

(2010) 10 MAD CK 0020

In the Madras High Court

Case No : Writ Petition No. 525 of 2010 and M.P. No. 1 of 2010

M.K. Sundaram

APPELLANT

Vs

Andhra Bank

RESPONDENT

Date of Decision : 21-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 67, 68
Finance Act, 1998 — Section 65

Citation : (2011) 256 MLJ 1274 : (2011) 6 RCR(Civil) 2399

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : K. Vijayan for R. Suresh Kumar, for the Appellant; R. Gowthaman Narayanan, for the Respondent

Final Decision : Allowed

Judgement

K.B.K. Vasuki, J.—The writ petition is filed to quash the proceedings of the Respondent dated 15.10.2009 in his letter No. 019/9-PR/218

and to consequently direct the Respondent to pay the arrears of service tax for the period from 1.6.2007 till date.

2. The brief facts leading to the filing of the present writ petition are as follows:

The Petitioner is the owner of the Commercial Building viz. Senthil Tower and the building was during 1999 leased out to the Respondent for

banking purpose subject to certain terms and conditions as per the lease deed dated 19.11.1999. During 2007, an amendment was introduced in

Section 65 of Finance Act 1998 thereby Assessee is liable to pay the service tax and the same was notified by the Government to the effect that

the leasing out the building for commercial purpose was brought into the ambit of service tax only in the year 2007 by way of amendment in

Section 65. Pursuant to such amendment, the Petitioner as the owner, has paid the service tax from June 2007 at the rate of 12.36% on rent and

has also sent a detailed letter to the Respondent demanding payment of service tax along with the rent with effect from 1.6.2007 and the

Respondent has at last replied the owner through the letter dated 15.10.2009 which is impugned herein, in and under which the Respondent

rejected the claim of reimbursement of service tax on the ground that as per the subsisting agreement all the taxes are to be borne by the land lord

and the management committee of Indian Bank Association advised the member banks not to reopen the existing contracts owing to the

enactment. Aggrieved against the same, the Petitioner/land owner has come forward with the present writ petition for the relief as stated supra

3. According to the learned senior counsel for the Petitioner, the service tax is on the service provider as such the same is payable only by the

customer to whom the service is provided and as the financial leasing is not liable for service tax on the date of entering into the lease agreement

during 1999 and as the amendment was introduced only during 2007, the same is not in the contemplation of the parties and the particulars

stipulated in the agreement to the effect that all the taxes are to be borne by the owner does refer to taxes payable as on that date on which the

lease deed was entered into and does not cover the service tax which was not in force during 1999 and de hor the stipulation in the agreement, the

tenant is bound to reimburse the service tax and the payment of which is one of the statutory liabilities cast upon the customer for whom the service

is provided.

4. Per contra, the learned Counsel for the Respondent would defend the correctness of the impugned letter mainly on the ground that the,

agreement does not provide for payment of service tax by the tenant. It is further contended by the learned Counsel for the Respondent that as the

issue relating to reimbursement of service tax arises but of contractual obligation, the dispute relating to the same cannot be resolved in the writ

jurisdiction and the appropriate remedy available to the Petitioner is only to go before the civil forum.

5. I have considered the rival submissions made on both sides and perused the materials available on record.

6. It is not in dispute that the Petitioner and the Respondent entered into lease agreement on 19.11.1999, on which date the liability to pay service tax for financial leasing transaction was not in force and the same was brought into the Financial Act only by way of amendment during 2007. If that is so, the taxes due to Municipal/local authorities or Government referred to as payable by the land lord as per the specific clause under lease agreement dated 19.11.1999 cannot be said to be in respect of service tax also. As the liability to pay the service tax is not in contemplation of any one including legislative authority on the date of lease agreement, the Respondent cannot be per-mitted to take shelter under the particulars stipulated in the agreement for denying his liability to reimburse the service tax. De hors, the agreement as the liability to pay the service tax is provided under the statute, the dispute arising out of the same can be as argued by the learned senior counsel for the Petitioner, decided in the writ jurisdiction. Further, as rightly pointed out by the learned senior counsel for the Petitioner, the liability denied by the Respondent herein is not the quantum of service tax, but to discharge the statutory obligation and the same can be resolved by invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India.

7. As a matter of fact, the judgment cited on the side of the Petitioner in Thermal Contractors Association v. DIR. Rajya Vidyut Utpadan Nigam Ltd. 2006 (4) S.T.R. 18 (All.) is made only in the writ petition filed under the writ jurisdiction, wherein, the Petitioner association through its members was providing various services to Rajya Vidyut Utpadan Nigam Ltd, who was the Respondent therein and the members of the association were paid for the services rendered by them in terms of the contract entered into between the members of the association and Nigam Limited and when the Petitioner association demanded the Respondent No. 2, who is the customer to reimburse the amount of service tax, they have to pay under the provisions of Section 67 and 68 of the Finance Act, 1994 the dispute was raised and was brought before the Division Bench of Alalhabad High Court by way of writ petition. The writ petition was disposed of not on the ground of maintainability, but on the failure of the Petitioner to file any contract between them in respect of the liability so raised. That being so, the Respondent cannot be permitted to say

maintainability of the present writ petition involving identical issue. Hence, the objection regarding the maintainability of the writ petition is thus answered in the negative.

8. On merits, the facts that the financial leasing transaction was assessed to service tax only during 2007 and the Petitioner-owner has been

regularly paying the same and the claim made herein is only for directing the Respondent to reimburse the same, are not denied. What is service tax

is interpreted in para 5 of the judgment in Thermal Contractors Association v. DIR. Rajya Vidyut Utpadan Nigam Ltd. (supra) referring to the

judgment of the Supreme Court in Tamil Nadu Kalyana Mandapam am Assn. Vs. Union of India (UOI) and Others, that service tax is an

indirect tax and is to be paid on all the services notified by the Government of India for the said purpose, ""the said tax is on the service and not on

the service provider"". It is further observed therein that ""the payer of service tax is entitled to realise the service tax from its customers, yet it all

depends upon contracts entered into between the parties. It is always open to the service provider to charge, or not to charge the amount of

service tax from its customers and to pay it from its own pocket"". The Allahabad High Court dismissed the writ petition on the ground that there is

no agreement between the parties. In my considered view, the judgment of the Division Bench of Allahabad High Court can be looked into for the

limited purpose to understand as to what is service tax and as to whether the payer of service tax is entitled to realise the service tax from its

customer. The observation of the Division Bench of Allahabad High Court on both the aspects has also been relied on by the learned senior

counsel for the Petitioner in support of his contention that the service tax is on the service and not on the service provider and the payer of the

service tax is entitled to get it reimbursed from his customer.

9. In the instant case, the only ground on which the liability of the tenant to reimburse the same denied is the absence of any stipulation in the

agreement to the effect. But, the same as rightly argued by the learned senior counsel for the Petitioner if viewed in the light of period of agreement

entered into between the parties and the period in which the amendment was introduced would render the ground on which the Division Bench of

Allahabad High Court dismissed the claim is inapplicable to the facts of the

present case. On the other hand, the observation of the Supreme Court in the judgment cited on the side of the Petitioner in Hindustan Sugar Mills Vs. State of Rajasthan and Others, can be though made on different context squarely, applied to the issue involved in the present case. In the case decided by the Supreme Court, A had entered into several contracts with Central Government for sale of cement and A was required to pay the sales tax and he claimed reimbursement of sales tax paid to the Central Government and the case was originally decided by the Supreme Court on the impression that there was no clause in the contract for reimbursement of the amount of sales tax. Under such impression, the Apex Court made certain observations in the original judgment as follows: ""It is true and we are aware that there is no legal liability on the central government to do so, but it must be remembered that we are living in a democratic society governed by the rule of law and every Government which claims to be inspired by ethical and moral values must do what is fair and just to the citizen, regardless of legal, technicalities. We hope and trust that the central government will not seek to defeat the legitimate claim of the Assessee for reimbursement of sales tax on the amount of freight by adopting a legalistic attitude"". The Supreme Court has in the judgment above cited clearly stated that ""these observations were made on the assumption that there was no legal liability on the central government to reimburse in respect of the amount of sales tax on the freight component of the price and we therefore wanted to impress on the central government that even if there was no such legal liability, the central government must pay up the amount of sales tax on the freight component of the price and do what is fair and just to the citizen"". Thereafter, the Assessee had by way of review application brought it to the notice of the Supreme Court that there was specific stipulation in the contract for reimbursement of the amount and the same compelled the Supreme Court to delete the observation from the judgment. The Supreme Court has while doing so, further observed ""we hopefully expect that the central government will not try to shirk its. legal obligation by resorting to any legal technicalities for we maintain that in a democratic society governed by the rule of law, it is the duty of the state to do what is fair and just to the citizen and the State should not seek to defeat the legitimate claim of the citizen by adopting a

legalistic attitude but should do what fairness and justice demand"". The Supreme Court has in the case referred to above relating to reimbursement of sales tax paid by the individual on behalf of the central government, clearly observed that with or without contract, the beneficiary of the service provided is liable to pay the same and such observation is strongly relied upon by the learned senior counsel for the Petitioner that as the service tax is on the service and not on the service provider and as the service is provided to the tenant/Respondent bank who is also one of the nationalised banks and instrumentality of the State, the Respondent is bound to reimburse the same and cannot take shelter under the lease agreement entered into much prior to the 2007 amendment with specific stipulation regarding payment of the taxes due as on that date and without specific stipulation regarding service tax which was not in force on that day. In my considered view, the strong observation of the Supreme Court that "It is the duty of the State to honour its legal obligation and should not seek to defeat the legitimate claim of the citizen by adopting legalistic attitude" is applicable to the Respondent herein who is the instrumentality of the state case in equal force, as such, the Respondent cannot be now permitted to deny its liability by placing reliance on the absence of one such stipulation in the lease agreement.

10. It is noteworthy to mention at this juncture that the Respondent has even in the impugned order refers to the advice of the management committee of Indian Bank to its member banks not to re-open the existing contracts owing to the enactment. If that is so, the question of reopening the agreement to add fresh clause in respect of reimbursement of the service tax to the owner who have to pay the service tax, under the relevant amended provision of Finance Act, does not at all arise herein.

11. Further, while it is strenuously argued by the learned Counsel for the Respondent that the payment of service tax is payable only by the owner, the copy of the circular issued by IOB to its Branch Manager on 2.7.2007 produced on the side of the Petitioner would reveal that the service tax is being reimbursed to the owner by the bank concerned. The circular further proceeds to say that the same can be reimbursed subject to the land owner being service tax Assessee and having service tax registration number. The last para of the circular would further reveal that the bank can

avail credit under Service Tax Rules for such service taxes paid for the services rendered to the banks and the same are instructed to be included

in the MIS on Service Tax Credit (Statement of Taxable input Services Consumed) on monthly basis without any omission.

12. Further, the Division Bench of Allahabad High Court has in the judgment in Thermal Contractors Association v. DIR. Rajya Vidyut Utpadan

Nigam Ltd. (supra) observed that it is always open to the service provider to charge or not to charge the amount of service tax from its customer

and to pay it from its own pocket. As the Petitioner herein has first chosen to pay the service tax and then to claim reimbursement from the

Respondent who is his customer and has made repeated demands to the tenant for reimbursement of the service tax paid by him, the bank has no

discretion to deny its liability in view of the observation of the Supreme Court in the judgment in Hindustan Sugar Mills v. State of Rajasthan and

Ors. (supra).

13. This Court is thus by applying the ratio laid down by the Supreme Court in Hindustan Sugar Mills v. State of Rajasthan and Ors. (supra) case

referred to above, inclined to uphold the claim of the Petitioner for reimbursement of the arrears of service tax and the impugned letter dated

15.10.2009 is hence liable to be set aside.

14. In the result, the writ petition is allowed as prayed for. The Respondent is directed to reimburse the service tax paid, till date, to the Petitioner

within four weeks from the date of receipt of the copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.