

(2012) 05 KL CK 0020

In the High Court Of Kerala

Case No : Writ Petition (C) No's. 15892 of 2008 and 19981 of 2009

Kerala State Insurance Department

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 21-05-2012

Acts Referred:

Companies Act, 1956 — Section 617
Constitution of India, 1950 — Article 309
Finance Act, 1994 — Section 65(105)(d), 65(12), 65(95), 66, 73(i)
General Insurance Business (Nationalisation) Act, 1972 — Section 36(1)(a)
Insurance Act, 1938 — Section 118
Life Insurance Corporation Act, 1956 — Section 44(f)

Citation : (2012) 28 STR 337 : (2013) 39 STT 227 : (2012) 54 VST 231

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : Sebastian Champappilly, Spl. Govt. Pleader Taxes, for the Appellant; P. Parameswaran Nair, Asst. Solicitor, P. Gopinath Menon, SC, Central Board of Excise, Abraham Thomas, CGC and Tojan J. Vathikulam, SC, C.B. Excise, for the Respondent

Final Decision : Allowed

Judgement

P.R. Ramachandra Menon, J.—Both these writ petitions have been filed by the Kerala State Insurance Department of the State. It involves a common issue, as to whether the petitioner, a Department of the Govt. of Kerala, established for providing "Life Insurance" coverage to the State Government employees, as provided under Rule 22A of Part I KSR and also for providing General Insurance coverage for the assets of the Government/Governmental Institutions, is liable to pay "service tax", treating such insurance as "taxable service". Contention is that the petitioner is not rendering any "taxable service" having been excluded from the purview of any such activity governing "life insurance" by virtue of the "exclusion" u/s 44(f) of the Life Insurance Corporation Act, 1956 (LIC Act in short) and "exemption" u/s 36(1)(a) of the General Insurance Business (Nationalisation) Act, 1972. The parties and proceedings are referred to, as

arrayed in W.P. (C) No. 15892 of 2008, treating the same as the lead case. The case of the petitioner/State Insurance Department is that their constitution and existence is only in discharge of the duties cast upon them, by virtue of the statutory obligations, giving "life insurance" protection to the employees of the State, in tune with the mandate of Rule 22A of Part I KSR and so also to insure the assets of the Government/Governmental Institutions, which constitutes public property. It is also stated that this is being pursued in continuation of the Scheme which was in existence for quite long, even prior to the enactment of the LIC Act, 1956 and the General Insurance Business (Nationalisation) Act, 1972. It is for this reason that, exemption/exclusion has been provided for the "Life Insurance" coverage provided by the petitioner to the State Government employees, as specifically provided u/s 44(f) of the LIC Act and the public property coverage exempted u/s 36(1)(a) of the General Insurance Business (Nationalisation) Act. Absolutely no business is being done by the petitioner/Government Department, but for meeting the obligation as above and hence there is no "taxable service", as contemplated u/s 65(12) of the Finance Act, 1994 to be mulcted with any liability. Still, the petitioner had submitted an application for registration and got registered, as provided under the Finance Act, 1994 and has been effecting "service tax" in respect of the "General Insurance" sector.

2. While so, the petitioner was served with a notice by the respondents, referring to some shortfall in the figures shown in the quarterly/yearly returns. According to the respondents, the petitioner was liable to pay "service tax" in respect of the "Life Insurance" segment as well. In spite of explaining the position, an order was passed by the concerned assessing officer on 19-11-2001, fixing huge liability, which was subjected to challenge before the First Appellate authority, i.e., the second respondent.

3. After considering the appeal, the First Appellate authority passed Ext. P1 order on 30-7-2003, remanding the case for fresh assessment; deleting the "penalty" imposed. The petitioner was directed to produce all the relevant documents before the concerned authority. On receipt of Ext. P1 order on 4-8-2003, the petitioner produced the documents and records before the 4th respondent/adjudicating authority, though no official receipt was given in this regard. Nothing transpired thereafter for quite long and the petitioner continued to file statutory returns and make remittance of "service tax", to the extent it was considered as payable.

4. While so, Ext. P3 notice was issued by the third respondent on 21-1-2008, demanding the alleged "service tax" and "penalty" stated as due, flowing from the order dated 19-11-2001, without any regard to the fact that the said order was already set aside by the appellate authority as per Ext. P1, deleting the penalty and remanding the matter for fresh consideration. On 27-2-2008, the petitioner sent a reply, pointing out the said aspect. Still, the 4th respondent/adjudicating authority proceeded further and passed Ext. P4 order dated

17-3-2008, as if it were in conformity with the directions given by the appellate authority vide Ext. P1.

5. On passing Ext. P4 order by the 4th respondent on 17-3-2008, the lower authority, i.e., the third respondent issued Ext. P5 "summons" dated 19-3-2008, asking the petitioner to appear and furnish the details for the period from 2004-05 to 2007-08. On that day, the Deputy Commissioner appeared and sought for time by "30" days. Just after two days, Ext. P6 Summons was issued on 10-4-2008 for appearance on 29-4-2008, on which day, the Deputy Commissioner appeared again and sought for 30 days" time. Just one week after, Ext. P7 summons was issued on 7-5-2008, ordering personal presence of the Commissioner on 29-5-2008. Alleging harassment at the hands of the concerned respondent, the petitioner approached this Court by filing W.P. (C) No. 15892 of 2008 and as per the interim order dated 28-5-2008, further proceedings pursuant to Ext. P7 were stayed, which was subsequently extended from time to time and until further orders, vide order dated 27-7-2009.

6. During the pendency of the above writ petition and operation of the interim stay, the respondents took the temerity to issue another demand notice on 24-4-2009, claiming "service tax", which made the petitioner to approach this Court by filing the second writ petition, i.e., W.P. (C) No. 19981 of 2009, wherein the said notice was produced as Ext. P4 and sought to set aside the same. On 16-7-2009, this Court granted interim stay of the said demand notice as well. Again, during the pendency of both the writ petitions and continued operation of interim order of stay, a show-cause notice was issued to the petitioner on 22-10-2009 for non-payment of tax for the period from 10-9-2004 to 31-3-2005. This was followed by another show-cause notice dated 20-10-2010 for non-payment of tax for the period from 1-4-2009 to 31-3-2010. Yet another show-cause notice was issued on 10-11-2011 covering the period from 1-4-2006 to 31-3-2011, claiming Rs. 61,91,64,306/- (under various heads). Notice was issued for recovery of the amount under the proviso to Section 73(i) of the Finance Act, 1994.

7. The respondents have filed separate counter affidavits in both the writ petitions, seeking to sustain the course and events. Dr. Sebastian Chempapilly, learned Spl. Govt. Pleader (Taxes) appearing for the petitioner submits that the petitioner is nobody else than an organ of the State Government itself and that the Insurance coverage provided by the petitioner in the "Life Insurance" sector, as well as in the "General" sector, is traceable to the pre-independence period. The Life Insurance policy being issued to the general public was stopped forever, after the commencement of the LIC Act and the operation stands confined only to issuance of Life Insurance coverage to the employees of the State Government, in discharge of the statutory obligation, to meet the requirements under Rule 22A of Part I KSR. It is stated that, by virtue of the definition of the term "taxable service" u/s 65(105)(d) of the Finance Act, 1994 and so also the term "service tax" u/s 65(95) of the Finance Act, it was a continuation of the pre-

existing scheme and that the State is not doing any "service" or "business", but for discharging the statutory obligation as above. It is also stated that Section 44(f) of the LIC Act clearly exempts the petitioner from the operation of the statute and similar exemption is provided u/s 36(1)(a) of the General Insurance Business (Nationalisation) Act in respect of the General Insurance coverage being given to the public property. The learned Spl. Government Pleader further submits that the position has been clarified by the Central Government as well, as per the Circular No. 89/7/2006-Service Tax, dated 18-12-2006 (Ext. P5). Reference is also made to Ext. P11 application for exemption preferred by the petitioner u/s 93 of the Finance Act, 1994 as early as in 2008, which is stated as still pending.

8. Mr. Tojan J. Vathikulam, the learned Central Government Counsel submits that the liability to pay "service tax" takes its origin from the Finance Act, 1994 and the liability to pay the same is not subjected to any prescriptions, to the contrary in some or other Statute. Referring to Sec. 65(105)(d) and 65(105)(zx) of the Finance Act, 1994, the learned Counsel submits, the insurance, both under the "General" segment, as well as in the "Life" segment, are clearly covered by the above provisions and so much so, the petitioner cannot seek to be absolved with reference to Sec. 44(f) of the LIC Act or 36(1)(a) of the General Insurance Business (Nationalisation) Act, 1972. It is further pointed out that the specific circumstances and how the exemption could be availed, have been provided u/s 93 of the Finance Act, 1994 and since there is no case for the petitioner that any such exemption has been obtained u/s 93 of the Finance Act, 1994, the exemption/exclusion under the LIC Act or under the General Insurance Business (Nationalisation) Act, 1972, cannot be of any help to the petitioner. The learned Counsel also submits that, pursuant to the application preferred by similarly situated State Government Departments like Insurance Department of the State of Rajasthan, "exemption" has been granted by the Central Government and notified in the Gazette, in exercise of the power u/s 93 of the Finance Act and unless and until such exemption is sought for and obtained, the petitioner is liable to meet the requirements towards tax liability. Reliance is sought to be placed on Ext. P5 Circular (in W.P. (C) No. 19981 of 2009) and the judgment rendered by the Karnataka High Court in W.P. (C) No. 23077 of 2011 [2012 (26) E.L.T. 521 (Kar.)], a copy of which is made available for perusal of this Court.

9. The basic question to be considered is whether the activity being pursued by the petitioner could be regarded as any business or does it constitute any "taxable service" to attract the tax liability under the Finance Act, 1994. The scope of "exemption" under different statutes also becomes relevant. Section 65(105)(d) reads as follows :

(105) "taxable service" means any service provided or to be provided :

(a) xx xx xx

(b) xx xx xx

(c) xx xx xx

(d) to a policy holder or any person, by an insurer, including re-insurer carrying on general insurance business in relation to general insurance business.

xx xx xx

10. What is meant by "service tax" is defined u/s 65(95), which reads as follows :

service tax means tax leviable under the provisions of this chapter.

Other relevant provisions are, Section 44(f) of the LIC Act, Section 36(1)(a) of the General Insurance Business (Nationalisation) Act and Rule 22A of Part I KSR, which are extracted below for the purpose of convenience of reference. Sec. 44(f) of the LIC Act:

44. Act not to apply in certain cases. - Nothing contained in this Act shall apply in relation to -

(a)... (xx)

(b)... (xx)

(c)... (xx)

(d)... (xx)

(e)... (xx)

(f) any scheme in existence on the appointed day or any scheme framed after the appointed day with the approval of the Central Government whereby, in consideration of certain compulsory deductions made by Government from the salaries of its employees as part of the conditions of service, the payment of money is assured by Government on the death of the employee concerned or on the happening of any contingency dependent on his life.

(g)... (xx)

Section 36(1)(a) of the General Insurance Business (Nationalisation) Act, 1972 :

36. Exemptions. - (1) Nothing contained in this Act shall apply in relation to -

(a) any general insurance business carried on by a State Government, to the extent to which such insurance relates to properties belonging to it or undertakings owned wholly or mainly by the State Government; or to properties belonging to semi-government bodies, or any Board or body corporate established by the State Government under any statute or any industrial or commercial undertaking in which the State Government has substantial financial interest, whether as shareholder, lender or guarantor.

Section 22A of Part I KSR :

22A. Any person who enters Government service on or after the 19th August

1976, and has not crossed the age of 50 years, shall within a period of one year from the date of such entry in service, subscribe to a policy in the official branch of the State Life Insurance at such rate as may be determined by Government from time to time and shall continue to subscribe till he ceases to be in Government service.

11. Section 44(f) of the LIC Act is very much clear and categoric to the effect that, it excludes any Scheme in existence on the appointed day or any Scheme framed after the appointed day with approval of the Central Government, in consideration of certain compulsory reduction made by the Government from the salary of its employees as part of the conditions of service, assuring payment of money on the death of the employee or on the happening of any contingency dependent on his life.

12. Similarly, Section 36(1)(a) of the General Insurance Business (Nationalisation) Act excludes any general insurance business carried on by the State Government, to the extent the insurance relates to the properties belonging to it or undertakings owned wholly or mainly by the State Government or to such extent as clearly dealt with thereunder.

13. Section 118 of the Insurance Act, 1938 also specifies the exemptions from the operation of the said Act, which in fact has been clarified by the Insurance Regulatory and Development Authority (IRDA) vide Ext. P3 letter dated 26-3-2007 (in W.P. (C) 19981 of 2009) sent in reply to the letters dated 2-2-2007 and 8-3-2007 of the petitioner seeking for clarification, as to the applicability of the Circular No. 035/IRDA/Motor TP/Dec.06/dated 4-12-2006. It is also relevant to note that, by virtue of Rule 22A of Part I KSR, which rules have been formulated by the State Government in exercise of the power under Article 309 of the Constitution of India, it is obligatory on the part of any State Government employee to have applied for and obtained coverage in respect of life, by subscribing to a Policy, in the official branch of the State Life Insurance and shall continue to subscribe the same till he ceased from the "service". The said provision itself makes it clear that there is a reciprocal statutory duty upon the State Insurance Department, to provide Policy to such State Government employees and this statutory obligation cannot be stated as a "taxable service" provided to any individual or establishment or class of such persons. This being the position, there is considerable force in the submission made by the learned Special Government Pleader with reference to the said provision.

14. But then, the question is whether the General Insurance Business being done by the petitioner, to cover the assets of the State Government or the assets of the financial institutions in which the State is having financial interest, could be said as part of discharging any statutory duty. In the case of assets of the Government, there may not be any room for much controversy, as no service is being extended to anybody else, but to the self. But with regard to the institutions in which the Government is having financial interest, even if it be a Government Company as contemplated u/s 617 of the Companies Act, 1956, the

position may be different. So also, it is not discernible from the materials on record whether the petitioner is providing "General Insurance Coverage" to other commercial establishments or persons including by way of "Motor Insurance" or such other Policy and if it be so", will it come within the purview of any protection/exemption. In the case of an institution including a Government Company, it is a separate entity of its own, in the legal parlance and the Company/Government Company is eligible to sue or be sued independently. If the assets of such institutions are sought to be covered by issuing a Policy, it can only be by way of a "Contract" and not by virtue of any statutory obligation. On issuance of any such Policy by way of Contract, it may turn to be a business and of course, a "taxable service" u/s 65(105)(d) of the Finance Act. If this be the position, it may attract the tax liability as well. With regard to "service tax" payable u/s 66 of the Finance Act, 1994, if the State wants to have exemption from the Tax in respect of such transactions as well, it can only be by way of filing necessary application for getting exemption, as provided u/s 93 of the Finance Act, 1994.

15. Coming to the case decided by the High Court of Karnataka, referring to the concerned Circular (copy of the said Circular has been produced in the present case also as Ext. P10); Paragraphs 1.2 and 3 of the Circular are relevant and hence which are extracted below :

A number of sovereign/public authorities (i.e. an agency constituted/set up government) perform certain functions/duties, which are statutory in nature. These functions are performed in terms of specific responsibility assigned to them under the law in force. For examples, the Regional Reference Standards Laboratories (RRSL), undertake verification, approval and calibration of weighing and measuring instruments; the Regional Transport Officer (RTO) issues fitness certificate to the vehicles; the Directorate of Boilers inspects and issues certificate for boilers; or Explosive Department inspects and issues certificate for petroleum storage tank, LPG/CNG tank in terms of provisions of the relevant laws. Fee as prescribed is charged and the same is ultimately deposited into the Government Treasury. A doubt has arisen whether such activities provided by a sovereign/public authority required to be provided under a statute can be considered as "provision of service" for the purpose of levy of service tax.

2. The issue has been examined. The Board is of the view that the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no

service tax is leviable on such activities.

3. However, if such authority performs a service, which is not in the nature of statutory activity and the same is undertaken for a consideration not in the nature of statutory fee/levy, then in such cases, service tax would be leviable, if the activity undertaken falls within the ambit of a taxable service.

From the above Circular, issued by the Central Government, it is clear that, when the Insurance Department is collecting premium, providing insurance coverage as part of the duty cast upon them, it assumes a character of compulsory levy as per the relevant provisions of the Act. Such activity is purely in public interest and is undertaken as mandatory and statutory function and in those cases "Service Tax" is not leviable. The said proposition has been highlighted by a Division Bench of the Karnataka High Court as per the judgment dated 4-11-2011 in Karnataka Government Insurance Department (K.G.I.D.) Vs. Assistant Commissioner of Central Excise, , making it clear that, if a Government authority performs a service, which is not in the nature of statutory activity and the same is undertaken for a consideration not in the nature of statutory fee/levy, then in such cases, Service tax could be leviable and it falls within the ambit of "Taxable Service". It was accordingly, that a finding was rendered that the particular type of insurance coverage being undertaken by the Karnataka State Insurance Department, in respect of "motor vehicles" was liable to be reckoned as a "Taxable Service".

16. Viewed in the above facts and circumstances, this court finds that the activity being pursued by the petitioner in providing "Life insurance coverage" to the employees of the State Government as part of its statutory obligation giving effect to Rule 22A of Part I KSR is not a "taxable service" so as to attract tax liability. However, with regard to any other service/insurance coverage provided to the General Insurance business extended to commercial institutions/individuals, even if it is a Government Company, such activities are liable to "Service Tax" as no statutory duty is involved and the same cannot be avoided, unless exemption is obtained u/s 93 of the Finance Act, 1994.

17. Now, the fact remains that the petitioner has preferred Ext. P11 application before the Central Government for exemption in respect of the activities being pursued by the petitioner, which is stated as still pending. The counter affidavit filed by the respondents in both the cases does not disclose as to the fate of such application. In the above circumstance, the first respondent/Union of India is directed to consider Ext. P11 u/s 93 of the Finance Act 1994, particularly in the light of similar exemptions stated as given to other similarly situated Government Departments like the State of Rajasthan and pass appropriate orders in accordance with law, as expeditiously as possible, at any rate within "three months" from the date of receipt of a copy of the judgment. All further coercive proceedings pursuant to Exts. P3 to P7 in W.P. (C) No. 15892 of 2008 and Ext. P4 in W.P. (C) 19981 of 2009 shall be kept in abeyance till final orders are passed by the Central Government as aforesaid. The petitioner shall produce

a copy of this judgment before the 1st respondent forthwith for further steps.
Both the writ petitions are allowed in part. No cost.