IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.9979 of 2024

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Bihar Rajya Pul Nirman Nigam Limited a company registered under Companies Act, 1956 having its office at 7, Sardar Patel Marg, Sachiwalaya, District Patna - 800015, Bihar through its Managing Director Shri. Sunil Kumar (Male, aged about 59 Years) son of Shri. Bhagwati Prasad, resident of 103, Shree Ganesh Apartment, Kavi Raman Path, Nageshwar Colony, Boring Canal Road P.S Buddha Colony District Patna, Bihar - 800023.

... ... Petitioner/s

Versus

1. Union of India through the Secretary, Finance, North Block, New Delhi-110001.
2. Commissioner, Central Tax, Audit Commissionerate, Patna having its office at Central Revenue Building, (Annexe), Bir Chand Patel Path, Patna.
3. Addl. Director General, Directorate General of GST Intelligence, Patna Zonal Unit having its office at Cybotech Tower, Near Pani Tanki, Patliputra Road, Patna - 13.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr.D.V.Pathy, Sr. Advocate Mr. Sadashiv Tiwari, Advocate Mr. Hiresh Karan, Advocate Ms. Shivani Dewalla, Advocate Mr. Prachi Pallavi, Advocate
For the Respondent/s	:	Dr.K. N. Singh, Sr. Advocate (ASGI) Mr. Anshuman Singh, Sr. SC, CGST and CX Mr. Shivaditya Dhari Sinha, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SOURENDRA PANDEY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 09 -05-2025

The present writ application has been filed for issuance of a writ in the nature of a writ of certiorari to quash and cancel the order dated 28.03.2024 (as contained in Annexure P2 series) passed by the respondent no. 2 under Section 73(1) of the Act charging tax, interest and penalty for the Period 2015-16, 2016-17 and 2017-18 (upto June 2017).

2. Petitioner has further prayed for granting any other relief(s) to which the petitioner is otherwise found entitled to.

Brief facts of the case of the petitioner

3. The petitioner is a government company. It is engaged in construction of bridges and roads in the State of Bihar. One of the main objects for which the petitioner company has been incorporated are inter-alia, to construct, execute, carryout, improve, work, develop, administer, manage, control or maintain in Bihar and elsewhere all types of bridges, roads and other structures, works and conveniences pertaining to bridge including approach roads to bridges and river training works. Further the main object of the company is to levy and collect toll on passengers and goods on the use of the bridges, bridge works, roads and approach roads to bridges which are vested in the corporation or are on lease, with the corporation for a period and at the rates to be decided by the Corporation.

4. The other objects of the petitioner-company is to invite tenders, enter into negotiations, contract for and in relation to the construction, execution, carrying out, equipment, improvement, management, administration or control of bridges, bridge roads, approach road to bridges, other roads and other works and conveniences and accessories and to undertake, execute, carry out, dispose of, or otherwise turn to account the

same.

5. The objects incidental or ancillary to the attainment of the main objects are provided under Article 1(III) of the Memorandum of Association (in short 'MOA'). For the brevity sake, we do not mention the ancillary objects as those are not relevant to the issues involved in the present writ application.

6. The petitioner was served with a show cause notice (SCN) under Section 73 of the Finance Act, 1994 (hereinafter referred to as the 'Act of 1994' or Finance Act, as the case may be), issued by the respondent no.3. The SCN was issued on the grounds inter-alia that from the information available, the petitioner was liable to pay service tax at the rate of 14-15% on the amount of 'centage', the penalty and other charges collected from the contractors amounting to Rs.262.70 crores and Rs.16.73 crores along with equivalent penalty and interest. The respondent no.3 invoked the proviso appended to sub-section(1) of Section 73 of the Finance Act which provided for extended period of limitation of five years in the cases falling under the proviso. A copy of the SCN is Annexure-P1 series to the writ application.

7. The petitioner filed a response by way of the written submission, a copy of the same has been made available to the Court by learned A.S.G. which is kept on the record. In the

written submissions the following pleas were taken:-

(i) That the noticee is a company wholly-owned by the State Government. It was formed pursuant to the resolution dated 05.11.1974 of the Public Works Department, Government of Bihar.

(ii) That the aims and objects for which the company was incorporated is inter-alia to construct, execute and carry out in Bihar and elsewhere all types of bridges, roads and other structures. It is the case of the petitioner that it has been specifically constituted by the State government of Bihar for construction of bridges and roads and also levy and collect toll.

(iii) That the modus operandi of its work relating to the construction of bridges and roads is as under:-

(a) The noticee prepares and submits a detailed project report to the State Government of Bihar.

(b) Thereafter, administrative approval is granted by the State Government of Bihar with estimated cost of the project and the duration by which the project is to be completed.

(c) Thereafter, tenders are invited from eligible bidders for undertaking the construction of bridges and roads.

(d) Upon Selection, an agreement is entered into with them to undertake construction of roads and bridges.

(e) Funds are granted by the State Government of Bihar for the construction of roads and bridges.

(f) After the completion of the contract, the bridges and roads, as the case may be, constructed is handed over to the State Government of Bihar.

(iv) That Section 66 B of the Finance Act, 1994 inter-alia provides that there shall be levied tax referred to as the "Service Tax" on value of all services other than those specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

(v) That Section 66D of the Act provides for a negative list of services. All other services other than the one mentioned in the negative list of services are liable to Service Tax unless exempt.

(vi) That Section 93 of the Finance Act empowers the Central Government to grant exemption from Service Tax. In exercise of that power under Section 93, the Central Government issued a notification No.25/2012-ST dated 20.06.2012 (known as Mega Exemption Notification). Clause 12, 12A and 13 of the Mega Exemption Notification has been relied upon to submit that the services provided to the government, a local authority or a

governmental authority by way of construction, erection, commissioning, installation, completion or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession is exempt from payment of service tax.

8. It is the case of the petitioner that it has been engaged in construction of the bridges and roads on the instruction of the government and that the same constitute services provided to the government only. The noticee has further contended that after completion of the bridges and roads, as the case may be, the same have been handed over to the Government of Bihar only. The services rendered by the noticee would, thus, qualify within the definition set out in clause 13 of the said notification.

9. It is stated that upon receipt of the funds from the State Government of Bihar, the noticee credits the same under the head “funds received from the Government of Bihar” in the liability side of the balance sheet. The noticee, similarly, by a corresponding debit entry accounts the same under the head of “work in progress” inclusive of the element of cost of material, labour etc. in the balance sheet. The same on completion are handed over to the Government. According to petitioner, such

activity would fall under clause 13 of the Mega Exemption Notification, therefore, it would be outside the purview of levy of Service Tax.

10. It is the further case of the petitioner that the petitioner is paid a ‘centage’ by the Government of Bihar on the activity of construction carried out by it, in terms of resolution dated 24.07.2006. Clause ‘7’ and ‘8’ of the resolution have been quoted in the written submissions. According to this resolution, earlier the petitioner was not being paid any centage on the estimated amount, therefore, the petitioner was making adjustment of 13.5% of the allocated amount for the present works towards it’s establishment cost as a result whereof the petitioner-company was suffering loss. In such circumstance, the cabinet took a decision that a centage charge of 12.5% would be paid to the petitioner-company on account of the actual amount spent on the construction work and on 100 crores or above turn over. It is the case of the petitioner that it was paid a sum equivalent to 13.5% of the cost of the work done, to meet the cost of establishment. The centage in respect of cost of work done above 100 crores would be 12.5%. It is to meet the cost of the establishment, therefore, it would not fall within the ambit of taxable service as defined in the Act. According to the petitioner,

reimbursement of expenditure is not service as provided in the Act. In this regard, the petitioner relies upon the definition of taxable service as provided in Section 65 (105) of the Act. According to him, by no stretch of imagination, it would fall within the meaning of word “service” as defined under Section 65B(44) of the Act.

11. As regards the issue of toll collection, it is the case of the petitioner that it has been authorized to receive toll charges on use of bridges and roads. Reliance is placed on the Rule 10(a) of the Bihar Toll Rules, 1979, wherein it is provided that toll shall be collected by the Corporation on behalf of the State Government and shall be deposited with the scheduled bank or banks by the Corporation under a separate and distinct head. The amount lying in the fund will be utilized to meet the expenditures such as :-

(a) direct expense connected with the toll collection.

(b) 15% of the gross amount of toll to meet overheads of the headquarters establishment. This ‘percentage’ may increased or decreased with the prior approval of the Government.

(c) cost of maintenance and repairs of bridges.

(d) cost of construction of new bridges approved by the State Government.

(e) for any other purpose without prior approval of the State Government.

12. It is the stand of the petitioner that 15% of the gross amount of toll collected is given to the petitioner to meet the overhead expenses of the headquarters establishment. It is for the expenditure which are incurred for the purposes of collection of toll, such as salary, wages etc. This collection is called “centage”. It is submitted that the amount of centage is only in the nature of reimbursement of expenditure. According to the petitioner, reimbursement of expenditure is not a service, therefore, the same would fall outside the purview of service tax.

13. Relying upon Circular No.178/10/2022-GST dated 03.08.2022 issued by the Ministry of Finance, Department of Revenue, Government of India, it is submitted that the Ministry of Finance, Government of India has inter-alia clarified that liquid damages, compensation and penalty arising out of breach of contract or other provisions of law being merely flow of money are not the consideration for the supply and are not taxable. It is submitted that the stipulation or term in the service tax Act “tolerate an act” are similarly used in the Goods and Services Tax Act, 2017 (in short ‘CGST/BGST Act’). It is submitted that with effect from 1st of July, 2017 the service tax Act was subsumed in

the CGST Act, therefore, the use of term ‘tolerate an act’ being common in both the legislation, the circular issued by the Central Government to hold that compensation and penalty are mere flow of money are not consideration for supply and are not taxable would equally apply to the provisions of the Finance Act, 1994.

14. It is submitted that as per sub-section (zzzza) of the Section 65(105) of the Act, works contracts in respect of roads, bridges, tunnels, etc. are excluded from the meaning of taxable service. As per Section 66D(a) of the Act which comprises negative list, services by Government or a local authority is exempt from Service Tax. Further, as per sub-section (26A) of Section 65B of the Act, the word “Government” has been interpreted. As per the said provision, the word “Government” means by purposive interpretation to include those entities whether created by statute or otherwise, the accounts of which are required to be kept in accordance with Article 150 of the Constitution of India.

15. It is submitted that in absence of any willful attempt to evade tax, the imputation of allegation of evasion of tax with the willful attempt does not seem to be justified. It is submitted that the noticee being a constituent of the government, cannot be expected to have been any attempt, much less

deliberately or willfully to evade tax.

The Order-in-Original dated 28.03.2024 (Annexure-P2)

16. It appears on going through Annexure-P2 that the respondent no.2 verified the available records of the noticee, perused the balance-sheet and ledger vis-a-vis relevant agreements in relation to construction of bridge and found that the noticee functioned as an executing agency in respect of work awarded to the Corporation (the petitioner) including the flagship project ‘MMSNY’ to get constructed the bridges by further awarding contracts to various contractors/vendors after bidding. In this regard, the findings of the respondent no.2 are as under:-

> “Further, it has been alleged that it appears that the noticee did not construct bridges themselves. Rather they functioned as an executing agency to get the bridges constructed by awarding contracts and also render technical assistance through their professionally qualified engineer and for which they were paid with remuneration in the name of 'Centage" of the total cost of the project. The contention of the noticee that their services are exempted as per the provisions of Mega Exemption Notification No. 25/2012-ST dated 20.06.2012 does not appear justified as the services being provided by them to Government of Bihar are not covered under Mega Exemption Notification No. 25/2012-ST dated 20.06.2012 as noticee has not provided any services of construction of

roads/bridges to Government of Bihar. Further, none of the books of accounts of the noticee reflect any amount under WCT or VAT payment on goods purchased by them. The contractors have executed the work by using their goods/material and thereafter transferred the same to M/s BRPNNL.

In the light of facts mentioned above i.e, essential nature of activities performed, objectives declared in sankalp (resolution) and official website, standard contract documents, memorandum of association, an statement of MD, BRPNNL (reply to Q.No. 14, 16, 22 & 23) and in light of definition of services; it appears that the activities mentioned above are 'service' as defined under Section 65B(44) and are taxable in terms of section 65B (51) of Finance Act, 1994 (as amended).”

17. As regards the toll collection, the respondent no.2 has found that the petitioner is engaging vendors/contractors for collection of toll. They themselves are not collecting the toll. As per Rule 10 of the Bihar Toll Rules, 1979, the petitioner is authorized to collect the tolls and they received 15% of the gross toll collection against the provisions of taxable service i.e. provision of day to day technical/administrative support regarding collection of toll charges. The amounts received by the petitioner has been held to be in the nature of taxable value towards rendering of services related to engaging vendors/contractors for toll collection and associated activities. The respondent no.2 has

taken a view that the petitioner had received 15% centage against the collection of toll but has not paid any service tax on the amount retained by the petitioner for rendering the said service. Petitioner has not paid service tax on centage received for getting the bridges/roads constructed by contractors.

18. Having said so, the respondent no.2 has recorded its view with regard to levy of service tax on toll collection by any agency which is being reproduced hereunder:-

> "In so far as levy of service tax on service by way of access to a road or bridge on payment of toll charges was concerned, same was covered under negative list [Sub section (h) of section 66D of Finance Act 1994] and accordingly not chargeable to service tax. However, toll collection by any agency on behalf of an agency authorized to levy toll was a taxable service, on which service tax was required to be paid by the agency collecting the toll. This has also been clarified by the Central Board of Excise and Customs (now Central Board of Indirect Taxes and Customs) vide **Circular No. 152/3/2012-ST dated 22.02.2012** and in the Guidance Note 4 of **"Taxation of Services: An Education Guide"** issued on 20th June 2012."

19. The respondent no.2 has relied upon Circular No.152/3/2012-ST dated 22.02.2022 issued by the Central Board of Indirect Taxes and Customs and the Guidance Note-4-Negative

List of Services.

20. Referring to the Circular and Guidance Note-4, the respondent no.2 has taken a view that the noticee/petitioner in this case provided required technical assistance to Government of Bihar etc. in relation to construction of roads/bridges and toll collection during the relevant period 2015-16, 2016-17 and 2017-18 (upto June, 2017) and received service charge/centage on which service tax is liable under the head “taxable services” as defined in clause (51) read with clause (44) of Section 65(B) of the Finance Act, 1994. Further, these services are neither excluded under the negative list, nor are these covered under any exemption. It has been held that the petitioner/noticee appears to have not paid applicable service tax on these receipts which appear to be towards rendering of taxable services.

21. The respondent no.2 has further observed in Annexure-P2 that “Regarding clarification sought for (a) figures shown under Revenue from operation (i) Toll collection (i.e., 15% of the gross toll collection retained for Hqrs expenses) (ii) Construction of Bridge (iii) Construction of Bridge/others. (b) Penalty deducted from Contractors (c) Other deduction from contractors (d) Miscellaneous receipt (e) Adjustment relating of earlier year (f) Service Tax (g) Remittances from BAPEPS

(discussed in para 3.4.8), the noticee did not furnish any satisfactory clarification on the above cited issues. Respondent no.2 has recorded that “It was again requested to Shri Surendra Yadav, Managing Director, M/s BRPNNL to clarify these issues in course of recording of his statement on 14/15.10.2020. It was also apprised to him that as per the provisions of Section 66E (e) of Finance Act, 1994, Penalty deducted from Contractors fall under the purview of service tax liability. To this, he submitted that penalty is the result of the breach of agreement by the contractors and its arrangement is to ensure timely completion of work. In most of the cases, penalty deducted is waived or refunded on extension of contract completion period. However, no supporting documents were furnished in respect of the same.”

22. From perusal of contracts of M/s BRPNNL, it is found that in respect of above, provision has been made under the head Liquidated Damages for delay' wherein it has been mentioned that in case of delay in completion of services, a liquidated damages not amounting to penalty equal to 0.05% of the contract price per day subject to a maximum 5% of the contract value will be imposed and shall be recovered from payments due/performance security. Section 66E (e) of the Finance Act, 2012 states that the following shall constitute

declared services, namely:-

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;"

Whether the petitioner/BRPNNL is a government or governmental authority.

23. The contention of the petitioner that they are government/governmental authority has been rejected by the respondent no.2 and upon scrutiny of balance-sheet, copy of agreement and documents submitted during investigation, the respondent no.2 has held as under:-

> "I have also to examine the noticee's claim that they being the Government/Local Authority/Governmental Authority are entitled for exemption under clause 12, 12A, 13 of Mega Exemption Notification, as amended.
>
> First and foremost, I have to check whether the noticee i.e. Bihar Rajya Pul Nirman Nigam Ltd. falls under the definition of Government, a local authority or a governmental authority; whether the noticee have provided any evidence that they fall under the definition of Government, a local authority or a governmental authority to get the exemption under above clause.
>
> The noticee could not produce any evidence proving that Bihar Rajya Pul Nirman Nigam, Ltd. is a Government, a local authority or a governmental authority. Now, I have gone through the definition of Government/Local

Authority/Governmental Authority; which are being re-produced below:

The definition of Government is prescribed in Section 658 (26A) of Finance Act, 1994 as under:

(26A) "***Government***" means the Departments of the Central Government, a State Government and its Departments and a Union territory and its Departments, but shall not include any entity, whether created by a statute or otherwise, the accounts of which are not required to be kept in accordance with article 150 of the Constitution or the rules made thereunder;

The definition of Local Authority is prescribed in Section 658(31) of Finance Act, 1994 as under:

(31) "***local authority***" means - (a) a Panchayat as referred to in clause (d) of article 243 of the Constitution; (b) a Municipality as referred to in clause (e) of article 243P of the Constitution; (c) a Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund; (d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006 (41 of 2006); (e) a regional council or a district council constituted under the Sixth Schedule to the Constitution; (f) a development board constituted under article 371 of the Constitution; or (g) a regional council constituted under article 371A of the Constitution;

The definition of Governmental authority are prescribed in Mega Exemption Notification No. 25/2012-Service Tax dated 20.06.2012 as under:

(s) "***governmental authority***" means a board, or an

authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution.

On the above issue, it is also relevant to point out here the guidelines issued by the Chairman, CBEC, Department of Revenue, Ministry of Finance, New Delhi in the "Taxation of Service: An Education Guide". It is pertinent to mention here that the objectives of this Guide are to mitigate the litigations. The relevant guidelines mentioned in the Guide are as under:

2.4.8 What is a local authority?

Local authority is defined in clause (31) of section 65B and means the following:-

A Panchayat as referred to in clause (d) of article 243 of the Constitution.

A Municipality as referred to in clause (e) of article 243P of the Constitution.

A Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund.

A Cantonment Board as defined in section 3 of the Cantonments Act, 2006.

A regional council or a district council constituted under the Sixth Schedule to the Constitution.

A development board constituted under article 371 of the Constitution, or.

A regional council constituted under article 371A

of the Constitution.

2.4.10 Would various entities like a statutory body, corporation or an authority constituted under an Act passed by the Parliament or any of the State Legislatures be 'Government' or "local authority"?

A statutory body, corporation or an authority created by the Parliament or a State Legislature is neither 'Government' nor a 'local authority' as would be evident from the meaning of these terms explained in point nos. 2.4.7 and 2.4.8 above respectively. Such statutory body, corporation or an authority are normally created by the Parliament or a State Legislature in exercise of the powers conferred under article 53(3)(b) and article 154(2)(b) of the Constitution respectively. It is a settled position of law Government (Agarwal Vs. Hindustan Steel AIR 1970 Supreme Court 1150) that the manpower of such statutory authorities or bodies do not become officers subordinate to the President under article 53(1) of the Constitution and similarly to the Governor under article 154(1). Such a statutory body, corporation or an authority as a juristic entity is separate from the state and cannot be regarded as Central or State Government and also do not fall in the definition of 'local authority'. Thus regulatory bodies and other autonomous entities which attain their entity under an act would not comprise either government or local authority.

7.3.1 Are various corporations formed under Central Acts or State Acts or various government companies registered under the Companies Act,

1956 or autonomous Institutions set up by special acts covered under the definition of 'governmental authority?

No. In terms of its definition in mega notification 25/2012-ST, following conditions should be satisfied for a board, body or an authority to be eligible for exemptions as a governmental authority:

set up by an act of the Parliament or a State Legislature;

established with 90% or more participation by way of equity or control by Government; and

carries out any of the functions entrusted to a municipality under article 243W of the Constitution.

The noticee produced a Sankalp letter dated 05.11.1974 Issued by the order of Governor of Bihar vide which it has been decided to establish Bihar Rajya Pul Nirman Nigam Ltd. as a Public Limited Company. Furthermore, MEMORANDUM AND ARTICLES OF ASSOCIATION produced by the noticee states that it has been incorporated under the Companies Act, 1986. Further, in Books of Accounts, it has been mentioned that 100% share is owned by State Government.

In the Profit & Loss Accounts of the noticee, they have shown Revenue from Operation from Centage from Toll collection; Centage from Construction of roads & bridges. Now I have to examine here whether the main work of Bihar Rajya Pul Nirman Nigam Limited from which they

receive Centage; "To Levy and collect toll on passengers and goods on the use of bridges, bridge works, roads and approach roads to bridges which are vested in the corporation or are on lease, with the Corporation for a period and at the rates to be decided by the Corporation" & "to act as technical advisers, consultants, market surveyors, procurement agency and to render technical know-how, management, financial and legal consultancy and other services to any firm, company, body corporate, ...etc." fall the under article 243W or not.

Article 243W of the Constitution is as under:

'Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow-

(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to-

(i) the preparation of plans for economic development and social justice,

(ii) the performance of functions and the implementation of schemes as may be entrusted to them Including those in relation to the matters listed in the Twelfth Schedule; (b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth

Schedule."

Matters listed in twelfth schedule are:

1. Urban planning including town planning.

2. Regulation of land-use and construction of buildings.

3. Planning for economic and social development.

4. Roads and bridges.

5. Water supply for domestic, industrial and commercial purposes.

6. Public health, sanitation conservancy and solid waste management.

7. Fire services.

8. Urban forestry, protection of the environment and promotion of ecological aspects.

9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.

10. Slum improvement and upgradation.

11. Urban poverty alleviation.

12. Provision of urban amenities and facilities such as parks, gardens, playgrounds.

13. Promotion of cultural, educational and aesthetic aspects.

14. Burials and burial grounds; cremations, cremation grounds; and electric crematoriums.

15. Cattle pounds; prevention of cruelty to animals.

16. Vital statistics including registration of births and deaths.

17. Public amenities including street lighting, parking lots, bus stops and public conveniences.

18. Regulation of slaughter houses and tanneries.

On going through the Article 243W, I find that the main work of the noticee from which are sole source of their income; which are reflected in their Profit & Loss Accounts do not fall under Article 243W.

Hence, in view of the above, I find that Bihar Rajya Pul Nirman Nigam Ltd. do not fulfil the criteria laid down in the definition of Governmental Authority and hence I find that the noticee do not fall under the definition of Government/Local Authority/Governmental Authority for claiming exemption from service tax.

Liability of service tax on the services provided in lieu of fee

24. The respondent no.2 further proceeded to consider the issue of liability of service tax on the services provided in lieu of fee charged by government or a local authority. In this regard, the views of the respondent no.2 are as under:-

"8. Services provided by way of construction, erection, commissioning, Installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public; are exempted in clause 13(a) of Mega Exemption Notification, as amended, but the one and only source of income is Centage and penalty deducted from customers which do not come under the purview of Mega Exemption

Notification.

9. Service by way of access to a road or a bridge on payment of toll charges are exempted in terms of Section 660 (h) of Finance Act, 1994 (Negative list of services). Further, Section 66 F (1) of Finance Act, 1994 prescribes that "Unless otherwise specified, reference to a service (herein referred to as main service) shall not include reference to a service which is used for providing main service.

10. On the above issue, it is relevant to point out here the clarifications issued by the Ministry vide Circular No. 152/3/2012-ST dated 22.02.2012; which are being re-produced below:

"2. Service tax is not leviable on toll paid by the users of roads, including those roads constructed by a Special Purpose Vehicle (SPV) created under an agreement between National Highway Authority of India (NHN) or a State Authority and the concessionaire (Public Private Partnership Model, Build Own/Operate-Transfer arrangement). "Tolls' is a matter enumerated (serial number 59) in List-II (State List), in the Seventh Schedule of the Constitution of India and the same is not covered by any of the taxable services ar present. Tolls collected under the PPP model by the SPV is collection on own account and not on behalf of the person who has made the land available for construction of the road.

3. However, if the SPV engages an independent entity to collect toll from users on its behalf and a part of toll collection is retained by that

Independent entity as commission or is compensated In any other manner. service tax liability arises on such commission or charges, under the Business Auxiliary Service [section 65(105) (zzb) read with section 65(19) of the Finance Act, 1994]."

11. On the above Issue, I have gone through the relevant guidelines mentioned in Education Guide Issued by the Ministry; which are being re-produced below:

"4.8 Access to a road or a bridge on payment of toll charges.

4.8.1 Is access to national highways or state highways also covered in this entry?

Yes. National highways or state highways are also roads and hence covered in this entry.

4.8.2 Are collection charges or service charges paid to any toll collecting agency also covered?

No. The negative list entry only covers access to a road or a bridge on payment of toll charges. Services of toll collection on behalf of an agency authorized to levy toll are in the nature of services used for providing the negative list services. As per the principle laid down in sub section (1) of section 66F of the Act the reference to a service by nature or description in the Act will not include reference to a service used for providing such service."

9.1.1 What is the scope of the clause (1) of section 66F: 'Unless otherwise specified, reference to a service (hereinafter referred to as the "main service") shall not include reference to

a service which is used for providing the main service"

This rule can be best understood with a few illustrations which are given below

Provision of access to any road or bridge on payment of toll' is a specified entry in the negative list in section 66D of the Act. Any service provided in relation to collection of tolls or for security of a toll road would be In the nature of service used for providing such specified service and will not be entitled to the benefit of the negative list entry.

Transportation of goods on an inland waterway is a specified entry in the negative list in section 66D of the Act. Services provided by an agent to book such transportation of goods on Inland waterways or to facilitate such transportation would not be entitled to the negative list entry."

12. In addition to above, it is also relevant to point out here the clarifications issued by the Ministry vide Circular No. 192/02/2016-Service Tax dated 13.04.2016 on the issue of liability of service tax on the services provided in lieu of fee charged by Government or a local authority as under:

SI No	Issue	Clarification
5	Services provided in lieu of fee charged by Government or a local authority	It is clarified Government consideration that any or a local constitutes a activity undertaken by authority against a service and the amount charged by charged for performing such activities is liable to Government Service Tax. It is Immaterial whether such activities or a authority local are undertaken as a statutory or mandatory requirement under the law and irrespective of

		whether the amount charged for such service is laid down in a statute or not. As long as the payment is made (or fee charged) for getting a service in return (i.e., as a quid pro quo for the service received), It has to be regarded as a consideration for that service and taxable Irrespective of by what name such payment is called. It is also clarified that Service Tax is leviable on any payment, In lieu of any permission or license granted by the Government or a local authority.

On going through the provisions of above Circular, it is clear that the **Government/Local Authority too** is liable to pay service tax, if they receive fee, consideration for performing such activities. It is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law irrespective of whether the amount charged for such service is laid down in a statute or not.

13. In view of above, I find that the Centage, which is received for service charge/technical assistance or for any other purpose by the noticee does not fall under the above clause of mega exemption notification, as amended and also under the negative list under Section 66D as claimed by the noticee. Consequently, I find that centage charges received by the noticee are not exempted under above clause of Mega Exemption Notification and negative list.

14. In view of facts narrated supra, I find that the noticee is liable to pay service tax of Rs. 38,79,23,782/- on consideration received in the form of Centage for the period April, 2015 to June, 2017."

Payability of tax on the penalty

25. Regarding payability of tax on the penalty deducted from the contractors for the period from April, 2015 to June, 2017, the respondent no.2 has recorded his views as under:-

"**15.** Now I proceed to decide whether the

Penalty deducted from the Contracts for the period from April, 2015 to June, 2017 is taxable or not.

16. It has been alleged in the instant Show Cause Notice that from perusal of contracts of M/s BRPNNL, it is found that in respect of above, provision has been made under the head Liquidated Damages for delay' wherein it has been mentioned that in case of delay in completion of services, a liquidated damages not amounting to penalty equal to 0.05% of the contract price per day subject to a maximum 5% of the contract value will be imposed and shall be recovered from payments due/performance security. Section 66E (e) of the Finance Act, 2012 states that the following shall constitute declared services, namely:-

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

Services mentioned above are declared services and attracts service tax @ applicable rate during the period.

The noticee in reply dated 04.10.2023 has submitted that "it has deducted penalty from the payments made to the contractor on default of the terms of the contract. The noticee further states that in large number of cases upon the contractor reaching a milestone in terms of the contract the penalty deducted is eventually returned. Further, the noticee stated that the Ministry of Finance, Department of Revenue, Government of India has issued a Circular No. 178/10/2022-GST dated 03.08.2022 has inter-alia clarified that liquid damages, compensation and penalty arising out of breach of contract or other provisions of law being merely for of money are not the consideration or the supply and are not taxable. They have referred Circular No. 178/10/2022-GST dated 03.08.2022."

I have gone through the above Circular wherein it has been clarified that:

"7.1.3 It is argued that performance is the essence of a contract. Liquidated damages cannot be said to be a consideration received for tolerating the breach or non-performance of contract. They are rather payments for not tolerating the breach of contract. Payment of liquidated damages is stipulated in a contract to ensure performance and to deter non-performance, unsatisfactory performance or delayed performance. Liquidated damages are a measure of loss and damage that the parties agree would arise due to breach of contract. They do not act as a remedy for the breach of contract. They do not restitute the aggrieved person. It is further argued that a contract is entered Into for execution and not for its breach. The liquidated damages or penalty are not the desired outcome of the contract. By accepting the liquidated damages, the party aggrieved by breach of contract cannot be said to have permitted or tolerated the deviation or non-fulfilment of the promise by the other party.

7.1.4 In this background a reasonable view that can be taken with regard to taxability of liquidated damages Is that where the amount paid as 'liquidated damages' is an amount paid only to compensate for injury, loss or damage suffered by the aggrieved party due to breach of the contract and there is no agreement, express or implied, by the aggrieved party receiving the liquidated damages, to refrain from or tolerate an act or to do anything for the party paying the liquidated damages, in such cases liquidated damages are mere a flow of money from the party who causes breach of the contract to the party who suffers loss or damage due to such breach. Such payments do not constitute consideration for a supply and are not taxable."

Further, I have also gone through the Final Order No. 50898/2023 dated 06.07.2023 of CESTAT, Principal Bench, New Delhi which is on the similar issue in which the Hon'ble CESTAT held that

> "13. In view of the aforesaid decisions of the Tribunal and the Circular, it is not possible to sustain the view taken by the Commissioner that since the task was not completed within the time schedule, the appellant agreed to tolerate the same for a consideration in the form of liquidated damages, which would be subjected to service tax under section 66E(e) of the Finance Act.
> 14. As service tax could not be levied, the imposition of interest and penalty also cannot be sustained."
> In the above order, the Hon'ble CESTAT has referred another Circular No. 214/1/2023-Service Tax dated 28.02.2023 issued by the Board and also different Orders of CESTAT on the similar issue.
> I have gone through the above Circulars and above orders of Hon'ble CESTAT and on the basis of guidelines issued by the Board and orders of Hon'ble CESTAT, I find that penalty deducted from contractors are not taxable under Service Tax. Consequently, I find that the demand of service tax of Rs. 2,48,40,450/- on penalty deducted from the contractors for the period from April, 2015 to June, 2017 is not sustainable in eye of the Law."

<u>On the plea of invocation of extended period of limitation under proviso to Section 73(1) of the Act of 1994.</u>

26. The respondent no.2 has given reasons for invoking the extended period of limitation which we will consider in later part of the judgment.

27. With regard to the interest liability under Section 75 and the proposed application of the penal provisions under Section 78 of the Act of 1994, the respondent no.2 has held that the demand for interest at appropriate rate under Section 75 of the

Act needs to be confirmed and recovered from the noticee.

Submissions on behalf of the petitioner

28. At the outset, learned senior counsel for the petitioner submits that this writ application involves certain questions of law, therefore, instead of availing remedy of statutory appeal, the petitioner has moved this Court in its writ jurisdiction. It is his submission that the impugned order (Annexure-P2) suffers from jurisdictional error, hence this Court may examine the issues raised in this case.

29. While assailing the impugned order (Annexure-P2), Mr. D.V. Pathy, learned senior counsel representing the petitioner has once again reiterated the submissions made before the respondent no.2. Learned senior counsel relies upon the judgment of this Court in the case of **Shapoorji Paloonji and Company Pvt. Ltd. VS. Commissioner, Customs Central Excise and service Tax** reported in **(2016) 67 taxmann.com 2018 (Patna)** to submit that an authority established by government having 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution of India would be eligible for exemption. It is submitted that in the case of **Shapoorji Paloonji** (supra) construction activity undertaken by the

petitioner in respect of the academic block of the Institute (respondent no.4 in the said case) was taken as exempted from payment of service tax in terms of notification dated 20th June, 2012 as amended.

30. It is submitted that the judgment of this Court in **Shapoorji Paloonji** (supra) was subject matter of challenge before the Hon'ble Supreme Court in Civil Appeal. The judgment of the Hon'ble Patna High Court has been upheld by the Hon'ble Supreme Court. It has been held that a perusal of the exemption notification would reveal that the exemption therein was only extended to those entities, viz. board or authority or body, which fulfilled the three requisite conditions, i.e. (a) having been established with 90% or more participation by way of equity or control by government, (b) set up by an Act of the parliament or a State Legislature, and (c) carrying out any function entrusted to a municipality under Article 243W of the Constitution. The scope of the exemption was severely restricted to only a few entities.

31. It is submitted that though the reason for re-defining "governmental authority" has not been made available, but the Hon'ble Court assumed that unworkability of the scheme for grant of exemption because of the restricted definition of "governmental authority" was the trigger and the scope of the

exemption was expanded to cover a larger section of entities answering the definition of “governmental authority”. An amendment by way of the clarification notification was, therefore, introduced which expanded the definition of “governmental authority” and widened the exemption base for service tax to be provided even to an authority or a board or any other body set up by an Act of Parliament or a State Legislature without the condition of having been established with 90% or more participation by way of equity or control by government to carry out any function entrusted to a municipality under Article 243W of the Constitution. The aforesaid interpretation of amended clause 2(s) of the exemption notification has been upheld by the Patna High Court.

32. Learned senior counsel has submitted that the order of the respondent no.2 imposing penalty under Section 78 of the Act equivalent to the amount of tax payable on the ground of misstatement and suppression of facts with a view to evade payment of tax in view of the notification issued by the Central Board of Indirect Taxes is wholly illegal and without jurisdiction. Reliance has been placed on the judgment of the Hon’ble Supreme Court in the case of **Hindustan Steel Ltd. Vs. State of Orissa** reported in **(1969) 2 SCC 627**.

33. It is submitted that in absence of willful attempt to evade tax the imputation of allegation of evasion of tax with the willful attempt does not seem to be justified.

Submissions on behalf of the CGST & CX

34. Learned ASG assisted by Sr. S.C., CGST and CX has opposed the writ application. It is submitted that the petitioner (M/S BRPNNL) has provided "services" as defined under Section 65B(44) of the Finance Act, 1994 which is taxable in terms of Section 65B(51) of the Finance Act, 1994. The petitioner claims itself to be a "governmental authority" but as per the provisions of Paragraph 2(s) of Mega Exemption Notification No.25/2012-ST dated 20.06.2012 it will not qualify as a "Governmental Authority". It is submitted that nature of services rendered by the petitioner to Government of Bihar is not covered under scope of Article 243W of the Constitution of India.

35. Learned ASG submits that the petitioner has not assessed its due liability of service tax and did not deposit the same on the relevant dates. The matter came to the knowledge of the department of CGST and CX only when investigation against the petitioner had been initiated on the basis of 3rd party data shared by the Income Tax Department. The noticee also not filed ST-3 return during the relevant period and hence not declared

actual taxable value and not paid the applicable Service Tax. In these circumstances, the adjudicating authority found that the noticee had willfully suppressed the facts of its taxable value from the department with an intention to evade the payment of service tax. The noticee never sought any clarification from the department or entered into any correspondence regarding taxibility or otherwise of the services rendered by them. The noticee did not respond despite several letters issued by the department for the documents/evidence during investigation. The noticee concealed/suppressed the taxable value for the period from April, 2015 to March, 2017 with malafide intent to evade the payment of service tax thereon by not filing statutory ST-3 return during the relevant period.

36. Learned ASG submits that if the 3rd party information had not been received by the department, the petitioner could have escaped the assessment and that would have resulted into non-payment of service tax. The petitioner has, thus, willfully suppressed the facts from the department and contravened the various provisions of the Act only with intent to evade payment of service tax for the relevant period. It is submitted that the extended period as envisaged under proviso to Section 73(1) of the Finance Act, 1994 has been rightly invoked

in the present case.

37. It is submitted that the contention of the petitioner that the services rendered by them are exempted as per the provisions of the Mega Exemption Notification No.25/2012-ST dated 20.06.2012 is not justified as the services being provided by them to Government of Bihar are not covered under Mega Exemption Notification because the petitioner has not provided any services of construction of roads/bridges to Government of Bihar. Further, none of the books of the accounts of the petitioner reflect any amount under WCT or VAT payment on goods purchased by them. The contractors have executed the work by using their goods/materials and thereafter transferred the same to M/S BRPNNL. Since the petitioner did not construct the bridges themselves by using their resources like manpower, equipment, stores, construction materials etc. and they get the same done by contractors/vendors, they functioned as an executing agency to get the bridges constructed by awarding contracts and for which they were paid with remuneration in the name of centage of the total cost of the project.

38. It is submitted that the main work of BRPNLL from which they received ‘centage’ is the collection of toll from the passengers and goods on the use of bridges. It is submitted

that the resolution letter dated 05.11.1974 issued by the order of Governor of Bihar by which it has been decided to establish BRPNNL as a public limited company nowhere stipulated that the petitioner is entrusted with function of municipality or panchayat for construction of roads and bridges in the State of Bihar.

39. Learned ASG submits that before adjudication, the opportunity of personal hearing was given to the assessee and the adjudicating authority has passed the impugned order after due consideration of the submissions made on behalf of the petitioner. The respondent no.2 has, in paragraph '3' of the impugned order dated 28.03.2024, clearly recorded that the date of personal hearing was given to the noticee to appear before the adjudicating authority in person or through authorized representative on 19.01.2023, 09.01.2024 and 15.02.2024. The noticee appeared on 15.02.2024 and submitted their defence reply dated 04.01.2023. They further submitted their reply dated 13.02.2024. Thus, the adjudicating authority has passed the impugned order after giving appropriate opportunity of hearing to the petitioner and the entire submissions of the petitioner has been considered by the adjudicating authority in detail. It is his submission that in this case no jurisdictional error has been committed by the respondent no.3, hence the present writ application is not fit to be entertained.

40. In course of hearing of the writ application, learned ASG has placed before this Court a copy of the Form ST-3 which is a return under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994 filed by the petitioner for the Financial Year 2015-2016. It is pointed out that there is a column under the heading 'Computation of service tax (to be filled by a person liable to pay service tax/not to be filled by input service distributor)'. In column 'A11' questions have been asked regarding exemptions. In column 'A11.1' a question is asked " Has the assessee availed benefit of any exemption notification ('Y/N'). The answer given by the petitioner in this case is 'N'. It is submitted that the intention of the petitioner writs large from the answer (N) provided in column 'A11.1'. If it is the contention of the petitioner that the services rendered by the petitioner would be falling in the Mega Exemption Notification and it would be entitled for exemption by virtue of the same, the answer to the question in column 'A11.1' should have been provided as 'Y'.

41. Learned ASG has pointed out that the submission of the petitioner that centage charge of 15% is received towards administrative expenses is not a correct submission. The petitioner has earned a profit of Rs.150 crores before tax in the financial year 2015-16. They did not file any return and did not

seek exemption on the amount of centage. They did not apply for advance ruling on any of the questions as per Section 97 of the CGST/BGST Act. It is submitted that the petitioner is not a government or governmental authority. It is a company liable to pay service tax. Reliance has been placed on a judgment of the Hon'ble Supreme Court in the case of **Union of India Vs. Rajasthan Spinning and Weaving Mills** reported in **(2009) 13 SCC 448**.

42. Learned ASG submits that the petitioner has an alternative and equally efficacious remedy of statutory appeal in terms of Section 86 of the Finance Act, 1994. The petitioner had an opportunity to prefer an appeal before the Appellate Tribunal within three months from the date of receipt of the impugned order. In this case, instead of availing the statutory remedy of appeal, the petitioner has presented this writ application invoking the extraordinary writ jurisdiction of this Court on 24.06.2024. The learned ASG has relied upon a judgment of the Hon'ble Supreme Court in the case of **State of Maharashtra and others Vs. Greatship (India) Limited** reported in **(2022) 17 SCC 332**. In the said case, the Hon'ble Supreme Court has held that no valid reasons have been shown by the assessee to bypass statutory remedy of appeal. The Hon'ble Supreme Court has held that there

is a consistent view of the Hon'ble Supreme Court that when there is an alternate remedy available, judicial prudence demands that court refrains from exercising its jurisdiction under constitutional provisions. The Hon'ble Supreme Court has followed **United Bank of India Vs. Satyawati Tondon** reported in **(2010) 8 SCC 110**; **Titaghur Paper Mills Co. Ltd. Vs. State of Orissa** reported in **(1983) 2 SCC 433; CCE Vs. Dunlop India Ltd.** reported in **(1985) 1 SCC 260** and **Punjab National Bank Vs. O.C. Kirshnan** reported in **(2001) 6 SCC 569**.

Consideration

Bihar Rajya Pul Nirman Nigam Limited (BRPNNL) -A Public Limited Company incorporated under the provisions of the Companies Act, 1956 does not fall within the meaning of word "Government", "Local Authority" and "Governmental Authority".

43. The respondent no.2 has considered the submissions of the petitioner that the BRPNNL being a governmental authority would be entitled for exemption under clause 12, 12A and 13 of the Mega Exemption Notification, as amended. The elaborate discussions on this topic may be found in the impugned order (Annexure-2). On going through the definition of the word "Government" within the meaning of clause 26A of Section 65B

of the Finance Act, it is crystal clear that the BRPNNL not being a department of the State government and not created by a statute or required to keep its account in accordance with Article 150 of the Constitution of India would not be covered within the meaning of the word “Government”. In the writ application, there is no averment that the BRPNNL is required to maintain its account in accordance with Article 150 of the Constitution of India. Article 150 of the Constitution of India reads as under:-

> “**150**. **Form of Accounts of the Union and of the States** -The Accounts of the Union and of the States shall be kept in such form as the President may, on the advice of the Comptroller and Auditor General of India, prescribe.”

44. The word “Local Authority” has been defined under clause 31 of Section 65B which means - (a) a Panchayat as referred to in clause (d) of article 243 of the Constitution; (b) a Municipality as referred to in clause (e) of article 243P of the Constitution; (c) a Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund; (d) a Cantonment Board as defined in section 3 of the Cantonments Act, 2006 (41 of 2006); (e) a regional council or a district council constituted under the Sixth Schedule to the Constitution; (f) a development board constituted under article 371 of the

Constitution; or (g) a regional council constituted under article 371A of the Constitution.

45. On a bare reading of the aforementioned two definitions, there is no iota of doubt that the petitioner-BRPNNL would not be falling under any of the two definitions.

46. The word "Governmental Authority" is defined under Mega Exemption Notification dated 20th June, 2012. In the case of **Shapoorji Pallonji**, this Court had occasion to consider the relevant clause 2(s) of the Exemption Notification defining "Governmental Authority." Clause 2(s) defines the word "Governmental Authority" means a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of Parliament or a State Legislature to carry out any function entrusted to a municipality under Article 243-W of the Constitution.

47. Clause 2(s) of the Exemption Notification underwent an amendment vide Notification dated 30.01.2014 (hereinafter called 'Clarification Notification'). This amendment, redefining "governmental authority", sought to broaden the scope of the exemption. The amended definition of the "governmental authority" in clause 2(s) reads as under:-

"2(s) "**governmental authority**" means an

> authority or a board or any other body-
> (i) set up by an Act of Parliament or a State Legislature; or
> (ii) established by Government,
> with 90% or more participation by way of equity or control by Government and set up by an Act of Parliament or a State Legislature to carry out any function entrusted to a municipality under Article 243-W of the Constitution."

48. The Hon'ble Division Bench of this Court in the case of **Shapoorji Pallonji** (supra) has considered the amended definition of the word "governmental authority" and held that as per definition of "governmental authority" as amended on 30.01.2014, an authority or board or any other body set up by an Act of Parliament or State Legislature is a "governmental authority." The views expressed by the Hon'ble Division Bench of this Court has been affirmed by the Hon'ble Supreme Court in **Commissioner, Customs, Central Excise and Service Tax, Patna VS. Shapoorji Pallonji and Company Private Limited and Others** reported in **(2024) 3 SCC 358**. Paragraph '24' of the judgment of the Hon'ble Supreme Court in the said case is quoted hereunder for a ready reference:-

> "**24.** Having read the two definitions, first and foremost, it is necessary to ascertain the objective behind the Clarification Notification which amended the Exemption Notification and redefined

"governmental authority". A bare perusal of the Exemption Notification reveals that the exemption therein was only extended to those entities viz. board or authority or body, which fulfilled the three requisite conditions i.e.:

(*a*) having been established with 90% or more participation by way of equity or control by Government,

(*b*) set up by an Act of Parliament or a State Legislature, and

(*c*) carrying out any function entrusted to a municipality under Article 243-W of the Constitution.

It is evident that the scope of the exemption was severely restricted to only a few entities. Although the reason for redefining "governmental authority" has not been made available by the appellants, we presume that unworkability of the scheme for grant of exemption because of the restricted definition of "governmental authority" was the trigger therefor and hence, the scope of the exemption was expanded to cover a larger section of entities answering the definition of "governmental authority". An amendment by way of the Clarification Notification was, therefore, introduced which expanded the definition of "governmental authority" and widened the exemption base for service tax to be provided even to an authority or a board or any other body, set up by an Act of Parliament or a State Legislature without the condition of having been established

> with 90% or more participation by way of equity or control by Government to carry out any function entrusted to a municipality under Article 243-W of the Constitution."

49. Here it is worth mentioning that the definition of the word "governmental authority" had fallen for consideration in the following facts of the said case:-

(i) the petitioner in the said case being a Limited Company was engaged in the business of works contract.

(ii) the Indian Institute of Technology -respondent no.4 being a body incorporated by the Institutes of Technology Act, 1961 appointed National Building Construction Corporation Limited (respondent no.3) as a consultant for construction of its academic building project at Bihta, Patna.

(iii) The petitioner Shapoorji Pallonji and Company was appointed as contractor for construction of academic complex of Indian Institute of Technology, Bihta, by NBCC vide letter of award dated 20th December, 2012. In terms of the letter of award, the petitioner registered itself with the service tax authority and started payment of service tax.

(iv) The Indian Audit and Account Department raised audit objection on 30th June, 2015 to the effect that service provider undertaking construction activity of educational

institutions are not required to pay service tax. In terms of the audit objection, the petitioner claimed that service tax is not payable by the petitioner or by the Indian Institute of Technology on the construction activity undertaken by the petitioner.

50. In the aforementioned backgrounds of the facts when it was pleaded on behalf of the CGST and CX that the Indian Institute of Technology would not fall within the meaning of the word "governmental authority", hence there would be no exemption on payment of service tax on the construction of the building of the Indian Institute of Technology, this Court had occasion to delve into the issue as to whether the Indian Institute of Technology would fall within the meaning of the word "governmental authority" as amended on 30th January, 2014. Whether the activity of construction undertaken by the petitioner in the said case would be exempted from payment of service tax or not by virtue of the Mega Exemption Notification was dependent upon the question as to whether the Indian Institute of Technology is a "governmental authority". In the said context, this Court held that the provisions contained in sub-clause (i) and sub-clause (ii) of clause 2(s) are independent, dis-conjunctive provisions and the expression "90% or more participation by way of equity or control to carry out any function entrusted to a

municipality under Article 243W of the Constitution" is related to sub-clause (ii) of clause 2(s) alone. It was held that the Indian Institute of Technology, Bihta, Patna (in short 'IIT') has been established by an Act of Parliament i.e. Indian Institutes of Technology Act, 1961 as an institute of national importance under Article 248 of the Constitution of India read with 7th Schedule List I.

51. This Court held that since the IIT is falling within the definition of governmental authority, the notification dated 20th June, 2012 (Mega Exemption Notification) would exempt the activity of construction undertaken by the petitioner from payment of service tax.

52. This Court is of the considered opinion that in the present case, the facts are otherwise. The petitioner is a Body Corporate incorporated under the provisions of the Companies Act, 1956. It is not established by an Act of Parliament or the State Legislatures. The respondent no.2 has recorded that the Memorandum and Articles of Association produced by the noticee shows that it has been incorporated under the Companies Act and in the books of accounts it has been mentioned that 100% share is owned by the State government. In paragraph '5' of the Order-in-Original (Annexure-P2), the respondent no.2 has recorded as

under:-

"**5.** …….It is admitted fact that

***** The noticee is having a dedicated work force of technical/professional expertise as Senior Project Engineer, Project Engineer & Junior Engineer in Divisions for technical assistance to contractors and supervise the concerned work and monitoring for quality control and proper progress of the project, as per guidelines of the approved DPR and condition of agreement with the contractors. (Reference: Reply to Q. 18 at the time of investigation).

***** The noticee is engaged in providing technical assistance with the help of their professionally qualified work force. Construction activities are carried out by successful bidders/contractors and their professionally qualified work force provide technical assistance to contractors/vendors and other authorities for successful execution of project as per the guidelines/specification given in DPR. (Reference: Reply to Q. 27 at the time of investigation).

***** The source of income of the noticee to maintain the work force of technical expertise providing technical assistance and other infrastructure for execution of the project is Centage, which is received against the execution of works and collection of tolls. (Reply to Q. 39 at the time of investigation).

***** BRPNNL (Noticee) received a fresh lease of life by way of fixation of "Centage" charge for every

> work which the corporation executed. **"Centage" charges meant that BRPNNL (Noticee) got a fixed % age of money in form of service charge for the work done by them**, (mentioned at Official website)."

53. The respondent no.2 has found that the bridges and roads are constructed by the contractors and the construction cost of the bridges and roads are paid to the contractors. A fixed percentage of construction cost i.e. 'centage' are paid to the noticee for their service charge/technical assistance.

54. It has been further held that, likewise, tolls are collected by the vendors assigned by the noticee and a fixed percentage of tolls are paid to the noticee for their service charge/technical assistance.

55. In the aforementioned background, the real question which would be falling for consideration is as to whether the activities carried on by the petitioner would be covered under the Mega Exemption Notification. In order to consider it, we take note of the relevant Entry No.12 of the Mega Exemption Notification dated 20th June, 2012 as under:-

> "12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of –
>
> (a) a civil structure or any other original works meant

predominantly for use other than for commerce, industry, or any other business or profession;

(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;

(d) canal, dam or other irrigation works;

(e) pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or

(f) residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65B of the said Act."

56. In the case of **Shapoorji Paloonji** (supra), it has been noticed by the Hon'ble Division Bench that vide Notification No.6/2015 Service Tax, dated 1st March, 2015, amending the Notification dated 20th June, 2012, item nos. (a), (c) and (f) of Entry 12 as reproduced above, stands omitted. While in the case of **Shapoorji Paloonji** (supra), the contract for construction was granted to the petitioner on 20th December, 2012 and prior to that the Notification dated 20th June, 2012 had been issued and the same had taken effect from 1st July, 2012, in the case of present petitioner, apart from the fact that the petitioner

does not come within the meaning of governmental authority, the petitioner has not been awarded any contract by the government during the relevant period which is financial year 2015-16, 2016-17 and 2017-18 (upto June, 2017). The ‘Modus Operandi’ of the petitioner which this Court has taken note of from the written submissions of the petitioner clearly shows that the petitioner invites tenders from the eligible bidders for undertaking construction of roads and bridges. Upon selection, an agreement is entered into with them to undertake the construction work.

57. A contention has been raised before this Court that under under Entry 12A, services provided to the government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a civil structure would be exempted from service tax and in terms of Entry No.13 the services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of (a) a road, bridge, tunnel or terminal for road transportation for use by general public would also be liable to be exempted from service tax. While there is no difficulty in appreciating the various entries of the Mega Exemption Notification, this Court finds that, on facts,

the petitioner has not controverted the findings recorded by the respondent no.2 in paragraph 5, 6 and 7 of the impugned order (Annexure-P2).

58. We further find from the Circular No.192/02/2016-Service Tax dated 13.04.2016 which clarifies the issue of liability of service tax on the services provided in lieu of fee charged by government or a local authority that any activity undertaken by government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to service tax. According to this Circular No.192/02/2016-Service Tax dated 13.04.2016, "….It is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law and irrespective of whether the amount charged for such service is laid down in a statute or not. As long as the payment is made (or fee charged) for getting a service in return (i.e., as a quid pro quo for the service received), it has to be regarded as a consideration for that service and taxable irrespective of by what name such payment is called. It is also clarified that Service Tax is leviable on any payment, in lieu of any permission or license granted by the Government or a local authority."

59. There is a finding recorded in paragraph '13' of the

impugned order (Annexure-P2) that the ‘centage’, which is received for service charge/technical assistance or for any other purpose by the noticee does not fall under the above clause of Mega Exemption Notification, as amended and also under the negative list under Section 66D as claimed by the noticee. In fact a reading of the Circular No.192/02/2016-Service Tax dated 13.04.2016 would show that even the government/local authority is liable to pay service tax, if they received fee, consideration for performing such activities.

60. In our considered opinion, unless the petitioner is able to demonstrate by cogent evidence that it is engaged in providing services by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a road or bridge for use by the general public, it would not be possible to hold that its activity would be exempted under clause 13(a) of the Mega Exemption Notification. We cannot lose sight of the findings recorded by the respondent no.3 that in the profit and loss account, the petitioner has shown revenue from operation from centage, from toll collection; centage from construction of roads and bridges.

61. As regards the invocation of extended period of

limitation for demand in terms of proviso to Section 73(1) of the Finance Act, 1994, we find that the respondent no.2 has given reasons for arriving at such conclusion. Paragraph 17 (i) to 17 (vi) are reproduced hereunder for a ready reference:-

> "**17. (i)** I find that the SCN dated 28.12.2020 has been issued invoking extended period of limitation for demand under the proviso to Section 73(1) of the Act. In other words, it can be said that charges of suppression of facts and contravening the various provisions of the Act with intent to evade Service Tax has been leveled against the Noticee.
> **(ii)** in this regard, I observe that the noticee have not assessed their due liability of Service Tax and did not deposit the same on its relevant dates. The matter came to the knowledge of the department only when investigation against the noticee had been initiated on the basis of 3rd party data shared by the Income Tax Department. On verification of the Service Tax portal, it has been found that the noticee have not filed ST-3 returns for the relevant period and therefore, taxable value had been intentionally suppressed and no Service Tax liability and payment has been reflected/paid therein.
> **(iii)** I further observe that the noticee have willfully suppressed the facts of their taxable value from the department with an intention to evade the payment of Service Tax. They also never sought any clarification from the Department nor entered into any correspondence regarding taxability or otherwise of the services rendered by them. From the available records, it is apparent that the noticee did not respond despite several letters issued by the Range Superintendent calling for the documents/evidence during investigation.
> **(iv)** In this regard, I find that the noticee have concealed/suppressed the taxable value for the period from April, 2015 to March, 2017 with malafide Intent to evade the payment of service tax thereon by not filing statutory ST-3 returns during the relevant period.

Further, during the relevant period, they did not pay due Service Tax from time to time, as provided under the Finance Act, 1994 and rules made thereunder. The said Noticee are required to discharge their Service Tax liability in respect of the taxable value received in lieu of providing such taxable Services. However, the Noticee suppressed the taxable value by not paying Service Tax due and by not filling the statutory ST-3 returns for the relevant period with intent to evade Service Tax.

(v) I also find that the above discussed commission and omission on the part of the Noticee would not have come to the Notice of the Department if the department had not initiated the investigation on the basis of 3rd Party data shared by Income Tax Department against them and the taxable amount received from various clients in lieu of services would have escaped the assessment and must have resulted into non-payment of service tax. Thus, I find that the act of noticee tantamount to suppression of facts. They have willfully suppressed the facts from the department and contravened the various provisions of the Act only with intent to evade payment of Service Tax for the relevant period. Thus, I am of the view that the extended period as envisaged under proviso to Section 73(1) of the Finance Act, 1994 is rightly invoked for their act of suppression with sole intent to evade the Service Tax payment which is liable to be recovered from them.

(vi) In this regard, it is pertinent to highlight here the relevant Paras of the observations of the Hon'ble Supreme Court of the judgment dated 12/05/2009 in Civil Appeal No. 3527/2009 (UOI Vs Rajasthan Spinning and Weaving Mills) regarding applicability of extended period wherein the Hon'ble Court has held that "in case the non-payment etc. of duty is intentional and by adopting any means as indicated in the proviso then the period of notice and a priory the period for which duty can be demanded gets extended to five years." Therefore, I am of the view that the extended period has been correctly invoked in the instant case."

62. In addition, we think it just and proper to reproduce

the relevant paragraph and column of return in form ST-3, a copy of which has been made available by learned ASG, wherein the petitioner was required to answer as to whether he had availed the benefit of any exemption notification. In answer to this question, the petitioner has said ‘N’, meaning thereby that the petitioner had not taken benefit of any exemption notification.

A11.1	**Has the assessee availed benefit of any exemption Notification (‘Y’/’N’)**	**N**

63. Mr. D.V. Pathy, learned senior counsel when confronted with the answer present to the question no.11.1 in ST-3 could only say that it should have been disclosed in ST-3 Form. If this is the declaration of the petitioner in Form ST-3, the allegation of the revenue that the petitioner had willfully suppressed the facts of their taxable value from the department with an intention to evade payment of service tax gains support. If the petitioner was claiming exemption from payment of service tax under the Mega Exemption Notification, it was obligatory upon the petitioner to make a correct declaration in Form ST-3 which has not been done in the present case. Therefore, the petitioner cannot succeed on this ground.

64. Learned senior counsel for the petitioner has relied on the judgment of the Hon’ble Supreme Court in the case of

Doypack Systems Pvt. Ltd. Vs. Union of India & Others reported in **(1988) 2 SCC 299**, **C.C., C.E. & S.T.-Bangalore (Adjudication) etc. Vs. Northern Operating Systems Pvt. Ltd.** reported in **2022 SCC OnLine SC 658**; and **Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay** reported in **1995 Supp (3) SCC 462**.

65. In the case of **Doypack Systems Pvt. Ltd.** (supra), the issue involved was as to whether equity shares in the two companies i.e. 10,00,000 shares in Swadeshi Polytex Limited and 17,18,344 shares in Swadeshi Mining and Manufacturing Company Limited, held by the Swadeshi Cotton Mills, vest in the Central Government under Section 3 of the Swadeshi Cotton Mills Company Limited (Acquisition and Transfer of Undertakings) Act, 1986 (hereinafter referred to as "the said Act"). The other subsidiary question was whether the immovable properties, namely the bungalow No. 1 and the Administrative Block, Civil Lines, Kanpur have also vested in the Government. This Court finds that this judgment has no application to the issue involved in this writ petition.

66. In the case of **Northern Operating Systems Pvt. Ltd.** (supra), the facts of the case may be noticed in paragraph '2' of the judgment as under:-

> "**2.** The assessee was registered with the Revenue, as a service provider under the categories of "Manpower Recruitment Agency Service", "Business Auxiliary Service", "Commercial Training and Coaching Service", "TTSS", "Telecommunication and Legal Consultancy Service", etc. under the Finance Act, 1994 (hereafter "the Act"). Following an audit of the records by the Revenue's officials, proceedings were initiated against the assessee alleging non-payment of service tax concerning agreements entered into by it with its group companies located in USA, UK, Dublin (Ireland), Singapore, etc. to provide general back-office and operational support to such group companies."

67. The assessing officer justified the extended period assessment and penalty but in Appeal the Commissioner, Bangalore, dropped the proposals in the SCN for the period April 2012 to March 2013 and April 2013 to September 2014.

68. Aggrieved by the Commissioner's order dropping the demand, the Revenue had filed an appeal challenging it, in which the assessee too filed it's cross objection.

69. CESTAT allowed the cross appeals and rejected the appeals of the Revenue. This order of CESTAT was challenged before the Hon'ble Supreme Court.

70. In the facts of the said case, the Hon'ble Supreme Court observed in paragraph '69' as under:-

> "**69.** The Revenue's argument that the assessee had indulged in wilful suppression, in this Court's considered view, is insubstantial. The view of a

previous three-Judge ruling, in *Cosmic Dye Chemical* v. *CCE*[42] — in the context of Section 11-A of the Central Excise Act, 1944, which is in identical terms with Section 73 of the Finance Act, 1994 was that : (SCC p. 119, para 6)

"*6*. Now so far as fraud and collusion are concerned, it is evident that the requisite intent i.e. intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word "wilful" preceding the words "misstatement or suppression of facts" which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful."

71. The above observations are required to be read in the light of the following finding present in paragraph '72' of the judgment as under:-

"**72.** It is held, for the foregoing reasons, that the assessee was the service recipient for service (of manpower recruitment and supply services) by the overseas entity, in regard to the employees it seconded to the assessee, for the duration of their deputation or secondment. Furthermore, in view of the above discussion, the invocation of the extended period of limitation in both cases, by the Revenue is not tenable."

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42. (1995) 6 SCC 117

72. This Court finds that in the present case, the petitioner has not preferred a statutory appeal. On facts also, the present case stand on a completely different footing.

73. In the case of **Pushpam Pharmaceuticals Company** (supra), the facts were as under:-

> "**2.** The appellant manufactured an item falling under Tariff Entry 14-E as well as another item under Item 68. The item under Item 68 was fully exempt from payment of duty. The value of items manufactured under Tariff Item 14-E in each year was less than Rs 5 lakhs. Notification No. 111 of 1978 was issued on 9-5-1978 exempting the turnover of goods manufactured under Item 14-E if it was below Rs 5 lakhs. Therefore, the appellant surrendered its licence and it was cancelled. Notices were, however, issued because if the turnover of the two items, i.e., exempted under Item 68 for the years in dispute was clubbed together with turnover of Item 14-E, then it exceeded Rs 5 lakhs and the goods became liable to duty. The Department invoked extended period of limitation of five years as according to it the duty was short-levied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs."

74. The Court found that law about excisability of exempted goods was settled by this Court in *Wallace Flour Mills Co. Ltd.* v. *CCE*[1] . Till then conflicting decisions were rendered by different High Courts and Tribunals and it was not settled whether the turnover of assessable and exempted goods were liable to be clubbed for determining liability. Therefore, two

1. (1989) 4 SCC 592: 1990 SCC (Tax)10

questions arose, whether the appellant was bound in the state of uncertainty in law to include the turnover of the two items and if it failed to do so then it amounted to suppression of fact and second whether it was the duty of appellant to keep the Department informed about the turnover of the goods which were not liable to any duty. No rule could be pointed out requiring a manufacturer to disclose the turnover of exempted goods. It was held that even assuming it was, the appellant could not be held guilty of suppression when the law itself was not certain.

75. In the above facts, the Hon'ble Supreme Court observed in paragraph '4' as under:-

> "**4.** Section 11-A empowers the Department to reopen proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the

> surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

76. The facts of **Pushpam Pharmaceuticals Company** (supra) are completely different from the facts of the present case. Here, we have noticed that petitioner is not engaged as a contractor for construction of roads and bridges and in ST Form-3 while answering question no.11.1 the petitioner answered in negative. The petitioner, therefore, did not declare that it is seeking benefit of exemption notification. The present case is clearly distinguishable.

77. In the light of the discussions made hereinabove, the grounds raised by the petitioner would not succeed. We find no jurisdictional error in the impugned order (Annexure-P2). No interference is required.

78. No other or further ground has been raised on behalf of the petitioner.

79. The petitioner has an alternative remedy of statutory appeal under Section 86 of the Finance Act, 1994. If so advised,

the petitioner may apply for the statutory remedy of appeal on any other ground or grounds within a period of eight weeks from today. If any such appeal is preferred and in case a question of limitation arises for consideration, the same will be considered by the appellate authority keeping in view the period spent by the petitioner in pursuing this writ application under bonafide belief.

80. This writ application stands disposed off accordingly.

(Rajeev Ranjan Prasad, J)

(Sourendra Pandey, J)

arvind/-

AFR/NAFR	
CAV DATE	25.03.2025
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