IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.14802 of 2018

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M/s Ajay Kumar through Partner Smt. Mala Sinha, having office at Flat no.402, Surya Sharda Villa Apartment (Near Dr. Bharat Singh Clinic) Mohalla New Punaichak P.S. Shastri Nagar, District-Patna.

... ... Petitioner/s

Versus

1. The Union Of India through the Commissioner Service Tax-cum-Central Excise, C.R. Building B.C. Patel Path, Patna.
2. The Joint Commissioner, CGST, Central Revenue Building (Annexi) B.C. Marg, Patna.
3. The Superintendent CGST and CX, CGST Range Phulwarisharif Rukanpura, Bailey Road, Distt. Patna.
4. The Senior D.M. Er. Mechanical, E C Railway at and P.O. Danapur, Distt. Patna.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Nand Kishore Singh, Advocate
For the Respondent/s	:	Mr. Alok Agrawal, Advocate
		Mr. Abbas Haider, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 20-08-2020

The following questions arise for consideration in the present petition:-

(a) As to whether petitioner, as a service provider, is liable to pay tax in terms of Chapters V and VA of the Finance Act, 1994 (hereinafter referred to as "the Act") for the services rendered by him or not?

(b) If yes, then whether non-receipt of payment of the amount of tax from the recipient of the services can be allowed to set up a defence for non-compliance with the statutory provisions?

(c) Whether the petitioner .should have preferred an appeal under Section 85 of the Act, challenging the order(s) of the appropriate authority constituted under the Act?

(d) Whether the order dated 02.04.2018 passed by the Joint Commissioner, CGST & Central Excise Patna-I can be said to be perverse, illegal, or erroneous, and warranting interference by this Court?

Briefly stated facts are as under:-

Petitioner, who is a service provider, is engaged in the business of providing washing and cleaning bedrolls and linen.

East Central Railway, the service recipient, ordered specific works to the petitioner whereby linen and bedrolls used by the passengers undertaking journey in different trains were required to be washed and cleaned.

An investigation carried out by the Anti-Evasion Branch of Central Excise & Service Tax, Headquarters, Patna revealed that (a) the petitioner was not registered under the Act; (b) not paid any amount of tax; (c) had received from the railways an amount of Rs.54,17,254/- in the financial year 2011-12 and Rs.1195,26,312/- in the financial year 2012-13; (d) such payment was towards the services classified as dry cleaning/washing of the bedrolls provided to the passengers in the AC Coaches in different trains.

A notice to show cause was issued to the petitioner calling upon them to explain as to why an order for recovery of service Tax amounting to Rs.1,47,84,882/-, Education Cess amounting to Rs.2,95,698/-; and Secondary & Higher Education Cess amounting to Rs.1,47,849/, amounting to a total of Rs.1,52,28,429/-for the financial years 2011-12 and 2012-13, be not passed.

After complying with all procedural formalities and adhering to the principles of natural justice, the Assessing Authority passed the impugned order dated 2nd April, 2018, operative portion of which reads as under:-

"12. In view of above discussions, I pass the following order:-

Order

1) I confirm the demand of Service Tax of Rs.1,47,73,452/- (one crore forty seven lakh seventy three thousand four hundred and fifty two) only including Ed. Cess and SHE Cess and order for its recovery from notice under Section 73(1) of the Finance Act, 1994;
2) I confirm demand of interest at appropriate rate in respect of the above confirmed amount at (1) above and order for its recovery under Section 75 of the Act;
3) I impose penalty of Rs.1,47,73,452 (one crore forty seven lakh seventy three thousand four hundred and fifty two) only under section 78 of the Act.
4) I also impose penalty of Rs.10,000/- only on the noticee under Section 77 of the Finance Act, 1994.

However, the noticee are given an option to avail the offer of payment of reduced penalty i.e. 25% of the S. Tax confirmed at (1) above, under the provisions of Sec.78 of the Finance Act, 1994, subject to condition that the entire amount of S.Tax confirmed at Sl. No.(1) along with interest at Sl. No.(2) and the 25% of the S. tax amount determined as penalty is paid within the period of 30 days of receipt of this order."

Petitioner has prayed for quashing of the aforesaid order (Annexure-3), with a further direction of reassessment.

Learned counsel for the petitioner has made the following submissions.

(a) The impugned order suffers from the vice of perversity.

(b) Petitioner has not received any amount from the Railways.

(c) Dispute inter se the parties, i.e. the petitioner and Railways stands referred to Arbitration which is still pending adjudication.

(d) It is the service recipient is obliged to comply with the statutory provisions.

(e) Alternatively, the obligation of the service provider is only on actual receipt of the amount of tax and not otherwise.

Before us, specific facts are not disputed.- (a) the petitioner had executed the work allotted by the Railways; (b) concerning that, petitioner received the amounts enumerated above for the financial year 2011-12 and 2012-13.

We proceed to examine the provisions of Chapter V and VA of the Act.

Section 65 contains the definitions.

Sub-section (44) of the said section defines “service”, relevant portion thereof is extracted as under:

> “(44) “**service**” means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—
>
> (a) an activity which constitutes merely,—
>
> (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ia) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(ii) a transaction in money or actionable claim; ………

'*Explanation 2*. - For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include —

(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

(ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out —

(a) by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998;. (17 of 1998);]

(b) by a foreman of chit fund for conducting or organising a chit in any manner. ….."

Section 66 defines the Charge of service tax; relevant portion thereof is extracted as under:

> "66. Charge of service tax – There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in sub-clauses (a), ……. and (zzzzw) of clause (105) of section 65 and collected in such manner as may be prescribed:
>
> Provided that the provisions of this section shall not apply with effect from such date as the Central Government may, by notification, appoint."

The charging Section (Section 66B) provides that there shall be levied tax at the prescribed rate(s) on the value of all services, other than those specified in the negative list. The said Section 66B reads as under:

> "**66B. Charge of service tax on and after Finance Act, 2012.**—
>
> There shall be levied a tax (hereinafter referred to as the service tax) at the rate of [fourteen per cent.] on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed." (Emphasis supplied)

These provisions are clear and unambiguous. The expression used is “shall”. Thus, tax is to be levied on the value of all services rendered, unless of course, such services find mentioned in the negative list.

Section 66D empowers the legislators to specify services falling in the negative list.

Section 68 makes every service provider liable to pay service tax at the specified rates, in such manner and within such period as may be prescribed and Section 69, mandates such person to apply for and get registered with the appropriate authority. The relevant provisions read as under:

> “**68. Payment of service tax.** —
>
> (1) Every person providing taxable service to any person shall pay service tax at the rate specified in section [66B] in such manner and within such period as may be prescribed.
>
> (2). Notwithstanding anything contained in sub-section (1), in respect of [such taxable services as may be notified] by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in section [66B] and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.]

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider.]"

"69. Registration.

(1) Every person liable to pay the service tax under this Chapter or the rules made thereunder shall, within such time and in such manner and in such form as may be prescribed, make an application for registration to the Superintendent of Central Excise.

(2) The Central Government may, by notification in the Official Gazette, specify such other person or class of persons, who shall make an application for registration within such time and in such manner and in such form as may be prescribed."

By virtue of and under the provisions of Section 71A, returns are mandatorily required to be filed by the service provider. Failure to do so entails consequences, for the Authorized Officer, becomes empowered to assess the taxable service based on best judgment, which is also evidently clear from the reading of Section 72, extracted as under:

"**72. Best judgment assessment.**

If any person, liable to pay service tax, —

(a) fails to furnish the return under section 70;

(b) having made a return, fails to assess the tax in accordance with the provisions of this Chapter or rules made thereunder, the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment."

By virtue of Section 72A, the Authorized Officer is empowered to direct the service provider, having failed to declare or determine the value of taxable service correctly; to have a special audit of accounts by a nominated Chartered Accountant or cost accountant.

Section 73 empowers the Authorized Officer to issue show-cause and pass appropriate orders in certain specified cases, inter alia, where the component of tax was not levied or paid.

By virtue of Sections 75 and 76, the Authorized Officer is empowered to levy interest and impose a penalty in certain cases including, where non-deposit of credit of tax is for unjustifiable reasons.

Section 85 provides a mechanism for an intra-departmental appeal. Any order passed by an Adjudicating Authority subordinate to the Principal Commissioner or Commissioner of Central Excise has a right to appeal to the Commissioner of Central Excise (Appeals).

Equally, by virtue of Section 86, in certain specified cases, an appeal shall lie before the Appellate Tribunal.

The Service Tax Rules, 1994 so framed under the Act provides for the mechanism for registration (Rule-4); payment of Service Tax (Rule-6) and filing of returns (Rule-7).

The Hon'ble Apex Court in **Laghu Udyog Bharati and another Vs. Union of India and others**, **(1999) 6 SCC 418,** while minutely examining and interpreting statutory provisions with which we are concerned observed as under:-

> "9. ……. Of course, it may be an indirect tax; it may be possible that the same is passed on to the customer but as far as the levy and assessment are concerned it is the person rendering the service who alone can be regarded as an assessee and not the customer. This is the only way in which the provisions can be read harmoniously."

Similar views stand reiterated by Hon'ble the Apex Court in **T. N. Kalyana Mandapam Assn. Vs. Union of India & others, (2004) 5 SCC 632.**

The Principal Act had to be amended by virtue of the interdiction by Hon'ble the Apex Court, and constitutional validity of which was also examined by Hon'ble the Apex Court in **Gujarat Ambuja Cements Ltd. and another Vs. Union of India and another, (2005) 4 SCC 214,** wherein also, the Court, after elaborately discussing the provisions not only upheld the amendment but clarified that liability to pay the tax in respect of services rendered is upon the service provider.

The Apex Court in **Commissioner of Central Excise, Vadodara-I Vs. Gujarat Carbon and Industries Limited, (2008) 9 SCC 518** has culled out the distinction between the availer/receiver and a service provider. Further holding that obligation for complying with the statutory provisions rests with the later, which principle additionally stands reiterated by Rohinton Fali Nariman, J. in **Union of India and others Vs. Bengal Shrachi Housing Development Limited and another, (2018) 1 SCC 311** who observed as under:

> "13. ………… Even in a converse situation, which is the situation in the facts of the present case, it is

the provider of the service alone, who is liable for paying service tax."

The principle above stands reiterated by Hon'ble the Apex Court in **Union of India and another Vs. Intercontinental Consultants and Technocrats Private Limited, (2018) 4 SCC 669.**

Most recently, on this issue, dealing with the very same legislation with which we are concerned, the Hon'ble Apex Court in **Civil Appeal No. 2413 of 2020, titled as Assistant Commissioner (CT) LTU, Kakinada and others Vs. Glaxo Smith Kline Consumer Health Care Limited** decided on 6th May, 2020 held that even though the jurisdiction of a Writ Court could not be ousted, but given complete mechanism provided under the statute, it would not be appropriate for a Writ Court to correct an error of fact and law. In fact, it has gone to the extent of holding that even the statutory period of limitation prescribed under the Act, for taking recourse to the adjudicating mechanism, cannot be condoned by a Writ Court.

Hence the settled law is clear. Language of the statute is simple, clear and unambiguous. The service provider, so defined, is mandatorily required to register and make payment of component of tax with receipt to the services so rendered. The Act does not stipulate payment only on receipt thereof.

As already observed, petitioner has not registered itself under the statute; nor paid any tax.

Coming to the first submission as to whether the impugned order suffers from perversity or not, having given our thoughtful consideration, we find that it does not.

The order passed was after affording an opportunity of filing response; all contentions allowed to be raised, considered and dealt with; fair opportunity of hearing afforded; reasons for assessing the liability stands assigned; statutory provisions correctly appreciated and applied to the attending facts and circumstances. There is no violation of principles of natural justice. There is no misconstruction or misappreciation of fact or misapplication of the law.

Petitioner has been providing service to the Government authority. The service does not fall within the specified services contained in the negative list. The amount received from the Railway Authorities is not in dispute, and the incidence of taxation stands correctly determined.

One finds that with impunity petitioner continued to evade the liability, which fact was discovered by the agencies only after gathering information through the source of intelligence.

In determining the incidence of tax liability, the Assessing Officer rightly excluded the amount pertaining to the service of dry cleaning of blankets.

Sl.No.	Amount of contract receipt	period	component of dry cleaning
1.	2,66,23,221.87	year 2011-12	3,00,683/-
2.	8,50,857.19/-	01.04.2012 to 30.06.2012	48225/-
3.	2,97,41,044.23/-	01.07.2012 to 31.03.2013	

Thus, the total amount received by the petitioner for the period in question amounts to Rs. 57,215,123.29/-.

The defence taken by the petitioner of persuading the service recipient to pay the amount or having initiated proceedings seeking appointment of an Arbitrator for settlement of disputes rightly stands rejected by the Assessing Authority, for compliance of the statutory provisions are not subject to or dependent upon the contractual terms governing the parties.

Arbitral proceedings would only determine obligations inter se the parties to the agreement and not the liability or factum of compliance of statutory provisions.

The statute mandates timely payment of component of tax. There is no provision for deferment, either till the time of its receipt or payment only subject to that. Hence, the contentions raised by the learned counsel at the time of the hearing, being untenable stands rejected.

Shri Agrawal learned counsel for the respondent rightly submits that the intent of the petitioner, has always been to evade with impunity, the provisions of the statute. Be it for registration or payment of the component of tax.

The questions are answered accordingly:

(a) The liability to pay the tax in terms of Chapter V and VA of the Finance Act, 1994 rests solely upon the petitioner, being the service provider;

(b) Such liability cannot be deferred. It is not subject to receipt of any amount, be it a tax or otherwise, from the service recipient;

(c) Failure on the part of the service recipient to pay the amount under the service provider agreement cannot be a reason sufficient enough for non-compliance of the statutory provisions by the service provider. Equally, it also cannot be set up as a defence in the adjudicatory proceedings.

(d) The Act provides for a complete mechanism for adjudication of all issues of fact or law before different forums. Errors both of fact and law can be corrected and rectified by such statutory authorities. However, since the matter pertains to the year 2011-12, we are not inclined to relegate the petitioner for exhausting such remedies. We have decided the issue on merits.

The impugned order 02.04.2018 passed by the Joint Commissioner, CGST & Central Excise Patna-I in the case of the petitioner cannot be said to be perverse, illegal or erroneous warranting interference by this Court.

The petition stands disposed of.

(Sanjay Karol, CJ)

(S. Kumar, J)

K.C.Jha/-

AFR/NAFR	AFR
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