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Can There Be a Levy of GST on Mining Royalty Post 9-Member Supreme Court Decision?

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Background

When the service tax authorities and the GST authorities sought to impose service tax and later GST on the royalty paid by licensees to State Government / State Mineral Development Corporations, writs were filed across the country and batches of writ petitions were kept pending to await the outcome of the 9-member judgement of the Supreme Court in ***Mineral Area Development Authority***.

The case of the Revenue was simple. Royalty paid to the State or State Corporations under mining leases was liable to service tax / GST under reverse charge mechanism on the ground that there is a service provided by the Government. The assessee had multiple arguments to counter this but one of the main arguments was that if royalty itself was a tax, then there cannot be a further levy by way of GST on such tax.

The Courts kept the matters pending and awaited the judgement of the 9-Member Bench of the Supreme Court. The Supreme Court in the case of Mineral Area Development Authority and Another Vs. SAIL ***(2024)***, has given a landmark judgement which runs to nearly 256 pages.

MADA Judgement

The Supreme Court in the case of ***Mineral Area Development Authority Vs. SAIL*** has held that

(i) On first principles, royalty is a consideration paid by a mining lessee to the lessor for enjoyment of mineral rights and to compensate for the loss of value of minerals suffered by the owner of the minerals.

(ii) The liability to pay royalty arises out of the contractual conditions of mining lease.

(iii) Section 9 of the MMDR Act statutorily regulates the right of a Lessor to receive consideration in the form of royalty from the Lessee for removing or carrying away minerals from the leased area.

(iv) The legislative power to tax mineral rights vests with the State Legislatures. The Parliament does not have legislative competence to tax mineral rights under Entry 54 of List I, being a general entry. Since the power to tax mineral rights is enumerated in Entry 50 of List II, Parliament cannot use its residuary powers with respect to that subject matter.

(v) The State Legislatures have legal competence under Article 246, read with Entry 49 of List II to tax lands which comprise of mines and quarries. Mineral bearing land falls within the description of 'land' under Entry 49, List II.

(vi) The yield of mineral bearing land in terms of the quantity of mineral produced or the royalty can be used as a measure to tax the land under Entry 49, List II.

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As can be seen from the 9-member bench decision, royalty has been clearly identified as consideration and can no longer be considered as tax based on the earlier decision of ***India Cements.***

High Court Decisions

Subsequent to the 9-member decision, there have been decisions of the High Courts in the context of service tax / GST on royalty.

The Chhattisgarh High Court in the case of ***Mahesh Sharma Vs. Union of India (2024)*** , has relied on the decision of the Supreme Court in the case of ***Mineral Area Development Authority*** and has held that the royalty is not a tax, the contention of the learned counsel for the petitioner that royalty is a tax cannot be appreciated. The Court directed the petitioner to reply to the Show Cause Notice and the officer would have to decide the case in accordance with law.

The Himachal Pradesh High Court in the case of***Matri Stone Crusher Vs. Union of India (2024)*** and ***Lakhwinder Singh Stone Crusher Vs. Union of India*** [TS-722-HC(HP)-2024-GST] has observed that it is not in dispute that the judgment rendered in India Cement Ltd.'s has now been overruled by Nine-Judge Bench of the Hon'ble Supreme Court in Mineral Area Development Authority & Anr. Vs. Steel Authority of India Another wherein it has been held that royalty is not a tax. Therefore, the respondents are well within their rights to levy GST on the royalty paid by the mineral concession holder for any mining concession granted by the State. In these two judgements, the Orders were upheld.

The Kerala High Court in the case of ***Udaya Rock Products and Others Vs. AC*** vide its order dated 16.12.2024 has disposed a batch of Writ Petitions following ***MADA*** and permitted filing of appeals wherever the Writ has been filed against the Order.

Is it the End of the Story?

On first blush, it may appear that since Supreme Court has held that Royalty is not a tax and that it is a consideration paid by a mining lessee to the lessor for enjoyment of mineral rights and to compensate for the loss of value of minerals suffered by the owner of the minerals, the levy of service tax or GST, as the case may be, is a direct consequence.

However, the answer could be very different. If royalty is a consideration paid by the lessee to the State for enjoyment of mineral rights and State *alone has the power under Entry 49, State List, Seventh Schedule, to tax the same, can there be a levy of GST under Article 246A?*

The broader question is when mineral rights have been identified as 'land' and the measure of tax on such land could be through royalty and the entire subject of tax is land and the tax is only under Entry 49, State List, can it still be a supply of service for the purpose of levy of GST?

Land

The Supreme Court in the **MADA** case referred to above, in Para 292, in the context of Entry 49, List II, has held as under:

(i) The expression 'lands' means all kinds of lands irrespective of the use to which the land is put.

(ii) The expression 'lands' include not only the surface but everything under and over the surface.

(iii) A tax on lands and buildings is a tax on lands and buildings as units.

(iv) The expression 'tax on lands and buildings as a unit' is used to distinguish composite taxes which involve imposition of tax cumulatively on all assets such as under list I, Entry 86.

(v) The tax is not a tax on totality, that is it is not a composite tax on the value of all lands and buildings.

(vi) The tax is not concerned with the division of interest in the building or land;

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(vii) A tax levied on the activity or service rendered on or in connection with lands and buildings does not fall within the description of taxes on lands and buildings under List II, Entry 49.

(viii) The use to which the land is put does not affect the competence of the State Legislature to tax it; and

(ix) The Legislature may take into account the use of land for determining the measure of taxation under List II, Entry 49.

The Supreme Court in Para 295 has held that the expression 'lands' includes land of every description. A land may be put to use for growing tea leaves or extracting minerals. But what List II, Entry 49 contemplates is the levy of tax on land as a unit, irrespective of the use to which it is put. Therefore, the State legislature is competent while designing the levy under List II, Entry 49, to tax lands, which comprise of mines and quarries. In other words, mineral bearing land also falls within the description of 'lands' under List II, Entry 49.

Entry 49, List II, Seventh Schedule, Constitution of India deals with "taxes on lands and building". Entry 50, List II, Seventh Schedule, Constitution of India deals with taxation of mineral rights subject to limitations imposed by Parliament of India relating to mineral development.

The Supreme Court in Para 365.2 of **MADA** decision has held that the legislative power to tax mineral rights vests with the State Legislatures. Parliament does not have legislative competence to tax mineral rights under List I, Entry 54, being a general entry. Since the power to tax mineral rights is enumerated in List II, Entry 50, Parliament cannot use its residuary powers with respect to that subject matter.

The Supreme Court in para 365.5 of **MADA** decision has held that the State Legislatures have legislative competence under Article 246, read with Entry 49 to tax lands which comprise of mines and quarries. Mineral bearing land falls within the description of 'lands' under List II, Entry 49.

Legislative / Executive Action post **MADA**

After the decision of the Supreme Court in **MADA**, the Government of Jharkhand has enacted the Jharkhand Mineral Bearing Land Cess Act, 2024 in order to levy Cess on certain mineral bearing lands as set out in the Schedule. In this Legislation, "Mineral Bearing Land" is defined to mean *holding or holdings of land comprising the area of a land either allocated or granted or deemed to be granted for mineral right i.e. mining or quarry lease or exploring license or prospecting license or petroleum mining lease under the Mines and Minerals (Regulation and Development) Act, 1957, the Coal Bearing Areas (Acquisition and Development) Act, 1957, the Coking Coal Mines (Nationalisation) Act, 1972, the Coal Mines (Nationalisation) Act, 1973, the Coal Mines (Special Provisions) Act, 2015, Petroleum and Natural Gas Rules, 1959.*

Press Reports indicate that Tamil Nadu Assembly has passed the Tamil Nadu Mineral Bearing Land Tax Bill, 2024 imposing tax on Royalty; Karnataka Government has introduced Karnataka (Mineral Rights and Mineral Bearing Land) Tax Bill, 2024.

State Alone has the Power to Tax Royalty under Entry 49

The Mineral rights can be considered as falling exclusively within the scope of Entry 49, List II, Constitution of India, and hence, only the State has the power to impose tax. CGST and SGST under Article 246A cannot be made applicable to a subject covered under Entry 49, List II. This is because of the fact that the Article 246A confers power to make laws with respect to Goods and Services Tax imposed by the Union or the State.

Article 366(12A) defines 'Goods and Services Tax' to mean any tax on supply of goods or services or both except taxes on the supply of alcoholic liquor for human consumption. Article 246A was introduced by the 101st Constitution Amendment Act.

The 101st Constitution (Amendment) Act amended the following entries in List II, Schedule VII:

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- Deletion of Entry 52;
- Substitution of Entry 54;
- Deletion of Entry 55;
- Substitution of Entry 52;

No amendment was carried out in Entry 49.

Effect of the **MADA** Judgement

After the **MADA** judgement, with reference to whether the earlier judgements should stand prospectively overruled or not, the Supreme Court in **MADA Vs. SAIL (2024) 10 SCC 257**, has rejected the submission that the decision should be given prospective effect. The Courts also held that while the States may levy or renew demands of tax if any, pertaining to Entry 49 and 50, in terms of the law laid down in the decision in **MADA**, the demand of tax shall not operate on transactions made prior to 01.04.2005.

Further, the Supreme Court also directed that the time of payment of demand of tax shall be staggered in installments over a period of 12 years, commencing from 01.04.2026 and also waived all interest and penalties for the period before 25.07.2024.

Fiscal Federalism

This is also relatable to fiscal federalism in some sense. The Supreme Court in Para 55 of the **MADA** judgement has held that the Constitution is cognizant of the imbalance between resources at the disposal of States and the Union. The Constitution remedies the imbalance by way of intergovernmental distribution [Constitution of India, Article 270(2)] and grants. [Constitution of India, Articles 273 and 275] One of basic features of fiscal federalism is that both the Union Government and the State Governments ought to have adequate fiscal resources to discharge their constitutional responsibilities. List I and List II of the Seventh Schedule contain various subject-matters under which Parliament and the State Legislatures can respectively levy taxes. The purpose of such a distribution is to entrust adequate fiscal powers with the legislatures to raise revenues to meet the growing fiscal expenditures and rein in the fiscal deficit. The legislatures can formulate the principles underlying any taxing legislation, define the taxing event or the charge of tax as well as the mode and manner of its implementation.

Conclusion

While there can be a number of other legal submissions such as non-applicability of supply since Government cannot be considered to be doing an activity in the course or furtherance of business; applicability of Notification No. 14/2017 – CTR; etc. an interesting and key constitutional argument would be that the role for Article 246A stands expressly ousted when the subject completely falls within Entry 49, List II.

Imposing a levy by way of a Cess or a Tax by the State on royalty in exercise of powers under Entry 49, should necessarily oust the jurisdiction of both the Parliament and the State in exercising the power to levy GST under Article 246A. If mineral rights are considered as land, then, it cannot and should not also be goods or services.

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