
(2014) 11 GAU CK 0003
In the Gauhati High Court
Case No : W.P.(C) No. 3514 of 2007

Gopal Agarwal

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 13-11-2014

Acts Referred:

Finance Act, 1994 — Section 65(105), 65(31)

Citation : (2014) 5 GLT 368

Hon'ble Judges : K. Sreedhar Rao, Acting C.J.; Ujjal Bhuyan, J

Bench : Division Bench

Advocate : A.K. Saraf, Senior Advocate, Advocates for the Appellant; S.C. Keyal, A.S.G.I, Advocates for the Respondent

Judgement

K. Sreedhar Rao, Actg. C.J.

1. The petitioners were engaged by the ministry of Shipping, Road Transport and Highways (MoSRTTH) to enumerate census of movement of vehicles between different places in the North-eastern states. The MoSRTTH while making payment of bills considered the contract with the petitioners as consultancy services and deducted services tax from the payments for remittance to the Central Excise and Services Tax department. The petitioners aggrieved by the said deductions filed these petitions. Annexure XIV is communication sent to the petitioners by the 4th respondent, which reads as follows.

"I am directed to refer to your letter No. RW/GHT/Genl/TC/05 dated 28.12.2006 on the subject mentioned above. The matter was referred to Finance Wing of the Ministry for their opinion. Finance Wing has clarified that the agreement itself terms the service provider as "Consultant". Therefore, service provider i.e. consultant is liable to pay service tax".

2. Annexure XVI is communication sent to the petitioners by the 4th respondent, which reads as follows.

"Please refer to the subject and reference cited above. It may be mentioned that

as per the discussion held on 30/03/2007, it was agreed that an amount of Rs. 7,01,438/- withheld from previous bills against non clearance of service tax for the work mentioned in the subject, will be released vide Final Bill No. RFXIII/TC/05-06 dated 31/03/2007 as the withheld amount cannot be booked by RPAO under RO Suspense Head as the work was sanctioned under MH-3054 by the Ministry under the condition that an unconditional Bank Guarantee for the amount of your service tax liability is submitted from your end which is still awaited.

The Final bill for the work has been submitted to RPAO and payment received from RPAO. It is requested that the Bank Guarantee along with an affidavit for extension of the same may be submitted to this office for release of DD/Cheque to you. The BG will be released after production to this office the evidence of payment of service tax due to the concerned department".

3. Section 65(105) of the Finance Act, 1994 defines the "taxable services" in the following manner.

"Taxable services" means any service provided or to be provided.-

(g) to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner or more disciplines of engineering but not in the discipline of computer hardware engineering or computer software engineering.

(r) to a client, by a management consultant in connection with the management of any organisation in any manner.

(za) to a client by a scientist or a technocrat, or any science or technology institution or organisation, in relation to scientific or technical consultancy".

4. It is the contention of MoSRTTH that the consultancy services rendered attracts tax.

5. The counsel for the petitioner with reference to the definition of "services tax" submitted that services rendered by a consulting engineer would mean only a professionally-qualified engineer or any body-corporate or any other firm who either directly or indirectly renders any advice, consultancy or technical assistance in any manner to any person in one or more disciplines of engineering.

6. In the circular dated 2nd July, 1997 issued by the ministry of Finance, Revenue department, Central Board of Excise and Customs (CBDT), "consulting engineers" is defined in the following manner.

"Consulting Engineer means any professionally qualified engineer or engineering firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to a client in one or more discipline of engineering. The taxable service rendered by a consulting engineer means any service provided to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of

engineering. The rate of tax is 5% and the value of taxable service in relation to service provided by a consulting engineer to a client shall be the gross amount charged by such engineer from the client for advice, consultancy or technical assistance in any manner in one or more discipline of engineering".

7. The "consulting engineer" is defined under section 65(31) of the Finance Act, 1994, which is as follows.

"Consulting engineer" means any professionally qualified engineer or any body corporate or any other firm who, either directly or indirectly, renders any advice, consultancy or technical assistance in any manner to any person in one or more disciplines of engineering".

8. In the light of the said instructions (CBDT circular dated 2nd July, 1997) it is strenuously argued that the services rendered by the petitioners does not amount to contract. Petitioners are not the "consulting engineers": nor do they constitute "a management consultant" in connection with "management of any organisation"; their job is to enumerate census of vehicles that pass through the roads. Therefore, in view of the instructions (circular) and the definition of "taxable services" it is improper on the part of the respondents to collect the services tax.

9. It is said that the services tax payable is being collected under protest and is being kept in a fixed deposit in a bank. It is submitted that the said deposit may be refundable to petitioners.

10. Heard the counsel for the respondents.

11. The counsel for the petitioners also relied on the decision of the Gujarat High Court in *Institution of Valuers Vs. Union of India*, . In the cited case, the registered valuer, who is not an engineer, was not held to be liable for payment of the service tax. It is held that when a consulting engineer or a group of engineers renders consulting services then only they become liable to pay services tax, while other persons/professional engineers are not liable to pay services tax. Insofar as "management consultant" is concerned, such consultancy should be given in respect of "management of an organisation". Here, the case of "management of an organisation" does not arise. Therefore the question of "liable to pay" services tax does not arise. Upon thoughtful consideration of the submission made at the Bar and the provisions of law coupled with the circular of the CBDT, it becomes explicit that the petitioners do not constitute "consulting engineer"; nor do "management consultant" within the definition of "taxable service". Therefore they are not liable to pay services tax. Accordingly the petitions are allowed. The amount in fixed deposit should be released in favour of the petitioners.