

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 17.10.2012

Judgment pronounced on: 19.10.2012

+ CS(OS) 512/2012

M/S MEATTLES PVT. LTD.

..... Plaintiff

Through: Mr S.Daljit Singh, Sr. Adv with
Mr D.K. Thakur, Adv.

versus

HDFC BANK LIMITED

..... Defendant

Through: Mr Arjun Mitra, Proxy Counsel for
Mr Rishab Raj Jain, Adv.

CORAM:

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. This is a suit for declaration, recovery of money and injunction. The plaintiff had let out premises measuring 2700 sq. ft. in property bearing No.3909-3912 Hamilton Road, Mori Gate, Kashmere Gate, Delhi to the defendant vide registered lease deed dated 25.11.2004. The lease expired by efflux of time and now the defendant continues to occupy the premises as a month to month tenant. The renting of immovable property for the commercial purpose was subjected to Service tax by inserting sub-Section 90(a) in Section 65 Chapter V of the Finance Act , vide Section 135 of Finance Act 2007. As a result, Service tax became payable with effect from 1.6.2007. The plaintiff called upon the defendant to pay

arrears of Service tax. The defendant, however, took the stand that it is not liable to pay Service tax to the plaintiff. Accordingly, the plaintiff has sought recovery of Rs.14,08,553/- towards arrears of Service tax for the period June, 2007 to January, 2012. It has also claimed interest on the aforesaid amount @ 18% per annum amounting to Rs.6,07,390/-, thereby making a total sum of Rs.20,15,943/-. The plaintiff has also sought a declaration to the effect that the defendant is liable to pay service tax on the lease rent. A mandatory injunction has also been sought requiring the defendant to pay Service tax on the lease rent.

2. The defendant has contested the suit and has denied any liability to pay service tax. It is further alleged that in terms of the lease deed dated 25.11.2004, the liability to pay service tax is of the lessor.

3. The following issues were framed on the pleading of the parties on 26.9.2012:-

1. Whether the defendant is liable to pay service tax on rent, as alleged in the plaint? OPP

2. To what amount, if any, the plaintiff is entitled from the defendant? OPP

3. Whether the suit is barred by limitation?
OPD

4. Since there was no dispute on facts, the matter was listed for final hearing and arguments have accordingly been heard. The plaintiff has filed an affidavit

dated 6.10.2012 giving details of the service tax deposited by it from time-to-time in respect of the premises let out to the defendant.

5. **ISSUE NO.1:**

The first question which comes for consideration in this case is as to whether the lease deed executed between the parties deals with the payment of service tax and if so, who under which term of the said deed is liable to pay the said tax.

Clause 4(v) of the lease deed reads as under:-

“The municipal taxes, rates, charges and other outgoings in respect of the demised premises that would be determined/fixed/varied from time to time by the Municipal Corporation/Municipality/Gram Panchayat or any other local authority shall be paid by the Lessor or the Lessee as specified/stipulated in the schedule annexed herewith and shall keep the other party indemnified at all times against the same.”

Clause 7 in the schedule to the lease deed reads as under:-

**“Monthly payment of
Corporation/Municipal
rates, Charges, taxes cessess
and all other outgoings”**

To be borne by the Lessor only.

6. Since the lease deed having been executed on 9.6.2004 and the service tax having been levied retrospectively with effect from 1.6.2007, it is obvious that the payment of service tax could not have been in contemplation of the parties at the time this deed was executed. Therefore, there could have been no agreement between the parties specifically with respect to payment of service tax. The

question which then arises is as to whether service tax can be said to be covered under the above referred clause of the lease deed. Admittedly, service tax is neither a municipal tax nor a charge, this being a tax on services levied by Union of India. As regards, the expression 'outgoings' used in the above referred clause, a careful examination of the clause would show that the expression 'outgoings' is qualified by the words 'that would be determined/fixed/varied from time to time by the Municipal Corporation/Municipality/Gram Panchayat or any other local authority'. Therefore, this clause refers only to those outgoings in respect of the tenanted premises, which are levied by Municipal Corporation/ Municipality/Gram Panchayat or any other local authority. Since service tax is not levied/recovered by Municipal Corporation/Municipality/Gram Panchayat or any other local authority, it can hardly be disputed that this is not included in the term 'outgoings', as qualified in clause 4(v) of the lease deed. Since the expression 'outgoings', for the purpose of clause 7 of the schedule has to be read in terms of clause 4(v) of the lease deed, it is obvious that the liability of the lessor would be to pay only those taxes, charges and other outgoings which are levied by Municipal Corporation/Municipality/Gram Panchayat or any other local authority. It is, thus, quite clear that payment of service tax is not at all covered under the covenants contained in the lease deed dated 25.11.2004.

7. The next question which arises for consideration is as to whether in the absence of an agreement for payment of service tax by the tenant, can the landlord recover the same from the tenant. The contention of the learned counsel for the plaintiff was that under the lease deed, the plaintiff agreed to let out the premises on receipt of a particular amount for rent and that amount cannot be reduced to his disadvantage by fastening the liability of service tax on it. The next contention of the learned counsel for the plaintiff was that service tax being a tax on service, it is the recipient of the service who has to bear the same and even in the absence of an agreement to this effect, the service provider can recover the amount of service tax from the recipient of the service. The learned counsel for the defendant, on the other hand, has contended that the defendant had agreed to pay a particular amount of rent for the use of the tenancy premises and the liability of the defendant cannot be increased by recovering the amount of service tax from it.

8. Vide Section 83 of Finance Act, the provisions of Section 12A and 12B of Central Excise Act have been applied in relation to service tax as they apply to excise. Section 12A of Central Excise Act provides that every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. Section 12B of the said Act provides that every

person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods.

9. As a result of application of the provisions contained in Section 12A and 12B of Central Excise and Salt Act 1944 in relation to service tax, there is a statutory presumption that the person paying the service tax has passed on the liability to the recipient of the service. The legislative intent, therefore, is quite clear i.e. the service tax is to be ultimately borne by the recipient of the service, though it is the service provider who is statutorily liable to pay the said tax to the exchequer. It was contended by the learned counsel for the defendant that the service provider can recover the service tax from the recipient of the service only by entering into an agreement with him in this regard and in the absence of such an agreement, the liability cannot be shifted to the recipient of the service. In my view, the contention of the learned counsel for the defendant cannot be accepted. Section 83 of the Finance Act read with Sections 12A and 12B of Central Excise and Salt Act, 1944, in my view, gives ample legal right to the service provider to recover the amount of service tax paid by him from the recipient of the service. Had that not been the legislative intent, there would have been no occasion to apply Sections 12A and 12B of Central Excise and Salt Act in relation to service tax. Even in the absence of Sections 12A and 12B of Central Excise and Salt Act in

relation to service tax, nothing prevented the service provider from entering into an agreement with the recipient of the service, for reimbursement of the amount of service tax, by the recipient of the service to its provider. Extension of Sections 12A and 12B of Central Excise and Salt Act in relation to the service tax gives a legal right to the service provider to recover the amount of service tax from the recipient of the service, even if there is no agreement between them for reimbursement of such tax by the recipient of the service to its provider.

10. The view being taken by me finds full support from the decision of a Division Bench of Madras High Court in **All India Tax Payers Welfare Association v Union of India 2006 Law Suit(Mad) 362** where the court, after noticing the provisions of Section 83 of Finance Act 2004 along with Sections 12A and 12B of Central Excise and Salt Act, inter alia, held as under:-

“9. The provider of service is an assessee Under Section 65 of the Finance Act and he has to collect service tax from the users of service as contemplated Under Section 12-A and 12-B of the Central Excise Act. In this context, it is necessary to refer that Section 12-A of the Central Excise Act contemplates that notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at

which such goods are to be sold. Section 12-B of the Central Excise Act contemplates that every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods. Thus, the provider of service only assessee according to Section 65 of Finance Act is to collect service tax from the users of service as contemplated Under Sections 12A and 12B of Central Excise Act, 1944. The second respondent rightly mentioned in all bills the details including service tax which is payable by the users.”

This issue came up for consideration before this Court in Pearey Lal Bhawan Association v. Satya Developers Pvt. Ltd. 173(2010) Delhi Law Times 685 and the following view was taken:-

“14. ... It is not denied that leasing, and renting premises was included as a “service” and made exigible to service tax, by an amendment; the rate of tax to be collected, is not denied. If the overall objective of the levy – as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one, which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realized, by including the amount of tax in the cost of the service (or goods).”

The Court in this regard also referred to the provisions contained in Section 64A of Sales of Goods Act and held as under:-

“15.....Although there is no explicit provision to that effect, enabling lessors such as the plaintiff, to the service tax component, this Court is of the view that there is sufficient internal indication in the Act, through Section 83 read with Section 12-A and Section 12-B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee). This issue, is therefore, answered in the plaintiff’s favour, and against the defendant.

11. The learned counsel for the defendant has referred to the decision of this Court in **Raghubir Saran Charitable Trust v. Puma Sports India Pvt. Ltd.** **2012(191) DLT 183**. In that case, an award was passed by the arbitrator requiring the landlord (petitioner before the Court) to bear the liability of all property taxes and other outgoings, including service tax liability. The arbitrator had distinguished the decision of this Court in **Pearey Lal Bhawan Association (supra)** on the ground that clause 7.1 of the lease deed in that case was worded differently from the relevant clauses of the lease deed in **Pearey Lal Bhawan Association (supra.)** Rejecting the challenge to the award, the Court, inter alia, held as under:-

“6. It may also be noted that the question of the liability to pay service tax for the subsequent period from 1st April 2009 to 30th September 2011 has been referred to a separate arbitration.

18. Clause 7.1 of the lease deed reads as under:

Clause 7.1 - It is agreed by and between the Parties that the Lessor shall be liable to pay property taxes and other outgoings in respect of the Premises,

whatsoever payable and as levied from time to time promptly and timely, including any revisions thereto, directly to the authorities concerned and no claim for contribution towards such taxes, cesses, levies or increases shall be made by the Lessor or be entertained by the Lessee.

19. The last four lines of the above Clause state that “no claim for contribution towards such taxes, cesses, levies or increases” will be made by the lessor (the Petitioner) or be entertained by the lessee (the Respondent). The word “such” refers to “property taxes and other outgoings in respect of the premises whatsoever payable and as levied from time to time” including “any revisions thereto.” The word “outgoings” suggests a wide range of levies not confined to tax on the property. The expression ‘from time to time’ accounts for new levies. The expression ‘increases’ denotes the possibility of a future levy resulting in enhancement of the tax burden beyond what was prevalent at the time of execution of the lease. There is no scope for reading the expression “other outgoings” ejusdem generis with the words “property tax”. The words “taxes, cesses, levies or increases” denote the range of possible levies and signifies the wide nature of the expression “other outgoings” following the words “property taxes”. The expression ‘other outgoings’ would include taxes ‘in respect of the premises’ and not limited to a tax ‘on the premises’ as suggested by learned counsel for the Petitioner. Service tax could well be an “outgoing” ‘in respect of the premises’ although it pertains to the use of the premises and is not a tax ‘on the premises’. In *Brett v. Rogers* it was held that the words “duties imposed in respect of the premises” are wide enough to include the expenses incurred by the landlord for replacing a new drain under the Public Health (London) Act,

1891 which was enacted after the commencement of the lease.

21. The expression "outgoing charges" in Clause II (1) cannot be said to have same connotation as the expression "other outgoings" in Clause 7.1. The word "other" preceding "outgoings" indicates a wider nature of the possible levies. Secondly, the learned Single Judge did not in the said judgment actually examine whether the expression "outgoing charges" could include service tax. The Court went by the objective of the levy which made service tax an indirect tax and which necessarily meant that the consumer of the services had to bear the burden. Even while referring to Section 64A SGA the Court did not dwell on the opening words of the said provision: "unless a different intention appears to the terms of the contract". In the circumstances it is not possible to accept the contention of the learned counsel for the Petitioner that the decision in *Pearey Lal Bhawan Association v. Satya Developers Pvt. Ltd.* covers the case on hand in its favour. The learned Arbitrator committed no error in distinguishing the said decision.

22. There is merit in the contention that as far as the present case is concerned, Clause 7.1 of the lease deed is wide enough to include the service tax "in respect of" the premises. Merely because levy was not statutorily operative at the time of entering into the lease deed did not mean that the said liability did not attach to the Petitioner. The fact that Section 83 of the Finance Act read with Section 12A of the Central Excise Act 1944 indicates that service tax is an indirect tax which will be presumed to have been passed on to the service recipient does not decide the issue of who

should in fact bear the burden. Those provisions are relevant for the assessee being the service provider and being the person, under Section 68 of the Finance Act, who has to in fact remit the tax to the government. It will be no defence for him to avoid that liability by pleading that he did not pass on the burden to the service recipient.

23. In a given case, a service provider may well decide to undertake the burden of service tax itself without passing it on to the service recipient. What the intention of the parties in that regard is can be determined only by examining the relevant clause in the agreement they execute. Even Section 64A of the SGA is useful in understanding the importance of the contract governing the parties. It opens with the words "unless a different intention appears to the terms of the contract". Therefore it is the contract, and not the nature of the levy, which will determine which party, the service provider or recipient, is liable to bear the burden of service tax.

26. In the present case, the wording of Clause 7.1 of the lease reflects the intention of the parties that it is the Petitioner who would bear the incidence of all taxes. In light of the decisions in Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd. and Rashtriya Ispat Nigam Ltd. v. M/s. Dewan Chand Ram Saran, the view of the learned Arbitrator that in terms of Clause 7.1 of the lease deed, the service tax liability is that of the service provider, i.e. the Petitioner, is a plausible one. No ground for interference under Section 34 of the Act is made out.

A comparison of Clause 4(v) of the lease deed in the case before this Court and Clause 7(i) of the lease deed in the case of **Raghubir Saran Charitable**

Trust(supra) would show that the two clauses are altogether different. In the case of Raghubir Saran (supra), the expression ‘outgoings’ had not been qualified by the words “that would be determined/fixed/varied from time to time by the Municipal Corporation/Municipality/Gram Panchayat or any other local authority”. Therefore, the expression ‘outgoings’ in that case included in its ambit of taxes, service tax in respect of the premises subject-matter of the lease deed. The use of the words “and no claim for contribution towards such taxes, cesses, levies or increases shall be made by the Lessor or to be entertained by the Lessee” is yet another indicator that the parties in that case had clearly agreed that the lessee would pay nothing more than the actual rent and any other liability in respect of the tenancy premises would be borne solely by the lessor. This judgment, therefore, is clearly distinguishable on facts.

12. Learned counsel for the defendant has also referred to Numaligarh Refinery Ltd. V Daelim Industrial Co. Ltd 2007(8) SCC 466. The issue before the Court was with respect to payment of countervailing, excise duty which had been imposed after execution of contract between the parties. Clause 2B and 6 of the contract in that case read as under:-

“Clause 2(b) all taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor....

6. It is specifically understood and agreed between the parties hereto that if there is any liability towards taxes/ duties (including custom duty on foreign component of supply portion) as may be assessed/ claimed/demanded by the concerned Indian or foreign authorities, it shall be the sole responsibility/ liability of the contractor to pay all such taxes/ duties and that the owner shall not be responsible at all for the payment of such taxes/ duties.”

Interpreting the clauses of the contract it was held that liability to pay countervailing excise duty was of the contractor. The clauses in that contract being altogether different from Clause 4(V) of the lease deed in the case before this Court, this judgment can be of no help to the defendant. It can hardly be disputed that in a given case, the lessor may agree to bear the liability of service tax but in case before this Court, there is no such agreement between the parties. Hence, the lessor, in my view, is entitled in law to recover the same from the lessee, even if there is no agreement between the parties for payment of such a levy by the lessee.

In **Rashtriya Ispat Nigam Ltd. V. M/s Dewan Chand Ram Saran 2012(4) SCALE 588**, the court was of the view that the question as to whether liability to pay service tax would be of the service provider or service recipient would be determined by the contract between the parties. The relevant clause in the contract between **Rashtriya Ispat Nigam Ltd.** and the contractor in that case read as under:-

“9.3 The Contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the Tax Authorities for the account of the Contractor and the Company shall provide the Contractor with required Tax Deduction Certificate.”

It was held by the Apex Court that the contractor had under the above referred clause, accepted the liability to pay service tax since the liability had arisen out of discharge of his obligations under the contract. The Court also felt that the rationale behind the above referred clause was that petitioner as a Public Sector Undertaking should be exposed only to a known and determined liability under the contract and all other risks regarding taxes arising out of the obligations of the contractor, should be borne by the contractor. It was also held by the Apex Court that there was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by him. Since there is no agreement between the parties to this suit, for shifting the ultimate liability towards service tax to the plaintiff, nothing in law prevents it from recovering the same from the defendant.

I have also perused the other two judgments relied upon by the defendant and none of them applies to the legal issue involved in this case, i.e., the right of

the service provider to recover the amount of service tax from the recipient of the service, in a case where there is no contract between the parties as to who has to ultimately meet this statutory liability.

For the reasons stated hereinabove, I hold that the plaintiff is entitled to recover service tax, to the extent the liability has not become barred by limitation, from the defendant.

13. **ISSUE NO.3**

The present suit was filed on 17.2.2012. A perusal of the affidavit filed by the plaintiff on 6.10.2012 would show that some payments were made by it between 31.3.2008 to 5.2.2009 i.e. more than 3 years before the suit was filed. Article 23 of the Limitation Act provides a limitation of three years, to be computed from the date money is paid, in a suit for money payable to the plaintiff for money paid for the defendant. Since the case of the plaintiff is that the service tax is ultimately to be borne by the defendant, the suit falls in the purview of Article 23 and not residuary Article 113 of Limitation Act. The amount of service tax paid upto 5.2.2009 therefore is clearly barred by limitation.

14. It was contended by the learned counsel for the plaintiff that since notification dated 22.5.2007 and circular dated 4.1.2008 with respect to levy of service tax were struck down by a Division Bench of this Court in WP (C)

No.1659/2008 **Home Solution Retail India Ltd. v. U.O.I.** 2009(158) DLT 722 and the statute came to be amended only by Section 76 of Finance Act 2010, though retrospectively with effect from 1.6.2007, the plaintiff could not have instituted any suit for recovery of the amount deposited towards payment of service tax between 18.4.2009 and 1.4.2010. I, however, find no merit in this contention. The payments between 31.3.2008 to 5.2.2009 having been made before the decision in WP(C) No.1659/2008 was rendered on 18.4.2009, there was no legal impediment in the plaintiff filing a suit for recovery of those payments, at any time before the above referred decision was rendered. Section 9 of the Limitation Act expressly provides that where once time has begun to run, no subsequent disability or inability to institute a suit or make an application stops it. Therefore, once the period of limitation commenced running, any subsequent event would not stop the running of limitation and would not extend the period of limitation. The period of limitation for the deposits made between 31.3.2008 to 5.2.2009 commenced on the date the deposits were made. Since there can be no stopping of the limitation, once it begins to run, the suit having been filed on 17.2.2012 is clearly barred by limitation with respect to service tax deposited between 31.3.2008 to 5.2.2009.

The issue is decided accordingly.

15. **ISSUE NO.2**

In view of the decision on issues No.1 & 2, the plaintiff is entitled to recover only service tax deposited between 5.3.2009 to 6.9.2012 from the defendant. This amount comes to Rs.9,74,922/-.

16. As regards payment of interest, admittedly there is no agreement between the parties governing payment of any interest. Interest, can, however, be awarded by the Court under Section 3 of the Interest Act 1978 which reads as under:-

“1. In any proceedings for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period, that is to say,-

(b) if the proceedings do not relate to any such debt, then from the date mentioned in this regard in a written notice given by the person entitled or the person making the claim to the person liable that interest will be claimed, to the date of institution of the proceedings: Provided that where the amount of the debt or damages has been repaid before the institution of the proceedings, interest shall not be allowed under this section for the period after such repayment.”

In the case before this Court, a number of notices/letters were sent by the plaintiff to the defendant before filing this suit. These notices and letters have been

specifically referred in paras 10 and 13 of the plaint. The defendant has not denied receipt of these letters and notices in the written statement. One such letter was written by the director of the plaintiff company to the defendant on 2.5.2011, whereby it was requested to pay service tax along with interest @ 13% per annum. Therefore, interest on the amount which had become due by 2.5.2011 can be awarded to the plaintiff under Section 3 of The Interest Act 1978. No notice/letter demanding interest was issued after 02.05.2011. Hence, no interest can be granted with respect to amounts deposited thereafter. A perusal of the affidavit filed by the plaintiff shows that it had deposited Rs.3,45,049/- towards service tax between 05.03.2009 to 02.05.2011. Rest of the deposits were made after sending the letter dated 02.05.2011 and interest was not claimed in any of those letters and notices. In my view, it would be appropriate to award interest to the plaintiff @ 6% per annum on the aforesaid amount. The amount of interest calculated @ 6% per annum with effect from 2.5.2011 till filing of the suit on 17.2.2012 comes to Rs.16,389.83. Thus, the plaintiff is entitled to recover principal sum of Rs.9,74,922/- and Rs.16,389.83, as interest from the defendant.

ORDER

In view of my findings on the issues, a decree for recovery of Rs.9,91,311.83 is hereby passed in favour of the plaintiff and against the defendant. In the facts

and circumstances, there shall be no order as to costs. If the decretal amount is not paid within four weeks from today, it shall carry pendent lite and future interest @ of 6% per annum.

Decree sheet be drawn accordingly.

V.K.JAIN, J

OCTOBER 19, 2012
KS/BG/RD