

McLeod Russel (India) Ltd. Vs Union of India

Court: Calcutta High Court

Date of Decision: Nov. 20, 2014

Acts Referred: Comptroller and Auditor-generals (Duties, Powers and Conditions of Service) Act, 1971 " Section 18 Finance Act, 1994 " Section 65(B)(49), 65B, 66, 66(a)(iv), 66(B) Finance Act, 1995 " Section 73

Citation: (2015) 1 CHN 180 : (2015) 39 STR 8

Hon'ble Judges: I.P. Mukerji, J

Bench: Single Bench

Advocate: Binod Poddar, Sr. Adv., Sumit Gadodia and Somak Basu, Advocate for the Appellant; S.S. Banerjee, K.K. Maity and R. Bhardwaj, Advocate for the Respondent

Judgement

I.P. Mukerji, J.

The writ petitioner is a public limited company. Its registered office is at 4, Mangoe Lane, Kolkata-1. It is engaged in the business of tea. It has tea plantations in the State of Assam. Along with this company there are others who own tea plantations in that state.

Learned senior counsel for the writ petitioner Mr. Poddar tells me that there is a 200 kilometre corridor in Assam where these tea plantations are

situated. The area is disturbed. It is highly volatile. There is a constant threat of damage to the tea gardens, the establishments connected with them

and their owners and staff from miscreants. Their acts of vandalism are often carried out with terrorist like precision.

2. In those circumstances the consortium of owners of tea gardens approached the government of Assam for protection. This government realised

that this threat from miscreants could not only cause immense financial loss to the tea plantation owners but could also be detrimental to the

economy of the State.

3. A force was created by the Assam Government. It was called the Assam Tea Plantation Security Force (ATPSF). Members of this force

comprised of policemen as well as home guards. It was placed under the Directorate of Civil Defence and Home Guards. The administrative

control rested with the Director General of Police and Commandant General of Home Guards, Assam.

4. The Indian Tea Association and the government of Assam on 29th October, 1993 signed a memorandum of understanding. Under it members

of this force were deployed in the area covered by tea plantations to protect the planters and their property.

5. Two facts are admitted. The members of the force are servants of the State of Assam. Their appointment, management, discipline and pay are

controlled by that State. The memorandum of understanding is annexed to the writ petition as annexure P-1.

6. ATPSF was replaced by AISF, on 6th March, 2009 under a fresh arrangement between the plantation owners and the government of Assam.

The force consists of eight companies and 1326 personnel. It operates in sections, platoons, companies, battalions and so on. It does not have the

power to carry out any investigation. In case they detect the commission of any cognizable offence they have to report the same to the nearest

police station.

7. For providing the service of this force, the Assam government charges the writ petitioner and other recipients of this service a fee. In other

words, they ask the tea plantation owners to reimburse them of the salary they have to disburse to the members of this force.

8. According to learned counsel for the respondents these personnel are nothing but private security guards who are provided by the State to the

tea plantation owners for protection of their person and property.

9. The controversy arises in this way.

10. By a letter dated 20th November, 2013 the Superintendent of Service Tax Range 18 and 19 Division-I Kolkata wrote to the writ petitioner

that the above service provided by the Assam government to the writ petitioner would be considered as a security service and to be more specific

a support service exigible to service tax ""in the hand of service receiver"". The writ petitioner was directed to furnish their compliance report on the

above issue.

11. According to the writ petitioner, no service tax is chargeable for the service in question.

12. At this stage a close look at the Finance Act, 1994 by which service tax was introduced is necessary.

13. Section 66(B) provides that service tax shall be levied at 12% on the value of all services other than those services specified in the negative list.

Section 68 clarifies that every person providing taxable service shall pay service tax at the rate specified in Section 66. Therefore, these two

sections suggest that all services other than those specified in the negative list are taxable services and exigible to service tax. Now, what are

services in the negative list? Section 66(D) provides the list. It inter alia mentions the services rendered by the government, except certain

categories of service specified therein. An exception is ""support services"" as provided in 66(a)(iv) of the Act. Support services are defined in

Section 65(B)(49) of the Act as follows:-

(49) "support services" means infrastructural, operational, administrative, logistic, marketing or any other support of any kind comprising functions

that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever

and shall include advertisement and promotion, construction or works contract, renting of immovable property, security, testing and analysis;

14. As will appear from the notice of demand of the service tax department dated 20th November, 2013 the nature of service rendered by the

said force to the writ petitioner company was classified as "support service". It is on this basis that the justification for claiming service tax was

made.

15. Mr. Poddar, learned senior advocate for the petitioner cites guidance notice 4.1.7 published by the department to explain the meaning of

support services" in the negative list of service. It is contained at pages 654-655 G. Sarangi's, Service Tax Manual published by Centax

Publications Pvt. Ltd. 18th Edition 2012-2013. It is in the following terms:

4.1.7. What is the meaning of "support services" which appears to be a phrase of wide ambit?

Support services have been defined in section 65B of the Act as infrastructural, operational, administrative, logistic marketing or any other support

of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from

other for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of movable or immovable

property, security, testing and analysis.

Thus services which are provided by government in terms of their sovereign right to business entities, and which are not substitutable in any manner

by any private entity, are not support services e.g. grants of mining or licensing rights or audit of government entities established by a special law,

which are required to be audited by CAG under section 18 of the Comptroller and Auditor General's (Duties, Powers and Conditions of Service)

Act, 1971 (such services are performed by CAG under the statute and cannot be performed by the business entity themselves and thus do not

constitute support services.)

16. According to Mr. Poddar this service rendered by the AISF is part of the sovereign functions of the State and cannot be called "support

service". The State has an obligation to guard the frontiers of the country, ensure internal security, enact laws, enforce them and so on. The state

has obligations with regard to maintenance of law and order, peace, prevention of crime in the tea growing and manufacturing area of the state [see

list II entry] of the 7th schedule to the Constitution of India. This part of maintenance of internal security obligations of the State in the tea plantation

areas have been delegated by it to the AISF. Discharging sovereign functions by the state cannot be equated with providing support services by it.

A State can never charge any tax for discharge of a sovereign function. Hence it cannot levy any tax for rendering of services by the AISF. This

has been recognised by the said guidance note of the department, it was submitted.

17. Mr. Poddar went to the extent of submitting that the arms that are entrusted with the members of this force are used by army personnel and are

not available to an ordinary security force.

MY FINDINGS

18. Very astonishingly, the basic foundation of the case of the petitioner has not been specifically denied in the affidavit-in-opposition. This

foundation is that the force employed by the State of Assam in the tea plantations in Assam discharges the sovereign function of the State of

maintaining peace and security in the region. The affidavit is silent with regard to the said assertion made by the petitioner. But, from the bar Mr.

S.S. Banerjee learned Advocate made very extensive arguments to try to show that the AISF did not render services provided by a sovereign

body. First of all, he argued that from the nature of services provided by the AISF it was clear that they were rendering the service of a private

security guard or a watchman. They were drawn from the AISF, no doubt but their functions were limited and personalised. He referred to the

contract documents and argued that this force did not have any police power. It had no power to carry out any investigation. If any member of the

force had knowledge of commission of a cognizable offence he was required to lodge an FIR with the local police. Because of the nature of their

service their salary was paid by the Assam government but realised from the tea plantation owners by way of reimbursement.

19. In the absence of any assertion in the affidavit-in-opposition, this court cannot take into account any statement made from the bar. Therefore,

the statement of the writ petitioner that the appointments to this force, its management, control, finance, discipline etc are regulated by the

government is uncontroverted. That the nature of its function is to protect the tea plantations and the personnel working therein against unlawful

acts is also uncontroverted. Therefore, prima facie there is every indication that the service rendered by this force is sovereign and hence not a

support service"".

20. In All Assam Tea Plantation Security Force Vs. The State of Assam and Others, the Gauhati High Court was concerned with a representative

action on behalf of the members of the tea plantation security force seeking regularisation of their service. While deciding that case Mr. Justice

Ranjan Gogoi held that this force performed sovereign functions, as follows:-

The modern day welfare State by taking upon itself multifarious duties in a wide sphere of public life has somewhat obliterated the difference

between the sovereign and non-sovereign functions of the State. Yet the concept of "Sovereign function" connote a well defined meaning and it is

such Sovereign functions, pertaining to law and order and maintenance of public order, that is looked after by the members of the Force. The

justification for creation of the Force instead of entrusting the normal machinery of the Police administration to deal with the threats of the

extremists violence in so far as Tea Gardens are concerned, has not been spelt out before the Court by the State authorities. The necessity of

providing round the clock security cover to the Tea Gardens located in the far-flung and remote areas of the State and to have an exclusive force

to deal with extremists threats to a key industry may have been the reasons behind the MOU giving birth to the Force. Whatever the justification

and reasons may have been, the fact remains that the members of the Force under the direct operational and disciplinary control of the Police

authorities are performing what are purely State functions. Even assuming the application of the Home Guards Act to the members of the Force,

what is revealed is that under the Home Guards Act. Home Guards on duty are public servants and while called for duty have the same powers,

privileges and protection as available to a member of the police force".

21. That the maintenance of the security of the state was a sovereign function was emphasised in the judgment of the Supreme Court in *Bakhtawar*

Singh Bal Kishan Vs. Union of India (UOI) and Ors. ,

22. The value of sovereign functions of a state is not taxable in the hands of the citizens. Support services rendered by the government are taxable.

According to the government this kind of service received by the writ petitioner is classifiable as a "support service".

23. Hence, whether the service in question is taxable or not is a question of fact. The service tax department is not bound by the above finding of

fact by the Gauhati High Court as it was not a party to the proceedings. Nonetheless the department is obliged to take serious note of the reasons

given in that judgment.

24. The department has the jurisdiction and obligation to determine whether the writ petitioner is receiving support services from the government.

Therefore, before it could demand or even show cause under Section 73 of the Finance Act, 1995, for Service Tax, it was incumbent upon the

department to make the determination whether the subject service could be classified as a support service and the writ petitioner exigible to service

tax. If the department's answer was in the affirmative, only then, a show cause notice and thereafter a demand for service tax could have been

issued.

25. In those circumstances, the notice dated 20th November, 2013 is quashed and set aside. It will be open for the department to make an

adjudication following an appropriate procedure as to whether the service rendered by the government of Assam to the writ petitioner in its tea

plantation is support service or not and exigible to tax by a reasoned order, upon hearing the writ petitioner or its advocate. Thereafter it can take

such steps as it may be advised.

26. No further action under the Service Tax Act can be taken by the department against the writ petitioner unless the above fact is established. In

making the determination the department will follow the observations made in Bakhtawar Singh Bal Kishan Vs. Union of India (UOI) and Ors, ,

All Assam Tea Plantation Security vs. The State of Assam and Ors. reported in (2003) 1 GLR 233 and those made in this judgment and order.

27. This writ application is accordingly disposed of.

28. Certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.