A M/S. KERALA STATE ELECTRICITY BOARD

v.

COMMR. OF CENTRAL EXCISE, THIRUVANANTHAPURAM

DECEMBER 12, 2007

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[S.B. SINHA AND HARJIT SINGH BEDI, JJ.]

Service Tax Rules, 1994—r. 6 (1)—Service tax—On Consultancy Engineering Services—Payment of interest on the tax due—Whether C *on service recipient or service provider—Contract between service recipient and service provider (a foreign company) fixing the liability on the recipient—Service provider not having its office in India—Held: In view of the agreement and provisions of law, liability to pay the tax was on the service recipient—Consequently liability to pay statutory* D *interest on the due tax was also on the service recipient—Finance Act, 1994—s. 75.*

Appellant entered into an agreement with a foreign company for obtaining consultancy services from them. Under the agreement, the E **liability to pay the service tax on behalf of the foreign company was fixed on the appellant. Despite the agreement, appellant neglected to pay service tax on behalf of the foreign company. It raised a dispute that in view of the statutory obligations of service provider as contained in Finance Act, 1994, it was not liable to pay the same. High Court by its** F **impugned order held that in view of the provisions of the Act and the terms of the contract, appellant was liable and not the foreign company. Hence the present appeal.**

Dismissing the appeal, the Court

G **HELD: 1. In terms of the proviso appended to sub-rule (1) of Rule 6 of Service Tax Rules, it is provided that in case of a person who was a non-resident or was from outside India and who did not have any office in India, the service tax due on the service rendered by him should be**

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paid by such person or on his behalf by another person authorized by him who should submit to the Commissioner of Central Excise in whose jurisdiction the taxable services had been rendered, a return containing specific details with necessary enclosures. The High Court has arrived at a finding of fact that the foreign company did not have any office in India. The terms of the agreement entered into by and between the appellant and foreign company at all material time, show that the responsibility of meeting the service tax liability was on the service recipient and despite the amendment of Rule 6 (1) of the Rules w.e.f. 16.8.2002, agreement still held good as the service recipient being the appellant had taken up the responsibility of meeting the liability of the foreign company. [Paras 13 and 14] [426-G, H; 427-A-B]

2. If appellant itself was liable for payment of tax, it was also liable for payment of statutory interest thereupon, if the same had not been deposited within the time stipulated by the statute. Proviso appended to Rule 6 of the Rules which has been inserted w.e.f. 28.2.1999 cast a liability upon a person authorized by the foreign company to do it in that behalf. The details were to be furnished by a person who was authorized. Clause (2) of the proviso provides for submission of the demand draft within 30 days from the date of raising the bill. Appellant being the person authorized to make payment of the service tax, Section 75 of Finance Act, 1994 would come into operation in the event of its failure to do so. [Paras 16 and 17] [427-E; G-H]

Gujarat Ambuja Cements Ltd. and Anr. **v.** *Union of India and Anr.*, **[2005] 4 SCC 214, relied on.**

Commissioner of Central Excise, Meerut – II **v.** *L.H. Sugar Factories Ltd. and Ors.*, **[2005] 13 SCC 245, distinguished.**

Laghu Udyog Bharati and Anr. **v.** *Union of India and Ors.*, **[1999] 6 SCC 418, held inapplicable.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5832 of 2007.

From the Judgment and Order dated 25.07.2006 of the High Court

A of Kerala at Ernakulam in C.E. Appeal No. 26 of 2005.

T.L.V. Iyer, M.T. George for the Appellant.

R.G. Padia, Navin Prakash and B. Krishna Prasad for the Respondent.

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The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

1. A limited notice was issued to the effect as to whether the C appellant–Kerala State Electricity Board, the service recipient, within the meaning of provisions of Finance Act, 1994, levying service tax, is liable to pay any interest on the amount of tax due to the respondent.

2. The question involved in this appeal arises out of a judgment and order dated 25.7.2006 passed by a Division Bench of the High Court of D Kerala at Ernakulam whereby the appeal filed by the respondent herein from the judgment and order of the Customs Excise & Service Tax Appellate Tribunal, Circuit Bench at Cochin in Final Order No. 477 of 2005, Appeal No.ST/36/2004 was allowed.

E 3. The basic fact of the matter is not in dispute. Appellant herein entered into an agreement with M/s. SNC Lavlin Inc. Montreal, Canada (Foreign company) in relation to various projects for obtaining consultancy services from them.

The relevant clauses of the said agreement are as under :-

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"16.1 – SNC Lavaline and all its expatriate personnel shall be responsible for timely and prompt filing of all returns, estimates, accounts, information and details complete and accurate in all respects as may be required under the applicable laws/regulations G in India before the appropriate authorities in India. In case SNC Lavaline or any of its expatriate personnel do not comply with the above tax requirements, which results in any penalty, interest or additional liability, the same shall be borne by SNC Lavaline.

16.2 – SNC Lavaline shall provide KSE Board the relevant orders/

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notices of demand, invoices, appellate orders and other relevant information as the proof of the actual tax liability to be borne by KSE Board, sufficiently in advance to enable KSEB to take appropriate action in this connection.

16.3 – SNC Lavaline and its expatriate personnel, if required by KSEB, shall contest appeals against any assessment/demand of an appropriate authority before such authority at the request of and cost expenses of KSEB".

4. Despite the said contractual commitments, the appellant failed and/or neglected to pay service tax on behalf of foreign company. It, on the other hand, raised a dispute that having regard to the purported statutory obligations of the service provider as contained in the Act and the Rules framed, it was not liable to pay any service tax.

5. By reason of the impugned judgment, the Division Bench of the Kerala High Court construing the provisions of the Act in the light of the terms of the contract entered into by and between the appellant and the foreign company opined that the liability in that regard was on the appellant and not on the foreign company.

6. Mr. T.L.V. Iyer, learned senior counsel, in support of this appeal, *inter alia*, urged that the liability to pay interest and penalty being statutory one, the service provider was responsible therefor and not the service recipient.

7. Mr. R.G. Padia, learned senior counsel appearing on behalf of the respondent, on the other hand, would support the impugned judgment.

8. The period for which the service tax was due is August 1998 to September 2002. Under the agreement, indisputably, the appellant was responsible to make payment of the service tax on behalf of the foreign company.

9. Section 65 of the Finance Act, 1994 provides for levy of service tax on the services specified therein. Section 66 of the Act provides that the rate of tax shall be twelve per cent of the value of taxable services specified therein and collected in such manner as may be prescribed.

A Section 68 of the Act puts the burden of payment of tax on the service provider.

Sections 68(2), 69(1), 71 and relevant parts of Sections 73 and 75 of the Finance Act, 1994 which are material for the purposes of this case, read as under :

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"68.(2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service 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 C 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.

69. *Registration.*--(1) Every person liable to pay the service tax under this Chapter or the rules made thereunder shall, within such D time and in such manner and in such form as may be prescribed, make an application for registration to the Superintendent of Central Excise.

71. *Verification of tax assessed by the assessee, etc.*—

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(1) The Superintendent of Central Excise may, on the basis of information contained in the return filed by the assessee under section 70, verify the correctness of the tax assessed by the assessee on the services provided.

F (2) The Superintendent of Central Excise may require the assessee to produce any accounts, documents or other evidence as he may deem necessary for such verification as and when required.

(3) If on verification under sub-section (2), the Superintendent of G Central Excise is of the opinion that service tax on any service provided has escaped assessment or has been under-assessed, he may refer the matter to the Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise, who may pass such order of assessment as he thinks fit.

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73. *Recovery of Service Tax Not Levied or Paid or Short lived or Short-paid or Erroneously Refunded.*

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

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(1A) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Chapter or the rules made thereunder, with intent to evade payment of service tax, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, such person or agent may pay service tax in full or in part as may be accepted by him, and the interest payable thereon under section 75 and penalty equal to twenty-five per cent. of the service tax specified in the notice or the service tax so accepted by such person within thirty days of the receipt of the notice.;

75. *Interest on delayed payment of service tax*

Every person, liable to pay the tax in accordance with the provisions of section 68 or rules made thereunder, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate not below ten per cent and not exceeding thirty-six per cent. per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette, for the period by which such crediting of the tax or any part thereof is delayed."

A 10. The Central Government in exercise of its power conferred upon it by sub-section (1) of Section 69 of the Finance Act, 1994 made Service Tax Rules, 1994 for the purpose of assessment and collection of service tax. Service tax was imposed on Consultancy Engineering Services w.e.f. 07.07.1997 by a Notification No.23 of 1997 dated 02.07.1997. B Consulting Engineer as defined in Section 65(31) of the Finance Act, 1994 is a professionally qualified or any body corporate or any other firm but that directly or indirectly render any advice, consultancy or technical assistance in any manner to a client in one or more disciplines of engineering.

C 11. Clause (g) of sub-section 105 of Section 65 of the Finance Act, 1994, as amended, provides for the definition of taxable services rendered by a consulting engineer to mean 'any service provided to a client by consulting engineer in relation to advice, consultancy or technical service in any manner to client in one or more disciplines of engineering'.

D 12. Sub-rule (1) of Rule 6 of Service Tax Rules, as applicable at the relevant time, stipulated that in case of a person who was from outside India and did not have any office in India, the service tax due on the service rendered by him should be paid by such person or on his behalf by any E other person authorized by him should submit to the Commissioner of Central Excise in whose jurisdiction the taxable services have been rendered by him a return containing specific details with necessary enclosures. Such returns along with a demand draft have to be submitted within a period of 30 days from the date of raising the bill on the client F for the taxable services rendered.

13. We may furthermore notice that in terms of the proviso appended to sub-rule (1) of Rule 6 of Service Tax Rules, it is provided that in case of a person who was a non-resident or was from outside India and who did not have any office in India, the service tax due on the service rendered G by him should be paid by such person or on his behalf by another person authorized by him who should submit to the Commissioner of Central Excise in whose jurisdiction the taxable services had been rendered, a return containing specific details with necessary enclosures.

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14. The High Court has arrived at a finding of fact that the foreign company did not have any office in India. It is not in dispute that the terms of the agreement entered into by and between the appellant and foreign company at all material time, show that the responsibility of meeting the service tax liability was on the service recipient and despite the amendment of Rule 6 (1) w.e.f. 16.8.2002 agreement still held good as the service recipient being the appellant had taken up the responsibility of meeting the liability of the foreign company.

15. Clause 16.1 of the contract obligated the foreign company responsible only for filing of returns, estimates, accounts, information and details complete and accurate in all respects as may be required by any law or regulation. Only in the event the foreign company did not comply with the said requirements resulting in imposition of any penalty, interest or additional liability, the same shall be borne by it. Clause 16.1 did not cast any obligation upon the foreign company to make the payment of tax; the same is being the liability of the appellant.

16. Submissions of Mr. Iyer that the payment of interest was the statutory liability of the service provider must be considered in the aforementioned context. If Appellant itself was liable for payment of tax, it was also liable for payment of statutory interest thereupon, if the same had not been deposited within the time stipulated by the statute. The liability to pay tax was not on the foreign company. Only on default on the part of the appellant the interest was leviable. Appellant was clearly liable therefor. In other words, the liability being that of the appellant, it must accept the liability of payment of interest leviable thereupon in terms of statute occasioned by the breach on its part to deposit the amount of tax within the prescribed time.

17. Proviso appended to Rule 6 which has been inserted w.e.f. 28.2.1999 cast a liability upon a person authorized by the foreign company to do it in that behalf. The details were to be furnished by a person who was authorized. Clause (2) of the proviso provides for submission of the demand draft within 30 days from the date of raising the bill. Appellant being the person authorized to make payment of the service tax, Section 75 would come into operation in the event of its failure to do so.

A 18. We may further notice that it was the appellant who had provided space and accommodation to the personnel of M/s SNC Lavalin in their office premises and borne expenditure related thereto. The service provider did not have any independent office.

B 19. We may at this juncture notice the decisions cited by Mr. Iyer. In *Laghu Udyog Bharati and Anr.* v. *Union of India and Ors.*, [1999] 6 SCC 418 this Court held that keeping in view the statutory scheme as they existed in the amended rules providing for payment of tax on the service recipient was illegal. The said provision, however, were amended with retrospective effect. Challenge of the constitutional validity of the said C amendment, came up for consideration in *Gujarat Ambuja Cements Ltd. and Anr.* v. *Union of India and Anr.*, [2005] 4 SCC 214 wherein a Division Bench categorically held that the basis of reconsideration of the decisions in Laghu Udyog Bharati's case was taken away stating:

D "22. As we have said, Rules 2(1)(d)(xii) and (xvii) had been held to be illegal in *Laghu Udyog Bharati* only because the charging provisions of the Act provided otherwise. Now that the charging section itself has been amended so as to make the provisions of the Act and the Rules compatible, the criticism of the earlier law E upheld by this Court can no longer be availed of. There is thus no question of the Finance Act, 2000 overruling the decision of this Court in *Laghu Udyog Bharati* as the law itself has been changed. A legislature is competent to remove infirmities retrospectively and make any imposition of tax declared invalid, valid. This has been F the uniform approach of this Court. Such exercise in validation must of course also be legislatively competent and legally sustainable. Those issues are considered separately. On the first question, we hold that the law must be taken as having always been as is now brought about by the Finance Act, 2000. The statutory foundation G for the decision in *Laghu Udyog Bharati* has been replaced and the decision has thereby ceased to be relevant for the purposes of construing the present provisions [vide *Ujagar Prints (II)* v. *Union of India*]. Therefore subject to our decision on the question of the legislative competence of Parliament to enact the law, and assuming H the amendments in 2003 to be legal for the time being, we reject

the submission of the writ petitioners that by the amendments brought about by Sections 116 and 117 of the Finance Act, 2000, the decision in *Laghu Udyog Bharati* has been legislatively overruled.

23. The next question is whether the levy of service tax on carriage of goods by transport operators was legislatively competent. *Laghu Udyog Bharati* did not consider the question of legislative competency. Before we consider the scope of the impugned Act, it is necessary to determine the scope of the two legislative entries namely Entry 97 of List I and Entry 56 of List II. It has been recognised in *Godfrey Phillips* that there is a complete and careful demarcation of taxes in the Constitution and there is no overlapping as far as the fields of taxation are concerned. This mutual exclusivity which has been reflected in Article 246(1) means that taxing entries must be construed so as to maintain exclusivity. Although generally speaking, a liberal interpretation must be given to taxing entries, this would not bring within its purview a tax on subject-matter which a fair reading of the entry does not cover. If in substance, the statute is not referable to a field given to the State, the court will not by any principle of interpretation allow a statute not covered by it to intrude upon this field.

24. Undisputedly, Chapter V of the Finance Act, 1994 was enacted with reference to the residuary power defined in Entry 97 of List I. But as has been held in *International Tourist Corpn.* v. *State of Haryana* : (SCC pp. 325-26, para 6-A)

"Before exclusive legislative competence can be claimed for Parliament by resort to the residuary power, the legislative incompetence of the State Legislature must be clearly established. Entry 97 itself is specific in that a matter can be brought under that entry only if it is not enumerated in List II or List III and in the case of a tax if it is not mentioned in either of those lists."

25. In that case Section 3(3) of the Punjab Passengers and Goods Taxation Act, 1952 was challenged by transport operators. The

A Act provided for the levy of the tax on passengers and goods plying in the State of Haryana. According to the transport operators, the State could not levy tax on passengers and goods carried by vehicles plying entirely along the national highways. According to them this was solely within the power of the Centre under Entry B 23 read with Entry 97 of List I. The submission was held to be patently fallacious by this Court. It was held that Entry 56 of List II did not exclude national highways so that the passengers and goods carried on national highways would fall directly and squarely within Entry 56 of List II. It was said that the State played a role C in the maintenance of the national highway and there was sufficient nexus between the tax and passengers and goods carried on the national highway to justify the imposition.

26. The writ petitioners in this case have, relying on this judgment, argued that the Act falls squarely within Entry 56 of List II and D therefore could not be referred to Entry 97 of List I. We do not agree.

27. There is a distinction between the object of tax, the incidence of tax and the machinery for the collection of the tax. The distinction E is important but is apt to be confused. Legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery. There is a further distinction between the objects of taxation in our constitutional scheme. The object of tax may be an article or substance such as F a tax on land and buildings under Entry 49 of List II, or a tax on animals and boats under Entry 58 List II or on a taxable event such as manufacture of goods under Entry 84 of List I, import or export of goods under Entry 83 of List I, entry of goods under Entry 52 of List II or sale of goods under Entry 54 List II to name G a few. Theoretically, of course, as we have held in *Godfrey Phillips India Ltd.* v. *State of U.P.* ultimately even a tax on goods will be on the taxable event of ownership or possession. We need not go into this question except to emphasise that, broadly speaking the subject-matter of taxation under Entry 56 of List II are goods and H passengers. The phrase "carried by roads or natural waterways"

carves out the kind of goods or passengers which or who can be subjected to tax under the entry. The ambit and purport of the entry has been dealt with in *Rai Ramkrishna* v. *State of Bihar* where it was said in language which we cannot better: (SCR p. 908)

"Entry 56 of the Second List refers to taxes on goods and passengers carried by road or on inland waterways. It is clear that the State Legislatures are authorised to levy taxes on goods and passengers by this entry. It is not on all goods and passengers that taxes can be imposed under this entry; it is on goods and passengers carried by road or on inland waterways that taxes can be imposed. The expression 'carried by road or on inland waterways' is an adjectival clause qualifying goods and passengers, that is to say, it is goods and passengers of the said description that have to be taxed under this entry. Nevertheless, it is obvious that the goods as such cannot pay taxes, and so taxes levied on goods have to be recovered from some persons, and these persons must have an intimate or direct connection or nexus with the goods before they can be called upon to pay the taxes in respect of the carried goods. Similarly, passengers who are carried are taxed under the entry. But, usually, it would be inexpedient, if not impossible, to recover the tax directly from the passengers and so, it would be expedient and convenient to provide for the recovery of the said tax from the owners of the vehicles themselves."

(See also *Sainik Motors* v. *State of Rajasthan*)

34. The point at which the collection of the tax is to be made is a question of legislative convenience and part of the machinery for realisation and recovery of the tax. The manner of the collection has been described as "an accident of administration; it is not of the essence of the duty". It will not change and does not affect the essential nature of the tax. Subject to the legislative competence of the taxing authority a duty can be imposed at the stage which the authority finds to be convenient and the most effective, whatever stage it may be. The Central Government is therefore legally competent to evolve a suitable machinery for collection of the

A service tax subject to the maintenance of a rational connection between the tax and the person on whom it is imposed. By Sections 116 and 117 of the Finance Act, 2000, the tax is sought to be levied on the recipients of the services. They cannot claim that they are not connected with the service since the service is rendered to
B them.

35. In a similar fact situation under an Ordinance the Central Government was authorised to levy and collect a duty of excise on all coal and coke dispatched from collieries. Rules framed under
C the Ordinance provided for collection of the excise duty by the railway administration by means of a surcharge on freight recoverable either from the consignor or the consignee. The imposition of excise duty on the consignee was challenged on the ground that the consignee had nothing to do with the manufacture
D or production of the coal. Negativing this submission this Court in *R.C. Jall* v. *Union of India,* AIR at p. 1286 said :

> "The argument confuses the incidence of taxation with the machinery provided for the collection thereof."

E 36. In *Rai Ramkrishna* the tax under Entry 56 of List II was held to be competently levied on the bus operators or bus owners even though the object of levy was passengers (which they were not) because there was a direct connection between the object of the tax viz. goods and passengers and the owners of the transport
F carrying the goods or passengers. There is thus nothing inherently illegal or unconstitutional to provide for service tax to be paid by the availer or user.

37. The writ petitioners have relying upon the decision in *Dwarka Prasad* v. *Dwarka Das Saraf* contended that the amendment to
G Section 68 by the introduction of a proviso in 2003, was invalid. It is submitted that as the body of the section did not cover the subject-matter, there was no question of creating an exception in respect thereto by a proviso. According to the writ petitioners, the proviso cannot expand the body by creating a separate charge. It
H is submitted that by merely amending the definition of the word

"assessee" it could not be understood to mean that thereby all customers of the services in question were liable. A

38. The submission is misconceived for several reasons. Section 68 is a machinery section in that it provides for the incidence of taxation and is not the charging section which is Section 66. The amendments to Section 66 brought about in 2000 changed the point of collection of tax from the provider of the service to "such manner as may be prescribed". Section 68(1-A) as it stood in 1997 provided for the collection and recovery of service tax in respect of the services referred in sub-clauses (*g*) to (*r*) of Section 65(41), which included both the services with which we are concerned, from such person and in such manner as may be prescribed. The 1998 Finance Act maintained this. Now the Service Tax Rules, 1994 provided for the collection and recovery of tax from the users or payers for the services. This was the prescribed method. All that the proviso to Section 68(1-A) did was to prescribe the procedure for collection with reference to services of goods transport operators and clearing agents which services had already been expressly included under the Finance Act, 2000 in the definition of taxable service." B C D E

20. Reliance placed by Mr. Iyer on *Commissioner of Central Excise, Meerut – II* v. *L.H. Sugar Factories Ltd. and Ors.*, [2005] 13 SCC 245 is also not of much assistance as the decision was rendered in relation to the provisions of Income Tax Act holding that the said Act also must be construed having regard to the charging provision. F

21. We, therefore, are of the opinion that no case has been made out for interference with the impugned judgment.

22. The appeal is dismissed with costs. Counsel's fee assessed at Rs.25,000/- (Rupees twenty five thousand only). G

K.K.T. Appeal dismissed.