

(2015) 02 OHC CK 0040

In the Orissa High Court

Case No : Writ Petition(C) No. 23548 of 2014

Bhubaneswar Development Authority

APPELLANT

Vs

Commissioner of Central Excise, Customs and Service Tax
and Others

RESPONDENT

Date of Decision : 23-02-2015

Acts Referred:

Finance Act, 1994 — Section 65(105)(zzzz), 65(105)(zzzz)(v), 65(66), 65(67), 65(90a)

Citation : (2015) 50 GST 707 : (2015) 39 STR 355 : (2015) 86 VST 76

Hon'ble Judges : B.K. Nayak, J.;I. Mahanty, J.

Bench : Division Bench

**Advocate : G.M. Rath, S.S. Padhy, S. Mishra and S. Satapathy, for the
Appellant; P.K. Ray, (Sr. SC), Advocates for the Respondent**

Judgement

I. Mahanty, J.—In the present writ application, challenge has been made to the demand-cum-show cause notice dated 22.9.2014 under Annexure-13 on the basis of the assertion that the petitioner-Bhubaneswar Development Authority (B.D.A.) which has registered under the Service Tax Act for providing "Renting of Immovable Property Services", classifiable under erstwhile Section 65(105)(zzzz) read with Section 65(66) and 65(67) of the Finance Act, 1994 and thereafter, under Section 66-E of the Act and calling upon to submit their show-cause within 30 days of the receipt of the notice as to why service tax interest/penalty shall not be levied.

2. Mr. G. Mukherji, learned counsel for the petitioner has sought to challenge the issue of demand-cum-show cause notice under Annexure-13, inter alia, essentially on the ground that the conditions precedent for exercise of jurisdiction to invoke the extended period of limitation are wholly absent and the Commissioner has not properly applied his mind to the question as to whether the condition for invoking the extended period of limitation existed and/or acted mechanically and consequently, he submits that the impugned show-cause notice amounts to wrongfully invocation of jurisdiction and hence, ought to be quashed.

In this respect, he placed reliance on the judgment of the Hon'ble Calcutta High Court in the case of Infinity Infotech Parks Ltd. v. Union of India, decided on 30.04.2014. In a factual matrix, learned counsel for the petitioner submits that the petitioner-B.D.A. is a statutory body created by the State for the development of infrastructure within the capital area at Bhubaneswar and he submits that on the basis of direction issued by the State Government, the petitioner offered an advertisement for setting of commercial-cum-residential complex, pursuant to which M/s. Unitech Ltd. being the highest bidder was identified for the purpose of carrying out the said project. He submits that the show-cause notice itself indicates that the consideration amount of Rs. 52.75 Crore was received by B.D.A. on 14.3.2008 and he further asserts that the taxable service i.e. "Renting of Vacant Land" come into the statute only on 1.7.2010. Consequently, premium received by the BDA prior to the said date, could not have been the subject matter of demand of any service tax thereon. Mr. Mukherji, learned counsel for the petitioner raised various other contentions in this case on merit but the same are not being repeated herein for the sake of brevity and in view of the order we propose to pass.

3. Mr. P.K. Ray, learned Senior Standing Counsel appearing for the Service Tax Department, on the other hand, placed reliance on Para-3 of the demand-cum-show cause notice and the reply made by the Finance Officer of B.D.A. to the queries raised by the Service Tax Authority as well as the discussion made in Para-4 and Suppression of facts in Para-6 thereof which is quoted hereinbelow:

"4. DISCUSSION

4.1 From the Lease Deed dated 30.09.2010, it is noticed that the title of the Deed has been mentioned as "LEASE OF LAND FOR DEVELOPMENT OF COMMERCIAL USE ZONE PURPOSE IN NEW CAPITAL AREA AT BHUBANESWAR". The said agreement has been registered with the District Sub-Registrar, Khurda. Hence the agreement is nothing but a valid and legal Lease Deed. In the text of the agreement, the following has been clearly spelt out under Para-B of the agreement.

To quote "..... the company in turn is entitled to construct and develop and transfer their lease hold right for the specified and demarcated portion of the construction (herein after referred to as "Developed Units") raised on the demised Land to sublessees, to unquote.

4.2 It also appears from the agreement dated 30.09.2010 that M/s. Unitech Ltd. had lease hold right over the land by virtue of the said lease agreement. The purpose of lease is development, construction of buildings and structures for the activities permissible in commercial use zone and the amount of consideration is Rs. 52.75 Crore. The document submitted by BDA states that they have received Rs. 52.75 Crore vide Cheque No. 826650 dated 14.03.2008, from M/s. Unitech Ltd.

4.3 The lease has been given for a period of 85 years as enumerated in the

above lease deed. In other words, the nature of transaction between BDA and M/s. Unitech Ltd. is of the nature of lease or rent and not of sale.

4.4 Renting of immovable property service has come in to Service Tax net w.e.f. 01.06.2007. The definition appended vide Section 65(90a) of the Finance Act, 1994 as follows:

[(90a "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 skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre.

Explanation [1] - For the purposes of this clause, "for use in the course or 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 purposes of this clause "renting of immovable property" includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property]

4.5 It has also been laid down under Section 65(105)(zzzz) of the Finance Act, 1994 that taxable service in case of renting of immovable property service means any service provided or to be provided;

xxx xxx xxx

4.6. As per Section 65(105)(zzzz)(v) of the Finance Act, 1994, as amended w.e.f. 01.07.2010, immovable property includes vacant land given on lease or license for construction of building or temporary structure at a later stage to be used as furtherance of business or commerce. In this case, 2.685 Acres of land has been leased out by BDA to M/s. Unitech Ltd. for construction of commercial complex. The lease agreement has been entered into during the month of September, 2010, when the leasing of vacant land had already become taxable under Finance Act, 1994 as amended. Hence, as per Finance Act, 1994, "Renting of Immovable Property Service" includes leasing of vacant land which is the subject matter of the present lease agreement between BDA and M/s. Unitech Ltd. Moreover, purpose of the said lease of land is development, construction of buildings and structures for the activities permissible in commercial use zone which are very much commercial in nature. Further, BDA is neither a religious body nor an educational institution and no exclusion as envisaged in erstwhile Section 65(90a) of the Act, is applicable to BDA.

4.7 Further, it has been rendered vide Notification No. 36/2010-ST dated

26-6-2010 that Service Tax on advances in case of services other than "Commercial Training or Coaching Service" and "Renting of Immovable Property Service" received prior to 01.07.2010, is exempted. In the instant case, BDA has received the consideration in advance in the year 2008 and agreement is entered into during September, 2010. Hence, it appears that Service Tax on the amount of Rs. 52.75 Crore received as advance from M/s. Unitech Ltd. is nothing but consideration for leasing out the aforesaid land and therefore, taxable under the category of "Renting of Immovable Property Service".

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4.9 Accordingly, vacant land given on lease by BDA for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce, appears to be covered under the provision of "Renting of Immovable Property Service" for the purpose of Service Tax and the one time consideration of Rs. 52.75 Crore received from M/s. Unitech Ltd. appears taxable.

4.10 it appears that this is not a case of sale of land by BDA to M/s. Unitech Ltd. but a case of lease of land. Here, control over the leased land remains with the lessee during the lease period of 85 years only. The leased land can be taken back after expiry of the lease period, if it cannot be renewed further. Again, a consideration is required for getting the lease renewed, whereas in case of sale, there is no question of renewal or collection of any extra consideration. Under Para-7(iii) of the Lease agreement dated 30.09.2010, it has been clearly laid down that if the lease granted is not renewed, the company shall hand over to BDA, free of cost, the peaceful possession of the demised land and transfer the buildings and other structure erected upon the demised land. In case of sale, there is no condition of post-sale renewal or the seller taking back the land at a later stage. Moreover, no evidence in support of sale could be produced either By Shri Mallick or by BDA (refer to answer to question No. 14 in statement dated 25.03.2013 of Shri Kushasan Mallick).

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4.21 Accordingly, the gross amount of Rs. 52,75,00,000/- received by BDA from M/s. Unitech Ltd. on 14.03.2008 towards leasing of land, Rs. 12,20,000/-, Rs. 2,51,287/- and Rs. 7,78,652/- received by BDA from M/s. Unitech Ltd. on 24.07.2010 towards construction of compound wall; watch and ward and advertisement appear taxable under the category of "Renting of Immovable Property Service," "Commercial or Industrial Construction Service", "Security Agency Service" and "Advertising Agency Service" respectively.

6.0. SUPPRESSION OF FACTS:

6.1 It appears from the foregoing that the said fact of non-payment of Service Tax has come to the light during the course of investigation by the DGCEI officers. It also appears that BDA has suppressed the fact of provision of "Renting of Immovable Property Service", "Commercial or Industrial Construction

Service", "Security Service" and "Advertisement Service" to M/s. Unitech Ltd. and has not paid any Service Tax on the service charges received from M/s. Unitech Ltd. They neither declared the above details in their statutory ST-3 Returns for the period 2010-11, nor did they intimate anything to the Department. Their acts or omissions of non-payment of Service Tax on gross amount collected from M/s. Unitech Ltd. for rendering "Renting of Immovable Property Service", "Commercial or Industrial Construction Service", "Security Service" and "Advertisement Service" is indicative of willful suppression of material facts with intent to evade payment of Service Tax. Hence, the extended period of limitation under the proviso to section 73(1) of the Act, appears invocable for recovery of the above mentioned Service Tax not paid by BDA."

4. Learned Senior Standing Counsel for the Service Tax Department placed reliance on the judgment of Hon"ble Supreme Court in the case of C.C.T. Orissa and Others Vs. Indian Explosives Ltd., in order to advance an argument that the writ court should not entertain a writ petition where ordinary remedy is available and judicial discipline ought to be adhered to and the department ought to be allowed to reach its own conclusion since any decision of the High Court in the present juncture would prejudice the interest of statutory authorities.

5. After hearing the learned counsel for the respective parties, it would be relevant herein to take note that the judgment of the Hon"ble Supreme Court in the case of Collector of Central Excise, Hyderabad Vs. Chemphar Drugs and Liniments, Hyderabad, and in particular, Para-9 thereof is quoted as hereunder:

"9. ----- In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section (1) of Section 11-A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before (sic beyond) the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case." 6. Hon"ble Single Judge of Calcutta High Court in the case of Infinity Infotech Parks Ltd. (supra) appears to have placed reliance on the judgment of Hon"ble Supreme Court as noted hereinabove in Para-66 which admittedly, is a leading judgment on the issue raised in the present case. In the said case, the Hon"ble Supreme Court came to conclude that "something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any

liability, before the period of six months. But most importantly, the Hon''ble Supreme Court has noted thereafter that "Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case."

7. On perusal of the aforesaid judgment of the Hon''ble Supreme Court, it is clear therefrom that Hon''ble Supreme Court in the said case was dealing with an appeal filed by the Collector of Central Excise, Hyderabad against an order passed by the Tribunal. In the facts and circumstances of the said case, Hon''ble Supreme Court came to hold that this finding of fact having been ultimately held against the revenue by the Tribunal which is the final fact forum and dismissed the appeal filed by the revenue on the basis that it did not want to interfere the facts determined by the Tribunal in the said case.

8. In the present set of circumstances of the case, any finding by the Court at this stage is likely to be prejudicial, either the petitioner-BDA or the Service Tax Authority. At a stage where demand-cum-show cause notice has been issued to the BDA, various grounds have been indicated in the show cause notice as to why the Service Tax Authority are seeking to apply the extended period of limitation to the facts and circumstances of the case. Further, in view of the fact that although it appears that an agreement was signed between the BDA and M/s. Unitech Ltd. on 14.3.2008, the same was admittedly registered only on 30.9.2010 and the consequences thereof are the matters to be determined in the light of the submissions that may be advanced by the petitioner in course of such determination.

9. In view of the judgment of the Hon''ble Supreme Court referred hereinabove, in the case of Collector of Central Excise, Hyderabad (supra), the issue itself, i.e. as to whether the extended period of limitation would apply, is yet to be determined by the adjudicating authority itself at the first instance. Consequently, without expressing any finding on the issues raised in course of the argument, we dismiss the writ application but allow the petitioner a further period of 30 days from today to file show cause reply and also to participate in such proceeding. The petitioner is at liberty to raise all such contentions and the Commissioner shall deal with the matter strictly in accordance with law without in any manner being influenced by any observation made hereinabove and reach in an independent conclusion both on fact and legal issues raised.

10. With the aforesaid observations and directions, the writ application stands dismissed.