

(2010) 10 DEL CK 0194

In the Delhi High Court

Case No : CS (OS) 1016 of 2008, I.A. No. 6532 of 2008 and CS (OS) 1018 of 2008 and I.A. No. 6537 of 2008

Pearey Lal Bhawan Association

APPELLANT

Vs

Satya Developers Pvt. Ltd.

RESPONDENT

Date of Decision : 20-10-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 12A, 12B
Finance Act, 1994 — Section 64, 65
Sales of Goods Act, 1930 — Section 64A
Service Tax Act — Section 83

Citation : (2010) 173 DLT 685 : (2011) 1 ILR Delhi 604 : (2011) 23 STR 213 : (2011) 31 STT 51 : (2011) 40 VST 117

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Simran Mehta, for the Appellant; Sacchin Puri and Jyoti Ojha, for the Respondent

Final Decision : Allowed

Judgement

S. Ravindra Bhat, J.—These two suits involve determination of common questions of fact and law; they were accordingly heard together. The Plaintiff claims declaratory and injunctive relief as to whether it or the Defendant has to bear service tax liability in respect of the rents paid (by the Defendant) and received (by the Plaintiff). In addition, money decrees for specified amounts, is claimed.

2. The Plaintiff Society is owner of the building Pearey Lal Bhawan located at 2, Bahadur Shah Zafar Marg, (hereafter called "the suit premises") and the principal lessee of the land. The Plaintiff had entered into a registered Lease Deed on 09.10.2006 "first lease" with the Defendant, (hereafter "Satya Developers") in respect of an area measuring 2818 sq. ft. on the ground floor of the premises Pearey at Lal Bhawan. On 16October, 2006, the parties entered into an Agreement for Maintenance of Common Services and Facilities in respect of the leased premises.

3. It is the common case of the parties that with effect from 1st June, 2007 the Central Government, by amending Chapter v. of the Finance Act, 1994, levied service tax on the renting of immovable property for business purposes. The Plaintiff contends that the said levy tax is in the nature of an indirect tax, which has to be deposited by the service provider, after collecting the same from the user of the service. It is de-facto and de-jure a tax on the service and not a tax on the service provider. It contends that the burden of service tax has to be borne by the user of the service provider. The Plaintiff relies on the Madras High Court judgment in All India Tax Payers Welfare Association Vs. Union of India (UOI), ; Vindhyachal Distilleries v. State of M.P. a Madhya Pradesh High Court decision, reported in 2006 (3) STR 723 (M.P.),; Tamil Nadu Kalyana Mandapmam am Assn. Vs. Union of India (UOI) and Others, , a decision of the Supreme Court, and Thermal Contractors Assn. v. Dir. Rajya Vidyut Utpadan Nigam Ltd., reported in 2006 (4) S.T.R. (All.) a decision of the Allahabad High Court.

4. The Plaintiff submits that service tax, levied by the Central Government, is not in the nature of a tax on property, as under the Constitutional scheme only the State Legislatures have the power to levy tax on property, but a levy on the service, and to be collected from the beneficiary of the service, such as the lessee Defendant, in this case. The suit states that in keeping with this position of law the bills of lease rental and maintenance charges sent to the Defendant from June, 2007, onwards included an amount on account of service tax and cuss at the rate of 12.36% on the rent payable.

5. On 11 June,2007, the Defendant by its letter repudiated the Plaintiff's stand, and stated that it (the Plaintiff) had to bear the incidence of service tax. The Plaintiff denied this position, by its letter dated 26June, 2007. The parties thereafter exchanged communication, whereby they maintained their stated positions.

6. The Plaintiff submits that the position in law being settled that service tax is a levy on the service, and having regard to the amendment to the Act, whereby leasing or renting properties, is deemed to be a service, the service consumer, who in this case, is the lessee has to bear the tax, as it is an indirect tax. The Plaintiff relies on the definition clause, Section 65(105), which defines "taxable service" as follows:

(zzzz) to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

Explanation 1.- For the purposes of this sub-clause, "immovable property" includes-

- (i) building and part of a building, and the land appurtenant thereto;
- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto; and (iv) in case of a building located in a complex or an industrial estate, all common areas and

facilities relating thereto, within such complex or estate, but does not include

(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;

(c) land used for educational, sports, circus, entertainment and parking purposes; and (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Explanation 2.-For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;..."

It is argued that by virtue of Section 83 of the Service Tax Act, read with Section 12-B of the Central Excise Act, there is a presumption that the levy has been collected from the user. Section 83 of the Service Tax Act reads as follows:

83. Application of certain provisions of Act 1 of 1944:

The provisions of the following section of the Central Excise Act, 1944 (1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:

9C, 9D, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 14AA, 15, 33A, 35F, 35FF to 35-O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40.

Section 12-B of the Central Excise Act reads as follows:

12B. Presumption that Incidence of Duty has been passed on to the buyer.

Every person who has paid the duty of excise on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods..

7. Satya Developers, the Defendant, denies the suit claim, and denies that service tax has to be paid after collecting the same from the user. The Defendant denies that the judgments relied on by the Plaintiff, apply to the facts of this case. It is contended that the ruling of the High Court of Allahabad in Thermal Contractors Asscn. Vs. Dir. Rajya Vidyut Utpadan Nigam Ltd., is contrary to the Plaintiff's contention, which holds that -

Therefore even though under the scheme of service tax from the scheme of service tax, the payer of service tax is entitled to realize service tax from its consumers, 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. In the absence of any contract having been filed along with the petition we are not in position to delve into and adjudicate upon the issue raised by the learned senior counsel for the Petitioner.

8. Satya Developers point out to the relevant clauses of the Lease Deed, particularly Clause 5 reads as under:

5. That the lessor shall continue to pay all or any taxes, levies or charges imposed by the MCD, DDA, LandDO and or Government, Local Authority etc.

The Defendant also relies on clause II (1), which reads as under:

II (1) That the Lessor to pay all rates, taxes, ground rent, house-tax charges, fire-fighting tax, easements and outgoing charges imposed or payable to the MCD, LandDO, DDA or Government in respect of the demised premises payable by the Lessor and discharge all its obligations well in time.

It is argued that the parties clearly agreed that all taxes would be borne and paid by the Plaintiff thus the question of Defendant paying any taxes much less service tax does not arise.

9. The Defendant contends that service tax, is a tax on property and if the Plaintiff has any grievance in respect of the imposition of service tax it is open for the Plaintiff to take up the matter in the appropriate forum with the Central Government. The Defendant argues that contractual clauses have to be plainly read by the Court, and no attempt to supply meanings other than the expressions used, and the context visualized, can be resorted to by the Court. Reliance is placed on the judgment of the Supreme Court in *State of Gujarat (Commissioner of Sales Tax, Ahmedabad) Vs. Variety Body Builders*, where the Court held that:

8. It is well settled that when there is a written contract it will be necessary for the court to find out there from the intention of the parties executing the particular contract. That intention has to be primarily gathered from the term and conditions which are agreed upon by the parties. We will therefore immediately turn our attention to the agreement in question.

Modi and Co. Vs. Union of India (UOI), , another decision of the Supreme Court is also relied on by the Defendants, to urge that the Court should only consider the intention of the parties, to be gathered from a reading of the agreement, or contract. The Court had held that:

8. In this connection it is well established that in construing such a contract. It is legitimate to take into account the surrounding circumstances for ascertaining the intention of the parties.

10. The parties had indicated that there would be no need to record evidence, and that the factual matrix was borne out by the pleadings and documents on the record. It was submitted that since the suit involved a decision on a pure

question of law, the suit may be heard for final disposal. Accordingly counsel were heard on all the questions.

11. The following issues arise for consideration:

1) On whom does the incidence of taxation fall, in this case, having regard to the materials and documents on the record;

2) Is the Plaintiff entitled to the money decree, as claimed, or any other relief: OPP

3) Relief.

Issue No. 1

12. The controversy requiring decision by the Court is narrow and limited. It is whether the burden of service tax, levied on the service or facility of leasing (of the suit premises) should be borne by the lessor (i.e. the service provider) or the lessee (i.e. the Defendant, user). There is no dispute that the parties did not visualize that this kind of a levy would be made in respect of lease, or rental of commercial properties; it is also undisputed that the levy was made effective in 2007, after the parties had entered into the agreement. The Defendant denies liability to pay, submitting that the conditions in the contract clearly stipulate that all taxes, etc. are to be borne by the Plaintiff landlord. It relies on principles of interpretation of contract, to submit that when parties visualize situations and provision for them, it is not open to either of them to roam outside the express terms, and try to discover obligations when none exist.

13. The Supreme Court, in All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, , speaking about the nature of service tax liability, held that:

4. Service tax is an indirect tax levied on certain services provided by certain categories of person including companies, associations, firms, body of individuals, etc., Service sector contributes about 64% to GDP. "Services" constitute a heterogeneous spectrum of economic activities. Today services cover wide range of activities such as management, banking insurance, hospitality, consultancy, communication, administration, entertainment, research and development activities forming part of retailing sector. Service sector is today occupying the centre stage of the Indian economy. It has become an Industry by itself. In the contemporary world, development of service sector has become synonymous with the advancement of the economy. Economics hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs.

In late seventies, Government of India initiated an exercise to explore alternative revenue sources due to resource constraints. The primary sources of revenue are direct and indirect taxes. Central excise duty is a tax on the goods produced in India whereas customs duty is the tax on imports. The word "goods" has to be

understood in contradistinction to the word "services". Customs and excise duty constitute two major sources of indirect taxes in India. Both are consumption specific in the sense that they do not constitute a charge on the business but on the client...

Similarly, in 2006 (112) ECC 175 it was held that:

9. The provider of service is an Assessee under s. 65 of the Finance Act, 1994 and he has to collect service tax from the users of service as contemplated under ss. 12A and 12B of the central Excise Act. In this context, it is necessary to refer that Section 12A of the Central Excise Act contemplates that notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold. Section 12B of the Central Excise Act contemplates that every person who has paid the duty of excise on any goods under this Act, shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods. Thus, the provider of service only being an Assessee according to Section 65 of finance Act is to collect service-tax from the users of service as contemplated under all bills the details including service tax which is payable by the users.

It would also be necessary to notice here that Sections 12A of the Central Excise Act, which are also made applicable by virtue of Section 83 of the Service Tax Act, prescribe that the provider of goods (in this case, service) has the obligation to indicate the quantum of tax, on the goods or services, sold or offered, for sale. The said provisions are as follows:

12A. Price of goods to Indicate the Amount of Duty Paid Thereon.

Notwithstanding anything contained in this Act or any other law for the time being in force, every person who is liable to pay duty of excise on any goods shall, at the time of clearance of the goods, prominently indicate in all the documents relating to assessment, sales invoice, and other like documents, the amount of such duty which will form part of the price at which such goods are to be sold....

14. It is true, that the contracts entered into between the parties in this case, spoke of the Plaintiff lessor's liability to pay municipal, local and other taxes, in at least two places. The Court, however, is not unmindful of the circumstance that service tax is a species of levy which the parties clearly did not envision, while entering into their arrangement. It is not denied that leasing, and renting premises was included as a "service" and made eligible to service tax, by an amendment; the rate of tax to be collected, is not denied. If the overall objective of the levy - as explained by the Supreme Court, were to be taken into consideration, it is the service which is taxed, and the levy is an indirect one,

which necessarily means that the user has to bear it. The rationale why this logic has to be accepted is that the ultimate consumer has contact with the user; it is from them that the levy would eventually be realized, by including the amount of tax in the cost of the service (or goods).

15. It would be noteworthy to recollect Section 64A of the Sale of Goods Act, 1930, which visualizes and provides for situations where levies of tax are imposed after the contract (for sale of goods) is entered into. The provision prescribes that:

64-A. In contracts of sale, amount of increased or decreased taxes to be added or deducted. -

(1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in Sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulation as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such goods tax-paid where tax was chargeable at that time,

(a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition; and

(b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer may deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.

(2) The provisions of Sub-section (1) apply to the following taxes, namely;

(a) any duty of customs or excise on goods;

(b) any tax on the sale or purchase of goods.

The above provision also clearly says that unless a different intention appears from the terms of the contract, in case of the imposition or increase in the tax after the making of a contract, the party shall be entitled to be paid such tax or such increase. Although there is no explicit provision to that effect, enabling lessors such as the Plaintiff, to the service tax component, this Court is of the view that there is sufficient internal indication in the Act, through Section 83 and read with Section 12A and Section 12B suggesting that the levy is an indirect tax, which can be collected from the user (in this case, the lessee). This issue, is therefore, answered in the Plaintiff's favor, and against the Defendant.

Issue No. 2

16. The Plaintiff seeks a decree for declaration in both the suits, and consequential injunction, to the effect that the extent of service tax liability has to be borne by Satya Developers; money decrees are also sought; in Suit No. 1016/2008, a decree for Rs. 3,55, 270/-is claimed; in Suit No. 1018/2008, a decree for Rs. 24,720/-is claimed. The Plaintiff has placed on record documents showing that these amounts were paid towards service tax liability for the period 01.06.2007 to 31.03.2008, in respect of the two agreements (i.e. for lease and Maintenance) dated 09.10.2006 and 16.10.2006. The levy had, apparently been held to be Unconstitutional during the pendency of the suit. However, parties had stated that the judgment is now pending consideration in appeal, and the present judgment may determine the liability, which would be subject to the final outcome of the appeal.

17. In view of the findings on issue No.1, this Court is of the opinion that the Plaintiff is entitled the declaration and injunctions claimed against the Defendant, to the effect that the latter is liable to pay and refund the service tax liability. The Plaintiff is also entitled to the amounts claimed. The second issue is answered accordingly.

Issue No. 3:

18. In view of the findings on Issue Nos.1 and 2, the suits are entitled to succeed. They are, accordingly decreed in terms of the reliefs sought by the Plaintiffs. It is clarified that this is subject to the levy of service tax being ultimately upheld, finally. In the circumstances, the Plaintiff is entitled to costs, in both the suits.