IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3686 of 2022

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Kanti Bijlee Utpadan Nigam Limited, having its office at PO-Kanti Thermal, Dist. Muzaffarpur, Bihar-843130, through its authorized representative/signatory Rakesh Bihari @ Rakesh Vihari, aged about 48 years (M), son of Dinesh Chandra Gupta, Resident of Shivahar, Ward No. 4, Town-Sheohar, Post and PS-Sheohar, District-Sheohar presently residing at D-4/6, KBUNL Colony, PO-Kanti Thermal, PS-Kanti, Dist-Muzaffarpur, 843130 (Bihar).

... ... Petitioner/s

Versus

1. The Union of India through the Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi-110001.
2. The Additional Director General, Directorate General of GST Intelligence, Coimbatore Zonal Unit, 155-I, Lakshmanan Street, Ukkadam, Coimbatore-641001.
3. The Additional Director General (Adjudication), Directorate General of GST Intelligence, Mumbai Zonal Unit, Laxmi Insurance Building, Sir P M Road, Fort, Mumbai-400001.
4. The Central Board of Indirect Taxes and Customs through the Chairman, Department of Revenue, Ministry of Finance, North Block, New Delhi-110001.
5. The Commissioner of CGST and Central Excise, Patna-II, 3rd Floor, C R Building (Annexe), Birchand Patel Path, Bihar-800001.

... ... Respondent/s

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with

Civil Writ Jurisdiction Case No. 2975 of 2022

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M/s Bhartiya Rail Bijlee Company Limited having its Office at Nabinagar, Office-H-Type, PO-Pirouta, PS-Khaira, Dist.Aurangabad, Bihar-824303, through its Authorized representative/Signatory R Jayaramachandran, aged about 56 Years (M), Son of Sh R Rangaswamy, resideng at Room No. 58 FH-3, Field Hostel, Sone Urja Township, PO Pirouta, PS Khaira, Nabinagar, Distt. Aurangabad, BIhar-824303.

... ... Petitioner/s

Versus

1. The Union of India Through the Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi-110001.
2. The Additional Director General, of GST Intelligence, Coimnatore Zonal Unit, 155-1, Lakshmanan Street, Ukkadam, Coimbatore-641001
3. The Additional Director Genral (Adjudication), Directorate General of GST Intelligence, Mumbai Zonal Unit, Laxmi Insurance Building, Sir P.M. Road, Fort, Mumbai-400001
4. The Central Board of Indirect Taxes and Customs, through the Chairman, Department of Revenue, Ministry of Finance, North Block, New Delhi-110001.
5. The Commissioner of CGST and Central Excise, Patna-1, 3rd Flor, C R Building (Annexe), Birchand Patel Path, BIhar-800001

... ... Respondent/s

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Appearance :

(In Civil Writ Jurisdiction Case No. 3686 of 2022)

For the Petitioner/s	:	Mr. Atul Gupta, Advocate Mr.Brisketu Sharan Pandey, Advocate
For the Respondent/s	:	Dr. K.N.Singh, A.S.G. Mr. Anshuman Singh, Sr. SC, CGST & CX Mr. Shivaditya Dhari Sinha, JC to ASG

(In Civil Writ Jurisdiction Case No. 2975 of 2022)

For the Petitioner/s	:	Mr. Atul Gupta, Advocate Mr.Brisketu Sharan Pandey, Advocate
For the Respondent/s	:	Dr. K.N.Singh, A.S.G. Mr. Anshuman Singh, Sr. SC, CGST & CX Mr. Shivaditya Dhari Sinha, JC to ASG

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 10-01-2024

Both the writ petitions challenge show cause-cum-demand notices issued under the Finance Act, 1994 (hereinafter referred to as the 'Act'). The contentions raised are identical against the show cause notices and are with reference to the exigibility of tax on the specific transactions alleged, by the Department to be an instance of evasion; which transactions, according to the petitioners are not exigible to service tax under the Act.

2. Shri Atul Gupta, Advocate appearing for the petitioners, argued that there cannot be any tax liability under the Act for supply of electricity; which is accepted to be a supply of goods; but exempted under the Bihar Value Added Tax Act. The assessment year in CWJC No. 3686 of 2022 is 2016 -2017 and the period between 01.04.2017 to 30.06.2017. In CWJC No. 2975 of 2022, the period reckoned for assessment is 01.01.2017 to 30.06.2017. Both the petitioners are government companies engaged in the production and sale of electricity to M/s Indian Railways and Distribution Companies (DISCOMS); the distributor. The petitioners levy fixed charges, which are to be payable by the DISCOMS for supply of a fixed quantum of electricity, without even the entire quantum being supplied and consumed by the DISCOMS. The petitioners also levy variable charges on the electricity consumed beyond the fixed quantum, as spoken of in the agreement with DISCOMS.

3. It is pointed out from Section 65B(44)(a) of

the Act that any activity which constitute a transfer of title in goods or immovable property, by way of sale, gift or in any other manner or coming within the definition of Article 366 (29A) of the Constitution; as a deemed sale, would not be included in the definition of service. The attempt of the respondent-Department is to include it as a declared service under Section 66E(e). Neither the levy of a fixed charge, variable charge or the charge raised as penalty, for delay, come under Section 66E(e). It is pointed out that neither can levy be made under Section 66F. The show cause notices are challenged on the ground that there is no pre-consultation before the show cause notices were issued and there is no jurisdiction conferred on the authority to proceed for assessment on the ground of evasion; since there is no taxability under the Act.

4. It is also pointed out that show cause-cum-demand notices were issued, which bring it squarely under the rigor of the declaration made by the Hon'ble Supreme Court in ***Siemens Ltd. v. State of Maharashtra; 2007(207) E.L.T. 168(SC).*** The respondent-Department has come forth with a counter affidavit sustaining the demand, in which event, a remand before the original authority would be a mirage. It is also submitted that in similar circumstances, the High Court of

Delhi has ruled in favour of the assessee, as seen from the decision in ***M/s NTPC Limited v. Additional Director General DGGI Coimbatore & Ors.*** in **WP© 9975/2021** dated 01.11.2023. Reliance is placed on Circular No. 214/1/2023-Service Tax read with Circular No. 178/10/2022-GST respectively dated 28.02.2023 and 03.08.2022.

5. The learned Additional Solicitor General appearing for the respondent-Department points out that there is no requirement for a pre-consultation, which is a mandate issued by the CBIC. The CBIC, vide an instruction in F.No. 1080/11/DLA/CC dated 28.06.2016, has clarified that pre-show cause notice consultation will be only in cases other than those detected by means of a preventive/anti-evasion measure and in cases where the amount involved is more than Rs. 50 lakhs. In the present case, the amount involved is more than Rs. 50 lakhs and evasion is sought to be curbed. The show cause notice is to bring to tax the evasion attempted by the petitioners, in which event, the petitioners would have to approach the authority with a show cause and put forth their contentions before the authority. There is no question of the petitioners pre-empting the authority by invocation of remedy under Article 226. The show cause notice is not a demand, as can be seen from the manner in

which it has been worded.

6. We were not happy with considering the issue when a show cause notice is issued to which the assessee/petitioner has to reply and the assessee's answer was, the decision in ***Siemens Ltd.***(supra). Therein by a purported show cause notice, the appellant was directed to make payment of cess with interest, immediately, in respect of the purported supplies made. On a writ petition being filed, the counter affidavit, while asserting it to be a show cause notice, also asserted the levy as proposed in the show cause notice.

7. The trite principle that a writ court would not exercise its discretionary jurisdiction by entertaining a writ petition, questioning a show cause notice, though reiterated, it was held that when a notice is issued with pre-meditation, a writ petition would be maintainable. A hearing by a statutory authority, it was held, in that circumstance, would not yield any fruitful purpose; which was the circumstances found in the cited decision where the respondent had clearly made up its mind. It was hence the matter was remanded to the High Court for a fresh consideration.

8. We will briefly deal with the contentions raised, which is of the show cause-cum-demand notice being

totally without jurisdiction for reason of the transactions sought to be levied being exempted from the definition of service and the levy of tax, on goods also being totally exempted. We have to briefly refer to the show cause notice for which we would refer to Annexure-P/2, produced in CWJC No. 3686 of 2022. There was a summons dated 05.02.2021 issued to the assessee requiring them to furnish documents related to various activities carried out by them, which was responded to by the petitioner. The tax attempted to be levied was on the late payment surcharge and capacity charges collected from DISCOMS. Late payment surcharge was collected on the basis of a provision which permitted a levy of 1.5% per month on the charges payable under any bill, when the payment is made after a period of 60 days. In the event of delay in payment of the monthly bills, DISCOMS also bear interest from the due date of payment, in addition to the late payment surcharge. Though there was also a provision in case of default payment to reallocate power to other consumers, the authorised officer of the petitioner had submitted that no such reallocation was carried out. However, the late payment surcharge was levied, which was stated to be in the nature of interest on late payment of electricity.

9. The tentative proposal of the Department is that the petitioner, the supplier of electricity, by providing for late payment surcharge agreed to tolerate the act of DISCOMS in making delayed payments, which late payment surcharge forms the consideration towards the said service, clearly coming under Section 66E(e).

10. Insofar as the capacity charges are concerned, the fixed charges levied on agreement is for supply of a definite capacity while the DISCOMS may not actually consume the available capacity/deemed generation of capacity. The Department took the difference in value of capacity charges billed and the charges for the actual receipt for the month, as the taxable value. As is seen from the illustration, for the year 2017-18, as available from show cause notice, the capacity charges claimed in crores was Rs. 38,17,39,086/-, while the charges for the energy actually consumed was Rs. 28,48,53,353/-.

11. The Department was of the opinion that the act agreed to be tolerated was the failure of the DISCOMS to consume the entire available capacity/deemed generation.

12. Both the notices produced as Annexure-2 in the two writ petitions proceed on identical lines though the figures are different and so are the periods. It cannot be said that

there is no jurisdiction on the Officer to proceed for levy, especially since it is not the supply of electricity which is sought to be taxed under the Act, as we find on a *prima facie* consideration.

13. Now, we look at the decision of the Division Bench of the High Court of Delhi, wherein the show cause-cum-demand notice was issued, based on capacity charges and late payment surcharge in respect of ocean freight on transportation of coal. The service tax on ocean freight had been struck down by the High Court of Gujarat and so was the levy on GST in respect of ocean freight. It was also held that the service tax on capacity charges and late payment surcharges are covered by the circular dated 03.08.2022 issued by the Department of Revenue, Ministry of Finance, Government of India; again, a *prima facie* finding. It is to be pertinently observed that the Division Bench of the High Court noticed that the circular issued was after the show cause notice issued and, in that circumstance, it was directed that the import of the circular as well as the decision of the High Court of Gujarat and the Hon'ble Supreme Court, on point, was to be examined. Liberty was also given to issue a fresh show cause notice, if necessary. Hence, the High Court of Delhi also had merely remanded the matter for consideration.

14. We cannot but notice that the circular referred to is issued under the Goods and Services Tax Act, which would not be applicable under the Act. Definitely, there could be a contention raised as to the principle which would *mutatis mutandis* apply under the earlier regime. However, the above discussion would only commend us to relegate the petitioners to the original authority. At this point, we do not think that we could look into the levy proposed and we cannot find the same to be without jurisdiction at first blush.

15. The petitioners, hence, would have to reply to the show cause notices and the original authority would have to pass a speaking order. We make it clear that the original authority would not be governed either by the contentions raised in the counter affidavit filed before this Court or the observation made by us hereinabove, which are *prima facie* in nature. We are not persuaded to interfere at this stage.

16. We direct the petitioners to reply to the show cause notices within a period of three weeks from the date of receipt of the certified copy of this judgment. The respondent authority shall then issue a notice of hearing, afford a reasonable opportunity of hearing and pass a speaking order in accordance with law.

17. The contentions raised by the assesses are left open and the assesses would be entitled to challenge the order passed, if the same is prejudicial to the assessees/petitioners.

18. With the above observations, both the writ petitions stand dismissed. Parties shall suffer their respective costs.

(K. Vinod Chandran, CJ)

(Rajiv Roy, J)

Sujit/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	16.01.2024
Transmission Date	