(2019) 07 PAT CK 0264

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 14469 Of 2017

Vrindaban Construction APPELLANT

Vs

Commissioner Of Central Excise And Service Tax And Ors RESPONDENT

Date of Decision : 01-07-2019

Acts Referred:
Finance Act, 1994 — Section 68

Citation : (2019) 07 PAT CK 0264

Hon'ble Judges : Jyoti Saran, J;Partha Sarthy, J

Bench : Division Bench

Advocate : D.V. Pathy, S.D. Sanjay, Alok Kumar Agrawal, Kumar Priya Ranjan, Anand Kumar Ojha, Ranjan Kumar

Final Decision : Allowed

Judgement

Heard Mr. D. V. Pathy, learned counsel appearing for the petitioner. The Central Goods and Services Tax Department is represented by Mr. S. D. Sanjay, Additional Solicitor General, who appears with Mr. Alok Kumar Agrawal, learned counsel for the Department. The Power Distribution Company is represented through Mr. Anand Kumar Ojha, the Bank is represented through Mr. Kumar Priya Ranjan and the Accountant General is represented through Mr. Ranjan Kumar.

The issue which falls for consideration herein is whether, in absence of any adjudicatory proceeding initiated by the competent authority under the Service Tax Act for assessment, quantification and consequentially fixation of liability of service tax for the contract executed by the petitioner company at the request of the respondent Power Distribution Company under a valid agreement, on a mere audit objection raised by the Accountant General as regarding liability admissible under the Service Tax Law at the level of the Power Distribution Company, the Power Distribution Company had either locus or lawful authority to not only issue the impugned notice in furtherance of such audit objection and as per its understanding of the legal position, but to even proceed further for making recovery of the said amount which in total comes to Rs. 25,03,919/-, by enforcement of the Bank Guarantee maintained with them under the terms of contract entered into between the parties i.e. the petitioner and the Power Distribution Company.

A Co-ordinate Bench bearing note of the issue in dispute had vide order passed on 28.11.2017 revoked the Bank Guarantee with direction to the Power Distribution Company to credit the money so recovered, in the account of the petitioner but the money has not been restored to the petitioner rather it is taking refuge in the inter-party correspondence in between the Power Distribution Company and the Service Tax Department of the Government of India that the delay is sought to be justified.

Since the purported action of recovery of the money as complained of by the petitioner, is not in execution of any adjudicatory order passed by the statutory authority under the Finance Act, 1994 regulating the scheme of service tax at the relevant time, it is only to be seen whether, the recovery is supported by the explanation given by Mr. Ojha, that the recovery of service tax was in the light of the agreement entered into between the petitioner and the Power Distribution Company and that the contractual amount payable to the petitioner by the Power Distribution Company was inclusive of taxes which would include the service tax amount.

According to Mr. D. V. Pathy, learned counsel for the petitioner, in the nature of the contract entered into between parties, for executing a Centrally Sponsored Scheme, no service tax was payable and thus the respondent Power Distribution Company proceeding in recovering the tax on the audit objection had committed an illegality.

As we have observed at the outset, the issue of admissibility of Service Tax on the contract executed by the petitioner, is yet to be initiated by the Service Tax Department. We would leave the discussion and determination on the issue at the wisdom of the competent authority under the Finance Act, 1994 as amended from time to time who are at liberty to take recourse to such jurisdiction as may be permissible but since it is not the action of the Service Tax Department which is put to question before us we are not required to express any opinion on the issue of admissibility.

Having observed thus, we are in no confusion to hold that the notice put to question issued by the Accounts Officer, Bhojpur Electricity Circle, Ara dated 06.07.2017 in so far as recovery of Rs. 14,38,221/- together with the notice dated 10.07.2017 issued by the Accounts Officer, Electricity Supply Circle, Patna for recovery of Rs. 10,65,698/- impugned at Annexure-8 and 7 respectively, are wholly without jurisdiction because we are posted with no provision under the Finance Act, 1994 available at the disposal of a service recipient, to carry out such deduction from the bill of the service provider like the petitioner nor do we find any clause in the agreement entered into between the parties which empowers the Power Distribution Company who is the service recipient, to carry out such a deduction. In fact while Section 68 of the Finance Act, 1994 as amended from time to time casts a responsibility on a service provider for collection and payment of service tax, but the amendment to the said provision under Finance Act, 2016 which has been translated into a notification bearing no.25 of 2012 dated 20.06.2012 as well as notification no. 30 of 2012 also dated 20.06.2012 enclosed at Annexure-11 to the writ petition and Annexure-A to the counter affidavit of the respondent no. 1 respectively, which allows distribution of the service tax liability in between the service provider and service recipient but yet the law on collection remains the same and the collection of service tax is to be made by the service provider for its deposit with the Department.

Now, while it is the submission of Mr. Ojha that since the agreement entered into between the parties on the issue of payment for the execution of the contract, was inclusive of taxes and which would also include the element of service tax which was payable by the Power Distribution Company in terms of the Notification No. 30 of 2012 dated 20.06.2012, there is a rebuttal from Mr. Pathy to submit that in the nature of the contract executed, it neither invited payment of service tax and even if it was payable, then it was to be done by the Power Distribution Company which would be independent of the value of the contract executed and could not have been deducted from the bills of the petitioner. It is submitted by Mr. Pathy that under the scheme of Service Tax Act the petitioner at best is a collecting agent but the liability of payment of service tax is on the service recipient.

We find a fair admission by the Power Distribution Company in the supplementary counter affidavit at paragraph 9 in which they fairly admit that they were to share only 50% liability and which was inclusive in the bills raised by the petitioner. It is stated that this 50% amount has been realized from the petitioner and deposited with the Service Tax Department but the remaining 50% is to be paid by the petitioner from his own pocket.

The statement made in paragraph 9 and 10 runs under:

"9. That it is stated and clarified that under Reverse Charge Mechanism the liability of the South Bihar Power Distribution Company Ltd. was to the extent of 50% of the service tax and the remaining 50% is to be paid by the Agency. The Service recipient and the service provider had to share the service tax to the extent of 50% each. The deduction was only of the share of Power Company to the extent of 50% of total service.

10. That it is stated that the Petitioner Agency had submitted its bill without adding any component of service tax. This was indication that the amount claimed in the invoice included the service tax portion of both South Bihar Power Distribution Company Ltd. (Service Recipient) and the Agency (Service Provider). The South Bihar Power Distribution Company Ltd. after the objection of the Audit made deduction from the running bill/Bank Guarantee only to the extent of the 50% share of the South Bihar power Distribution Company Ltd. and not the

Agency. The Amount remitted to the Central Excise Department is only the portion of service tax which the South Bihar Power Distribution Company Ltd. had to pay under the Reverse Charge Mechanism (RCM).''

We are at a complete loss to understand the manner in which the Power Distribution Company has proceeded in the matter because there are several issues which have been canvassed by the parties and which remain unanswered in absence of any adjudication on the issue by the competent authority under the Service Tax Department i.e.:

(a) Whether in the nature of the contract executed by the petitioner at the request of the respondent Power Distribution Company, the same was exigible to service tax;

(b) If the answer to the issue posed at (a) is in affirmative then the extent of liability to be discharged by the parties to the contract;

(c) Whether the law governing issue of service tax empowers the service recipient to make deductions from the bill of the petitioner;

(d) Whether in absence of any demand raised by the competent authority in the Service Tax Department, the Power Distribution Company had any business to make recovery of the service tax from the petitioner by enforcing the Bank Guarantee; and

(e) Whether the Bank Guarantee in question could be enforced for realizing service tax in absence of contractual violation by the petitioner.

Having heard learned counsel for the parties we are in no confusion to hold that in absence of adjudication by the respondent Department on the issue, we are not required to express ourselves as to whether the contract executed by the petitioner was exigible to service tax and if the answer was 'Yes', then the extent of liability to be suffered by each of the party. We would leave such determination at the wisdom of the Department to come to a just conclusion on the issue obviously, in a duly constituted proceeding and on hearing the parties.

While observing thus, we also express our anguish on the laid back attitude of the Service Tax Department in not coming forward to resolve the issue of taxibility as well as the fixation of liability, even when this matter is pending for last 2 years.

We would now advert to the other issue and which is whether the act of the Power Distribution Company to mechanically proceed on the audit objection of the Accountant General to make realization of the service tax from the bills of the petitioner by enforcement of the Bank Guarantee is justified. It is not a case that while making payment of the bill of the petitioner, any amount was deducted by the Power Distribution Company rather having made payment for execution of the contract in question that when audit objection came they have chosen to enforce the Bank Guarantee to realize that amount of service tax which as per their own statement, was actually payable by them in terms of the notification bearing no. 30 of 2012 dated 20.06.2012. Since this is purely a contractual dispute and requires interpretation of the terms of the contract, we leave it open for the parties to resolve the issue of payability before the appropriate forum. However, while observing thus, we are of definite opinion that before such issue could be resolved, the respondent Power Distribution Company had no business to enforce the Bank Guarantee for realizing their part service tax specially where there is nothing in the agreement which allows them to make such recovery nor the service tax statute allows them to make such recovery. In our opinion, it is on a complete misappreciation of the legal position as well as misinterpretation of a contractual obligation that the authorities in the Power Distribution Company has mechanically followed the audit objection of the Accountant General to take coercive action which has no lawful sanction.

We note that by interim order dated 28.11.2017 the respondent Power Distribution Company was directed to restore status quo by restoring the Bank Guarantee which essential discharge is yet lacking and refuge is being taken by the company to the correspondence between the Power Distribution Company and Central Excise and Service Tax Department. We are certainly neither concerned with the correspondence going between the departments nor it can be assigned a reason for the disobedience.

Prima facie, thus, the respondent authorities in the Power Distribution Company are in contempt but since the matter was pending before this Court for final disposal, we allow them time to discharge the onus cast on them under the interim order dated 28.11.2017 for we have already held that the act of the authorities of Power Distribution Company to effect recovery, is per se illegal and has no lawful sanction.

We accordingly quash the notice dated 06.07.2017 issued by the respondent no. 4 Accounts Officer, Bhojpur Electrical Circle, Ara impugned at Annexure-8 together with the notice dated 10.07.2017 issued by the Accounts Officer, Electricity Supply Circle, Patna, impugned at Annexure-7 and consequentially direct the respondents no. 2 to 4 to remit the amount recovered within a period of eight weeks from today. The interim order passed on 28.11.2017 stands confirmed.

The writ petition is allowed with the directions above.

