

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	11.03.2021
Pronounced On	22.03.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.Nos.8900, 3969 & 12489 of 2018 and 31799 of 2017
and
W.M.P.Nos.10756, 4856, 14647 of 2018 and 34941 of 2017
(Through Video Conferencing)

W.P.No.8900 of 2018

Cuddalore Municipality,
Represented by Commissioner
Mr.K.Saravanan,
Bharathi Road,
Cuddalore - 607 001.

... Petitioner

Vs.

The Joint Commissioner of GST &
Central Excise,
Office of the Commissioner of GST &
Central Excise,
No.1, Williams Road, Contonment,
Tiruchirappalli - 620 001.

... Respondent

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records on the file of the respondent in proceedings in Show Cause Notice No.04/2018(ST) dated 07.03.2018 in C.No.V/ST/15/2/2018-ST.Adjn. and quash the same as arbitrary and illegal.

For Petitioner : Mr.Joseph Prabakar

For Respondent : M/s.R.Hemalath, Senior Standing Counsel

W.P.No. 31799 of 2017

Cuddalore Municipality,
Represented by Commissioner
Mr.P.N.Mujibur Rahumaan,
Bharathi Road,
Cuddalore - 607 001.

... Petitioner

Vs.

The Assistant Commissioner of Central Excise
& Service Tax,
Office of the Superintendent of Central Excise,
No.1, Vallalar Nagar, Manjakuppam,
Cuddalore - 607 001.

... Respondent

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records on the file of the respondent in proceedings in Order-in-Original No.03/2017-ST dated 24.03.2017-ST in C.No.IV/09/04/2017-ST.Adjn. (RO OC No.100/2016) and quash the same.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mr.A.P.Srinivas, Senior Standing Counsel

W.P.No. 3969 of 2018

Virudhachalam Municipality,
Represented by Commissioner
Thiru K.Balu,
No.31/16, Ayyanar Koil Street,
Virudhachalam.

.... Petitioner

Vs.

The Assistant Commissioner,
Office of the Assistant Commissioner
of GST and Central Excise,
No.1, Vallalar Nagar, Manjakuppam,
Cuddalore - 607 001.

... Respondent

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records on the file of the respondent in proceedings in Show Cause Notice C.No.V/ST/15/21/2017-ST.Adjn. dated 22.11.2017 and quash the same as arbitrary and illegal.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mr.A.P.Srinivas, Senior Standing Counsel

W.P.No. 12489 of 2018

Virudhachalam Municipality,
Represented by Commissioner
Thiru K.Balu,
No.31/16, Ayyanar Koil Street,
Virudhachalam.

... Petitioner

Vs.

The Assistant Commissioner,
Office of the Assistant Commissioner
of GST and Central Excise,
No.1, Vallalar Nagar, Manjakuppam,
Cuddalore - 607 001.

... Respondent

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records on the file of the respondent in proceedings in Order-in-Original No.05/2018-ST dated 06.04.2018 in C.No.V/ST/15/21/2018-ST.Adjn. and quash the same as arbitrary and illegal.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mr.A.P.Srinivas, Senior Standing Counsel

COMMON ORDER

By this common order, all the four Writ Petitions are being disposed.

2. In these Writ Petitions, the respective municipalities have challenged the impugned Show Cause Notices and the impugned Orders-in-Originals passed by the respondent proposing and levying service tax on the services provided by the petitioners under the provisions of the Finance Act, 1994.

3. Details of the impugned Show Cause Notices and Orders-in-Originals are detailed below:-

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Sl. No.	W.P.No.	Show Cause Notice bearing ref. No/ Dated.	Period	Amount	Order in Original/Dated
1 (i)	3969/2018	S.C.N. in C.No.V/ST/15/21/2017-ST. Adjn. Dated 22.11.2017	2012-2013 to 2016-2017	Rs.39,85,349/-	As in Sl. No.1(ii) below.
1 (ii)	12489/2018	(Virudhachalam Municipality)			Order-in-Original No.5/2018-ST in C.No.V/ST/15/21/2018-ST.Adj. dated 06.04.2018
2	8900/2018	S.C.N.No.04/2018 (ST) in C.No.V/ST/15/2/2018-ST. Adjn. Dated 07.03.2018. (Cuddalore Municipality)	2015-2016 and 2016-2017	Rs.55,35,216/-	
3	31799/2017	i. S.C.N. No.01/2016 (ST) - R - IV-Cud Dated 12.05.16 (Range O.C.No.100/16) ii.S.C.N. No.2/17 (ST) Dated 13.02.17 (C.No.IV/09/04 / 2017-ST. Adjn.) (Cuddalore Municipality)	April 2014 to March 2015	Rs.10,36,709/- + Penalty of Rs.1,03,671/-	Order-in-original No.3/2017-ST in C.No.IV/09/04/2017-ST. Adjn. (RO OC No.100/2016) dated 24.03.2017

4. Show Cause Notice at Serial No 1(i) issued to Virdhachalam Municipality has culminated in Order-in-Original No.5/2018-ST in C.No.V/ST/15/21/2017-ST. Adjn. at Serial No.1 (ii). Therefore, W.P.No.3689 of 2018 in Sl.No.1(i) filed by Virdhachalam Municipality is dismissed as infructuous.

5. Under these circumstances, the impugned Show Cause Notice at Serial No.2 issued to Cuddalore Municipality and two Orders-in-Originals at Serial No. 1(ii) and at Serial No.3 passed against Cuddalore Municipality and Vridachalam Municipality are taken up for final hearing.

6. The impugned Show Cause Notice issued and the Orders-in-Originals passed by the respondent are challenged primarily on the ground that they are without jurisdiction. It is submitted that there is no question of proposing or demanding service tax on the activities undertaken by the respective municipalities under the provisions of the Finance Act, 1994.

7. For the sake of clarity, the activity undertaken by the petitioners which are subject matter of the impugned Show Cause Notices/Orders-in-Original are detailed as under:-

	(1)	(2)	(3)
	W.P.No.8900 of 2018 (Cuddalore Municipality)	W.P.No.31799 of 2017 (Cuddalore Municipality)	W.P. No.12489 of 2017 (Vridhachalam Municipality)
Period	2015-2016 and 2016-2017	Our editorial 2014-2015	i. April 2012 - June 2012; & ii. July 2012 - March 2013; & iii. April 2013 - May 2017
1	Fees for Bays in Bus Stand	Fees for Bays in Bus Stand	Bus Stand Receipts
2	Slaughter House Fees (Annual Lease)	Slaughter House Fees (Annual Lease)	Slaughter House
3	Parking Fees	Parking Fees	-

	(1)	(2)	(3)
4	Rent from Daily Market	Rent from Daily Market	Market Fees
5	Rent for Shopping Complex	Rent on Shopping Complex	Rent on Shops Bus Stand Rent on Shops KK Road
6	Rent for Community Hall	Rent on Community Hall	-
7	Fees on pay and use Toilets	Fees on Pay and Use Toilets	Bus Stand & Use Toilet Sannathi Street & Use Toilet KK Road & Use Toilet
8	Rent on Building, Bunks and parks fees	Rent from Buildings, bunks.	Bunk stall
9	Water charges (Arrear & Current)	-	-
10	Arrears Collected	-	-
11	-	-	Advertisement Fees
12	-	-	Bus Fees

8. The demand in W.P.No.12489 of 2017 is for the period up to June, 2012. It is towards the amounts received by the petitioner Vridhachalam Municipality towards renting of immoveable property.

9. These proceedings were initiated by the respective respondent against the respective petitioner municipalities are challenged on the ground that the petitioner municipalities were not a "person" within meaning of Finance Act, 1994 as it stood prior to 01.07.2012 and thereafter. It is therefore submitted that the question of levying tax on services provided by the respective municipalities cannot be taxed under the provisions of the Finance Act, 1994.

10. Show Cause Notice dated 07.03.2018 issued to the Cuddalore Municipality impugned in W.P.No.8900 of 2018 covers the period between 2015-2016 and 2016-2017 while the Order-in-Original dated 24.03.2017 impugned in W.P.No.31799 of 2017 covers the period 2014-2015.

11. These proceedings have to be examined in the light of the amended provisions of the Finance Act, 1994 with effect from 01.07.2012 read with, Negative List, Mega Exemption Notification No.25/2012 - ST dated 20.06.2012 and other provisions of the Finance Act, 1994.

12. As far as the challenge to Order-in-Original dated 06.04.2018 impugned in W.P.No.12489 of 2018 is concerned, Order-in-Original covers the period between 2012-2013 and 2016-2017.

13. The learned counsel for the petitioners submitted that the services rendered by the petitioners are either not taxable or otherwise exempted. He submitted that for instance, fees on pay and use toilets are exempted from tax under Sl.No.38 to the said Notification. He further submitted that for the period prior to 2012, i.e., the period between April 2012 and March 2013 covered by the challenge in W.P.No.12489 of 2018 wherein Order-in-Original dated 06.04.2018 has been challenged, no tax can be demanded as the petitioner was not a person providing any taxable service.

14. It is submitted that the petitioners are not liable to tax as the petitioner are not a "person" within the meaning of Section 65B(37) of the Finance Act, 1994 as it stood amended with effect from 01.07.2012. It is further submitted that even if the petitioner is to be considered as a "local authority" with the meaning of Section 65B(31) of the Finance Act, 1994 as it stood amended with effect from 01.07.2012, the petitioner was exempted from payment of service tax in terms of Sl.Nos.38 & 39 to the Mega Exemption Notification No.25/2012 - ST dated 20.06.2012 which reads as under:-

[TO BE PUBLISHED IN THE GAZZETE OF INDIA, EXTRAORDINARY,
PART II, SECTION 3, SUBSECTION (i)]

Government of India
Ministry of Finance
(Department of Revenue)

Notification No. 25/2012-Service Tax

New Delhi, the 20th June, 2012

G.S.R.....(E).- 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:-

1.....
.....

38. Services by way of public conveniences such as provision of facilities of bathroom, washrooms, lavatories, urinal or toilets;

39. Services by "Government, a local authority or" Inserted vide Notification 22/2016- Service Tax. a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution.

15. The learned counsel for the petitioner further submitted that the exemption under Sl.No.39 to the Mega Exemption Notification No.25/2012 - ST dated 20.06.2012 applies to services by a Government Authority by way of any activity in relation to any function entrusted to a municipality under Article 243W of the Constitution of India. He further submitted that under Article 243W of the Constitution of India, the Legislature of a State may, by law, endow the Municipalities with such powers and authority as may be necessary to enable such Municipalities to function as institutions of self government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to.

16. He submitted that the following activities have been specified in the 12th Schedule to the Constitution of India for the purpose of Article 243W of the Constitution of India:-

1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.
5. Water supply for domestic, industrial and, commercial purposes.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.
8. Urban forestry protection of the environment. and promotion of ecological aspects.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Slum improvement and upgradation.
11. Urban poverty alleviation.
12. Provision of urban amenities and facilities such as parks, gardens, play-grounds.
13. Promotion of cultural, educational and aesthetic aspects.
14. Burials and burial grounds; cremations, cremation grounds and electric crematoriums.
15. Cattle ponds; prevention of cruelty to animals.
16. Vital statistics including registration of births and deaths.
17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
18. Regulation of slaughter houses and tanneries.

17. These proceedings are defended by the respective counsel for the respondent on the ground that in W.P.No.8900 of 2018, the petitioner has challenged only the Show Cause Notice dated 07.03.2018 and in W.P.No.31799 of 2017 and W.P.No.12489 of 2018, the respective petitioner have challenged Orders-in-Original dated 24.03.2017 & 06.04.2018 respectively. It is submitted that the petitioners have an alternate remedy to participate in the Show Cause Proceedings and to file appeal before the Commissioner of Central Excise (Appeals) or the Customs Excise and Service Tax Appellate Tribunal depending upon the pecuniary jurisdiction. It is submitted that there are several disputed questions of facts which cannot be decided in a summary manner in a writ proceedings and therefore, these writ petitions are liable to be dismissed.

18. M/s.R.Hemalatha, the learned Senior Standing Counsel appearing for the respondent in W.P.No.8900 of 2018 places

reliance on the decision of the Madurai Bench of this Court in R.Nambi Vs. Tenkasi Municipality and Another, in W.P.(MD) No.5743 of 2014, dated 24.09.2014, wherein, the Court has concluded that the first respondent therein namely Tenkasi Municipality being a service provider was bound to pay the service tax which had been remitted and therefore, the challenge to the notice of the respondent Municipality therein, namely Tenkasi Municipality, in Na.Ka.No.543/2012/A2, dated 27.02.2012 was unsustainable. There the petitioner had challenged the aforesaid communication of the Tenkasi Municipality asking the receipt of service tax for the license granted to him by the said Municipality.

19. Mr.A.P.Srinivas, the learned Senior Standing Counsel appearing for the respondent in W.P.No.31799 of 2017 and W.P.No.12489 of 2018 filed by the respective Municipalities against the respective Order-in-Originals submitted that the respective petitioners have an alternate remedy by way of appeals before the appellate body and therefore, these writ petitions were liable to be dismissed. He further submitted that respective Municipalities were "persons" for the purpose of Finance Act, 1994. He further submitted that the period prior to 2012, even if there was no definition for the word "person", the definition of "person" in the General Clause Act would apply and therefore, the petitioners were liable to pay tax.

20. He further submitted that after 1st July, 2012, the definition of "person" in Section 65B(37) includes a "local authority". The definition of "local authority" includes the Municipality in Clause (e) of Article 243P of the Constitution of India. He further submitted that the definition of "person" includes the artificial and juridical person and there is no dispute that the respective petitioners were the "persons" for payment of service tax.

21. He also relied on the decision of the Hon'ble Supreme Court in The State Trading Corporation of India Limited and Others Vs. The Commercial Tax Officer, Visakhapatnam and Others, 1963 AIR 1811 : 1964 SCR (4) 89.

22. I have considered the arguments advanced by the learned counsel for the petitioner and the respective learned Senior Standing Counsel for the respective respondents in the respective Writ Petitions.

23. Since the dispute pertains to the period prior to July 2012 and thereafter, I shall deal with the issues in two parts, i.e. for the period prior to July 2012 and for the period after July 2012. The period prior to 2012 is partly covered by W.P.No.12489 of 2018.

24. In W.P.No.12489 of 2018, the petitioner has challenged Order-in-Original No.05/2018-ST in C.No.V/ST/15/21/2018-ST.Adj. Dated 06.04.2018. For the period prior to July 2012, the demand is confined to levy of tax under Section 65(105)(zzzz) of the Finance Act, 1994 read with definition of "Renting of Immovable Property Services" under Section 65(90a) of the Finance Act, 1994.

25. From the category of service and income generated from the petitioner, it appears that the petitioner was renting out the stops in bus stand and other areas where it was having immovable properties.

26. Service Tax on Renting of Immovable Property Service was introduced in 2007 vide 65(105)(zzzz) of the Finance Act, 1994. The expression of renting of immovable property was defined in Section 65 (90a) of the Finance Act, 1994.

27. The High Court of Delhi in Home Solutions Retail India Ltd. & Others Vs. UOI, 2009 (237) E.L.T. 209 (Del.) by its order dated 18.04.2009 however struck down this levy by observing that the renting of immovable property for use in the course of furtherance of business or commerce did not involve any value addition and therefore, cannot be regarded as service.

28. The tenants all over the country therefore stopped reimbursing the tax element to the land owner. Since landlords were receiving regular demand notices from the department but such notices were being subjected to stalemate, the Finance Act, 2010 amended the provision with retrospective effect and attempted to cure the defect pointed out by the Delhi High Court.

29. Thus, definition of taxable service of "renting of immovable property" and "renting of immovable property" was amended to read as follows:-

Definition of Taxable Service taxable service of in "renting of immovable property" Section 65(105)(zzzz) of the Finance Act, 1994.	Definition of "renting of immovable property" in Section 65 (90a) of the Finance Act, 1994.
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To any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or furtherance of, business or commerce.

Explanation 1: For the purpose of this sub- clause, "immovable property" includes-

- (i) building or part of a building, and the land are pertinent thereto;
- (ii) land incidental to the use of such building or part of a building; the common or shared areas and facilities relating thereto; and
- (iii) the common or shared areas and facilities relating thereto; and
- (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate, but does not include -
 - (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
 - (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
 - (c) land used for educational sports, circus, entertainment and parking purposes; and
 - (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities;

- (v) vacant land, given on lease or

"Renting of immovable property" includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include-

- (i) renting of immovable property by a religious body or to a religious body; or
- (ii) renting of immovable property to an educational body, imparting skills or knowledge or lessons on any subject of field, other than a commercial, training or coaching centre

Explanation 1: For the purpose of this clause, "for use in the course of furtherance of business or commerce" includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings;

Explanation 2: For the removal of doubts, it is hereby declared that for the purpose of this clause "renting of immovable property" includes allowing or permitting the use of space in and immovable property, irrespective of the transfer of possession or control of the said immovable property.

30. The Delhi High Court in the 2nd Home Solutions Retails (India) Ltd. v. Union of India 2011 (24) S.T.R. 129 (Del) upheld the constitutional validity of the amended definition in Section 65(105)(zzzz) in 2010 with retrospective effect with the following observation :-

"In view of our aforesaid analysis, we are disposed to think that the imposition of service tax under Section 65(105)(zzzz) read with Section 66 is not a tax on land and building which is under Entry 49 of List II. What is being taxed is an activity, and the activity denotes the letting or leasing with a purpose, and the purpose is fundamentally for commercial or business purpose and its furtherance. The concept has to be read in conjunction. As we have explained that service tax is associated with value addition as evolved by the judgments of the Apex Court, the submission that the base of the said decisions cannot be taken away by a statutory amendment need not be adverted to. Once there is a value addition and the element of service is involved, in conceptual essentiality, service tax gets attracted and the impost gets out of the purview of Entry 49 of List II of the Seventh Schedule of the Constitution and falls under the residuary entry, that is, Entry 97 of List I.

31. This Court has also upheld the validity of the above provision. Similar view has been taken by the other High Courts also. There is no doubt that the petitioner municipality was renting immovable property to various person in the course of or furtherance of, business or commerce of the lessee as defined in Section 65(90a) of the Finance Act, 1994 as it stood during the period between April 2012 and June 2012. However, merely because there was renting of immovable property by itself was not sufficient to attract the levy.

32. To attract levy under Section 65(105) (zzzz) of the Finance Act 1994 there should be renting of immovable property or provision any other service in relation to such renting, for use in the course of or furtherance of, business or commerce to "any person". Only if service was provided by "any other person", i.e., by a person other than the owner, such service was liable to service tax.

33. The expression "any other person" can only mean any other person other than the owner of the property. Therefore, owner of the immovable property is not liable to pay tax under

Section 66 of the Finance Act, 1994 for the period up to 30.06.2012.

34. An owner can be held liable to pay tax for renting of immoveable property service only if there was an appropriate notification issued under Section 68(2) of the Finance Act, 1994 read with Rule 2(1)(d) of the Service Tax Rules, 1994.

35. If the legislature intended to include both owner and a person other than the owner of the property in Section 65(105) (zzzz) of the Finance Act, 1994, the legislature would have simply adopted a wider expression such as "any person" instead of "any other person". The expression "any other person" restricts the scope of exposure to levy of service tax to a different class of service providers. It is perhaps for this purpose, the expression any other service in relation to such renting has been used in the Section to indicate service tax has to be charged only where there is a value addition.

36. May be renting of immoveable property service partly overlapped with the taxable service of a "real estate agent". This was because there was no definition for the expression "service" till July, 2012 and therefore there was scope for such overlap in the definition. The definitions are reproduced below:-

Section 65(88)	Section 65(89)
"Real Estate Agent" means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant;	"Real estate consultant" means a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management, of real estate
Definition of taxable service in Section 65(105) (v)	
any service provided or to be provided to a client, by a real estate agent in relation to real estate.	

37. Since the interpretation given for the expression "any other person" in this order may have a large scale ramification, it is therefore made clear the interpretation given in this order for the expression "any other person" qua Section 65(105)

(zzzz) cannot be uniformly applied to other provisions of the Finance Act, 1994 unless they are examined separately and individually on case to case basis for the other services.

38. In my view, service tax was payable only if such services were provided "by any other person" other than the owner, to any person by such renting, for use in the course of or in furtherance of, business or commerce.

39. As the owner of the immovable property who rents out the property simpliciter was not in contemplation in the definition of taxable service of "renting of immovable property" in Section 65(105)(zzzz) of the Finance Act, 1994, demand against the petitioner was without jurisdiction.

40. Since the petitioner municipality is the owner of property, question of it being made liable to pay service tax for any service in relation to such renting of immovable property does not arise even if it had rented out its immovable property for use in the course of or for furtherance of, business or commerce of the person who was renting it.

41. In the light of the about discussion, W.P.No.12489 of 2017 filed Vridhachalam Municipality for the period April 2012 - June 2012 deserves to be allowed. To that extent impugned Order-in-Original No.5/2018-ST in C.No.V/ST/15/21/2017-ST. Adjn. is liable to be quashed straight away.

42. I shall now take up demand proposed and confirmed for the period after 30.06.2012 after the Finance Act 1994 was amended drastically vide Finance Act, 2012.

43. From 01.07.2012, there was a paradigm shift in the entire structure of the provision of the Finance Act, 1994 in view of the amendments to it by Finance Act, 2010.

44. It introduced a new definition of "service" in Section 65B(44) of the Finance Act, 1994 for the first time. The said definition underwent few changes. The definition incorporating few amendments thereafter is reproduced below:-

Section 65B(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

(ii) 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

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1. – For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,–

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

[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;].

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

Explanation 3. – For the purposes of this Chapter,–

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4. – A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;

45. The definition of "Service" as in Section 65B(44) of the Finance Act, 1944 is very wide. Thus, any activity carried out by any person for another for valuable consideration is service. It includes "declared service" as defined in Section 65B(22) of the Finance Act, 1944 read with 66E of the Act. The definition excluded few categories of activities as service. They are as follows:–

(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

(ii) 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

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

46. Barring the above exception, certain services were exempted under Mega Exemption Notification No.25/2012 - ST dated 20.06.2012 issued under Section 93(1) of the Finance Act, 1944. Certain activities were listed in the negative list. Those services are not liable to tax as Service tax is payable on the value of all services provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed under Section 66B of the Finance Act, 1994.

47. Under Section 66B of the Finance Act, 1994 no tax was payable for the services specified in the negative list. The expression "negative list" is defined in Section 66B(34) of the Finance Act, 1994 as those services specified in Section 66D of the Act.

48. Most services provided by the Central or State Government or local authorities are in the negative. Section 66D of the Finance Act, 1994 gives list of 17 service which were grouped under the "negative list". Sl.No.1 to Section 66D which is relevant for the present dispute includes all service provided by Government or a local authority excluding the following:-

- i. services by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services provided to a person other than Government;
- ii. services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;
- iii. transport of goods or passengers; or
- iv. [Support Service]*, other than services covered under clauses (i) to (iii) above, provided to business entities;

Note:

* Substituted with Any service vide Finance Act, 2015 (20 of 2015), dated 14.05.2015.

49. In its publication dated 20.6.2012, titled the Taxation of Service, An Education Guide, the Central Board of Indirect Tax clarified as follows:-

2.4.5 Are Government and local authorities also liable to pay tax?

Yes. However, most of the services provided by the Government or local authorities are in the negative list.

2.4.6 What is the rationale behind taxing certain activities of the Government or local authorities?

Only those activities of Government or local authorities are taxed where similar or substitutable services are provided by private entities. The rationale is as follows-

- to provide a level playing field to private entities in these areas as exemption to Government in such activities would lead to competitive inequities; and
- to avoid break in Cenvat chain as the support services provided by Government are normally in the nature of intermediary services.

2.4.8 What is a local authority?

Local authority is defined in clause (31) of section 65B and means the following :-

- A Panchayat as referred to in clause (d) of article 243 of the Constitution
- A Municipality as referred to in clause (e) of article 243P of the Constitution
- 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
- A Cantonment Board as defined in section 3 of the Cantonments Act, 2006
- A regional council or a district council constituted under the Sixth Schedule to the Constitution
- A development board constituted under article 371 of the Constitution, or
- A regional council constituted under article 371A of the Constitution.

2.4.9 Are all local bodies constituted by a State or Central Law local authorities?

No. The definition of 'local authority' is

very specific as explained in point no 2.4.8 above and only those bodies which fall in the definition comprise 'local authorities'. It would not include other bodies which are merely described as a local body by virtue of a local law.

However it may be noted that services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243W of the Constitution are specifically exempt under the mega exemption. 'Governmental authority' has been defined in the said mega exemption as 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. Thus some of these local bodies may comprise governmental authorities.

2.4.10. Would various entities like a statutory body, corporation or an authority constituted under an Act passed by the Parliament or any of the State Legislatures be 'Government' or "local authority"?

A statutory body, corporation or an authority created by the Parliament or a State Legislature is neither 'Government' nor a 'local authority' as would be evident from the meaning of these terms explained in point nos. 2.4.7 and 2.4.8 above respectively. Such statutory body, corporation or an authority are normally created by the Parliament or a State Legislature in exercise of the powers conferred under article 53(3)(b) and article 154(2)(b) of the Constitution respectively. It is a settled position of law Government (Agarwal v. Hindustan Steel - AIR 1970 Supreme Court 1150) that the manpower of such statutory authorities or bodies do not become officers subordinate to the President under article 53(1) of the Constitution and similarly to the Governor under article 154(1). Such a statutory body, corporation or

an authority as a juristic entity is separate from the state and cannot be regarded as Central or State Government and also do not fall in the definition of 'local authority'.

Thus regulatory bodies and other autonomous entities which attain their entity under an act would not comprise either government or local authority.

2.4.11 Would services provided by one department of the Government to another Department of the Government be taxable?

If services are provided by one department of the Central Government to another department of the Central Government or by a department of a State Government to another department of the same State Government then such service would not be taxable as it would amount to self-service. To be taxable a service has to be provided to another person.

On the other hand if a service is provided by a Central Government department to a State Government department or vice versa or by a State to another State Government or by a Government to an autonomous body, the same would be taxable if such service does not fall in the negative list. It is another matter that most of the services provided by the Government are in the negative list. For details please refer to point no. 4.1 of this Guide.

2.4.12 Would taxable services provided by Government or local authorities still be liable to tax if they are covered under any other head of the negative list or are otherwise exempted?

No. For example, transport services provided by Government to passengers by way of a stage carriage would not be taxable as transport of passengers by stage carriage has separately been specified in the negative list of services. The specified services provided by the Government or local authorities

50. In Para 4.1 of the Education Guide, it was specifically explained that most of the services provided by Government and Local Authority are in the negative list and were outside the ambit of the service tax. Para 4.1 of Guidance Note 4- Negative List of Services is reproduced below:

Guidance Note 4 - Negative List of Services

In terms of Section 66B of the Act, service tax will be leviable on all services provided in the taxable territory by a person to another for a consideration other than the services specified in the negative list. The services specified in the negative list therefore go out of the ambit of chargeability of service tax. The negative list of service is specified in the Act itself in Section 66 D. For sake of ease of reference the negative list of services is given in Exhibit A1. In all, there are seventeen heads of services that have been specified in the negative list. The scope and ambit of these is explained in paras below.

4.1 Services provided by Government or local authority

4.1.1 Are all services provided by Government or local authority covered in the negative list?

No. Most services provided by the Central or State Government or local authorities are in the negative list except the following :

(a) services provided by the Department of Posts by way of speed post, express parcel post, life insurance, and agency services carried out on payment of commission on non government business;

(b) services in relation to a vessel or an aircraft inside or outside the precincts of a port or an airport;

(c) transport of goods and/or passengers;

(d) support services, other than those covered by clauses (a) to (c) above, to business entities.

4.1.2 Would the taxable services provided by the Government be charged to tax if they are

otherwise exempt or specified elsewhere in the negative list?

No. If the services provided by the government or local authorities that have been excluded from the negative list entry are otherwise specified in the negative list then such services would also not be taxable.

51. Only Support services provided by the government or local authorities that have been excluded from the negative list entry are in the negative list. Otherwise, all service of government and local authorities are not taxable. Support services was defined in Section 65B of the Act as 'infrastructural, operational, administrative, logistic marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of movable or immovable property, security, testing and analysis.

52. Services which are provided by government in terms of their sovereign right to business entities, and which are not substitutable in any manner by any private entity, are not support services.

53. In fact, in the Education Guide, list of activities such as grant of mining or licensing rights or audit of government entities established by a special law, which are required to be audited by CAG under Section 18 of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971 and therefore such services are performed by CAG under the statue and cannot be performed by the business entity themselves and thus do not constitute support services.

54. If the activity carried out by the Petitioner Municipalities are categorised as "Support Service", it cannot be held that there was a provision of taxable service and such service was liable to tax under Section 66B of the Finance Act, 1994 as in force with effect from 01.07.2012.

55. However, for such support services, service tax was payable by the recipient of such service in terms of Rule 2(1) (d) (E) of the Service Tax Rules, 1994 as amended by notification No.36/2012-ST dated 20.6.2012 with effect from 1.17.2012.

56. For support service provided, the recipient was liable to pay tax on reverse charge basis under Rule 2(1) (d) (E) of the

Service Tax Rules, 1994 as amended by notification No.36/2012-ST dated 20.06.2012 as in force from 01.07.2012.

57. Therefore, the Petitioner Municipalities can be held liable to pay service tax only for service specified in Sub-Clauses in (i), (ii) and (iii) of Clause (a) of Section 66D of the Finance Act, 1994.

58. As far as renting of immoveable property is concerned, though under Rule 2(1)(d)(E) of the Service Tax Rules, 1994, service tax is payable by the service provider, it has to be held that if such services are provided by a Government or Local Authority, they are exempted under Section 65D(1)(a) of the Finance Act, 1994 as amended and as in force from 01.07.2012. Only ancillary service provided by a third party towards renting of immoveable property of a non-governmental or local body will be liable to pay service tax like any other service provider. Therefore, service tax is payable by the service provider himself.

59. That apart, it is seen that some of the services provided are also exempted under the Mega Exemption Notification No.25/2012-ST dated 20.06.2012 vide Sl.Nos.38 and 39. They are reproduced below:-

38. Services by way of public conveniences such as provision of facilities of bathroom, washrooms, lavatories, urinal or toilets;

39. Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution.

60. Thus, there is no jurisdiction in the impugned Show Cause Notices / Orders-in-Originals issued by the respondent. In the light of the above discussion, demand proposed in the impugned S.C.N.No.04/2018 (ST) in C.No.V/ST/15/2/2018-ST. Adjn. Dated 07.03.2018 and demand confirmed in Order-in-original No.3/2017-ST in C.No.IV/09/04/2017-ST. Adjn. (RO OC No.100/2016) dated 24.03.2017 and Order-in-Original No.5/2018-ST in C.No.V/ST/15/21/2018-ST.Adj. dated 06.04.2018 are liable to be quashed and are accordingly quashed.

61. In the result,

i. W.P.No.3969 of 2018 as mentioned above is dismissed as infructuous.

ii. W.P.No.8900 of 2018, W.P.No.31799 of 2017 and

W.P.No.12489 of 2007 are allowed.

iii.No. Cost. Consequently, connected Miscellaneous
Petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

jen

To

- 1.The Assistant Commissioner of Central Excise & Service Tax,
Office of the Superintendent of Central Excise,
No.1, Vallalar Nagar, Manjakuppam,
Cuddalore - 607 001.
 - 2.The Assistant Commissioner,
Office of the Assistant Commissioner of GST and Central Excise,
No.1, Vallalar Nagar, Manjakuppam,
Cuddalore - 607 001.
 - 3.The Joint Commissioner of GST & Central Excise,
Office of the Commissioner of GST & Central Excise,
No.1, Williams Road, Contonment,
Tiruchirappalli - 620 001.
- +2 cc to Mr.A.P.Srinivas, Advocate, SR.NO.18316, 18315
+1 cc to M/s.R.Hemalatha, Advocate, SR.NO.18273

Pre- delivery common order
in

W.P.Nos.8900, 3969 & 12489 of 2018
and 31799 of 2017 and
W.M.P.Nos.10756, 4856, 14647 of 2018
and 34941 of 2017

PCH (CO)
NS (07/05/2021)

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