IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Service Tax Appeal No.75097 of 2019

(Arising out of Order-in-Original No.16/ST/Ayukt/2018 dated 21.08.2018 passed by Commr. of CGST & Excise, Patna I)

M/s Smaarftech Technologies Pvt. Ltd.
1st Floor,1/56, Vivekanand Marg (Near Peari Club),
North S.K.Puri, Patna-800013

Applicant

VERSUS

CGST & Excise, Patna I
4th Floor, C.R.Building (Annexe),
Bir Chand Patel Path,
Patna-800001.

Respondent

Appearance:

Shri Anurag Misra & Ms.Pragya Pandey, both Advocates for the Appellant
Shri T. Mondal, Authorized Representative for the Respondent

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI BIJAY KUMAR, TECHNICAL MEMBER

FINAL ORDER NO.76871/2019

DATE OF HEARING : 24.10.2019

DATE OF DECISION/PRONOUNCEMENT : 11 December, 2019

PER P.K.CHOUDHARY :

The present appeal is filed against the Order-in-Original No.16/S.T./AYKUT/2018 dated 21-08-2018 passed by the Commissioner of Central GST & Central Excise, Patna –I wherein the Learned Commissioner has confirmed the demand of Service Tax along with Interest and equivalent Penalty under Section 78 of the Finance Act 1994.

2. The facts of the case in brief is that a Show cause notice dated 19.04.2016 was issued against the appellant namely M/s Smaarftech Technologies Private Limited and its Director alleging *inter alia* that during the period February, 2011 to March, 2015, the appellant

provided ‘Management or Business Consultant Service’ and ‘Business Auxiliary Service’ to M/s Bihar State Electronic Development Corporation, Govt. of Bihar, Beltron Bhawan, Shastri Nagar, Patna-800 023 (BSEDC in short) and also provided ‘Support Service to Business and Commerce’ to the Central Bank of India (CBI in short) and in lieu received Rs.36,77,02,905/-, which included Service Tax including Cesses totally amounting to Rs.4,21,52,940/-. But the appellant, in connivance with its Director namely Shri Anand Sarnaik, did not assess their taxable value correctly, did not file periodical returns and also did not deposit the same in the Government’s account and thus, they contravened the provisions of Sections 66, 67, 68, 69 and 70 of the Finance Act, 1994 read with Rule 4, 5, 6 and 7 of the Service Tax Rules, 1994. Accordingly, the said amount of Service Tax including Cesses was proposed to be recovered from the appellant under the extended time limitation on account of suppression of facts with intent to evade Service Tax along with interest under the provisions of Section 73(1) and 75 of the Act, respectively. In addition, the penalty under Section 77 and 78 of the Act was also proposed to be imposed upon the appellant for their act of omission and commission and intentional evasion of Service Tax and Cesses. The notice also proposed to impose penalty upon the Director under Section 78A of the Act.

3. As per the notice, during investigation, Shri Vijay Kumar Sinha, Project Lead of BSEDC vide his letter bearing 2257/11 dated 04.04.2011 forwarded the copy of the agreement dated 10.09.2008 which was for the implementation of e-Muster (also known as e-Shakti project). According to him, the project was in relation to provision of Smart Card to the beneficiaries of National Rural Employment Guarantee Scheme, (NREGS in short) of Patna District. As per the agreement, the appellant had to provide biometric (fingerprint) module, digital photographs, hand held terminals, application software, smart card & key management system, beneficiary module, project management module, data entry and storage module,

workflow measurement module, MIS module, grievance redressal module, GIS module, electronic payment module, design, development, implementation and maintenance of the above apparatus and instruments and other robust equipments which were resistant to damage from heat, dust, moisture, rough handling and poor storage in rural conditions. Apart, the appellant had to collect comprehensive data/information in respect of the beneficiaries of NREGS like photographs, biometric fingers print, etc., to make data entry of records and to issue smart cards/identity cards/job cards to such beneficiaries. For this sake, the appellant had to provide handheld terminals for project sites for muster rolls and measurement book details. MIS generation at panchayat, block, district and state headquarters level, integration of electronic payment mechanism of various banks and for payments of wages to the beneficiaries, capacity building programme, awareness and sensitization programme, facility management services, opening of zero balance bank accounts for the NREGS beneficiaries etc. were also required to be done by the appellant.

4. As per the notice, the nature of work as elaborated above was covered under Management or Business Consultant service, On-line Information & Data Base Access or Retrieval service. The notice further refers to Section 65A of the Act which stipulates 'when the nature of services provided correspond to more than one services, the service which provides the most specific description or represent the essential character of services would be preferred over other services'. As per the notice, the management consultant service related to consultancy or technical assistance in relation to financial management, logistics management, procurement and management of information technology or other similar areas of management. The works pertaining to workflow measurement module, capacity building programme, awareness and sensitization programme and facility management services were covered by human resources management. Opening of bank accounts fell within financial

management. Key management system and project management module came under management of any organization. The biometric (fingerprint) module, digital photography, hand held terminals and their customization, application software, smart card, data entry and storage module, electronic payment module, design, development, implementation and maintenance of these technical inputs, beneficiary information like photograph, biometric fingers print, data entry of records, issuance of smart card, hand held terminals, integration of electronic payment mechanisms were covered by management of information technology resources. Thus, the over-all characteristics of the services provided by the appellant were covered by Management Consultant service as defined under sub-clause (r) of erstwhile Section 65(105) of the Finance Act, 1994 which was neither covered in the negative list of Section 66(D) of the Finance Act, 1994 nor in Mega Exemption Notification 25/2012-ST dated 20.06.2012 both effective since 01.07.2012.

5. The notice further referred to Form 26AS and alleged that the CBI had deducted Income Tax at source under Section 194J of the Income Tax Act, 1961 on the amount of Rs.1,72,23,480/- paid by them to the appellant during 2010-11 (Sept.,10-March,11), 2011-12 and 2012-13. The said Section 194J stipulates deduction of Income Tax at source against the professional or technical fee paid. From such details of Form 26AS, it is alleged that the appellant had received Rs.1,72,23,480/- during the said period for providing professional or technical service by way of accounting and logistics support for the operation of the accounts of the beneficiaries of NREGS. Thus, the services provided were chargeable to Service Tax under "Support service of Business or Commerce" category.

6. During adjudication proceeding, the appellant contended before the learned adjudicating authority that generation of digital job cards (E-shakti cards) for the beneficiaries of the Mahatma Gandhi National Rural Employment Guarantee Scheme (MNREGS in short) was a sovereign function of the State under the Mahatma Gandhi National

Rural Employment Guarantee Act, 2005 (MNREGA in short) hence was not taxable under the Finance Act, 1994. They also advanced other arguments including hypothetical classification and taxability as ascertained in the notice, demand of Service Tax on supply of plant/machinery/equipments /hardware/software etc. The appellant also produced evidences pertaining to availability of Cenvat Credit of inputs/input services to them in the neighborhood of Rs.1,83,84,233/-, the genuineness of which got verified from the field formation by the learned adjudicating authority. The aforesaid Credit was not taken in view non-taxability of output service.

7. The learned adjudicating authority however, did not find contention and arguments of the appellant worth consideration and confirmed the entire demand of Service Tax with interest expressing his consent with the allegations leveled in the notice. He further imposed penalties on various counts on the appellant as well as on its Director namely Shri Anand sarnayeke. Hence, the present appeal.

8. Shri Anurag Mishra and Pragya Pandey appeared on behalf of the appellant and during the course of hearing, the learned counsel of the appellant after submitting the text of MNREGA, mainly emphasized that as per the agreement dated 10.09.2008 executed by and between the Hon'ble Governor of Bihar acting through its authorized representative, BSEDC and the consortium consisting of the appellant and M/s. Anil Printers Limited and M/s. Face Technologies (Proprietary) Limited; the appellant was assigned with the work of generation of digital job cards (E-shakti cards) for the beneficiaries of MNREGS. He stressed upon that MGNREGA was notified on September 7, 2005 with the mandate to provide at least 100 days of guaranteed wage employment in a financial year to every rural household whose adult members volunteer to do unskilled manual work. The goals of this legislation were to provide social protection for the most vulnerable people living in rural India by providing employment opportunities; to provide livelihood security for the poor through creation of durable assets; to improve water security, soil conservation and higher land

productivity by drought-proofing and flood management in rural India; to empower the socially disadvantaged, especially women, Scheduled Castes (SCs) and Schedules Tribes (STs), through the processes of a rights-based legislation; to strengthen decentralised, participatory planning through convergence of various anti-poverty and livelihoods initiatives; to deepen democracy at the grass-roots by strengthening Panchayati Raj Institutions and to effect greater transparency and accountability in governance. Thus, MGNREGA is a powerful instrument for ensuring inclusive growth in rural India through its impact on social protection, livelihood security and democratic empowerment. Under the scheme, the Central Government bears the following costs:

i) The entire cost of wages for unskilled manual workers;

ii) 75 percent of the cost of material and wages for skilled and semi-skilled workers;

iii) Administrative expenses as may be determined by the Central Government. These will include, inter alia, the salary and allowances of Programme Officers and their support staff and work site facilities;

iv) Administrative expenses of the Central Employment Guarantee Council;

And the State Governments bear the following costs:

i) 25 percent of the cost of material and wages for skilled and semi-skilled workers;

ii) Unemployment allowance payable in case the State Government cannot provide wage employment within 15 days of application.

iii) Administrative expenses of the State Employment Guarantee Council.

9. The learned Counsel further submitted the print-out of the 3rd Edition of Operational Guidelines, 2008 published under the MNREGA by the Ministry of Rural Development, Department of Rural Development, Government of India, New Delhi and emphasized that as per sub-para 5.3.3 of the Guidelines; the cost of the Job Cards,

including that of the photographs, was to be borne as part of the programme cost.

10. The learned Counsel further submitted that for the purpose of issue of digital job cards (E-shakti cards), the appellant had to first set up the infrastructure by providing/installing various equipments/plant & machinery, computers, servers, hardwares and softwares etc. from its own resources for which they were to be paid in 20 equal installments on quarterly basis and on expiration of the term of the agreement, the ownership had to be transferred by the appellant to the Government of Bihar against the token money of Rs. 1/- only. Apart from the above, the appellant was also assigned with the responsibility to collect comprehensive data/information about the beneficiaries of MNREGS, uploading the same into servers, feeding into electronics chips to be fitted in digital job cards (E-shakti cards) and issue thereof. In addition, the appellant was also required to run awareness programme about MNREGS and its sensitization. The counsel pointed out that the aforesaid fact has also been admitted by the learned adjudicating authority at para-36 and 41 of his Order hence, there is no dispute in this regard.

11. The learned Counsel further stressed upon that the very purpose of generation of digital cards was to ensure correct and timely wage payment to genuine beneficiary of MNREGS initiated under MNREGA, 2005. The cards had to become the identity proof for MNREGA workers of Bihar, providing them access to bank accounts to withdraw or to deposit money anytime he wanted. The project had also intended not only to ensure timely payment of wages but also to make the physical presence of the workers at the bank, unnecessary. It also intended to bring transparency and accountability by curbing the corruption so that the unprecedented employment guarantee scheme as envisaged by the Central Government could effectively be implemented without diversion of funds. With the help of biometrics-aided attendance, only a worker could withdraw money, nobody on his behalf could do so.

12. The learned Counsel further drew the attention of this court towards various clauses of the Agreement dated 10.09.2008 and emphasized that the appellant had in fact, acted as an 'executing agency' for the generation of digital job cards (E-shakti cards) under the supervision of BSEDC which functioned as an implementing agency for and on behalf of the Government of Bihar. The Government of Bihar was the real service recipient who got the work executed under MNREGA, 2005 through its agency namely BSEDC. Hence, the allegation that the appellant provided taxable services to BSEDC is totally incorrect. The Counsel further contended that since the activities carried out by the appellant on behalf of the Government were covered under Clause 16 of Article 243W of the Constitution of India and as the whole expenditures are also debited to the consolidated funds of India therefore, such activities were carried out under the sovereign power envisaged originally by NREGA, 2005. Accordingly, no Service Tax was payable on such Service in terms of Sl.39 of the Mega Exemption Notification No.25/2012-ST, dated 20-12-2012.

13. With intent to seek support to his above argument, the learned Counsel relied upon the decision of the Tribunal pronounced in the case of UTI Technology Services Limited Vs. Commissioner of Service Tax as reported in 2012(26) STR 147 whereby it is held that the service of issue of PAN card to applicants and collecting charges for the same is not chargeable to Service Tax under the category of Business Auxiliary Service as the levy and collection of Income Tax is a sovereign function and issue of PAN cards is in relation to such function. He further placed his reliance on the decision of the Tribunal, Bangalore pronounced in the case of Commissioner of Customs, Central Excise and Service Tax, Hyderabad-II v. C.S. Software Enterprises Ltd. [2008] 16 STT 187 (BANG. - CESTAT), whereby the Tribunal held that "if a service is rendered in relation to a sovereign function, such activity cannot be brought under the category of a taxable service and no service tax is leviable on such activities." He

further quoted the decision pronounced in the case of CCE v. Ankit Consultancy Ltd. reported in 2007 8 STT 84 (New Delhi - CESTAT) and the decision of the Tribunal in the case of Commissioner of Central Excise, Indore Vs. Virgo Softech Ltd. reported in 2018 (9) GSTL 274 (Tri.-Del.). He also referred to CBEC Circular No.89/7/2006-S.T., dated 18-12-2006 whereby it has been clarified that 'the activity which is undertaken as mandatory and statutory function and is purely in public interest are not in the nature of service to any particular individual for any consideration'. In the light of above case laws and clarifications, the learned Counsel vehemently argued that the activities as carried out by the appellant were part of the sovereign function under MNREGA, 2005 and hence, was not be liable to service tax.

14. The learned Counsel also quoted Board Circular No.125/7/2010-ST, dated 30-07-2010 by which it has been clarified that the 'amount received for implementation of project under a centrally sponsored scheme cannot be presumed as consideration for providing a taxable service' and levy and collection of service tax on State government agencies/departments implementing CSS under a central grant, is not legally tenable and therefore, in such cases service tax should not be demanded. The learned Counsel urged that MNREGS was conceptualized and implemented by the Central Government by MNREGA, 2005 and the generation of digital job cards (E-shakti cards) was done out of CSS and fund of State Government, hence not taxable as per above clarification. He further quoted the decisions of the Hon'ble Supreme Court in Commissioner v. Apitco Ltd. – 2011 (23) S.T.R. J94 (S.C.) whereby the Hon'ble Supreme Court affirmed the decision of the Tribunal wherein the Tribunal had set aside the demand of Service tax on 'grants-in-aid received from Government' for implementation of Welfare Schemes when the grants-in-aid were fully utilised for said activity and no consideration was received for any service to the Government. The Tribunal held that taxable service was not rendered by implementing Government's schemes as

implementing agency and that Service provider-client relationship was absent between the assessee and the Government.

15. The learned Counsel further argued that the activities of data collection and digitization thereof, printing and generation of e-shakti cards for the Government of Bihar was not the taxable service either under the category of "Management or Business Consulting service" or under "Business Auxiliary Service" as alleged in the notice and wrongly held by the learned adjudicating authority because of the fact that Government of Bihar was not a business organization and also because the appellant was not engaged in promotion/marketing/sale of any goods or service. They did not provide any customer care service and did not procure any goods or services, which were inputs for the Government of Bihar. They did not provide any service on behalf of the Government of Bihar and also did not provide any service incidental or auxiliary to any activity of billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision for the Government of Bihar. Instead, digital job cards (E-shakti cards) were generated under the sovereign power with intent to facilitate workers of MNREGS. In view thereof, they were not liable to pay Service Tax under either of the categories. The learned counsel contended that the adjudicating authority has confirmed the demand without determining the specific nature and classification of service hence, is not sustainable in view of the decision of Hon'ble Kerala High Court pronounced in the case of Kerata Colour Lab. Association vs. Union of India 2003 reported in (156) ELT 17 (Ker.) whereby it was held that "taxable event occurs because of the service rendered" and "the taxable event determines the true event of tax".

16. The learned AR supported the version of the Commissioner and stressed upon that the Order-in-Original is just, legal and valid hence, does not deserve any interference at this level.

17. We have heard both sides and perused the appeal records.

18. From various clauses and terms and conditions of the agreement dated 10.09.2008, it transpires that the Government of Bihar, through its agency BSEDC, allotted the entire work of generation of digital job cards (E-shakti cards) for the workers of MNREGS to the appellant on turn-key basis. For the aforesaid purpose, the appellant had to set-up the entire infrastructure by supplying all kinds of plant & machinery/equipments/software/hardware. As per the Agreement, the appellant had to collect, process and store data of the beneficiaries of MNREGS like photographs, biometric fingers prints, along with names, address etc. in the database server installed for the purpose. They had to integrate electronic payment mechanism of various banks and to make proper arrangements for payments of wages to the beneficiaries. They had to create awareness about MNREGS and sensitization thereof and to undertake other ancillary work like opening of 'No Frills and Zero Balance Bank accounts' for the MNREGS beneficiaries. The establishment cost and the cost of plant & machinery/equipments/tools was to be paid back to the appellant in 20 (twenty) quarterly installments. The ownership of these assets was to be transferred to the Government of Bihar on expiration of the agreement against the token money of Rs. 1/- only. From the text of MNREGA, 2005, it transpires that job-card were to be issued mandatorily to every beneficiaries of MNREGS and as per sub-para 5.3.3 of the 3rd Edition of Operational Guidelines, 2008 published under the MNREGA by the Ministry of Rural Development, Department of Rural Development, Government of India, New Delhi, the cost of such job-cards was to be borne by the Government as part of the programme cost. It also transpired from the agreement that the appellant had to first execute the works at the District of Patna which was termed as 'Pilot District' in the agreement. Only after completion of work at the Pilot District, the project was to take place in the remaining districts. We have considered the Board's Circular No. 96/7/2007-S.T., dated 23.08.2007 issued by CBEC wherein it is clarified that the activities assigned to and performed by the

sovereign/public authorities under the provisions of any law are undertaken as mandatory and statutory functions and cannot be treated as services provided for a consideration. The relevant para of the Circular is extracted hereunder:

> *"The Board is of the view that the activities performed by the sovereign/public authorities under the provision of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute, and it is deposited into the Government Treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/public authority under the provisions of law does not constitute provision of taxable service to a person and, therefore, no service tax is leviable on such activities."*

19. We are further of the considered view that the Appellant was acting as an implementing agency and implementing the government welfare scheme sponsored by the Government of Bihar, accordingly the entire demand against the Appellant is contrary to the Board's Circular No.125/7/2010-ST dated 0.07.2010 which clarifies that levy and collection of service tax on State Government agencies/departments implementing the CSS under a central grant is not legally tenable and therefore, in such cases service tax should not be demanded. Since the Appellant has executed the project to facilitate the Government in discharging of its sovereign duty, the Appellant cannot be made liable for service tax. The appellant's case is squarely covered by the Judgment of *Commissioner of Cus. & C. Ex., Hyderabad-ii Vs. CMC Limited, 2007 (7) S.T.R. 702 (Tri. – Bang.), Instrumentation Ltd. Vs. Commissioner, Lucknow* – 2016 (45) S.T.R. 182 (Tri. – All.) and *Sukhmani Society For Citizen Services vs.*

C.C.E. & S.T., Chandigarh - 2017 (47) S.T.R. 172 (Tri. - Chan.). The activity of the appellant is a sovereign activity and therefore out of the ambit of the Service Tax and no service tax can be demanded on such services. We further conclude that all the other activities on which the service tax has been demanded against the appellant are in or in relation to providing e-shakti cards to MGNREGA beneficiaries which is a sovereign activity and therefore no service tax can be demanded on such services also.

20. In view of the above findings, we set aside the impugned Order and allow the appeal with consequential relief to the appellants.

(Pronounced in the open court on **11 December, 2019**)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/

(Bijay Kumar)
Member (Technical)

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