before we delve deep, some of the relevant Constitutional entries may be referred below. Article 265 of the Constitution prohibits levy and collection of tax without authority of law. Neither the Parliament nor State Legislature is at liberty to levy any tax unless Constitution expressly grants such taxing power to them.

Under the federal structure, the Constitution has distributed the powers between Centre and States. Article 246 read with Seventh Schedule clearly demarcates the legislative field for Parliament [Union List] and States [State List]. Seventh Schedule contains various entries which are bifurcated into taxing entries and general entries.

Union List	State List
Entry 54 : Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.	Entry 23 : Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union.

	<p>Entry 50 : Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.</p>
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It is well settled that taxing entries are different from general entries and taxing power cannot be deduced from a general entry. Furthermore, taxing powers of Parliament & States does not overlap and are mutually exclusive. Also, Parliament cannot intrude in the field which is reserved for States and vice-versa.

Royalty is not a 'Tax'

Article 366 (28) of the Constitution defines 'tax' to include any impost whether general or local or special. The characteristics of 'tax' as decided by Courts time and again and also followed in the present case are as follows:

- Compulsory extraction of money by public authority
- Impost is under law
- Consent of payer is immaterial
- Demand of tax is enforceable
- Objective is to meet general expenses for common public welfare
- Absence of quid-pro-quo
- No privilege to payer

Mines and minerals are matters of national importance and hence, the subject of lease, mining rights, royalty, etc. are being regulated under the MMDR Act.

Nonetheless, mining royalty is paid in pursuance of a lease agreement, for grant of mining right, between the lessor [either State or private party] and the lessee. Mining royalty need not be collected by only public authority and it may be collected by private person, in case where lessor is a private party. Thus, mining royalty is paid against receipt of exclusive privilege.

Basis the above salient features of royalty, it was held that royalty does not qualify as tax.

It is also pivotal to note that the dissenting opinion holds royalty as tax by relying upon the principles laid down in the case of *Govind Saran Ganga Saran 1985 Supp SCC 205 [6] = 2002-TIOL-589-SC-CT*. In the case of Govind Saran Ganga Saran, the Court held that unless the tax statute defines the following, levy would be fatal:

- Taxable Event
- Taxable Person
- Tax Rate
- Taxable Value

The dissenting view has examined royalty on the basis of the above parameters and found that all conditions are cumulatively satisfied to hold royalty as tax.

It is crucial to note that the law laid down in Govind Saran Ganga Saran is more in the nature of threshold that unless such conditions are fulfilled, the levy may fail. However, this per se does not expressly or impliedly concludes that upon meeting all such conditions, the levy would partake the colour of 'tax'. Hence, in the view of the author, perhaps a difference exists between 'characteristics' of tax and the 'conditions governing levy' of tax.

Interpretation & Scope of Entry 54 [Union List] vis-à-vis Entry 23 & Entry 50 [State List]

Entry 54 of Union List is a general entry which seeks to regulate the mines and mineral development in public interest. Entry 54 nowhere authorises Parliament to levy tax.

Entry 23 of State List is also a general entry which seeks to regulate the mines and mineral development in public interest. However, Parliament has supremacy over regulation of mines and mineral development and the power of States stands denuded insofar as Parliament regulate this field.

In exercise of the powers under Entry 54 of Union List, the Parliament has framed MMDR Act in public interest. Royalty is attracted on grant/ exercise of mineral rights, and which includes a bundle of rights such as extracting minerals, its use, consumption or sale, etc.

Entry 50 of State List is a specific taxing entry. Entry 50 has two essential constituents: (i) legislative field to levy tax on mineral rights is exclusive domain of State; (ii) Such power is not unlimited and is subject to '*any limitation*' enforced by Parliament by law.

The lawmakers have carefully drafted the Constitution to provide general power vide Entry 54 of Union List and Entry 23 of State List for regulating mines and mineral development. At the same time, the power of State Legislatures would be curtailed to the extent the Parliament makes any law in that field. The objective behind such restriction is that there must be a uniform policy across different States for regulation and development of mines and mineral.

At the same time, the States are given exclusive power to impose taxes on mineral rights and such right is not available with the Parliament. Though the Parliament has power to levy tax under List-III [concurrent list] in respect of matters not covered under List-I and List-II; yet, it cannot be used as a means to whittle down the power reserved for States under the Constitution.

Nevertheless, the taxing power granted to States under Entry 50 is made subject to any limitation which may be imposed by Parliament. The expression '*any limitation*' is of wide import and the Parliament has the right to introduce any limitation given the national interest of development of mines and minerals. Such limitation may even include a prohibition debarring the States from levying taxes on mineral rights.

To summarize,

- Royalty is not a tax and is a consideration towards grant of mining rights.
- Entry 54 of Union List is for regulating the minerals and mineral development whereas Entry 50 of State List is empowering State Legislature to impose tax on mineral rights. Hence, there is no conflict between these entries which clearly operates in different fields.
- Additionally, there is no provision in MMDR Act which prohibits the States to levy taxes on mineral rights. Hence, no impediment stands created by virtue of MMDR Act as well as Entry 54 of Union List which could stop the States from levying tax on mineral rights.
- Yet, the Parliament may, by law, impose any limitation to restrict the States and it could even prohibit the States from levying taxes on mineral rights.

Concluding remarks

A connected issue is regarding demand of indirect taxes [Service tax and GST] on mining royalty. The revenue authorities have contended that by grant of mining rights, there is a supply of service in return for royalty and tax is payable on such royalty. Hitherto, one of the arguments canvased by the taxpayers [relying upon India Cements] is that royalty is a tax and there cannot be any tax on tax. Now, since the dust is settled, the taxpayers need to re-examine this matter too.

[The views expressed are strictly personal.]

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