

(2015) 02 PAT CK 0102

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 4250 of 2012

Multi Engg. and Scientific Corpn.

APPELLANT

Vs

Bihar State Electricity Board

RESPONDENT

Date of Decision : 18-02-2015

Acts Referred:

Finance Act, 1994 — Section 65, 65(105)(zzzza), 66, 68, 69
Sales of Goods Act, 1930 — Section 64A

Citation : (2015) 39 STR 414

Hon'ble Judges : Ramesh Kumar Datta, J;Anjana Mishra, J

Bench : Division Bench

Advocate : Mrigank Mauli and Sanjay Kumar, for the Appellant; Nilu Agrawal, Jainendra Kumar Sinha and Kumar Pankaj, Advocates for the Respondent

Judgement

Ramesh Kumar Datta, J—Heard learned counsel for the petitioners and learned counsel for the respondent-Bihar State Electricity Board (Now Bihar State Power Holding Company Limited). The petitioners seek a direction upon the respondents to reimburse the amount of Rs. 3,04,596/- being the amount of service tax paid by the petitioners for the services provided by them to the respondent-Board.

2. The petitioner No. 1 which is a partnership firm had pursuant to a tender entered into an agreement with the respondent-Board by work orders dated 19-4-1999 and 14-1-2000 for design and execution of Pile/well foundation for three numbers of main river crossing tower and open foundation for two numbers of anchor towers of 220 KV/DC transmission line crossing overhead across the river Budhi Gandak at Khagaria and for construction of two numbers of well foundation and modification of two numbers existing well foundation of special river crossing of 132/33 KV D/C Transmission Line across river Kosi near Kursela bridge. The work was successfully carried out over a protracted period of time till the year 2009 for which payments were received by the petitioners from time to time from the Board. With effect from 1-6-2007 the service provision

part of the work contract became exigible to service tax and pursuant to a notice from the Central Excise and Service Tax Authorities, the petitioners had ultimately to pay the aforesaid amount of service tax. The petitioners approached the respondent-Board for reimbursement of the service tax amount paid which has been refused by letter dated 21-10-2010 of the Additional Chief Engineer (Civil) of the Board stating that in terms of Chapter-X, Instruction to Tenderer Clause 1 of the Contract Agreement, the petitioners were not entitled to any such payment of reimbursement of service tax. Aggrieved by the same the petitioners have filed the present writ application.

3. Learned counsel for the petitioners, in support of his stand, has sought to rely upon a decision of the Allahabad High Court in the case of Bhagwati Security Services (Regd.) Vs. Union of India, (2014) 45 GST 571 : (2013) 31 STR 537 which short judgment is in the following terms:

"2. There is an agreement between the petitioner and the Respondent No. 2 i.e. B.S.N.L., under which the petitioner was required to provide security services to the Respondent No. 2 under agreement between the two parties. The agreement contained the terms of payment.

3. Subsequently Service Tax was demanded from the petitioner which has been deposited by the petitioner. The petitioner applied before the Respondent No. 2 for reimbursement of the service tax, which request has been denied by the Respondent No. 2 by the impugned order.

4. Only reason given for denying the reimbursement of the service tax is that the same was not contemplated in the service agreement.

5. Having gone through the agreement and the provisions of the relevant statute, we find that service tax is statutory liability. It is a tax which is required to be collected by the service provider from the person to whom service is provided and thereafter to be deposited with Government treasury within the prescribed time.

6. Thus essentially the statute is being imposing the tax upon the person to whom service is being provided and the service provider is merely a collecting agency.

7. In that view of the matter, the writ petition is allowed. The Respondent No. 2 is directed to make reimbursement of service tax to the petitioner without further delay."

4. It is submitted by learned counsel for the petitioners that Clause 1 of Chapter-X of the Agreement itself is only in relation to items and not in the context of rates and since the contract does not show that in case of any increase or decrease of rates the contractor would be liable, it is not open to the respondents to deny the benefits of service tax to the petitioners which is essentially a tax upon the person to whom service has been provided which is supposed to be collected by the service provider and paid to the Government.

5. Learned counsel further submits that since the said Clause 1 itself is ambiguous and not clear hence it ought to be read against the Board and in favour of the petitioners, in support of which he relies upon a decision of the Supreme Court in the case of Bank of India and Another Vs. K. Mohandas and Others, (2009) 123 FLR 973 : (2009) 5 JT 247 : (2009) 3 LLJ 609 : (2009) 4 SCALE 596 : (2009) 5 SCC 313 : (2009) 2 SCC(L&S) 32 : (2009) 5 SCR 118 : (2009) 3 SLJ 493 : (2009) 5 SLR 661 , in para-32 of which it has been held as follows:-

"32. The fundamental position is that it is the banks who were responsible for formulation of the terms in the contractual Scheme that the optees of voluntary retirement under that Scheme will be eligible to pension under the Pension Regulations, 1995, and, therefore, they bear the risk of lack of clarity, if any. It is a well-known principle of construction of a contract that if the terms applied by one party are unclear, an interpretation against that party is preferred (*verba chartarum fortius accipiuntur contra proferentem*).

6. Learned counsel also submits that under Section 64A of the Sale of Goods Act, unless a different intention appears from the terms of the contract, the liability of any new tax or increase or decrease in an existing tax like duty of customs or excise or tax on sale and purchase of goods, the liability or benefit of such increase would fall upon the respective person. It is submitted that in the present matter since the service tax has been imposed from a date subsequent to the contract during the process of the execution of the contract, in all fairness, the Electricity Board ought to have reimbursed the petitioners all such liabilities.

7. Learned counsel in this regard further contends that although the service tax is not specifically mentioned in Section 64A of the Sale of Goods Act but the contract of the petitioners is a work contract which is a holistic contract including within itself a contract for supply of goods and for supply of service, hence the same principle ought to be applied in favour of the petitioners.

8. Learned counsel has also sought to rely upon the provisions of Clause 4.11.8 of Chapter-X under which the contractor was required to keep the respondent-Board at all times indemnified and protected against all claims and liabilities that may be made under the Workmen's Compensation Act, the Factories Act and the Payment of Wages Act and Rules made thereunder from time to time. He also relies upon Clause 6.1.4 which provides that in quoting the item rates for the work specified, the contractor has to take into account the fact that due to the design or other stipulations or requirements at site or the necessity to follow a particular sequence of overall constructions on account of non-supply of particular drawings or the connected work of other agencies for other reasons interruptions may likely to be encountered in work of any nature and magnitude and no claim will be entertained on any account. It is thus submitted that while specifically denying liability under certain enactments and with regard to certain additional expenses which may be incurred no such provision has been made with regard to any liability arising on account of service tax itself and hence the

respondents cannot be permitted to say that they are not liable for payment of such service tax and reimburse the petitioners for the same.

9. Learned counsel for the respondent-Board, on the other hand, submits that under the provisions of the Finance Act, 1994 the liability to pay service tax has been imposed upon the service provider which is to get registered for the said purpose. It is submitted that the petitioners have not raised any such claim for payment of service tax either at the time of entering into the contract or subsequently when the said tax was imposed and did not get themselves registered and only after the receipt of notice the petitioners have made the payments of the service tax which was the liability of the petitioners and not of the Board.

10. Learned counsel relies upon Clause 1 of Chapter-X of Instructions to Tenderers in support of the stand of the Board stating that rates had to be indicated for each item of work indicating all minute ingredient of each item directly or indirectly including all incidental items not shown or specified but reasonably implied or necessary for completion of the work. It is further submitted that in case of any doubt the same had to be clarified before submitting the tender which has not been done by the petitioners.

11. Learned counsel further submits that there is absolutely no ambiguity in the said Clause 1 of the Instructions to the Tenderers and thus the principles laid down in the case of Bank of India v. K. Mohandas (*supra*) are not at all applicable in the present matter.

12. The provisions of Service Tax were introduced by the Finance Act, 1994. However, the same at that time applied only to a limited number of items and not to all forms of service. Subsequently, from time to time a large number of services were brought under the scheme by amendment of the provisions of the Finance Act, 1994. Under Section 65(105)(zzzza) "taxable service" means any service provided or to be provided to any person by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. The said provision was brought into effect from 1-7-2007. It is not in dispute that the work in question under the agreement between the petitioners and the Board was squarely covered by the definition of taxable service under the aforesaid provision. The work itself continued to be carried out from a prior period till 9-12-2009 and for the period from 1-6-1997 the service provided is under the provisions of the Act liable to payment of service tax.

13. Section 66 of the Finance Act, 1994 provides that there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent of the value of taxable services referred to in different sub-clauses of Section 65 and quoted in such manner as may be prescribed.

14. Section 68 provides for payment of service tax and is quoted below:-

"68. Payment of Service tax.-

(1) Every person providing taxable service to any person shall pay service tax at the rate specified in Section 66 in such manner and within such period as may be prescribed.

(2) Notwithstanding anything contained in sub-section (1), in respect of "such taxable service as may be notified" by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in Section 66 and all the provisions of this chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service:

Provided that the Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of this Chapter shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider."

15. It is evident from the aforesaid provisions that liability to pay service tax has been fixed upon the person providing taxable service and the manner and period within which it has to be paid has been provided by the Rules.

16. Section 69 provides for registration of every person liable to pay service tax which means the person who provides the service. There is further liability on the person providing service to furnish to the Superintendent of Central Excise, a return in such form and in such manner and at such frequency as may be prescribed. There is also provision of recovery of service tax not levied or paid or short levied or short paid or erroneously refunded from the service provider under Section 73 of the Act. Section 73A provides that a person who is liable to pay service tax and has collected any amount in excess shall forthwith pay the amount to the credit of the Central Government.

17. Thus, from the scheme of the Finance Act, 1994 which introduced the concept of service tax and the liability for payment of service tax, it is evident that so far as the Act is concerned, the liability of paying the service tax has been fixed upon the service provider. True, it is that the service provider has the right to collect the said tax from the person to whom service is provided but so far as the Excise and Service Tax Department is concerned, it holds the provider of service as liable to pay the service tax. There is no provision in the said Act for recovery or reimbursement of any service tax by the service tax provider from the person to whom the service is provided. Thus, it is the liability of service provider to pay the service tax arising in the course of the provision of service and to provide for its collection in the contract which it enters into with the person who is recipient of the service.

18. This Court is also of the view that the provisions of Section 64A of the Sale of Goods Act, 1930 cannot be applied to the provision of any service and the liability for tax thereupon as the said provision is specifically confined to the

payment of tax in respect to any taxable events in relation to goods and not with regard to services. The taxes, in fact, have been specified as duty of Customs or Excise and any tax on the sale or purchase of goods. The service tax evidently is not upon any contract for sale of goods. It is purely, leviable on a contract for provision of service.

19. Learned counsel for the petitioners is unable to point out any provision similar to Section 64A of the Sale of Goods Act, 1930 with regard to Service Tax levied on a service provider. In the absence of any such provision it is not for this Court to provide a casus omissus as the same falls in the realm of the Legislature.

20. Moreover even in Section 64A of the Sale of Goods Act, 1930 liability of benefit of imposition of new tax or increase or decrease in taxes is subject to there being a different intention appearing from the terms of the contract and the same is not absolute. It is only when the contract is silent on the point that the benefit of liability for increase or decrease on the price of goods on account of such taxes will have to go to the respective party. In the present matter, the stand of the respondent Board is based upon Clause 1 of Chapter-X Instruction to Tenderer of the Contract between the parties. The said Clause is in the following terms:-

"(1) The tenderers should quote the firm rate for each item of the work in Indian Rupees distinctly both in figures and words. The rate of all items of the work must contain the cost of all minutes ingredient in each item of work directly or indirectly including all incidental items not shown or specified but reasonably implied or necessary for completion of the work. It is understood that the tenderer has any doubt on any point he shall get it clarified before submitting the tender. Therefore, there should be no scope for any doubt or ambiguity regarding non-inclusion of any ingredient of work in the rate quoted by the Contractor."

21. From perusal of the aforesaid provision this Court is unable to accept the submission of learned counsel for the petitioners that the same does not relate to rates and is only for items. It is evident from Clauses 1, 2 and 3 that all of them relate to the rates quoted for each item of work and not for any specific ingredients of the work. Thus, splitting any item mentioned in Bill of Quantities has been specifically forbidden. Reasonably interpreted the said provisions mean that the rates or items of work, including all items of the work not shown or specified but reasonably implied or necessary, have to be indicated in the rates to be quoted by the tenderers. It would thus include the tax liability that fall upon such items of work whether they are in the nature of excise or customs or tax on sale or purchase of goods. Although service tax was not leviable at the relevant time on works contract but the same would also be deemed to have been included in view of the clear provision that the rate should be inclusive of direct or indirect elements. Thus, the said provision can only be interpreted to mean that any future increase or decrease of tax or levy of a new tax with regard to item of the contract would be entirely to the benefit or be the liability of the contractor and the same would not have any effect on the rates and service.

There does not appear to be any ambiguity in the said provisions. The provisions, in fact, go further to show that it was the tenderer's duty to get it clarified before submitting the tender and thereafter there would be no scope for any doubt or ambiguity regarding non-inclusion of any ingredient of work in the rate.

22. That being the situation, this Court is unable to agree that there is any ambiguity in Clause 1 of Chapter-X of the Agreement. It is clear that the benefit or liability accruing from any increase or decrease of tax or imposition of new tax would fall upon the contractor.

23. Thus, with respect, we are unable to agree with the decision of the Allahabad High Court relied upon by learned counsel for the petitioners.

24. Hence, since service tax had become leviable from 1-6-2007, for the period after 1-6-2007 the liability for the same would fall upon the petitioners and it is not open to the petitioners to claim any such refund from the respondent-Board in the absence of any agreement to the contrary or any provision in the Finance Act, 1994 with respect to the same. For the aforesaid reasons, we find no merit in the writ application. It is, accordingly, dismissed.