

Laghu Udyog Bharati and Another

Vs

Union of India and Others

Writ Petitions (C) No. 53 of 1998 with Nos. 186, 262, 263, 347, 382, 404, 452, 228 of 1998

(B. N. Kirpal, S. R. Babu JJ)

27.07.999

JUDGMENT

KIRPAL, J. -

1. The petitioners in these cases are the persons who are utilising the services of goods transport operators and of clearing and forwarding agents and are seeking to impugn the validity of Rules 2(xii) and 2(xvii) of the Service Tax Rules, as amended in 1997, on the ground that the said sub-rules are contrary to the provisions of Sections 65 and 66 of the Finance Act, 1994, whereby service tax was sought to be levied by Parliament.

2. A brief legislative history is that service tax was, for the first time, imposed by the Finance Act, 1994. This tax was proposed on three type of services which were rendered. By the Finance Act, 1997 the Legislature sought to cast the net much wider. It amended certain provisions in the Act and, thereafter rules which had originally been framed in 1994 were also amended.

3. By Chapter V of the Finance Act, as amended by the Finance Act, 1997, service tax is imposed in relation to the taxable services which are provided. Section 65 is the definition section. Some of the clauses which are relevant for our purpose read as under :

"65. (5) 'assessee' means a person responsible for collecting the service tax and includes his agent;

* * *

(17) 'goods transport operator' means any commercial concern engaged in the transportation of goods but does not include a courier agency;

* * *

(28) 'person responsible for collecting the service tax' means a person who is required to collect service tax under this Chapter or is required to pay any other sum of money under this Chapter and includes every person in respect of whom any proceedings under this Chapter have been taken;

* * *

(34) 'service tax' means tax chargeable under the provisions of this Chapter;

* * *

(41) 'taxable service' means any service provided, -

(a) to an investor, by a stock-broker in connection with the sale or purchase of securities listed on a recognised stock exchange;

(b) to a subscriber, by the telegraph authority in relation to a telephone connection;

(c) to a subscriber, by the telegraph authority in relation to a pager;

(d) to a policy-holder, by an insurer carrying on general insurance business in relation to general insurance business;

(e) to a client, by an advertising agency in relation to advertisements in any manner;

(f) to a customer, by a courier agency in relation to door-to-door transportation of time-sensitive documents, goods or articles;

(g) to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering;

(h) to a client, by a custom house agent in relation to the entry or departure of conveyances or the import or export of goods;

(i) to a shipping line, by a steamer agent in relation to a ship's husbandry or dispatch or any administrative work related thereto as well as the booking, advertising or canvassing of cargo, including container feeder services;

(j) to a client, by a clearing and forwarding agent in relation to clearing and forwarding operations in any manner;

(k) to a client, by manpower recruitment agency in relation to the recruitment of manpower in any manner;

(l) to a customer, by an air travel agent in relation to the booking of passage for travel by air;

(m) to a customer, by a goods transport operator in relation to carriage of goods by road in a goods carriage;

(n) to a client, by an outdoor caterer;

(o) to a client, by a pandal or shamiana contractor in relation to a pandal or shamiana in any manner and also includes the services, if any, rendered as a caterer;

(p) to a client, by a mandapkeeper in relation to the use of a mandap in any manner including the facilities provided to the client in relation to such use and also the services, if any, rendered as a caterer;

(q) to any person, by a tour operator in relation to a tour;

(r) to any person, by a rent-a-cab scheme operator in relation to the renting of a cab;"

4. Section 66 is the charging section which, after its amendment in 1997, reads as under :

"66. Charge of service tax. - (1) On and from the commencement of this Chapter, there shall be charged a tax (hereinafter referred to as the service tax), at the rate of five per cent of the value of the taxable services referred to in sub-clauses (a), (b) and (d) of clause (41) of Section 65 which are provided to any person by the person responsible for collecting the service tax.

(2) With effect from the date notified under Section 85 of the Finance (No. 2) Act, 1996 (33 of 1996), there shall be charged a service tax at the rate of five per cent of the value of the taxable services referred to in sub-clauses (c), (e) and (f) of clause (41) of Section 65 which are provided to any person by the person responsible for collecting the service tax.

(3) With effect from the date notified under Section 84 of the Finance Act, 1997, there shall be charged a service tax at the rate of five per cent of the value of the taxable services referred to in sub-clauses (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q) and (r) of clause (41) of Section 65 which are provided to any person by the person responsible for collecting the service tax."

5. Sections 67 and 68 which contain the method in which the taxable services are to be valued, and collection and recovery of service tax, are as under :

"67. Valuation of taxable services for charging service tax. - For the purposes of this Chapter, the value of taxable services, -

(a) in relation to service provided by a stockbroker, shall be the aggregate of the commission or brokerage charged by him on the sale or purchase of securities from the investors and includes the commission or brokerage paid by the stockbroker to any sub-broker;

(b) in relation to telephone connections or pagers provided to the subscribers, shall be the gross total amount (including adjustments made by the telegraph authority from any deposits made by the subscribers at the time of applications for telephone connections or pagers) received by the telegraph authority from the subscribers.

Explanation. - For the removal of doubts, it is hereby declared that the value of taxable service in this clause shall not include the initial deposits made by the subscribers at the time of applications for telephone connections or pagers;

(c) in relation to services of general insurance business provided to the policy-holders, shall be the total amount of the premium received by the insurer from the policy-holders;

(d) in relation to service provided by an advertising agency to a client, shall be the gross amount charged by such agency from the client for services in relation to advertisements;

- (e) in relation to service provided by a courier agency to a customer, shall be the gross amount charged by such agency from the customer for services in relation to door-to-door transportation of time-sensitive documents, goods and articles;
- (f) in relation to service provided by a consulting engineer to a client, shall be the gross amount charged by such engineer from the client for advice, consultancy or technical assistance in any manner in one or more disciplines of engineering;
- (g) in relation to service provided by a custom house agent to a client, shall be the gross amount charged by such agent from the client for services rendered in any manner in relation to the entry or departure of conveyances or in relation to the import or export of goods;
- (h) in relation to service provided by a steamer agent to a shipping line, shall be the gross amount charged by such agent from the shipping line for services in relation to a ship's husbandry or dispatch or any administrative work related thereto or in relation to the booking, advertising or canvassing of cargo, container feeder services, including the commission paid to such agent;
- (i) in relation to service provided by a clearing and forwarding agent to a client, shall be the gross amount charged by such agent from the client for services of clearing and forwarding operations in any manner;
- (j) in relation to service provided by a manpower recruitment agency to a client, shall be the gross amount charged by such agency from the client in relation to the recruitment of manpower in any manner;
- (k) in relation to service provided by an air travel agent to a customer, shall be the gross amount charged by such agent from the customer for services in relation to the booking of passage for travel by air excluding the airfare but including the commission, if any, received from the airline in relation to such booking;
- (l) in relation to service provided by goods transport operator to a customer, shall be the gross amount charged by such operator for services in relation to carrying goods by road in a goods carriage and includes the freight charges but does not include any insurance charges;
- (m) in relation to service provided by an outdoor caterer to a client, shall be the gross amount charged by such caterer from the client for services in relation to such catering including the charges for food, edible preparations, alcoholic or non-alcoholic beverages or crockery and similar articles or accoutrements provided to such client for any purpose or on any occasion;
- (n) in relation to service provided by a pandal or shamiana contractor to a client, shall be the gross amount charged by such contractor from the client for services in relation to the setting up of a pandal or shamiana including the supply of furniture, fixtures, lights and lighting fittings, floor coverings and similar articles used therein and also the charges for catering, if any;
- (o) in relation to service provided by a mandapkeeper to a client, shall be the gross

amount charged by such keeper from the client for the use of mandap including the facilities provided to the client in relation to such use and also the charges for catering, if any;

(p) in relation to service provided by a tour operator to a client, shall be the gross amount charged by such operator from the client for services in relation to a tour and includes the charges for any accommodation, food or any other facilities provided in relation to such tour;

(q) in relation to the service provided by a rent-a-cab scheme operator to any person, shall be the gross amount charged by such operator from such person for services in relation to the renting of a cab and includes such rental.

68. Collection and recovery of service tax. - (1) Every person providing taxable service to any person shall collect the service tax at the rate specified in Section 66.

(1-A) Notwithstanding anything contained in sub-section (1) of Section 68, in respect of the taxable service referred to in items (g) to (r) of clause (41) of Section 65, the service tax for such service shall be collected from 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 responsible for collecting the service tax in relation to such service.

(2) The service tax collected during any calendar month in accordance with the provisions of sub-section (1) or sub-section (1-A), as the case may be, shall be paid to the credit of the Central Government by the 15th of the month immediately following the said calendar month.

(3) Any person, responsible for collecting the service tax, who fails to collect the tax in accordance with the provisions of sub-section (1) or sub-section (1-A), as the case may be, shall, notwithstanding such failure, be liable to pay such tax to the credit of the Central Government within seventy-five days from the end of the month in which the service was rendered."

6. The procedure which has to be followed for collecting the service tax is prescribed by Section 70 which, inter alia, requires the person responsible for collecting the service tax to file the return in the prescribed form. Assessment is made under Section 71 and there are other sections in the said chapter which deal with levy and collection of this tax and also provide for imposition of penalty etc. in relation thereto.

7. A perusal of these provisions relating to the machinery of the levy and collection of service tax clearly shows that any action which is required to be taken is qua the assessee, namely, the person responsible for collecting the service tax which includes his agents.

8. Section 66, which is a charging section provides that the charge of tax at the rate of 5% is on the value of the taxable services which are provided to any person by the persons responsible for collecting the service tax. Insofar as the clearing agents and the transporters are concerned, Section 66 has to be read with Section 65(41)(d), (j) and (m), according to which the taxable service is what, in the case of clearing and forwarding agents, is rendered to his client and in the case of goods transporter is rendered to its customer. The "person responsible for collecting the service tax",

referred to in Section 66, has to be read with Section 65(28) which defines this expression to mean the person who is required to collect the service tax or to pay the same. It is clear from the reading of these provisions that according to the Finance Act the charge of tax is on the person who is responsible for collecting the service tax. It is he, who by virtue of the provisions of Section 65(5) is regarded as an assessee. He is the person who provides the service.

9. Section 68(1-A) is a special provision which has been inserted by the Finance Act, 1997. According to Section 68(1) "every person who was providing the taxable service is the one who is required to collect the service tax at the rate specified in Section 66". With respect to the taxable services referred in Items (g) to (r) of clause (41) of Section 65, Section 68(1-A) provides that the service tax for such service shall be collected from such person and in such manner as may be prescribed and to such person all the provisions shall apply as if he is the person responsible for collecting the service tax in relation to such service. As we read Section 68 it does not in any way seek to alter or change the charge of service tax levied under Section 66, which is on the person responsible for collecting the service tax. It also does not to our mind, in any way, amend any of the clauses of Section 65 which contain the definitions of different expressions. All that Section 68(1-A) enables to be done is that with regard to the assessee or the persons who are responsible for collecting the service tax, the individual or the officer concerned can be identified and it is that person who would be a person responsible for collecting the service tax. In other words this provision, namely, Section 68(1-A) cannot be so interpreted as to make a person an assessee even though he may not be responsible for collecting the service tax. The service tax is levied by reason of the services which are offered. The imposition is on the person rendering the service. Of course, it may be an indirect tax; it may be possible that the same is passed on to the customer but as far as the levy and assessment are concerned it is the person rendering the service who alone can be regarded as an assessee and not the customer. This is the only way in which the provisions can be read harmoniously.

10. By amending the definition of "person responsible for collecting of service tax" in the impugned rules with regard to services provided by the clearing and forwarding agents and the goods transport operator a person responsible is said to be the client or the customer of the clearing and forwarding agents and the goods transporter. In relation to the services provided by others and referred to in sub-rules (i) to (xi) and (xiii) to (xvi) of Rule 2(d), the definition of the person responsible is in consonance with the definition of that expression occurring in Section 65 of the Act. However, with regard to the services rendered by the clearing and forwarding agents and the goods transport operator the definitions contained in Rule 2(d)(xii) and (xvii), which seek to make the customers or the clients as the assessee, are clearly in conflict with Sections 65 and 66 of the Act.

11. Section 68(1-A) cannot, to our mind, regard a customer or a client of the clearing and forwarding agent or of the goods transport operator being treated as an assessee who will become liable to file a return and be subjected to the levy of service tax and if he does not file the return, would render himself to penalty and other proceedings. In this connection we may refer to Sections 70 and 71 which read as under :

"70. Person responsible for collecting service tax to furnish prescribed return. - (1) Every person responsible for collecting the service tax shall furnish or cause to be furnished to the Central Excise Officer in the prescribed form and verified in the prescribed manner, a quarterly return, within fifteen days of the end of the preceding quarter, showing -

- (a) the aggregate of payments received in respect of the value of taxable services;
- (b) the amount of service tax collected;
- (c) the amount of service tax paid to the credit of the Central Government; and
- (d) such other particulars as may be prescribed;

(2) In the case of any person who, in the opinion of the Central Excise Officer, is responsible for collecting service tax under this Chapter but who has not furnished a return under sub-section (1), the Central Excise Officer may, before the expiry of the quarter in which the return is to be furnished, issue a notice to such person and serve it upon him, requiring him to furnish within thirty days from the date of service of the notice the return in the prescribed form and verified in the prescribed manner setting forth the prescribed particulars.

(3) Any person responsible for collecting the service tax who has not furnished the return within the time allowed under sub-section (1) or sub-section (2) or having furnished a return under sub-section (1) or sub-section (2), discovers any omission or wrong statement therein, may furnish a return or a revised return, as the case may be, at any time before the assessment is made.

71. Assessment. - (1) For the purposes of making an assessment under this Chapter, the Central Excise Officer may serve on any person, who has furnished a return under Section 70 or upon whom a notice has been served under sub-section (2) of Section 70 (whether a return has been furnished or not), a notice requiring him on a date therein to be specified, to produce or cause to be produced such accounts or documents or other evidence as the Central Excise Officer may require for the purposes of this Chapter and may, from time to time, serve further notices requiring the production of such further accounts or documents or other evidence as he may require.

(2) The Central Excise Officer, after considering such accounts, documents or other evidence, if any, as he has obtained under sub-section (1) and after taking into account any relevant material which he has gathered, shall, by an order in writing, assess the value of taxable service and the amount of service tax payable on the basis of such assessment."

12. These sections clearly show that the return which has to be filed pertains to the payment which are received by the person rendering the service in respect of the value of the taxable services. Surely, this is a type of information which cannot, under any circumstances, be supplied by the customer. Moreover the operative part of sub-section (1) of Section 70 clearly stipulates that it is a person responsible for collecting the service tax who is to furnish the return. By rules which are framed, the person who is receiving the services cannot be made responsible for filing the return and paying the tax. Such a position is certainly not contemplated by the Act.

13. Section 94 gives the Central Government power to make the rules. These rules are to be made for carrying out the provisions of the chapter. The chapter relates to taxing the services which are provided. The tax is on the value of the services and it is only the person providing the service who can be regarded as an assessee. The rules, therefore, cannot be so framed which do not carry out the

purpose of the chapter and cannot be in conflict with the same.

14. We have no hesitation in holding that the provisions of Rule 2(d)(xii) and (xvii), insofar as they make persons other than the clearing and forwarding agents or the persons other than the goods transport operator as being responsible for collecting the service tax, are ultra vires the Act itself. The said sub-rules are accordingly quashed.

15. At this juncture it is pertinent to notice that by an amendment Notification No. 20/98-Central Excise (N.T.) dated 2-6-1998 issued under Section 93 of the Finance Act taxable services provided by goods transport operators, outdoor caterers, pandal and shamiana contractors were exempted from the levy of the said tax. This exemption was, however, prospective and it does not grant exemption in regard to clearing and forwarding agents. It is for this reason that the petitioners have continued to pursue with these petitions.

16. For the aforesaid reasons the transferred cases and the writ petitions, except WPs (C) Nos. 5 of 1999, 228 and 262 of 1998, are allowed and any tax which has been paid by customers or clients of the clearing and forwarding agents or of the goods transport operators shall be refunded within twelve weeks on their making a demand for refund.

17. All the intervention applications are dismissed except those which were allowed earlier.

WP (C) No. 262 of 1998

18. The writ petition is dismissed as withdrawn.

WPs (C) Nos. 228 and 5 of 1999

19. Learned counsel for the petitioners wishes to withdraw both these writ petitions with liberty to raise the contentions before the authorities under the Act if and when an appeal is filed by the members of the petitioner Association. The writ petitions are, accordingly, dismissed as withdrawn.

IA No. 6 of 1999 in WP (C) No. 53 of 1998

20. This is an application for intervention in WP (C) No. 53 of 1998. The said writ petition stands disposed of. As far as the applicant is concerned, he is seeking to raise questions and contentions which were raised in WP (C) No. 53 of 1998. The writ petition of the applicant is still pending in the High Court which the applicant is at liberty to proceed with. As far as this application for intervention is concerned, no further orders are called for.