IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CWP No. 12304 of 2015 (O&M)
Date of decision: August 11, 2016

M/s Bharat Bhushan Gupta & Company

.. Petitioner

v.

State of Haryana and others

.. Respondents

CORAM: HON'BLE MR. JUSTICE RAJESH BINDAL
HON'BLE MR. JUSTICE HARINDER SINGH SIDHU

Present: Mr. Jagmohan Bansal, Mr. Sandeep Khunger, Mr. Gagneshwar Walia, Mr. Davender Gorsi for Mr. Rajesh Bansal, Mr. Rajnish Gupta, Mr. Vikrant Kackria, Mr. Vishal Munjal, Mr. Shakti Singh for Mr. S. N. Yadav, Advocates for the petitioner(s).

Ms. Mamta Singla Talwar, Deputy Advocate General, Haryana.

Mr. Sudeep Singh, Advocate for respondents No. 2 & 3-Haryana Housing Board.

Mr. Arvinder Singh, Advocate for respondents No. 2 & 3 in CWP No. 21731 of 2015.

Mr. Sharan Sethi, Advocate for Customs & Excise Deptt.

Rajesh Bindal J.

1. This order will dispose of a bunch of petitions bearing CWP Nos. 11585, 12304, 12442, 12465, 12541, 12564, 12597, 12677, 12686, 14523, 14758, 14780, 14825, 15939, 15959, 16661, 17284, 17287, 17558, 21082, 21731, 26165 and 26191 of 2015, 186 and 4087 of 2016.

2. The facts have been taken from CWP No. 12304 of 2015.

3. The issue raised in all the petitions is identical as the petitioners are aggrieved against the action of Haryana Housing Board (for short, 'the

Board'), whereby service tax which, according to the Board, was payable in its hands, is sought to be deducted from the bills of the petitioners.

4. Learned counsel for the petitioner submitted that the petitioner is a firm carrying on the business as a contractor. It was awarded contract for construction of flats for BPL category vide letter dated 26.8.2013. The contract is nearing completion. As per the provisions of Finance Act, 1994 and notification No. 25/2012- S.T. dated 20.6.2012 issued by the Government, the service of construction etc. provided to the Government, a local authority or a governmental authority is exempted from payment of service tax. The words "governmental authority" have been defined in the same notification, which was clarified later on vide notification No. 2/2014-S.T. Dated 30.1.2014. The term "original works" has also been defined in notification dated 20.6.2012. It was further submitted that the Board has been created under Haryana Housing Board Act, 1971 (for short, 'the Act'). It is totally controlled by the Government. There is no private participation. It is engaged in construction of houses for the poor and for other customers as well. In addition to clause 12 of the notification dated 20.6.2012, it was submitted that the petitioner may be entitled to exemption even in clause 14, which talks about construction of low cost houses upto a carpet area of 60 square meters. In the case in hand the construction of houses is for BPL category, which are of a carpet area less than 60 square meters.

5. It was further submitted that due to some error, clauses 12 (a), (c) and (f) were omitted from the notification dated 20.6.2012 vide notification dated 1.3.2015 w.e.f. 1.4.2015, however, vide Section 102 of the Finance Act, 2016, the exemption was restored again with retrospective effect from 1.4.2015 till 29.2.2016, with reference to three clauses, which

were omitted from notification dated 20.6.2012. It was further submitted that after entry 12 in the notification dated 20.6.2012, entry 12A was inserted w.e.f. 1.3.2016 extending the exemption from payment of service tax in terms of the previous provisions upto 31.3.2020.

6. Taking the arguments further, learned counsel for the petitioner submitted that the issue was considered by a Division Bench of Patna High Court in Civil Writ Jurisdiction Case No. 16965 of 2015—Shapoorji Paloonji and Company Pvt. Ltd. v. Commissioner, Customs Central Excise and Service Tax and others, decided on 3.3.2016, where the issue was regarding levy of service tax on the award of contract for construction of an administrative block by Indian Institute of Technology, a body incorporated by Institutes of Technology Act, 1961, to National Building Construction Corporation Ltd. It was opined that Indian Institute of Technology, being a governmental authority, it shall be entitled to the benefit of exemption, as granted vide notification dated 20.6.2012. The case in hand is identical as in the present case, the award of contract for construction has been awarded by a governmental authority constituted under the Act of the State and the purpose of construction is not commercial.

7. It was further submitted that the benefit of exemption in terms of notification dated 20.6.2012, being effective from 1.7.2012, the petitioners in most of the petitions were awarded contract thereafter will not be liable for payment of service tax, however, in some cases there is some small period, which is prior thereto, for which the petitioners have already paid the due tax or are availing of their appropriate remedy. The dispute in the present bunch of petitions is only for the period from 1.7.2012 onwards. Ever since the contract was entered into and the work was being executed

by the petitioner, neither the department ever issued any notice to the petitioner nor the Board ever asked for deposit of service tax. The petitioner was aggrieved against the action of the Board in deducting the entire amount of service tax even due for the previous period from the running bills. The grievance is that the petitioner being not liable to pay the tax, the action of the Board in deducting the same from the bills of the petitioner was totally un-called for. Further, it was submitted that in the case of contractors, the liability to pay the service tax is 50:50 on the service provider and the recipient. Even if the clause in the contract is seen, the petitioner would be liable to pay the service tax of his own share, whereas the liability, if any, of the Board cannot be passed on to the petitioner.

8. On the other hand, learned counsel for the Board submitted that the stand of the Board is also that the transaction in question, namely, the contract awarded by the Board for construction of houses for BPL category to the petitioner is not a taxable transaction under the provisions of the Finance Act, 1994, if read with notification dated 20.6.2012 and subsequent thereto. He further submitted that same stand was taken by the Board before the department in pursuance to the show cause notice but not accepted. The tax was deducted from the bills of the petitioner on account of an opinion received by the Board that such a transaction is taxable. He further submitted that the department has assessed the tax on the transaction in question besides other activities being undertaken by the Board prior to the period in question and the current period as well. The orders have been impugned by filing appeals. He further submitted that in terms of the condition contained in the contract, the entire liability of payment of service tax of the contract is on the contractor. The amount of share of the Board

was deducted from the running bills of the petitioners. For 50% payable at the hands of the petitioners, if leviable, is their own liability. As regards the case of the petitioner regarding claiming exemption under clause 14 of the notification dated 20.6.2012 is concerned, it was submitted that the project was not sanctioned by the competent authority.

9. Learned counsel appearing for the department submitted that clause 12 of the notification dated 20.6.2012 provides for exemption from payment of tax if it is a non-commercial transaction. In the case in hand, there was no material produced by the Board before the adjudicating authority to suggest that exemption, as envisaged in clause 12 of the notification dated 20.6.2012, was available to the Board. The balance sheet of the Board was seen and finding that huge profits were made and there were other activities being carried on by the Board, the tax was assessed. However, he could not refer to any material on record to show that the notice was ever issued to any of the petitioners for levy of tax, though as per the stand taken, they would also be liable to pay 50% of the tax. He further submitted that the department has already passed order in the case of the Board, which is under appeal.

10. Heard learned counsel for the parties and perused the paper book.

11. The following issues arise for consideration by this court in the present petition:

(i) Whether service tax is chargeable on construction of BPL houses constructed by the petitioners for the Board ?

(ii) Whether in terms of condition No. 3 in the tender conditions, the petitioners would be liable to discharge the liability of service tax, if payable, by the Board as per the provisions of the Finance Act, 1994, the Rules and the notifications issued thereunder?

Issue No. (i)

12. Section 93 of the Finance Act, 1994, which enables the Government to grant exemption from payment of tax is extracted below:

"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."

13. In exercise of the powers conferred under the aforesaid provision, various notifications have been issued providing for exemption from payment of service tax. Relevant provisions of the applicable notifications are extracted below:

"**Notification: 25/2012-S.T. Dated 20-Jun-2012**

Exemptions from Service tax- Mega Notifications- Notification No. 12/2012-S.T. Superseded

In exercise of the powers conferred by sub-section (1) of Section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services from the whole of the service tax leviable thereon under Section 66B of the said Act, namely:

xx xx xx

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;

xx xx xx

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

xx xx xx

(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;

xx xx xx

(y) "original works" means has the meaning assigned to it in Rule 2A of the Service Tax (Determination of Value) Rules, 2006;

xx xx xx

Notification No. 2/2014-S.T. Dated 30-Jan-2014

Mega Exemption Notification-Governmental Authorities-Redefined

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;

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

(iii) 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;

xx xx xx

Notification: 6/2015-S. T. dated 01-Mar-2015

Exemption from Service Tax- Mega Notification exempting 39 group of services-Amendment to Notification No. 25/2012-S.T.

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 G.S.R. 467(E), dated the 20th June, 2012, namely:

1. In the said notification,-

xx xx xx

(ii) in entry 12, items (a), (c) and (f) shall be omitted.

xx xx xx

3. Save as otherwise provided in this notification, this notification shall come into force on the Ist of April, 2015.

The Finance Act, 2016

xx xx xx

102. Special provision for exemption in certain cases

relating to construction of Government buildings.- (1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the Ist day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable 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 structure meant predominantly for use as -

(i) an educational establishment;

(ii) a clinical establishment; or

(iii) an art or cultural establishment;

xx xx xx

Notification: 9/2016-S.T. Dated 01-Mar-2016

Exemption from Service Tax- Mega Notification- Amendment to Notification No. 25/2012-S.T.

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 number G.S.R. 467 (E) dated the 20th June, 2012, namely:

xx xx xx

(iv) after entry 12, with effect from the Ist March, 2016, the following entry shall be inserted, namely-

"12A. 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) <u>a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;</u>

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

(c) a 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 65 B of the said Act;

under a contract which had been entered into prior to the Ist March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date:

provided that nothing contained in this entry shall apply on or after the Ist April, 2020.

[Emphasis supplied]

xx xx xx"

14. The Board has been constituted in terms of the provisions of Section 3 of the Act, as was enacted by the State Legislature. It is a body corporate which consists of a Chairman, a Chief Administrator and such other members, as the State Government may, from time to time, appoint by a notification. The Chief Administrator shall be a person from amongst the officers of the rank of Head of the Department or Joint Secretary of the State Government. It is termed to be a local authority for the purposes of Land Acquisition Act, 1894. Section 20 of the Act provides that subject to control of the State Government the Board may incur expenditure on framing and execution of such housing schemes as may be considered necessary from time to time or as may be entrusted to it by the State Government. Every year, the Board is to prepare a budget in advance for the next year and place it before the State Government for its approval. After sanction is granted by the State Government, the same is published in the official gazette. The Board is authorised to borrow money for implementation of the projects, as approved with prior approval of the State Government. Section 72 of the Act provides that the State Government shall exercise superintendence and control over the Board and its officers. The aforesaid provisions of the Act clearly show that the Board is a governmental authority, as it is fully under the control of the State Government.

15. The issue sought to be raised by the petitioners is that they are contractors engaged by the Board for construction of BPL houses from time to time. In all the cases, except two, the contract was entered into after 1.7.2012. There is no dispute about the period prior thereto as the

petitioners in most of the petitions have categorically stated that service tax for that period was paid by them. The period in dispute is from 1.7.2012 onwards.

16. The petitioners approached this court for the reason that the Board deducted the amount of service tax from the running bills of the petitioners from the very beginning opining that service tax was payable. The action was taken, as claimed, on an opinion sought by the Board. The tax deducted from the bills of the petitioners, if leviable, would be liability of the Board in law.

17. The service tax has been levied on various services with amendments made in Finance Act, 1994. The services on which the tax was levied were added from time to time. Section 93 of the Finance Act, 1994 enables the Central Government to exempt any service from payment of tax by issuing a notification. Notification No. 25/2012-S.T. Dated 20.6.2012 was issued stating therein that the Government being satisfied exempts the taxable services as enumerated in the notification from the whole of the service tax leviable thereon. If clause 12 of the notification dated 20.6.2012 is analysed, exemption from taxation to the services is provided to :

(i) Government, a local authority or a governmental authority;

(ii) the kind of service being construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-

(iii) it is meant predominantly for use other than for commerce, industry, or any other business or profession.

18. “Original works” has been defined in clause 2(y) of the notification dated 20.6.2012 to mean the meaning as assigned to in Rule 2A of the Service Tax (Determination of Value) Rules, 2000.

19. On a plain reading of the notification dated 20.6.2012, in our view, the service being provided by the petitioners would clearly fall in the exemption clause, as the Board is a governmental authority having been set up under a State Act, i.e., Haryana Housing Board Act, 1971. It is wholly controlled by the State Government. BPL houses constructed by the petitioners are meant for residential purpose and not for commerce, industry or any other business or profession.

20. Similar issue came up for consideration before a Division Bench of Patna High Court in Shapoorji Paloonji and Company Pvt. Ltd.'s (supra), where the contact was for construction of administrative block in Indian Institute of Technology set up under the Institutes of Technology Act, 1961. Indian Institute of Technology was held to be a governmental authority and the contract for construction was opined to be falling in the exemption clause. The notice issued for levy of service tax was quashed.

21. In view of our aforesaid discussion, it can safely be opined that for the kind of contract entered into between the petitioners and the Board, no service tax is leviable, hence, the action of the Board in deducting part of the service tax, though payable in the hands of the Board, if tax is leviable, from the bills of the petitioners is declared to be illegal.

Issue No. (ii)

22. Another issue was raised regarding liability for payment of service tax, if payable. Though in view of our aforesaid findings, the issue has lost significance, however, as the argument was raised, we will touch

upon the same. Condition No. 3 in the additional conditions, as provided for in the contract entered into between the parties, reads as under:

> "3. Royalty, Sales Tax, Excise Duty, Octroi, Service Tax or any other tax or levy, shall be paid by the contractor direct to the respective department in accordance with their rules and regulations enforce from time to time, without any liability to the Housing Board Haryana."
>
> *[Emphasis supplied]*

23. The stand of the petitioners was that as per the aforesaid contract, the petitioners could not shift their liability of any kind of tax on the Board. Where any liability, as per law, is on the Board, that cannot be shifted on the contractors by way of the aforesaid clause. As per the provisions of Finance Act, 1994, as amended upto date read with notification No. 30/2012-S.T. Dated 20.6.2012 on the works contracts the liability is 50% on the contractor, whereas 50% is on the contractee, i.e., service provider and the service recipient. The stand of the petitioners was that for any alleged levy on the petitioners, namely, the contractors/service provider, the department never issued any notice seeking to levy the tax. Notice was issued to the Board. From the running bills of the petitioners, the Board had deducted the amount of tax, which is to be paid by the Board, in case the tax is leviable, which was totally uncalled for. A perusal of the aforesaid clause shows that the contractor is liable to pay various taxes, as mentioned in the clause, directly to the department in accordance with the Rules and the Regulations in force from time to time. The case of neither of the parties is that the liability, which may be put on the contractor/service provider, if tax is leviable, is being passed on to the Board, as the scheme of

the Act provides for levy of tax 50:50 on service provider and the service recipient. Hence, the action of the Board, even if it is assumed that tax is leviable, to pass on their share of burden as per the provisions of the Act on the contractors is not envisaged in the clause.

24. Mere assessment framed by the department in the case of the Board will not detain this court from opining on the legal issue raised by the petitioners in the writ petitions, as the petitioners are aggrieved of the act of the Board in deducting the tax from their bills.

25. In view of our abovesaid discussion, the questions, as framed above, are answered as under:

(i) On the contract for construction of BPL houses, as awarded by the Board to the petitioners, no service tax is leviable w.e.f. 1.7.2012; and

(ii) the Board is not entitled to pass on the burden of service tax payable on its part, if the tax is leviable, upon the contractors.

26. The writ petitions stand disposed of.

(Rajesh Bindal)
Judge

(Harinder Singh Sidhu)
Judge

August 11, 2016
mk

Whether speaking/reasoned: Yes/No
Whether reportable: Yes/No