2024:UHC:7311-DB

***Reserved Judgment***

# IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

**HON'BLE THE CHIEF JUSTICE MS. RITU BAHRI**
**AND**
**HON'BLE MR. JUSTICE RAKESH THAPLIYAL**

Reserved on : 23.09.2024
Delivered on : 27.09.2024

**WRIT PETITION (M/S) NO. 646 OF 2023**

New Jai Hind transport Service …… Petitioner

Versus

Union of India and others …… Respondents

Counsel for the petitioner : Mr. M.P. Devnath and Mr. Pulak Raj Mulllik, learned counsel

Counsel for the respondents : Ms. Puja Banga, learned Brief Holder for the State / respondent No. 2

: Mr. Shobhit Saharia, learned counsel for respondent No. 3

**The Court made the following:**

**JUDGMENT: (per Hon'ble the Chief Justice Ms. Ritu Bahri)**

The petitioner M/s New Jai Hind Transport Service is a proprietorship firm and providing services of Goods Transport Agency ( in short GTA) to its customers / service recipients.

2) The petitioner is challenging the order passed by learned Appellate Authority for Advance Ruling for the State of Uttarakhand Goods and Service Tax dated

30.01.2023 (Annexure-1 to the writ petition) issued by respondent No. 3. Petitioner is a sole proprietor of the said firm and is duly registered under the Uttarakhand Goods and Service Tax Act, 2017. His place of business is 1st Floor, Shop No. 72, Avdhoot Mandal, Haridwar, Uttarakhand.

3) A proposed draft agreement (Annexure-2 to the writ petition) was entered between the petitioner and the service recipient. The salient features of the proposed draft agreement are as under :

> "(i) Scope: - Petitioner will transport the goods belonging to the service recipient from its factory to the specified destination within in a specified period (reasonable) of time taking specified route. Petitioner will be assuming transit risk of the goods being transported.
>
> (ii) Exclusivity: - The vehicle, deployed by the petitioner, shall exclusively transport the goods belonging to the service recipient for the trip, i.e., the vehicle deployed by the petitioner for the particular trip cannot transport the goods for any other person.
>
> (iii) Consignment Note: - Petitioner will issue consignment note, serially numbered, signifying the receipt of goods from service recipient for the purposes of transportation. The consignment note, inter alia, will contain details of the date of consignment note, registration number of the goods carriage deployed by the applicant, name and address of the consigner, name and address of consignee, quantity and type of goods loaded for transportation, upon successful delivery of the consignment, the petitioner will obtain proof of delivery

from the consignee, which shall signify completion of service by the petitioner.

(iv) Fuel: - Fuel required to transport the goods of service recipient shall be in the scope of the service recipient and not in the scope of work of the petitioner. In other words, fuel will be supplied by the service recipient, free of cost to the petitioner. Fuel will be supplied in required quantity depending on load and trip. Ownership of the fuel shall always remain with the service recipient.

(v) Consideration: - Petitioner will raise tax invoice towards freight charges for the GTA service provided to service recipient. Freight charges shall be the only consideration and sole consideration that will flow between the parties under this agreement. Freight charges shall not include any element of value / cost of the fuel because under the agreement between the parties, fuel required for transport is within scope of the service recipient and shall be supplied by the service recipient in required quantity for exclusively transporting the goods of the service recipient."

4) Petitioner filed an application before the learned Goods and Service Tax Advance Ruling Authority Uttarakhand seeking advance ruling on the following question :

"Whether the value of free diesel filled by service recipient under the accepted terms of contractual agreement in the fleet(s) placed by GTA service provider will subject to the charge of GST by adding this free value diesel in the value of GTA service, under the Central Goods and Services Tax Act, 2017 & Uttarakhand Goods and Service Tax Act, 2017?

Said application is dated 30.06.2022 (Annexure-3).

5) Vide order dated 26.09.2022 (Annexure-5), Goods and Service Tax Advance Ruling Authority Uttarakhand ruled that the value of diesel filled by service recipient in the vehicle(s) provided by the petitioner, on FOC basis as per the terms of the agreement, **will be subject to the charge of GST by adding the free value of diesel to arrive at the transaction value of GTA service**.

6) The petitioner challenged the order dated 26.09.2022 (Annexure-5) and vide impugned order dated 30.01.2023, the learned Appellate Authority for Advance Ruling Uttarakhand upheld the earlier order dated 26.09.2022, passed by Goods and Service Tax Advance Ruling Authority Uttarakhand by observing as under :

> "The value of diesel supplied / filled by the service recipient in the vehicle(s) provided by the applicant will form part of the value of GTA service and the same will attract GST in terms of Section 15 of the CGST Act, 2017 and Uttarakhand Goods and Service Tax Act, 2017."

7) The petitioner has come up in appeal against the above said order.

8) The petitioner has referred to Section 7(1)(a) of the Central Goods and Services Tax Act, 2017 (hereinafter referred to as 'the CGST Act, 2017). The same is reproduced as under :

> "7. Scope of supply.— (1) For the purposes of this Act, the expression —supply includes–
>
> (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;

9) As per above said section, the supply includes all forms of supply of goods or services made or agreed to be made for a consideration by a person. The petitioner has entered into an agreement for supply of GTA service for a consideration to the service recipient, and he has to be paid by the recipient only the cost of transportation which does not include the cost of diesel or fuel. The petitioner has to supply GTA service to the service recipient against freight charges, i.e., the only consideration flowing between the parties, agreed under the proposed agreement (Annexure-2), is the freight charges. Fuel is not a consideration agreed under the proposed agreement between the petitioner and the service recipient. For the free fuel given by the service recipient, petitioner cannot be made liable to pay GST, as the agreement between the parties is only with respect to the freight charges, and the cost of fuel is to be borne by the service recipient**.** The petitioner as per the agreement (Anneuxre-2) is not supplying fuel and he is only being

paid fuel charges for using the vehicle and transporting the goods.

10) **The question for consideration in the present case is whether the free supply of fuel can be included / added to the freight consideration**.

11) For the purpose of levy and collection of tax, the petitioner has referred to Section 9 of the CGST Act 2017, which provides that GST shall be levied on the value determined as per Section 15(1) of the CGST Act. Petitioner is only supplying GTA service to the service recipient against freight charges. Under the agreement between the parties, the said freight charges are the transaction value or the contract price for the GTA service, and this supply of GTA service does not include the cost of fuel as the cost of fuel is borne by the supplier / recipient, and this cost is actually paid by the supplier, and hence this cannot be included in the freight charges.

12) Section 15(1) and Section 15(2)(b) of the Central Goods and Services Tax Act, 2017, are extracted here-in-below :

> "15. Value of Taxable Supply.— (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not

related and the price is the sole consideration for the supply.

(2) The value of supply shall include–

(a) ……

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both."

13) As per Section 15(2)(b) of the CGST Act, 2017, there has to be a contract or one has to enter into contract or be a part of contract in some capacity as to who is liable to pay for the supply of fuel. As per the agreement (Annexure-2), the liability to pay for the cost of the fuel was never on the petitioner-transporter. He was only to be paid freight charges under the GTA Rules 2017, and in this backdrop, the cost of fuel could not be added as per Section 15(2)(b) of the CGST Act, 2017. Since as per the agreement (Annexure-2) the fuel "has to be procured and to be supplied by the service recipient to the petitioner, the value of fuel cannot be added to the value of freight charges charged by the petitioner".

14) Section 2(31) of the CGST Act, 2017 defines "consideration" as under :

``"Consideration" in relation to the supply of goods or services or both includes –

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to,

or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or the State Government.

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;

15) The further plea taken is that free of cost fuel is supplied by the service recipient on account of rights and responsibilities created under the agreement between the parties and also for the reason that uninterrupted supply of GTA service is carried on. The petitioner has again referred to Circular No. 47/21/2018 dated 08.06.2018 which clarifies that value of moulds and dyes provided by OEM to the component manufacturer on FOC basis shall not be added in the value of such supply in terms of Section 15(2)(b) of CGST Act because the cost of moulds / dyes was not to be incurred by the component manufacturer and thus does not merit inclusion in the value of supply. The above said section is binding on the

respondents as per the Supreme Court judgment rendered in ***CIT Vs Trans Asian Shipping Services Pvt. Ltd. (2016) 8 SCC 604***.

16) The petitioner has also referred to a Supreme Court judgments in ***CST Vs Bhayana Builders (P) Ltd. (2018) 3 SCC 782*** and ***Union of India Vs Intercontinental Consultants and Technocrafts Pvt. Ltd. (2018) 4 SCC 669***, where it has been clearly held that value materials / goods supplied free of cost by the service recipient to the service provider are not includable in the value of service.

17) Reference has been made to a judgment of Rajasthan Authority for Advance Ruling in ***In Re: M/s Sunil Giri [2022 (7) TMI 1103 – Authority for Advance Ruling, Rajasthan]***, wherein it has been held that value of diesel filled free of cost (FOC) by the service recipient is not includable in the value of GTA service proposed to be provided by the applicant.

18) Reference has again been made in the case of AAR Karnataka in ***In Re: M/s Hical Technologies Pvt. Ltd. [2019 (10) TMI 571 – Authority for Advance Ruling, Karanataka]***; AAAR Karnataka in ***In Re: M/s Nash Industries (I) Pvt. Ltd. [2019 (3) TMI 435 – Appellate Authority for Advance Ruling, Karnataka]*** and AAR Maharashtra in ***In Re M/s Lear Automotive India Private***

***Limited [2018 (12) TMI 766 – Authority for Advance Ruling, Maharashtra]***.

19) In all the above said judgments it has been consistently held that value of diesel filled free of cost (FOC) by the service recipient is not includable in the value of GTA service proposed to be provided by the applicant. It is further stated that the petitioner has paid the GST as a transporter, and the whole of it is allowable as credit to the recipient of service as input tax credit (ITC) under Section 16 of the CGST Act, 2017. Such ITC is usable by the recipient of service for payment of its own GST on the supplies made by it. There will be no financial impact on the recipient of service, and even for the exchequer there will be no financial impact since whole of the GST paid by the petitioner-transporter on freight will be allowable as ITC to the recipient and such credit is then utilizable by the recipient for payment of GST on its own supplies, net receipts by the exchequer will be the same, whether or not fuel cost is included in the freight.

20) On notice of this petition, a counter-affidavit has been filed by the Assistant Commissioner CGST, Haridwar. The stand taken in the counter-affidavit is that the fuel supplied by the service recipient was undoubtedly for the inaction of taxable activities of transportation, and it

should have formed part of "Value of Supply" as envisaged in Section 15(2)(b) of the CGST Act, 2017. Section 15(2)(b) suggests that the transaction or contractual value is not final and in all cases and in the case of supply, all ingredients of a supply are required to be looked into while arriving at the value of a particular supply. Hence, free fuel purportedly supplied by the service recipient was an integral constituent for carrying out such "Supply of Service" activity, and hence as per provisions of Section 15(2)(b) of the act, the said cost would have invariably been included in value of supply. There was an omission / drafting error in exclusion of necessary clause in the proposed agreement (Annexure-2) which did not include cost of fuel as part of freight charges. This omission in itself cannot form the basis of non-consideration of an obvious tax constituent.

21) Further stand taken by the respondents in the counter-affidavit is that as per the above said section the value of supply shall include any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both. As per the wording of Section 15(2)(b) the transaction or contractual value is not final in all cases and in the case of supply, all ingredients of a

supply are required to be looked into while arriving at the value of a particular supply. The running condition of a vehicle cannot be achieved without fuel, as in the absence of fuel the vehicle cannot move from one place to another to transport goods and accordingly, it is observed rightly by both the authorities that without transportation of goods due to absence of fuel or any other reason the same cannot be termed as 'GTA Service'. As per Section 15 of the CGST Act 2017, the value of a supply of goods or services or both shall be the transaction value yet it has been specially mandated that any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both shall be included in the value of the supply. As per Section 15(2)(b) all ingredients of a supply are required to be looked into while arriving at the value of a particular supply. The claims of the petitioner have been rightly rejected on the grounds that the GTA includes 'transport of goods by road' and 'issuance of consignment note' and the essential ingredients in the transport of goods and issuance of consignment note would be the presence of the goods for the purpose of transporting them plus the provision of a movable vehicle, the presence of a driver to drive the vehicle, fuel for the vehicle and such other assets / services, taken as a whole and at the same time and together, to

meet the requirements of the service. The transportation of goods cannot take place by providing a static asset, whether on rent or otherwise. It also cannot take place simply by hiring out or renting of a movable asset (such as a truck) that is not able to move because of a mechanical problem or due to the absence of a driver or of fuel. With regard to the instant case it is further stated that the running condition of a vehicle cannot be achieved without fuel, as in the absence of fuel the vehicle cannot move from one place to another to transport the goods. Thus, without transportation of goods due to absence of fuel or any other reason the same cannot be termed as "GTA Service" and the same is liable to be taxed under GST services. In ordinary course of GTA business the essential cost of fuel is borne, in normal and ordinary course, by the service provider only, i.e., the transporter.

22) The stand taken by the respondents in the counter-affidavit is that in the proposed agreement (Annexure-2), even if, cost of fuel is not included as part of the freight charges, this omission cannot form basis for non-consideration of the GST tax, is liable to be rejected.

23) The Supreme Court in the case of ***Commissioner of Service Tax & others Vs Bhayana Builders Private Limited & others, (2018) 3 SCC 782*** was examining Section 67 of the Finance Act, 1994, with respect to the goods /

materials supplied by the service recipient while procuring the taxable service of construction if the amount charged is not included in the gross amount charged by the service provider for providing such service under a composite contract of service and supply of goods, then it will lead to the obvious conclusion that the value of the goods / materials provided by the service recipient free of charge is not to be included while arriving at the gross amount simply because no price is charged by the assessee / service provider from the service recipient in respect of such goods / materials. The service tax has to be calculated on the gross amount that was charged from the service recipient. In the case before the Supreme Court, the assessee / service provider had availed benefit of notifications and paid service tax on 33% of the gross amount which it had charged from the persons for whom construction was carried out, i.e., the service recipients. This did not include the value of such goods / materials which were supplied by the service recipient in the gross value. The Supreme Court held that it was not incumbent on the assessee to include the value of goods / materials supplied free of cost by the service recipient.

The Supreme Court in para 12 of the above said judgment has observed as under :

> "12. On a reading of the above definition, it is clear that both prior and after amendment, the value on which

service tax is payable has to satisfy the following ingredients :

(a) Service tax is payable on the gross amount charged – the words "gross amount" only refers to the entire contract value between the service provider and the service recipient. The word "gross" is only meant to indicate that it is the total amount charged without deduction of any expenses. Merely by use of the word "gross" the Department does not get any jurisdiction to go beyond the contract value to arrive at the value of taxable services. Further, by the use of the word "charged", it is clear that the same refers to the amount billed by the service provider to the service receiver. Therefore, in terms of Section 67, unless an amount is charged by the service provider to the service recipient, it does not enter into the equation for determining the value on which service tax is payable.

(b) The amount charged should be for "for such service provided" – Section 67 clearly indicates that the gross amount charged by the service provider has to be for the service provided. Therefore, it is not any amount charged which can become the basis of value on which service tax becomes payable but the amount charged has to be necessarily a consideration for the service provided which is taxable under the Act. By using the words "for such service provided" the Act has provided for a nexus between the amount charged and the service provided. Therefore, any amount charged which has no nexus with the taxable service and is not a consideration for the service provided does not become part of the value which is taxable under Section 67. The cost of free supply goods provided by the service recipient to the service provider is neither an amount "charged" by the service provider nor can it be regarded as a consideration for the service provided by the service

provider. In fact, it has no nexus whatsoever with the taxable services for which value is sought to be determined."

24) ***Union of India & another Vs Intercontinental Consultants and Technocrats Private Limited, (2018) 4 SCC 669*** was another case where the Supreme Court was examining the validity of the expenditure / cost incurred by the service provider in the course of providing taxable services. The Supreme Court in this case also was examining Section 67 of the Finance Act, 1994 which relates to the expenditure / cost incurred by the service provider in the course of providing taxable services. In para 26 of the above said judgment, the Supreme Court observed as under :

"26. In this hue, the expression "such" occurring in Section 67 of the Act assumes importance. In other words, valuation of taxable services for charging service tax, the authorities are to find what is the gross amount charged for providing "such" taxable services. As a fortiori, any other amount which is calculated not for providing such taxable service cannot be a part of that valuation as that amount is not calculated for providing such "taxable service". That according to us is the plain meaning which is to be attached to Section 67 (unamended i.e. prior to 01.05.2006) or after its amendment, with effect from 01.05.2006. Once this interpretation is to be given to Section 67, it hardly needs to be emphasised that Rule 5 of the Rules went much beyond the mandate of Section 67. We, therefore, find that the High Court was right in interpreting Sections

66 and 67 to say that in the valuation of taxable service, the value of taxable service shall be the gross amount charged by the service provider "for such service" and the valuation of tax service cannot be anything more or less than the consideration paid as quid pro qua for rendering such a service."

25) Finally, the Supreme Court in the above said judgment has held that the value of free supplies of diesel and explosives in respect of service of "Site Formation and Clearance Service" can be included for the purpose of assessment to service tax under Section 67 of the Act. The Supreme Court further held that the value of such material which is supplied free by the service recipient cannot be treated as "gross amount charged" and it is not the consideration for rendering the services. In this backdrop, the value of free supplies of diesel and explosives would not warrant inclusion while arriving at the gross amount charged on the service tax to be paid, and all the appeals filed by the Union of India were dismissed.

26) The Supreme Court in the judgments referred to hereinabove has consistently held that where diesel is filled free of cost (FOC) by the service recipient and is not included in the value of GTA service, then the cost of fuel cannot be added to the payment made by the service

recipient to the transporter, and further GST be charged from the transporter.

27) Recently, the Supreme Court in ***Jayhind Projects Ltd. Vs Commissioner of Service Tax, Ahmadabad, (2023) 13 Centax 32 (S.C.)*** has again reiterated and followed the judgment of the Supreme Court in the case of ***Commissioner of Service Tax & others Vs Bhayana Builders (P) Ltd, (2018) 3 SCC 782***, and held that the value of goods / materials supplied free of cost by service provider is not to be included in the gross amount for levy of service tax by the service provider.

28) Hence, as per the consistent view taken by the Supreme Court in the judgments referred to above the cost of fuel cannot be added in the account of the petitioner, who was a transporter, and was governed by the GST rules. Thus, in the case of the petitioner, as per the agreement (Annexure-2), the cost of fuel was to be borne by the service recipient and this cost of this fuel cannot be subjected to charge of GST by adding the value of free diesel in the transaction value of GTA service done by the petitioner. Hence, value of free fuel cannot be added to value of taxable supply under Section 15(1) and Section 15(2)(b) of the CGST Act, 2017.

29) Keeping in view the above law laid down by the Supreme Court, the present writ petition is allowed, and the order dated 30.01.2023 (Annexure-1), passed by the Appellate Authority for Advance Ruling for the State of Uttarakhand Goods and Service Tax is, hereby, set aside.

**RITU BAHRI, C.J.**

**RAKESH THAPLIYAL, J.**

Dt: 27TH SEPTEMBER, 2024
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