

THE HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_

WP(C) NO.269 of 2010
along with WP(C) NO.270 of 2010
along with WP(C) NO.284 of 2010
along with WP(C) NO.421 of 2010.

A) WP(C) NO.269 of 2010

Sri Ashish Kumar Dey,
Son of Sri Sunil Chandra Dey,
Resident of Village - Shibbari Road,
P.S.-Dharmanagar, Dharmanagar,
District - North Tripura.

..... *Petitioner.*

- Vs -

1. **Food Corporation of India,**
Represented by its Managing Director, having his office at 16/20,
Barakhamba Lane, New Delhi - 110 001
2. **The General Manager,**
Food Corporation of India, NEF Region,
having his office at Shillong, Meghalaya.
3. **The Area Manager,**
Food Corporation of India, District Office,
having his office at Colonel Chowmohani,
Agartala, West Tripura, P.O. - Agartala.
4. **The State of Tripura,**
Represented by the Secretary to the Government of Tripura,
Finance Department, having his office at Agartala,
West Tripura.
5. **The Commissioner of Taxes,**
Government of Tripura, having his office at Agartala,
West Tripura, P.O. - Agartala.
6. **The Union of India,**
Represented by the Secretary to the Government of India,
Finance Department, having his office at South Block,
New Delhi - 110 001.

..... *Respondents.*

B) WP(C) NO.270 of 2010

Sri Ashish Kumar Dey,
Son of Sri Sunil Chandra Dey,
Resident of Village - Shibbari Road,
P.O. & P.S.-Dharmanagar, District - North Tripura.

..... *Petitioner.*

- Vs -

1. **Food Corporation of India,**
Represented by its Managing Director, having his
office at 16/20, Barakhamba Lane, New Delhi-110 001
2. **The General Manager,**
Food Corporation of India, NEF Region, having his office
at Shillong, Meghalaya.
3. **The Area Manager,**
Food Corporation of India, District Office, having his
office at Colonel Chowmohani, Agartala, West Tripura,
P.O. - Agartala.
4. **The State of Tripura,**
Represented by the Secretary to the Government of Tripura,
Finance Department, having his office at Agartala,
West Tripura.
5. **The Commissioner of Taxes,**
Government of Tripura, having his office at Agartala,
West Tripura, P.O. - Agartala.
6. **The Union of India,**
Represented by the Secretary to the Government of India,
Finance Department, having his office at South Block,
New Delhi - 001.

..... *Respondents.*

C) WP(C) NO.284 of 2010

M/S Sunil Chandra Dey & Partner,
A Registered Partnership Firm, having its Office
at Village - Shibbari Road, P.O. & P.S. - Dharmanagar,
Sub-Division - Dharmanagar, District - North Tripura,
Constituted by its Partners, namely,

1. **Smt Maya Rani Dey,**
W/o - Late Sunil Chandra Dey,

2. **Smt Poly Dey,**
W/o - Sri. Ashish Kumar Dey,
both of them are residents of Village - Shibbari Road
P.O.& P.S. - Dharmanagar, Sub-Division - Dharmanagar,
District - North Tripura.

..... *Petitioner.*

- Vs -

1. **Food Corporation of India,**
Represented by its Managing Director, having his office at 16/20,
Barakhamba Lane, New Delhi-110 001.
2. **The General Manager,**
Food Corporation of India, NEF Region,
having his office at Shillong, Meghalaya.
3. **The Area Manager,**
Food Corporation of India, District Office,
having his office at Colonel Chowmohani,
Agartala, West Tripura.
4. **The State of Tripura,**
Represented by the Secretary to the Government of Tripura,
Finance Department, having his office at Agartala, West Tripura.
5. **The Commissioner of Taxes,**
Government of Tripura,
having his office at Agartala, West Tripura.
6. **The Union of India,**
Represented by the Secretary to the Government of India,
Finance Department, having his office at South Block,
New Delhi.

..... *Respondents.*

D) WP(C) NO.421 of 2010

M/S Ranjit Kumar Saha & Sons,
A partnership firm having its office situated at Old Thana Road,
West Banamalipur, P.S. - East Agartala, P.O. - Agartala,
District - West Tripura, constituted by its partners viz.

- a) **Sri Ranjit Kumar Saha,**
S/o - Late Lalit Mohan Saha, resident of Old Thana Road,
West Banamalipur, P.S. - East Agartala,
District - West Tripura.

- b) **Sri Subrata Kumar Saha,**
- c) **Sri Sushanta Saha,**

All are sons of Sri Ranjit Kumar Saha, resident of Old Thana Road, West Banamalipur, P.O. - Agartala, P.S. - East Agartala, District - West Tripura.

- d) **Sri Manish Debnath alias Manindra Debnath,**
S/o - Late Lal Mohan Debnath, resident of Old Thana Road, West Banamanipur, P.O. - Agartala, P.S. - East Agartala, District - West Tripura.
- e) **Sri Badal Saha alias Pradip Saha,**
S/o - Late Chitta Ranjan Saha, resident of Shibnagar, College Road, P.S. - East Agartala, P.O. - Agartala College, District - West Tripura.
- f) **Sri Anil Kumar Choudhury,**
S/o - Late Judhistir Choudhury, resident of Netaji Subhas Road Extension near M.B.B. Club, P.S. - East Agartala, P.O. - Agartala, District - West Tripura.
- g) **Sri Noni Gopal Pal,**
S/o - Late Satish Chandra Pal, resident of M.B. Tilla, P.S. - West Agartala, P.O. - Arundhutinagar, Agartala, District - West Tripura.
- h) **Sri Gopal Chakraborty,**
S/o - Late Dharendra Chandra Chakraborty, resident of Milan Sangha, P.S. - West Agartala, P.O. - Agartala, Agartala, District - West Tripura.

Represented by their duly constituted attorney namely, Sri Ranjit Kumar Saha, S/o - Late Lalit Mohan Saha, resident of Old Thana Road, West Banamalipur, P.S. - East Agartala, P.O. - Agartala, District - West Tripura.

..... *Petitioner*

- Vs -

1. **Food Corporation of India,**
Represented by its Managing Director, having his office at 16/20, Barakhamba Lane, New Delhi-110 001
2. **The General Manager,**
Food Corporation of India, NEF Region, having his office at Shillong, Meghalaya - 793 003.

3. **The Area Manager,**
Food Corporation of India, District Office, having his office at Colonel Chowmohani, P.O Agartala, Agartala, West Tripura.
4. **The State of Tripura,**
Represented by the Secretary to the Government of Tripura, Finance Department, having his office at New Secretariat Complex, Gokhabasti, P.O. Kunjaban, Agartala, West Tripura.
5. **The Commissioner of Taxes,**
Government of Tripura, having his office at Kar Bhawan, Palace Compound, P.O. Agartala, Agartala, West Tripura.
6. **The Union of India,**
Represented by the Secretary to the Government of India, Finance Department, having his office at South Block, New Delhi -1.

 _B_E_F_O_R_E
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA
HON'BLE JUSTICE MR. S C DAS

is admittedly a Government Corporation for transportation of food grains, sugars and other food materials.

3. Briefly stated the case of the petitioner is that the liability to pay service tax on the services provided by the petitioners of providing goods transport services etc. lies upon the assessee which is the service receiver and not the service provider and, therefore, the FCI has wrongly deducted the service tax from the contractual amount and the same should be ordered to be refunded to the petitioners.

4. The stand of the FCI is that in terms of the agreement entered into between the parties, the contractor has undertaken to pay these liabilities and under the contract entered into between the parties, the contractor has quoted a rate inclusive of all taxes which will include service tax also and therefore, the deduction of service tax has rightly been made from the contractual amount.

5. Lengthy arguments were addressed on the question as to who is the assessee in the given case. In our view, this question should not detain us for long because in view of the amendment to the Service Tax Act made by the Finance Act of 2000 in relation to service providers and their agents providing goods transport services, the assessee is now the service receiver and this amendment is effective from 1997. Therefore, there can be no

manner of doubt that the assessee for all intention and purposes would be the Food Corporation of India.

6. We may only refer to the following observations of the Apex Court in *Gujrat Ambuja Cement Vs. Union of India*, (2005) 4 SCC 214 which read as follows :

“20. As we read the decision in Laghu Udhog Bharati, the basis was the patent conflict between Sections 65, 66, 68(1) and 71 of the Finance Act, 1994 as amended in 1997 on the one hand and Rules 2(1) (d) (xii) and (xvii) of the Service Tax Rules 1994 on the other. Each of these sections of the Finance Act 1994 as amended in 1997 proceeded on the basis that the tax was imposable on the person providing the service. All the other sections regarding the liability to furnish returns, assessments, penalties etc. flowed from that. It was because unamended Section 66 spoke of the liability to pay tax in respect of services "which are provided to any person by the person responsible for collecting the service tax" and Section 65(5) defined "assessee" as meaning "a person responsible for collecting the service tax", that this Court held that sub-clauses (xii) and (xvii) of Rule 2(1) (d) of the Service Tax Rules were illegal.

21. As is apparent from Section 116 of the Finance Act, 2000, all the material portions of the two sections which were found to be incompatible with the Service Tax Rules were themselves amended so that now in the body of the Act by virtue of the amendment to the word "assessee" in Section 65(5) and the amendment to Section 66(3), the liability to pay the tax is not on the person providing the taxable service but, as far as the service provided by clearing and forwarding agents and goods transport

operators are concerned, on the person who pays for the services. As far as Section 68(1A) is concerned by virtue of the proviso added in 2003, the persons availing of the services of goods transport operators or clearing and forwarding agents have explicitly been made liable to pay the service tax.

22. As we have said, Rule 2(1)(d) (xii) and (xvii) had been held to be illegal in Laghu Udhyog Bharati only because the charging provisions of the Act provided otherwise. Now that the charging section itself has been amended so as to make the provisions of the Act and the Rules compatible, the criticism of the earlier law upheld by this Court can no longer be availed of. There is thus no question of the Finance Act, 2000 overruling the decision of this Court in Laghu Udhyog Bharati as the law itself has been changed. A legislature is competent to remove infirmities retrospectively and make any imposition of tax declared invalid, valid. This has been the uniform approach of this Court. Such exercise in validation must of course also be legislatively competent and legally sustainable. Those issues are considered separately. On the first question, we hold that the law must be taken as having always been as is now brought about by the Finance Act, 2000. The statutory foundation for the decision in Laghu Udhyog Bharati has been replaced and the decision has thereby ceased to be relevant for the purposes of construing the present provisions (vide Ujagar Prints (II) vs. Union of India) . Therefore subject to our decision on the question of the legislative competence of Parliament to enact the law, and assuming the amendments in 2003 to be legal for the time being, we reject the submission of the writ petitioners that by the amendments brought about by Sections 116 and 117 of the Finance Act 2000, the decision in Laghu Udhyog Bharati has been legislatively overruled.”

A bare reading of this judgment leaves no manner of doubt that the liability to pay tax is of the Food Corporation of India.

7. Reference may also be made in this behalf to the judgment of the Apex Court in ***Rashtriya Ispat Nigam Ltd. Vs. M/S Dewan Chand Ram Saran, (2012) 5 SCC 306***. We may, however, point out that in that case the contracts were entered into in the year 1998 and the Apex Court held that the intention of the parties was to shift the burden of taxes from the assessee to the person who is now liable to pay the taxes. The Apex Court reiterated the law laid down in ***Gujrat Ambuja Cement's*** case and held that in view of the amendment of the law it is the service receiver who is liable to pay the tax. However, in ***Rashtriya Ispat Nigam's*** case the Apex Court went on to hold that the parties by agreement have agreed that the contractor shall bear all taxes, duties and other liabilities. Clause 9.3 which was the subject matter of the decision in the said case read as follows :

“9.3. The Contractor shall bear and pay all taxes, duties and other liabilities in connection with discharge of his obligations under this order. Any income tax or any other taxes or duties which the company may be required by law to deduct shall be deducted at source and the same shall be paid to the Tax Authorities for the account of the Contractor and the Company shall provide the Contractor with required Tax Deduction Certificate.”

Interpreting the said Clause the Apex Court held thus :

“26. As far as the submission of shifting of tax liability is concerned, as observed in paragraph 9 of Laghu Udyog Bharati (Supra), service tax is an indirect tax, and it is possible that it may be passed on. Therefore, an assessee can certainly enter into a contract to shift its liability of service tax. Though the appellant became the assessee due to amendment of 2000, his position is exactly the same as in respect of Sales Tax, where the seller is the assessee, and is liable to pay Sales Tax to the tax authorities, but it is open to the seller, under his contract with the buyer, to recover the Sales Tax from the buyer, and to pass on the tax burden to him. Therefore, though there is no difficulty in accepting that after the amendment of 2000 the liability to pay the service tax is on the appellant as the assessee, the liability arose out of the services rendered by the respondent to the appellant, and that too prior to this amendment when the liability was on the service provider. The provisions concerning service tax are relevant only as between the appellant as an assessee under the statute and the tax authorities. This statutory provision can be of no relevance to determine the rights and liabilities between the appellant and the respondent as agreed in the contract between two of them. There was nothing in law to prevent the appellant from entering into an agreement with the respondent handling contractor that the burden of any tax arising out of obligations of the respondent under the contract would be borne by the respondent.

27. If this clause was to be read as meaning that the respondent would be liable only to honour his own tax liabilities, and not the liabilities arising out of the obligations under the contract, there was no need to make such a provision in a bilateral commercial document

executed by the parties, since the respondent would be otherwise also liable for the same. In Bank of India (supra) one party viz. the bank was responsible for the formulation of the Voluntary Retirement Scheme, and the employees had only to decide whether to opt for it or not, and the principle of contra proferentem was applied. Unlike the VRS scheme, in the present case we are concerned with a clause in a commercial contract which is a bilateral document mutually agreed upon, and hence this principle can have no application. Therefore, clause 9.3 will have to be read as incorporated only with a view to provide for contractor's acceptance of the tax liability arising out of his obligations under the contract.

28. *It was pointed out on behalf of the appellant that it is conventional and accepted commercial practice to shift such liability to the contractor. A similar clause was considered by this Court in the case of Numaligarh Refinery Ltd. vs. Daelim Industrial Co. Ltd., reported in [2007 (8) SCC 466]. In that matter, the question was as to whether the contractor was liable to pay and bear the countervailing duty on the imports though this duty came into force subsequent to the relevant contract. The relevant clause 2(b) read as follows:*

“2(b) All taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor...”

Reading this clause and the connected documents, this Court held that they leave no manner of doubt that all the taxes and levies shall be borne by the contractor including this countervailing duty.”

8. As far as the present case is concerned, the Clause with which we are concerned reads as follows :

“Tenderers for transportation work are required to quote the rates inclusive of all taxes, duties, cesses etc.

In case rates are quoted in a manner other than mentioned above the tenders are liable to be ignored. The tenderers should not incorporate any condition in the tenders as conditions of tenders are likely to be ignored.”

Dealing with this clause the contention of Mr. Somik Deb learned counsel for the petitioner is that what this clause contemplates is that the liability which is that of the contractor shall be borne by him and the liability which is that of the Corporation shall be borne by it. He, therefore, contends that since now the law is clear that the liability to pay the service tax is of the FCI, it is the FCI which had to pay the service tax and the burden to pay the service tax was not transferred upon the contractor by means of this clause.

9. In *Numaligarh Refinery Ltd. Vs. Daelim Industrial Company. Ltd, (2007) 8 SCC 466* the Apex Court was dealing with a contract wherein the clause reads as follows :

“2(b) All taxes and duties in respect of job mentioned in the aforesaid contracts shall be the entire responsibility of the contractor...”

Interpreting this clause along with the other clauses the Apex Court held that the liability to pay taxes had been shifted from the assessee to the other party.

10. Therefore, the only issue which requires consideration in this case is, with regard to the interpretation of the note quoted hereinabove. If this note was not there then the FCI would definitely be liable to pay the tax. The question is what is the effect of this note.

11. In our opinion, the note as incorporated clearly indicates the intention of the parties that the rate to be quoted by the contractor should be inclusive of all taxes, levies, cesses etc. which would obviously include service tax. The contractor cannot be heard to urge that service tax is not part of the taxes which arises out of the contract. The liability to pay the tax may have been on the FCI under law but while quoting the rate a contractor can very clearly state what is the rate being quoted by him. This Court can take notice of the fact that in many such tenders or contracts where sales tax etc. are to be taken into consideration, the contractors are asked to quote rates either inclusive of tax or exclusive of tax. If they are inclusive of tax then the contractor is liable to pay all the taxes therein. This reasoning is also in line with the judgment rendered by the Apex Court in *Rashtriya Ispat Nigam's* case.

12. Therefore, we find no merit in the writ petitions which are accordingly dismissed. No order as to costs.

JUDGE

CHIEF JUSTICE

Sukhendu