

(2010) 01 MP CK 0038

In the Madhya Pradesh High Court

Case No : Writ Petition No's. 13410, 13412, 13413 and 13414 of 2009 (O)

Ravishankar Jaiswal

APPELLANT

Vs

Jabalpur Development Authority and Another

RESPONDENT

Date of Decision : 29-01-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 268A
Finance Act, 1994 — Section 19, 69

Citation : (2011) 22 STR 5 : (2011) 33 STT 53 : (2011) 36 VST 500

Hon'ble Judges : Ravi Shankar Jha, J;Ramesh Surajmal Garg, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Parties are heard on question of admission.
2. Though each of the Petitioners is claiming the same relief but for the sake of convenience we take the facts from Writ Petition No. 13410 of 2009(O).
3. The Petitioner, a Government contractor, entered into some agreements/ contracts with Respondent No. 1 for construction of residential complex. Undisputedly, there were no terms in the agreement/contract that the service tax would be paid either by the Petitioner or by Respondent No. 1. It appears that after the execution of the contract was over, Respondent No. 2 issued notices to the Petitioner to deposit the service tax. The Petitioner, being aggrieved by the said demand, placing reliance upon the resolution/ subject No. 12 taken up by the board of directors of Respondent No. 1 on October 23, 2009, has come to this Court with a submission that if Respondent No. 1 has resolved that in the matters where there was no condition for payment of the service tax then in all such cases where the contract was already executed, the service tax would be paid by Respondent No. 1 but in all cases for future the service tax shall be paid by the contractor.
4. Learned Counsel for the Petitioner submitted that Respondent No. 1 being the

State under Article 12 of the Constitution of India is obliged to be honest and, therefore, they were also required to put subject No. 12 into execution and as they are not putting the said subject No. 12 into, execution by writ of mandamus, Respondent No. 1 be directed to implement the decision dated October 23, 2009 (annexure-P/3) and be asked to make the payment of service tax due upon the Petitioner to the Petitioner or Respondent No. 2. The Petitioner has also submitted that a declaration be granted by this Court that the Petitioner is not liable to pay service tax pertaining to the demand covered under the decision dated October 23, 2009 (annexure-P/3). They have also prayed that a direction to Respondent No. 2 be issued to register the Petitioner u/s 69 of the Finance Act, 1994.

5. Respondent No. 2 even after notice has not filed any reply with a submission that they are entitled to recover the tax, irrespective of the fact that whoever pays it.

6. Shri Prashant Singh, learned Counsel for Respondent No. 1, however, submitted that under the Finance Act the liability to pay the service tax is always upon the service provider and as in this case the services are being provided by the Petitioner, he is to be held liable. In relation to subject No. 12 and its implementation, it is submitted by him that even after passing the said resolution, Respondent No. 1 cannot be held liable to pay tax. It is further submitted that a review of subject No. 12 is in offing because the said resolution runs contrary to the provisions of law. His submission is that the present is a matter relating to contract and the liability of the parties under the contract, therefore, this Court should not interfere in the matter.

7. We have heard the parties at length and have gone through the annexure-P/3.

8. Undisputedly, u/s 19 of the Finance Act, in matters of commercial contracts, service tax at the rate of 10.24 per cent. is leviable with effect from June 10, 2004 and June, 16, 2005, respectively, on commercial constructions and residential complex constructions. Undisputedly, the construction work was completed between 2005 and 2008, and therefore, Section 19 of the Finance Act shall apply with full force.

9. In so far as liability to pay the tax is concerned, it is upon the service provider. It cannot be said that the Petitioner is not liable to pay the tax as a service provider.

10. The learned Counsel for the Petitioner has placed his strong reliance upon the judgment of the apex court in the matter of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, . It was contended that once the State or an instrumentality of the State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is, the requirement of Article 14 of the Constitution of India. It was also contended that once it is held that Respondent No. 1 under the contract or the resolution is liable to pay the service tax then this Court should issue such a direction.

11. In so far as the question of contract is concerned, undisputedly there is no contract between the parties that Respondent No. 1 shall pay the amount of service tax either to the Petitioner or to the Department. It is to be rather observed that the Petitioner is trying to procure Something out of the contract to which he is not entitled. Once it is held that there is no agreement or contract between the parties that Respondent" Nb. 1 shall pay the amount of sales tax either to the Petitioner or to Respondent No: 2 then the Petitioner's submission that Respondent No. 1 is still liable to pay because of subject No. 12 would be something contrary to law.

12. Learned Counsel for the Petitioner has also placed strong reliance upon the judgment of the Supreme Court in the matter of All India Federation of Tax Practitioners and Others Vs. Union of India (UOI) and Others, Learned Counsel for the Petitioner has placed strong reliance upon paragraph Nos. 6, 7 and 22 of this judgment. The said paragraph read as under (pages 411 and 417 of 293 ITR) (pages 153 and 160 of 9 VST):

At this stage, we may refer to the concept of Value Added Tax" (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provisions of services. VAT is a consumption tax as it is borne by the consumer.

In the light of what is stated above, it is clear that service tax is a VAT which in turn is destination based consumption tax in the sense that it is on commercial activities and is not a charge on the business but on the consumer and it would, logically, be, leviable only on services provided within the country. Service tax is a value added tax.

As stated above, the source of the concept of service tax lies in economics. It is an economic concept. It has evolved on account of service industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy. With the enactment of the Finance Act, 1994, the Central Government derived its authority from the residuary entry 97 of the Union List for levying tax on services. The legal backup was further provided by the introduction of Article 268A in the Constitution vide the Constitution (Eighty-eighth Amendment) Act, 2003 which stated that taxes on services shall be charged by the Central Government and appropriated between the Union Government and the States. Simultaneously, a new entry 92C was also introduced in the Union List for the levy of service tax. As stated above, as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. It is this economic concept based on the legal principle of equivalence which now stands incorporated in the Constitution vide the Constitution (Eighty-eighth Amendment) Act, 2003. Further, it is important to note, that "service tax" is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. Moreover, VAT is a consumption tax as it is borne by the client.

13. After going through the said paragraphs and the context in which the judgment has been delivered by the Supreme Court, we are unable to hold that this judgment shall provide any support to the Petitioner.

14. The only question for consideration is whether the, Petitioner is entitled to recover the amount of service tax from Respondent No. 1 either under the common law or under resolution No. 12 relating to the service tax. Once we hold that under the law the liability would be of the Petitioner then whether under the contract entered into between the parties the Petitioner is entitled to reimbursement Will have to be decided by a court of competent jurisdiction which can receive evidence, hear the parties and decide the matter in accordance with the terms of the agreement. At this stage, we are of the opinion that this Court is not required to enter into the contractual dispute.

15. In so far as the implementation of subject No. 12/resolution No. 12 is concerned, assuming that the Respondent has taken such a resolution then too it would not be possible for a court of law to direct Respondent No. 1 to put into force such resolution which is likely to be reviewed. We refuse to interfere in the matter.

16. In so far as the Petitioner's prayer for issuing a direction to Respondent No. 2 to register the Petitioner u/s 69 of the Finance Act is concerned, we can only observe that the Petitioner would be free to make an application before the competent authority which shall decide the application in accordance with law.

17. The petition is dismissed.