

IN THE HIGH COURT OF JUDICATURE AT PATNA

M/s Indian PAC Consulting Pvt. Ltd.

vs.

Union of India and Others

Civil Writ Jurisdiction Case No. 18978 of 2021

24 July, 2023

(HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE PARTHA SARTHY)

Issue for Consideration

1. Whether the demand-cum-show cause notice dated 20.07.2021 under Section 73(1) Finance Act, 1994 was barred by limitation, without jurisdiction post-CGST Act, and vitiated by reliance on ultra vires Rule 5(1) of 2006 Rules?

Headnotes

Finance Act, 1994—Section 73(1), Section 73(6)—Service Tax (Determination of Value) Rules, 2006—Rule 5(1)—Central Goods and Services Tax Act, 2017—Sections 173, 174—Demand-cum-show cause notice—limitation—jurisdiction—validity of deductions claimed as “pure agent”—financial years 2015-16 to 2017-18—notice challenged as time-barred, without jurisdiction after Act, 2017 and based on ultra vires Rule 5(1).

Held: Under Section 73(1) proviso, limitation extends to five years in cases of fraud, mis-statement or suppression—earliest relevant date 25.07.2016 (filing of ST-3 return)—notice dated 20.07.2021 within five years—plea of limitation rejected—Rule 5(1) declared ultra vires does not vitiate notice—deductions claimed as “pure agent” must be proved by assessee with requisite documents—mere claim insufficient. Allegations of misrepresentation included mismatch between ST-3 returns and ITR/TDS data and failure to

discharge service tax under Reverse Charge Mechanism on legal expenses—jurisdiction not denuded by Act, 2017—Section 174 saves pending proceedings under Finance Act despite repeal by Section 173—writ petition against show cause notice not maintainable—remedy lies before adjudicating authority—petition dismissed.

(Paras 6, 7, 12, 15, 17, 18, 19, 20, 22, 23)

Case Law Cited

International Consultants and Technocrats Pvt. Ltd. vs. Union of India, **2012 SCC Online Delhi 5958**; Union of India vs. Intercontinental Consultants and Technocrats Pvt. Ltd., **(2018) 4 SCC 669—Referred to.**

List of Acts

Finance Act, 1994; Service Tax (Determination of Value) Rules, 2006; Central Goods and Services Tax Act, 2017.

List of Keywords

Demand-cum-show cause; jurisdiction; limitation; ultra vires.

Case Arising From

From challenge to demand-cum-show cause notice dated 20.07.2021 under Section 73(1) Finance Act, 1994 for FYs 2015-16 to 2017-18, assailed on grounds of limitation, jurisdiction post-CGST Act, and reliance on ultra vires Rule 5(1) of 2006 Rules.

Appearances for Parties

For the Petitioner: Mr. Arun Kumar, Adv.

For the Respondents: Mr. Prabhat Kumar Verma AAG.

Headnotes Prepared by Reporter: Abhas Chandra, Advocate.

Judgment/Order of the Hon'ble Patna High Court

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.18978 of 2021

M/s Indian PAC Consulting Pvt. Ltd. a company registered under the Companies Act having its Registered office at 4A, Khushi Vilaa, East Boring Canal Road, Patna-800001 through its authorized signatory and Director of the petitioner Company namely Pratik Jain male aged about 31 years son of Prakash Chand Jain, resident of Radhey Shyam Lane, Old Commissioners Compound, G.P.O. - Ranchi, Ranchi, Jharkhand-834001 (Financial Year 2015-2016 to 2017-18 (Upto June 2017)

... .. Petitioner/s

Versus

1. Union of India through the Revenue Secretary, Ministry of Finance, North Block, Government of India, New Delhi-110001.
2. The Commissioner, Central GST and CX Patna-1, office of the Principal Commissioner, CGST and CX, Patna-1, 1st Floor, Central Revenue Building, GST Bhawan, Birchand Patel Path, Patna-800001.
3. The Superintendent, CGST Kotwali Range, Patna, Ground Floor, Chandraopura Place, Opposite Dadiji Temple (Near Biscoman), Patna-800001.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. J. K. Mittal, Advocate
Mr. Alok Kumar Jha, Advocate

For the Respondent/s : Dr. Krishna Nandan Singh (ASG)
Mr. Anshuman Singh, Sr. CGC

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
ORAL JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 24-07-2023

1. The writ petition has been filed challenging the demand-cum-show cause notice dated 20.07.2021 issued by the 2nd respondent under the proviso to Section 73(1) of the Finance Act, 1994 for the financial years 2015-16, 2016-17 and up to June, 2017 in the year 2017-18.



2. The allegation raised is that the notice has been issued without jurisdiction, is *ex-facie* time barred, against the procedure established by law, without application of mind and on the basis of the provisions already declared *ultra vires* in **International Consultants and Technocrats Pvt. Ltd. vs. Union of India; 2012 SCC OnLine Del 5958** and upheld by the Hon'ble Supreme Court in **Union of India v. Intercontinental Consultants and Technocrats Pvt. Ltd.; (2018) 4 SCC 669**.

3. The petitioner has also challenged the issuance of Notification No.12/2017, Central Excise (NT) dated 09.06.2017 after the Central Goods and Services Tax Act, 2017 was passed by the Parliament after which there is no jurisdiction vested on the 2nd respondent to issue the impugned demand-cum-show cause notice.

4. We heard learned counsel for the petitioner and the learned Additional Solicitor General and perused the records.

5. We observe at the outset that the writ petition against the demand-cum-show cause notice would not be maintainable. However, we considered the same only on the plea raised by the learned counsel for the petitioner that the notice was barred by limitation and also was without



jurisdiction for the reason of the same having been issued on the basis of the provisions declared *ultra vires*.

6. We would first consider the contention raised of the notice being barred by limitation. The argument with respect to limitation is based on Section 73(1) of the Finance Act, 1994. Section 73(1), which came into effect from 28.05.2012, enables a notice to be served on the person chargeable with the service tax, which has not been levied or paid or which has been short-levied or short-paid within a period of 18 months from the relevant date. The relevant date discernible from Section 73(6) is the date on which the return is filed or the date prescribed under the Rules, if no return is filed. It has also to be noticed that when there is an allegation of short levy or short payment or erroneous refund on the grounds of (a) fraud, (b) collusion, (c) willful mis-statement, (d) suppression of facts; or (d) contravention of any of the provisions of this Chapter or the rules made thereunder with intent to evade payment of service tax, then the period of limitation is five years which period stands substituted for eighteen months as seen from the proviso to sub-section (1) of Section 73.

7. The assessment years, as we notice is of the years 2015-16 to 2017-18. The demand-cum-show cause notice itself,



at page-11 in the 28th paragraph, indicates that the noticee filed ST-3 return for the period April, 2015 to September, 2015 on 25.07.2016 while returns for the remaining relevant periods were filed thereafter. Hence, in terms of the provisions of Section 73(6) (i) (a) of the Act, the earliest relevant date in the present case is 25.07.2016 for the purpose of calculation of period of limitation under the proviso to Section 73. The notice issued on 20.07.2021, thus, comes within the five-year period, especially when the allegation is of willful mis-statement and suppression of facts.

8. Limitation, as in any case, is a mixed question of fact and law. Looking at the law, the relevant provision is Section 73 of the Finance Act, 1994. Section 73 provides for a notice on the person chargeable to the service tax, for reason of absence of levy or payment or short levy or short payment or an erroneous refund, within eighteen months from the relevant date. Insofar as an allegation of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions of the Chapter in which is included section 73 or Rules made thereunder, with intent to evade payment of service tax, the words 'eighteen months' shall stand substituted as 'five years'. The relevant date is available under sub-section (6) of



Section 73 which is extracted hereunder :-

- “(6) For the purposes of this section, “relevant date” means, —*
- (i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid —*
 - (a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;*
 - (b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;*
 - (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;*
 - (ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;*
 - (iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.”*

9. The relevant date as provided in clause (a) and (b) of the above extract indicates it to be the date on which the return is filed, if a periodical return is mandated in the rules made under this Chapter and where no periodical return is filed, the date on which such return is filed under the said Rules.

10. The Service Tax Rules, 1994 prescribe periodical returns by Rule 7 mandating a half yearly return in ST-3 or ST-3A along with Form TR-6, in triplicate for the months covered in the half-yearly return. The prescription is that the half yearly



return shall be filed by the 25th of the month following the particular half-year. Hence, in any financial year, the first half yearly return is to be filed on or before 25th of October and the next, on or before 25th of April. Rule 7C also prescribes the manner in which a delayed return can be filed, which is by payment of an amount; in the event of fifteen days delay being five hundred rupees; beyond fifteen days and within thirty days, one thousand rupees; and beyond thirty days one thousand rupees together with one hundred rupees for every day from the thirty first day till the date of furnishing the said return, subject to maximum of the amounts specified in Section 70 of the Act; which is twenty thousand rupees.

11. In this context, it has to be pertinently noticed that the relevant dates under clause (a) & (b) of sub-section (6) of Section 73 is insofar as return filed within time as provided under the Rules or in the absence of any return being filed. Clause (c) of Section 73 (6) (i) provides for the relevant date to be the date on which service tax is to be paid under this Chapter or the rules made thereunder; in any other case. (*emphasis supplied by us*)

12. Hence, when there is a delayed filing of the return under Rule 7C of the Service Tax Rules, 1994, it has to be



presumed that the amount specified in Rule 7C has been paid and so has the tax liability been satisfied. In that circumstance, the relevant date is the date on which the tax has been paid. As is evident from Annexure-17, for the period between April, 2015 and September, 2015 the assessee has filed an ST-3 Return on 25.07.2016 while returns for the remaining relevant period were filed thereafter. The limitation, hence, commences on 25.07.2021 and as on 25.07.2021, the date of demand-cum-show cause notice; the five year period, has not expired. The ground of limitation raised fails and we reject it.

13. Insofar as the allegation in the notice, the same has a bearing on the next contention raised of the notice being without jurisdiction for the provisions under which it has been issued having been set aside by the High Court of Delhi which decision has been confirmed by the Hon'ble Supreme Court. The provision which has been held *ultra vires* is Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006. Rule 5(1) is extracted hereinunder:-

“5. Inclusion in or exclusion from value of certain expenditure or costs.- (1) Where any expenditure or costs are incurred by the service provider in the course of providing taxable service, all such expenditure or costs shall be treated as consideration for the taxable service provided or to be provided and shall be included in the value for the purpose of charging service tax on the said



service.

Explanation.- For the removal of doubts, it is hereby clarified that for the value of the telecommunication service shall be the gross amount paid by the person to whom telecommunication service is actually provided.”

14. The specific rule provided for the expenditures/costs such as travel, hotel stay and transportation etc. incurred by the service provider in the course of providing taxable service also to be treated as consideration for taxable service and included in the taxable value for charging service tax. The rule was held *ultra vires* Section 67 which quantifies the charge of service, both before and after its amendment of 01.04.2006. The expenditure or costs, it was held, cannot be considered as amount charged by the service provider (for such service provided by him) especially when these are reimbursements made by the client of the service provider on which, in any event service tax has already been levied; thus even resulting in double taxation.

15. A reading of the demand-cum-show cause notice at Annexure-17 does not indicate any such reimbursed expenses having been included as taxable value; on the allegations of misrepresentation and suppression of facts. A brief look at the demand-cum-show cause notice indicates that the gross value of



services declared in ST-3 Returns of the petitioner did not match the gross value of services declared in ITR/TDS, returns, shared by the Income Tax Department. The value of the services declared in the ITR under Section 194C and 194J far exceeded that declared in STR-3.

16. Table-A in the notice is with respect to financial year 2015-16 which has been included in Table-B along with the financial years 2016-17 and 2017-18. The total value of TDS deducted under Section 194C and 194J was Rs.74,92,55,875/- while that declared in P & L Account was Rs.43,09,45,509/-. The value declared in STR was Rs.45,97,50,639/-; which was the gross receipt under the category of “Management and business consultant service” from which Rs.44,73,36,000/- was claimed as deduction from taxable value on account of ‘pure agent charges’. The tentative finding in the show cause notice is that going by the definition of ‘pure agent’ under *Explanation 1* of Rule 5 (2) of the Rules of 2006, the service as a pure agent starts with a contractual agreement between the service provider and the recipient of service and the service provider has to fulfill the conditions laid down under Rule 5(2) of the Rules of 2006 to exclude the reimbursable expenses from the taxable value. We also find reference to the inclusion of expenditure or costs



incurred as consideration under Section 67 of the Act. Hence, if there is a reimbursable expense, it is for the assessee to establish that before the officer, based on the decision of the Hon'ble Supreme Court.

17. We also see from Table-C, that the deduction of huge amounts under the category of pure agent was sought for in the return itself without submission of any requisite documents relating to pure agency. Hence, a mere claim of reimbursable expenses having been deducted would not suffice and though Rule 5(1) has been declared to be *ultra vires*; it has to be proved that the deductions made are, in fact, reimbursable expenses. In this context, we also nurture an apprehension as to how if they were reimbursable expenses; TDS was deducted from the said amount by the service provider.

18. It has also to be noticed that one other head on which willful misrepresentation and suppression is alleged, is the legal charges incurred by the noticee for the financial year 2015-16 to 2017-18; which came to Rs.1,19,48,243/- on which they were liable to pay service tax under Reverse Charge Mechanism in terms of Notification No.30/2012- Service Tax dated 20.06.2012.

19. We do not think that the notice is vitiated either on



limitation or on the ground of Rule 5(1) having been declared *ultra vires* by the Hon'ble Supreme Court. The notice is within the period of limitation and the deduction claimed has to be proved as reimbursable expenses, incurred as a pure-agent.

20. Now, we come to the contention raised of jurisdiction, of the officer who issued the notice, having been denuded, by reason of the Central Goods and Services Tax Act, 2017 (for brevity, the CGST Act) having come into force. The CGST ACT was enacted pursuant to the Constitution 101st Amendment Act 2016. Section 19 of the Act of 2016 provided the transition period by which, notwithstanding the amendment, any provision of law relating to tax on goods or services or both, in force in any State immediately before the commencement of Act of 2016, inconsistent with the provisions of the Constitution as amended, would continue to be in force until amended or repealed by a competent legislature or by the competent authority or until expiration of one year from such commencement, whichever is earlier. The 101st amendment was on 08.09.2016. The Central Services and Goods Act, 2017 came within one year, i.e. on 12.04.2017. The C.G.S.T. Act contained Section 173 by which Chapter V of the Finance Act stood omitted. However, Section 174 of the CGST Act dealing with



Repeal and Saving, by sub-section (2) saved the operation of the Amended and Repealed Acts and orders issued thereunder or anything duly done or suffered thereunder; without any right, privilege or law accrued under the Amended Act being affected by reason of the amendment in Section 173. Hence, despite the CGST Act having come into force on 01.08.2017, the proceedings under Chapter V of the Finance Act, 1994 stands validated.

21. There is another contention raised by the learned counsel for the petitioner that earlier a notice was issued which was replied, but no action was taken thereunder. It is seen from Annexure-9 that a pre-notice consultation was scheduled on 09.07.2021 at 12:00 P.M. through virtual mode. The e-mail produced at Annexure-9 is said to have enclosed a demand-cum-show cause notice which was almost on the same lines of the demand-cum-show cause notice; but without a date. The petitioner has replied to the same by Annexure-13, but however, raising many contentions on jurisdiction, limitation and so on, as also citing various decisions, but, however, not focusing on the factual allegations raised of mis-representation and suppression of the actual taxable value of services provided during the assessment years.



22. We find absolutely no reason to interfere with the show cause notices and reject the writ petition leaving remedy to the petitioner to take appropriate remedies, with just exceptions.

23. The writ petition stands dismissed without any observation on the merits of the allegations and leaving the parties to suffer their respective costs.

(K. Vinod Chandran, CJ)

(Partha Sarthy, J)

Sunil/-

AFR/NAFR	AFR
CAV DATE	
Uploading Date	10.08.2023
Transmission Date	

