BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **24.04.2024**

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.(MD) No.6371 of 2022
and
W.M.P.(MD) Nos.4967 & 4968 of 2022

The Commissioner,
Colachel Municipality,
Colachel,
Kanyakumari. ... Petitioner

Vs.

1.The Joint Commissioner,
O/o.The Commissioner of Central Excise & Service Tax,
Central Revenue Building,
Tractor Road,
NGO "A" Road,
Tirunelveli – 627 007.

2.The Assistant Commissioner,
O/o.The Assistant of Central GST & Central Excise,
Tirunelveli Division,
2/1, Nehru Nagar, STC College Road,
NGO "A" Colony,
Tirunelveli – 627 007.

3.The Superintendent of CGST & Central Excise,
O/o. The Superintendent of GST & Central Excise,
Marthandam Range,

48/14-Sivaraj Building 1st Floor,
Tower Junction,
Nagercoil – 629 001.

4.The Branch Manager,
State Bank of India,
Colachel Town Branch,
Opp. St. Mary's Higher Secondary School,
Main Road, Colachel,
Kanyakumari.

5.The Branch Manager,
Indian Bank,
Colachel Branch,
St.Mary's Primary School Building,
Port Street, Colachel,
Kanyakumari. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari to call for the records pertaining to the impugned order passed by the 1st respondent in C.No.V/ST/15/88/2012-Adjn & C.No.V/15/2013-STC dated 12.06.2015 and consequential order passed by the 3rd respondent in DIN-20220359XO0000000CC3 dated 02.03.2022 and quash the same.

For Petitioner : Mr.P.Athimoolapandian

For R1 to R3 : Mr.N.Dilip Kumar
Senior Standing Counsel
Asst. by Mr.K.Prabhu
Junior Standing Counsel.

For R4 & R5 : Mr.C.Karthik

ORDER

The issue is covered in favour the the petitioner in view of the order passed by this Court on 22.03.2021 in the case of The Cuddalore Municipality vs. The Joint Commissioner of GST and Central Excise in W.P.Nos.8900 of 2018 etc. batch. The operative portion of the order is extracted hereunder:

"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 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 a 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 immovable 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."

2. Although a contrary was taken by this Court on an earlier occasion on 09.09.2020 in W.P.(MD)No.3774 of 2018, the said view is not based on any reasoning. Hence, I do not wish to dilute on it. Suffice to state that the petitioner has made out a case for the relief in view of the discussion in order dated 22.03.2021 in W.P.No.8900 of 2018 etc.

3. Hence, this Court is of the view that this Writ Petition can be allowed and it is open for the respondent to adjudicate the issue before the Division Bench.

4. Accordingly, this Writ Petition stands allowed. No costs. Consequently, connected miscellaneous petitions are closed.

24.04.2024

Index : Yes / No
Internet : Yes / No
apd

C.SARAVANAN, J.

apd

W.P.(MD) No.6371 of 2022

24.04.2024