IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.16965 of 2015

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Shapoorji Paloonji & Company Pvt. Ltd., a company incorporated under the Companies Act, 1956 having its Corporate office at S.P. Centre, 41/44 Minoo Desai Marg, P.O. + P.S. Colaba, Mumbai - 400005 (Maharashtra) and Branch Office at Indian Institute of Technology Patna Campus, Amhara, P.O. + P.S. - Bihta, District - Patna through its Additional General Manager, Pradip Kumar Ghosh, son of Sri Amiya Kumar Ghosh, resident of Deodar Place, Garia Station Road, P.O. Garia, P.S. Sonepur, Kolkata - 700084.

.... Petitioner

Versus

1. Commissioner, Customs Central Excise and Service Tax having its office at Annexe C.R. Building, Beer Chand Patel Marg, Patna.
2. Indian Audit and Account Department through its Principal Director of Audit, having its office at Central Lucknow Branch at Patna Maha Lekhakar Bhawan, Veer Chand Patel Path, Patna.
3. National Building Corporation Ltd. through its General Manager having its office at 404, 4th Floor, Maurya Tower, Maurya Lok Complex, Patna - 800001.
4. Indian Institute of Technology through its Registrar having its office at Amhara, P.O. + P.S. - Bihta, District - Patna.

.... Respondents

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Appearance :

For the Petitioner : Mr. D.V.Pathy, Advocate
Mrs. Manju Jha, Advocate
For Respondent No.1 : Mrs. Nivedita Nirvikar, Advocate
For Respondent No.3 : Mr. Binay Kumar, Advocate
For Respondent No.4 : Mr. Jayant Roychoudhary, Advocate
For Accountant General: Mr. Madhuresh Prasad, Advocate

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CORAM: HONOURABLE THE ACTING CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE HEMANT GUPTA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE HEMANT GUPTA)
Date: 03 -03-2016

The petitioner is a Limited Company engaged in the business of execution of works contract. The Indian Institute of Technology – Respondent No.4 (for short herein after referred as "Institute"), is a body incorporated by the Institutes of Technology Act, 1961. The Institute appointed National Building

Construction Corporation Limited (in short, NBCC) (respondent No.3) as a consultant for construction of its academic building project at Bihta, Patna. The petitioner was appointed as contractor for construction of academic complex of Indian Institute of Technology, Bihta, by NBCC vide letter of award, dated 20th December, 2012. The relevant extract for the purpose of this writ petition, from the letter of award reads as under:-

> **"4.2. SALES TAX ON WORKS CONTRACT AND TURNOVER TAX**
>
> The award of work under this contract is on "Works Contract Basis". You shall be responsible for payment of any tax levied on the transfer of property in goods involved in the "works Contract" under Bihar State Government Sales Tax Act and the rules made thereunder including amendments, if any. This liability shall be to your account and it shall not be reimbursed by NBCC.
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> xxx xxxx xxxxxxxxxxx xxxxxxxxxx
>
> 4.2.4 The contractor shall be required to have a valid Service Tax registration under "Work Contract Service" for executing this work. The rates quoted by the contractor are exclusive of Service Tax. The Contractor will be required to submit service tax paid challans to NBCC and the same will be reimbursed to the contractor on receipt from IIT Patna."

2. In terms of the letter of award, the petitioner registered itself with respondent No. 1 and started payment of service tax. A notice to pay service tax was also issued to the Petitioner by the Superintendent of Service Tax, Range -XVIII, Division -2, Service Tax Commissoinerate, Kolkata, on

13.11.2013. Such levy of service tax was again reiterated vide communication, dated 05.09.2014.

3. Respondent No. 2, Indian Audit and Account Department, raised audit objection on 30th June, 2015 to the effect that service provider undertaking construction activity of educational institutions are not required to pay service tax. In terms of the audit objection, the petitioner claimed that service tax is not payable by the petitioner or by the Indian Institute of Technology, respondent no.4, on the construction activity, undertaken by the petitioner.

4. The Government of India has issued Notification No. 25/2012, dated 20th June, 2012, exempting the services mentioned therein from the levy of service tax in exercise of the powers conferred under Section 93 of the Finance Act, 1994. It may also be noticed that Section 66D has been inserted by the Finance Act, 2012 with effect from 1st July, 2012, wherein negative list of the services on which service tax is not payable was inserted.

5. In counter affidavit, the stand of respondent No.1 is that the construction activity is taxable service under the provision of Section 65 of the Finance Act, 1994. It is pointed out that Notification No.25/2012, dated 20th June, 2012, has exempted specified services from the levy of service tax subject to fulfillment of the conditions stipulated for such exemption.

The first and foremost condition needs to be satisfied is that specified service must be provided to Government or Local Authority or Governmental Authority. Governmental Authority has been defined by Notification No. 2/2014 dated 30th January, 2014. It is thus asserted that the Indian Institute of Technology, Bihta, Patna, a body corporate under a Central Statute would not be covered under the category of negative list (Section 66D) and also by the exemption dated 20th June, 2012, as it is not a Governmental Authority within the meaning of Notification dated 30th January, 2014. Thus the service tax is payable by the Institute. The reliance is also placed on a circular issued on 19th September, 2013, by CBDT clarifying the ambit and scope of levy of service tax pursuant to a representation by several educational institutions. It is clarified that the service provided to Institute is related to construction work but is not exempt from payment of service tax. Annexure – A appended to the reply dated 06.10.2015, addressed to respondent No.3, makes a mention of the Notification dated 30th January, 2014, to assert that service tax is payable by the Petitioner for the relevant period.

6. At this stage, certain statutory provisions relating to imposition of service tax under the Finance Act, 1994 and the Notifications issued from time to time need to be extracted –

> **"65B.** ***Interpretations.-*** In this Chapter, unless the context otherwise requires,**-**

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NO

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(31) "local authority" means –

(a) a Panchayat as referred to in clause (d) of article 243 of the Constitution;

(b) a Municipality as referred to in clause (e) of article 243P of the Constitution;

(c) a Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund;

(d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006 (41 of 2006);

(e) ……..''

xxxxxx xxxxxxxxxxxx xxxxxxxxx

"93. Power to grant exemption from service tax

(1) If the Central Government is satisfied that it is necessary in public interest so to do, it may, by notification in the Official Gazette, exempt generally or subject to such conditions as may be specified in the notification, taxable service of any specified description from the whole or any part of the service tax leviable thereon.

(2) If the Central Government is satisfied that it is necessary in the public interest so to do, if may, be special order in each case, exempt any taxable service of any specified description from the payment of whole or any part of the service tax leviable thereon, under circumstances of exceptional nature to be stated in such order."

The Notification dated 20th June, 2012 (Annexure 11) has been issued under Section 93 of the Finance Act, 1994. The relevant clause reads as under :-

"2. Definitions.- For the purpose of this notification, unless the context otherwise requires,

xxxxx xxxxxxx xxxxxxxx xxxxx

(s) Governmental authority means a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution.

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12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –

(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;

(d) canal, dam or other irrigation works;

(e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or

(f) residential complex predominantly meant for self-use or the use of their employees or other persons specified in the *Explanation* 1 to clause 44 of section 65B of the said Act."

Notification No. 2/2014 ST dated 30th January, 2014, partially amending the notification dated 20th June, 2012 reads as under:-

"In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government being satisfied that it is necessary in the public interest so to do, hereby makes the following further amendments in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 25/2012-Service Tax, dated the 20th June, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i), vide GSR 467(E), dated the 20th June,2012, namely:-

In the said notification, in the paragraph 2, for clause(s), the following shall be substituted, namely:-

(s) "governmental authority" means an authority or a board or any other body;

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by Government,

With 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution;'

7. Our attention has also been drawn to Notification No.6/2015 Service Tax, dated 1st March, 2015, amending the Notification dated 20th June, 2012. By the said Notification, item nos. (a), (c) and (f) of Entry 12 as reproduced above, stands omitted.

8. The petitioner was granted the contract for construction on 20th December, 2012. But even before that date on 20th June, 2012, with effect from 1st July, 2012, the services provided to the Government, local authority, or governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration were exempted from payment of

service tax. 'Local authority' has been defined under Section 65B (31) of the Finance Act, 1994, and the 'Governmental Authority' is defined in clause 2(s) of the Notification, dated 20th June, 2012. Such clause has been amended by Notification dated 30th January, 2014.

9. It is undisputed that the Indian Institute of Technology, Bihta, Patna, whose academic block was to be constructed by the petitioner, was set up by an Act of Parliament, i.e., Indian Institutes of Technology Act, 1961 (59 of 1961) as an institute of national importance under Article 248 of the Constitution of India read with 7th Schedule List I. As per the definition of Governmental Authority as amended on 30th January 2014, an authority or board or any other body set up by an Act of Parliament or State Legislature is a Governmental Authority. Therefore, the Notification dated 20th June, 2012, exempts the activity of construction undertaken by the petitioner from payment of service tax.

10. However, the arguments of Mrs. Nivedita Nirvikar, learned counsel for respondent No.1, is that only an authority with 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution alone is the Governmental Authority, entitled to exemption from benefit of service tax. Such provision in the notification dated 30th January 2014 is applicable to both

parts of clause 2(s) and not to sub-clause (ii) of clause 2(s) alone of the said Notification.

11. We have heard learned counsel for the parties and found the arguments raised by Mrs. Nivedita Nirvikar are not sustainable in law. The Governmental Authority as defined in the Notification dated 30th January, 2014, means an authority or a board or any other body set up by an Act of Parliament or State Legislature. The provisions contained in sub-clause (i) and sub-clause (ii) of Clause 2(s) are independent dis-conjunctive provisions and the expression "90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution" is related to sub-clause (ii) of Clause 2(s) alone. The clause (i) is followed by ";" and the word "or". Therefore, each of the sub-clauses is independent provision. The condition of 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution is relatable to only sub-clause (ii) of Clause 2(s). It means that an authority established by Government should have 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution to be eligible for exemption. The Authority set up by an Act of Parliament or State Legislature is not and cannot be made subject to the condition of 90% or more participation

by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution. Thus, the construction activity undertaken by the petitioner in respect of the academic block of the Institute-respondent No. 4, is exempt from payment of service tax in terms of Notification, dated 20th June, 2012 as amended.

12. Thus, the service tax paid either by the petitioner or respondent No.4 and collected by respondent No.1, cannot be levied or collected as it is not chargeable levy. Consequently, the direction contained in the communication dated 05.09.2014 (Annexure 5), is quashed.

13. At this stage, another argument advanced by Mrs. Nivedita Nirvikar, needs to be discussed. She argues that the petitioner shall not be entitled to refund of the service tax as it would be a case of undue enrichment. We do not find any merit in this argument as well. The payment of service tax has not been made by the numerous consumers and collected by the petitioner. It is paid by the petitioner alone. The petitioner is entitled for the reimbursement of the amount of service tax by respondent No. 4 in terms of the letter of award of contract. Such payment of service tax by the petitioner is not indirect collection of taxes but the direct payment by the petitioner. Therefore, it is not a case of undue enrichment.

14. Thus, since the levy as collection of service tax

paid by the petitioner or respondent No.4, has not been found to be justified, therefore, the respondent No. 1 shall refund the amount of the service tax deposited either to the petitioner or respondent No. 4, as the case may be, expeditiously.

(Hemant Gupta, J)

I A Ansari, ACJ. I agree.

(I. A. Ansari, ACJ)

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