

17th July, 2021

APPLICABILITY OF SERVICE TAX/GST TO LEGAL SERVICES- DEVI PRASAD CASE

Tannishtha Singh,
Legal Head, MCO Legals
LLB (Hons.), ILS Law College, Pune
Expertise: Litigation & Corporate/Commercial Arbitration

Shivangi Pathak
Research Partner
B.A., LLB (Hons), Calcutta University

The High Court of Orissa at Cuttack dealt with the issue of applicability of service tax/GST (Goods and Services Tax) to legal services in W.P.(C) No. 27727 of 2020, *Devi Prasad Tripathy vs. The Principal Commissioner, CGST and Central Excise, Bhubaneswar*.

1. Brief Facts

- 1.1 The petitioner (Devi Prasad) filed this writ petition challenging the notice issued by the concerned department calling upon the petitioner to pay his service tax.
- 1.2 The main allegation is that by virtue of the notifications issued by the central government, the petitioner, being a lawyer and rendering legal services, is not liable to pay the service tax.
- 1.3 The Principal Commissioner, GST and Central Excise, Bhubaneswar Commissionerate filed an affidavit in the matter and stated that the department had confirmed through the information received through the PAN Card which listed that the petitioner was an individual advocate and hence no service tax liability lied against him.
- 1.4 In view of the developments in the matter, the Department, however, insisted that although the service tax liability does not accrue against the petitioner, yet the burden to prove the same is upon the lawyer and the department may call upon them to prove the nature of services and profession.

2. Issues

The principal issues address by the Division Bench consisting of the Chief Justice Dr. S Muralidhar and Justice B.P. Routray are:

- 2.1 Firstly, whether a lawyer is exempted from the payment of service tax in as far as the legal services rendered by him are concerned.
- 2.2 Secondly, whether a lawyer may be called upon, through notice or otherwise, to prove that he is a practicing individual lawyer and hence is not liable to pay service tax against the legal services rendered.

3. The Rules

- 3.1 Section 9 of the Central Goods and Services Tax Act, 2017 (for short “**CGST Act**”) provides that all intra-state supplies of goods or services shall be subject to levy of taxes.
- 3.2 Section 9(3) authorizes the government to make special provision to specify certain categories of supplies of goods or services, through notification, the taxes on which shall be payable under the reverse charge mechanism.
- 3.3 In pursuance of the powers under Section 9(3), the Ministry of Finance (Department of Revenue) issued Notification No. 13/2017- Central Tax (Rate) dated 28th June, 2017(for short “**Notification**”).
- 3.4 Under the said Notification, certain categories of services were listed which were to be taxed on a reverse charge basis. The Notification specifies that service of representation before a court, tribunal or authority by an individual advocate (including a senior advocate or firm of advocates) to a business entity located in taxable territory shall be taxable on reverse charge mechanism.
- 3.5 Thus, by fact of the legal services lying under the purview of the categories mentioned in Notification, the general scheme for imposition of service tax was changed and lawyers were exempted from payment of service tax towards legal services and the receivers of such supplies were instead made liable.
- 3.6 To understand the law in relation to such Notification as it stands, certain concepts may be defined:-
 - 3.6.1 Section 2(zm) of the Notification No. 12/2017, issued on the same date defines a “legal service” as any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority.
 - 3.6.2 Section 2(1)(a) of the Advocates Act, 1961, defines an advocate as an advocate enrolled under the Bar Council of India in terms of the provisions of the said Act.

- 3.6.3 Section 2(98) of the CGST Act defines “reverse charge” as the liability to pay tax by the recipient of supply of goods or services or both instead of the supplier of such goods or services or both under sub-section (3) or sub-section (4) of section 9.
- 3.7 Under general circumstances, the service tax is payable by the supplier of the goods or services. However, in specified and exceptional cases, as may be notified, the recipient of the service becomes liable to pay the service tax. Thus, the burden shifts from the supplier to the receiver. This is known as Reverse Charge Mechanism (RCM) under the GST. It is essentially a mechanism that merely shifts the burden but does not provide an exemption altogether from liability to pay service tax.
- 3.8 The conjoint reading of the CGST Act and the two notifications issued there under provides a conclusion that service tax against services rendered by lawyers in the nature of advice, consultancy or representation shall be paid by the receiver of such services as if they are the entity/persons liable to pay the tax.
- 3.9 The Supreme Court has, on an earlier occasion, clarified that service tax against legal services shall be levied on the reverse charge basis.
- 3.10 The legal and constitutional validity of the Notification was challenged before the Delhi High Court in *JK Mittal vs. Union of India 2017 SCC OnLine Del 9087*, on the ground of lack of clarity on whether the legal services would include only representational services. The Court in this case had clarified that no adverse action may be taken against any lawyer or law firms for non-compliance since no clarification with regard to the services were provided in the notification. Thus, the interests of the lawyers were protected in lieu of such order.

4. Observations

- 4.1 In *Devi Prasad Tripathy*, the Orissa High Court observed that despite clear clarifications being received in regard to the fact that legal services shall be subject to reverse charge mechanism, the GST Commissionerate continued to issue notices to the lawyers.
- 4.2 The Court expressed its aversion towards the issue and noted that the lawyers must not be harassed in being called upon to pay service tax when they are not liable to and to further prove that they are practicing advocates.
- 4.3 The Court in unequivocal terms directed the GST Commissioner to instruct all officers in the GST Commissionerate in Odisha to refrain absolutely from issuing demand notices to lawyers for payment of service tax.
- 4.4 The Principal Commissioner in view of the instructions of the Court, filed a Compliance Affidavit on 22nd April, 2021 which affirmed that strict notices were circulated by both the Bhubaneswar and Rourkela Commissionerate directing all officers to act with utmost diligence in initiating verifications and ensuring that no unnecessary hardships are caused to parties.

5. Conclusion

- 5.1 This is a welcome decision, especially for lawyers, as it clarifies the Notification dated 28th June, 2017 and saves the harassment the lawyers had been facing in respect of having to prove their professional identity in spite of the protection granted under the legal regime relating to payment of service tax and the applicability of reverse charge mechanism.
- 5.2 The decision also addressed a vital clarification in an area that had not been dwelled upon earlier and hence this may act as an advanced form of safety for lawyers across the country.

A copy of the judgment is annexed hereto at **page 3 to 5**.

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.27727 of 2020

Devi Prasad Tripathy *Petitioner*
in person

-versus-

The Principal Commissioner *Opposite Parties*
CGST and Central Excise
Bhubaneswar and others

Mr. P. K. Parhi,
Assistant Solicitor General of India

CORAM:
THE CHIEF JUSTICE
JUSTICE B. P. ROU TRAY

ORDER
31.03.2021

Order No.

04. 1. The Counter affidavit sworn to by the Principal Commissioner, GST and Central Excise, Bhubaneswar Commissionerate on behalf of Opposite Party Nos.1 to 7 is produced in Court today, which is taken on record.
2. It is stated in the said affidavit that “after receiving information from Devi Prasad Tripathy having PAN as being an individual advocate practicing in the Hon’ble High Court of Odisha”, further proceedings against him are dropped.
3. What the Court is concerned about is the deponent insisting that the Petitioner should have submitted “documentary evidence to prove his claim that he is a practicing individual lawyer and does not come under the provision of GST or service tax.”
4. A reference is made to a Notification dated 20th June 2012, in terms of which service tax liability of an individual

advocate is Nil for legal services rendered to any of business entities located in the taxable territory. However, even for this, the Department appears to insist that the burden to prove it lies on the Petitioner. The counter affidavit filed acknowledges that a similar notice was issued to the Petitioner in 2017 to which he replied, pointing out how he was not liable to pay any service tax.

5. Mr. P. K. Parhi, learned Assistant Solicitor General of India, has fairly admitted that no notice in the first instance ought to have been issued to the Petitioner, who is a practising advocate. However, when specifically asked whether the clear instructions have been issued by the Department to all the officers involved in the enforcement of the GST regime that practising advocates should not be issued notices, he sought time for instructions.

6. During the hearing, certain other advocates present in the Court stated that they too have received such notices. It appears that despite knowing fully well that advocates are not liable to pay service tax or GST, notices continue to be issued to them by the GST Commissionerate.

7. The Court expresses its concern that practising advocates should not have to face harassment on account of the Department issuing notices calling upon them to pay service tax/GST when they are exempted from doing so, and in the process also having to prove they are practising advocates. The Commissioner GST is directed to issue clear instructions to all the officers in the GST Commissionerates in Odisha that no notice demanding payment of service tax/GST will be

issued to lawyers rendering legal services and falling in the negative list, as far as GST regime is concerned. Copies of such instructions be placed before the Court on the next date.

8. List on 22nd April, 2021.

(Dr. S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

M. Panda

