

Legal Aspects of Water Rate / Licence Fees charged by the State Government of Orissa for Industrial / Commercial use of Ground Water.

The State Government of Orissa in the department of Revenue and Disaster management has brought about substantial amendments in Orissa Irrigation Rules, 1961 vide Notification S.R.O. No.429/2010 dated 01.10.2010, which is effective from the 1st October, 2010.

This amendment has very deep adverse impact on the industry operating in the State of Orissa and is against the public interest. Brief of the main amendments are given below, where the impact of the amendment could be perceived clearly:-

A) The Water Rate / Licence Fee for ground water has gone up exorbitantly with the implementation of the Orissa Irrigation (Amendment) Rules 2010. The pre-amendment and post amendment tariff for Industrial / Commercial use of water from the natural water source (say Government Water Source as defined in the Orissa Irrigation Act, 1959).

Water Charges before the said amendment.

	<u>License fee</u>
-	
<u>Particulars</u>	<u>(Rs. per lac gallon)</u>
For water actually consumed	200/-
For water drawn and discharged back after purification	50/-

Water Charges after amendment vide notification S.R.O 429/2010 dt. 01/10/2010

	<u>License Fee</u>	<u>Equivalent License Fee</u>
-		
<u>Particulars</u>	<u>(Rs. per m³)</u>	<u>(Rs. per Lac gallon)</u>
Subsoil Water	-	
Consumption > 5 cusec	9.00	4,091/-
Consumption ≤ 5 cusec	6.80	3,091/-
Other than Subsoil Water	-	
Consumption > 5 cusec	4.50	2,046/-
Consumption ≤ 5 cusec	3.40	1,546/-

Thus by this amendment notification the license fee for ground water is hiked up to 82 times, i.e. from Rs. 50 per lac gallon to up to Rs. 4,091 per lac gallon.

B) The licence fee of the prescribed rate shall be charged on allocated quantity even if the actual drawal by an industrial or commercial establishment is nil.

C) Provision for six times of penalty has been prescribed if the consumption crosses the allocation.

The Water Research Group of Orissa has carried out a detailed study of the said notification along with the Orissa Irrigation Act, 1959, Orissa Irrigation Rules, 1961 (before this amendment) and other relevant laws and rules with a view to assess the validity of the amendment; scope of the Irrigation Act, 1959 and Rules framed there under; jurisdiction of the Orissa Government to levy Water Rate / License Fee on water drawn by the different industrial or commercial establishment from different sources of water, specially on drawing of ground water.

From our study we have found many irregularities that we believe should come in the notice of the industrial and commercial units, and all other persons likely to be affected by this amendment.

1) That the department of the State Government, which has come out with this amendment notification has stated that invitation for objections and suggestions from all the persons likely to be affected has been made by publishing a draft in an extra ordinary issue of the Orissa Gazette dated 30/07/2010 and whereas no objection or suggestion has been received by the concerned department till the expiry of 30 days from the date of publication of the draft, the Orissa Irrigation Rules, 1961 has been amended in a manner as proposed in the draft.

In fact, the above circulation has not been carried out in its true spirit and no proper step has been taken so that the draft notification reaches to the concerned affected parties that is to say in the instant case, to the industries or their associations such as different Chamber of Commerce. Thus practically those amendments have been carried out without any consent from the affected parties.

2) The Orissa Irrigation Act, 1959 was enacted with the following objects & reasons "Large expenditure has been and is being incurred from the State exchequer for construction of Irrigation works in the whole State of Orissa. A large number of minor irrigation works have already been constructed throughout the State under the intensive Cultivation Scheme at a great cost to the exchequer and large numbers of major and medium irrigation projects are under construction and will be constructed according to the plan.

It is necessary that payment of water rates and cess should be made obligatory on persons deriving benefits from the lands within the irrigable command of all these irrigation works whether water is actually used for cultivation or not, and that a fit return should in all cases alike be made to Government, on accounts of the increased profits derivable from lands irrigated by such works, so as to promote economy in the use of water and to create conditions which will make the maintenance and development of the irrigation schemes possible on larger scale in future. It is also necessary that there should be suitable provisions for the efficient regulation and control of the supply of water from irrigation works and for certain other matters relating to irrigation and for the recovery of the cost of construction of water sources when such cost is incurred by Government to popularize use of water from the irrigation works.

There is at present no law in the State to carry out all these objectives. The provisions of the existing irrigation Acts, are to all intents and purposes, not sufficient to carry out all these objects consistent with the modern principles of using irrigation water to the full, nor is any of them applicable to the Ex-State areas. This Bill, therefore, seeks to consolidate the existing laws, introduce a system of firm basic rate as recommended by the committee appointed to investigate into the direct benefits of Hirakud Dam Project and to bring about uniformity in the irrigation laws in the whole of the State of Orissa.”

The said Orissa Irrigation Act, 1959 was made to consolidate and amend the laws relating to irrigation, assessment and levy of water rate & cess in force in different parts of the state of Orissa. The said act was amended vide Notification No. 1769-Legis / 2.2.1994 “to provide for the regulation of use of water from Government source” was added to the said Act.

This is nothing but an arbitrary widening of jurisdiction of the Act beyond its basic objective and purpose.

3) That the Government of Orissa by virtue of the powers conferred on it by Sec. 53 of the said Orissa Irrigation Act, formulated the Orissa Irrigation Rules, 1961. The State Government in the Revenue & Disaster Management Department subsequently on 1st October, 2010 has further amended the said Orissa Irrigation Rules, 1961 vide Notification No. 429 / 2010 dt. 01/10/2010, and this came into force on the same date.

That it is very pertinent to mention here that the subject “Irrigation” comes within the administrative control of the Water Resources Department. Therefore, no rule can be made by any other department, except the Water Resources Department which is the Administrative Department of Irrigation. This is to point out here that the Orissa Irrigation (Amendment) Rules, 2010 was introduced by the Revenue & Disaster Management Department of the State Government who cannot act as the sub-ordinate legislation and rule making authority for amending the existing rule relating to a subject matter of another Administrative Field / Department. In the present case, the provisions of the Rules of Business of the Government of Orissa prepared for smooth governance of the State has been violated.

4) That Orissa Irrigation (Amendment) Rules, 2010 has been formulated / made contrary to the “Objects & Reasons” for which the Orissa Act 14 of 1959 was enacted, which was regulation of Irrigation; and levy and collection of Water Rate for use of water from irrigation work. It is submitted that the rules should be made to carry out the objects of the Act and not otherwise. Further, it may be appreciated that no tax / fee can be imposed by any bye law or Rule or Regulation or by a Policy Decision of the Government, unless the Statute under which the Sub-ordinate legislation is made specially authorizes such imposition.

The Revenue & Disaster Management Department of Government of Orissa has brought drastic amendments in the Orissa Irrigation Rules, 1961 vide the aforesaid notification dt. 01/10/2010; and thereby increased the License Fee / Water Rate up to 82 times for use of water for industrial / commercial purposes. Such amendments are not in consonance with the intention and purposes of the Orissa Irrigation Act, 1959.

5) That the above mentioned amendment has been made without taking into consideration the ground reality and its impact on different industries. This exorbitant hike in Water Rate on Licence Fee is highly prejudicial to the interest of the various industries in the state and also against the interest of the public at large. The impact of the same on the industries may be so extensive that the sincere effort of the present State Government for industrialization of Orissa and growth of Industry, Trade & Commerce to put "Orissa as number One State of the country" may become a mere slogan only, like the slogan of the previous Government "one thousand industries in one thousand days".

6) That it has been clearly and categorically indicated in the amended Rule 23-A(2)(f) and in the Schedule –III that the rate prescribed in the said schedule is in the nature of fees. In fact, any amount paid for license, for any use of water, is a fee and not a tax, even in the common parlance. While prescribing for levying a fee it should be kept in mind that a tax is a compulsory exaction as part of a common burden, without promise of any special advantages to classes of tax payers; whereas, a fee is a payment for services rendered, benefit provided or privilege conferred. In the present case no service is rendered or going to be rendered by the State Government to ensure the supply of allocated quantity of water to the Industries.

In other words the levy of license fee is compensatory in nature, and the element of quid pro quo (consideration for consideration) which is the sine qua non (a thing that is absolutely essential) for levy of a fee. Most of the industries operating in Orissa are using ground water or water from natural water sources, where the State Government does not require to make any capital investment or to spend anything for maintenance but still the same has been subjected to licence fee, which is against the law of the land.

7) It may be pointed out that in Schedule – III in Item No.5 rate of fees has been prescribed for subsoil water @ Rs. 6.80 for consumption of less than 5 cusec of subsoil water and Rs. 9.00 for consumption of more than 5 cusec of subsoil water; whereas in the item No.2 of the said Schedule, Rs. 3.40 has been prescribed for consumption of less than 5 cusec of water (other than subsoil) and Rs. 4.50 has been prescribed for payment of fees for consumption of more than 5 cusec of water other than subsoil).

Prescription of higher fees for consumption of subsoil water is unreasonable and discriminatory as the State Government need not to spend anything to ensure the drawal of subsoil water by the industries. Whereas the Government may require to spend substantial money to make water available for industrial / commercial use, when the same is provided from any dam, canals, reservoir etc. and there the Government may ask for the licence fee in such cases.

8) That the Ministry of Law, Justice and Company Affairs have already come up with an Act i.e. the Water (Prevention and Control of Pollution) Cess Act 1977 which has subsequently been amended by way of the Water (Prevention and Control of Pollution) Cess (Amendment) Act, 2003. The said Act passed by the Central Government stipulates for the levy and collection of a cess on water consumed by persons carrying on certain industries and by local authorities with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act, 1974. The Central Government levies cess which is a tax that is paid on consumption of water.

Taking into consideration the above fact the Central Government has already by way of a taxing statute has incorporated cess and that is now governing the field so far as industrial sectors are concerned.

In the instant case the Notification i.e. by way of amending Orissa Irrigation (Amendment) Rule, 2010 has come up with amended Rule 23-A. In the said notification the State Government has decided to levy a license fee under the Irrigation Act which is double taxation and amounts to interfering with the Central Government's Act and Rules and hits the doctrine of occupied field.

9) That the Section 7(g) of the Indian Easement Act, 1986 which reads as "The right of every owner of land to collect and dispose within his own limits of all water under the land which does not pass in a defined channel and all water on its surface which does not pass in a defined channel."

The above right is further upheld in the Plachimada Coca-Cola case, when on an appeal the division bench asserted the primacy of the land owners' control over ground water in the absence of a specific law.

Thus the principle of unrestricted and unconditional right of the land owner over the ground water will remain until and unless the state government legislate separate Act for regulation of the ground water.

In order to regulate the ground water in Orissa the State Government of Orissa in the year 2006 has brought a bill namely Orissa Ground Water (Regulation and Control of Development and Management) Bill, 2006; but the same has not been enacted by the Government yet.

Thus in order to regulate the Ground Water the State Government should come up with a specific enactment for this purpose and the Orissa Irrigation Rules 1961, which was meant for Irrigation Work, could not be amended in order to create a restriction on the right of the owner of land to collect and dispose ground water by introducing licence fee on subsoil water.

10) That the Orissa Irrigation (Amendment) Rules, 2010 has prescribed for charging fees on higher of allocated quantity or consumed quantity. However the State Government does not take any measures such as storing of water etc. in order to ensure the uninterrupted supply of allocated water nor the Government earmarked water for the users. Under this situation the charging of fees on allocated quantity will only create extra burden on the industries without any improvement in the supply of water. Thus situation may arise when in the dry seasons industries are unable to get the required water for their operation but they have to pay in full on the basis of allocated quantity.

11) That the aforesaid notification has been issued under a situation when large numbers of Writ Petitions are sub-judice before the Hon'ble High Court challenging the earlier notification issued on the basis of Orissa Irrigation Act, 1959 and the rules framed there under i.e. Orissa Irrigation Rules, 1961. More so in view of the fact the State Government have rendered their appearance in the above cases and have filed their Counter Affidavits in the said cases. The cases relate to the legislative competency of the State of Orissa under entry 17 of list II of Schedule VII to the Constitution of India by amending the Orissa Irrigation (Amendment) Act, 1993 (Act 3 of 1994) and incorporating Section 4 Sub-section 6-a i.e. Government water source, as well as Section 20A as well as Orissa Irrigation (Amendment) Rules, 1994 in so far as it seeks to impose license fee on use of water drawn from natural sources. Thus without curing the old defects in the Orissa Irrigation Act, 1959 and rules framed thereunder, it is an injustice to come up with Orissa Irrigation (Amendment) Rules, 2010.

This is an endeavour in the interest of the Industrial and Commercial Establishments operating in the state of Orissa in order to bring to their notice the legal status of the Water Rate / Licence Fees levied by the Government of Orissa and this is our cordial request to the readers to spread this note to all the concerned persons they know.