

# Bimal Jain

FCA, FCS, LLB, B. Com (Hons)

Dear Professional Colleague,

**Construction Services provided to IIT exempt even though Government does not hold 90% or more equity/control in it**

We are sharing with you an important judgement of the Hon'ble High Court of Patna in the case of ***Shapoorji Paloonji & Company (P) Ltd. Vs. Commissioner, Customs & Central Excise & Service Tax [(2016) 67 taxmann.com 218 (Patna)]*** on the following issue:

Issue:

**Whether an authority established under an Act of Parliament/ State Legislature is a Governmental authority, for claiming exemption under the Mega Exemption Notification No. 25/2012-ST dated June 20, 2012, without having 90% or more equity/control in it by the Government?**

**Facts & Background:**

Shapoorji Paloonji & Company (P) Ltd. ("**the Petitioner**") was appointed as contractor for construction of academic complex of Indian Institute of Technology ("**IIT**"), Bihta ("**the Services**") by National Building Construction Corporation Limited (consultant for construction appointed by IIT). The Petitioner initially paid Service tax on the Services but stop paying Service tax after some time and also claimed refund with respect to earlier payments.

Petitioner's contention: Construction/ Works contract of 'educational institution' is exempt under Entry No. 12(c) of the Mega Exemption Notification No. 25/2012-ST dated June 20, 2012 ("**the Mega Exemption Notification**"), as the Services were provided to IIT, being a 'Governmental authority', which is set up under an Act of Parliament.

Revenue's contention: IIT is not a Governmental authority, as Government did not have 90% or more equity/control in it. Hence benefit of the Mega Exemption Notification is not available in this case.

Relevant provisions: The term 'Governmental authority' as defined under Clause 2(s) of the Mega Exemption Notification was amended by Notification No. 02/2014 – ST dated January 30, 2014 in the following manner:

**For the period prior to January 30, 2014:**

*"(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*

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*Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution;"*

**W.e.f. January 30, 2014:**

*"(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, to carry out any function entrusted to a municipality under article 243W of the Constitution."*

**Held:**

The Hon'ble High Court of Patna held as under:

- The 'Governmental authority' as defined in the Notification dated January 30, 2014, means an authority or a board or any other body set up by an Act of Parliament or State Legislature;
- The provisions contained in sub-clause (i) and sub-clause (ii) of Clause 2(s) of the Mega Exemption Notification 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, as the sub-clause (i) is followed by ';' and the word 'or'. Therefore, each of the sub-clauses is independent provision;
- Thus, it means that when an authority is established by Government, then, it should have 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 to be eligible for exemption;
- The Authority set up by an Act of Parliament or State Legislature is not and cannot be made subject to the condition of 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;

Thus, it was held that the Services provided by the Petitioner in respect of the academic block of IIT is exempt from Service tax in terms of the Mega Exemption Notification as amended.

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It was further held that since the levy as collection of Service tax paid by the Petitioner or IIT has not been found to be justified, therefore, the Department shall refund the amount of the Service tax deposited either to the Petitioner or IIT, as the case may be, expeditiously.

## **Our Comments:**

It would not be out of place here to mention that Entry No. 12 of the Mega Exemption Notification was amended vide Notification No. 6/2015-ST dated March 1, 2015 (effective from April 1, 2015) to delete exemption from Service tax on services provided to the Government, a local authority or a Governmental authority by way of construction, erection, commissioning etc. 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;

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

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

- However, in Union Budget 2016, new Section 102 is proposed to be inserted in the Finance Act, 1994 vide the Finance Bill, 2016 to provide restoration of exemption from Service tax provided for the services provided under a continuous contract which had been entered into prior to March 1, 2015 and on which appropriate stamp duty, as applicable, had been paid prior to that date. Therefore, the services provided during the period from April 1, 2015 to February 29, 2016 under such contracts are proposed to be exempted from Service tax;
- Refund of Service tax also allowed, if paid on the said services during the period from April 1, 2015 to February 29, 2016 in accordance with the law including the law of unjust enrichment - Application for refund may be allowed to be filed within a period of 6 months from the date on which the Finance Bill, 2016 receives the assent of the President;
- Vide corresponding amendment in the Mega Exemption Notification [New Entry 12A], said exemption is also being restored till 31.03.2020 [Read with Notification No. 9/2016-ST dated March 1, 2016].

*Hope the information will assist you in your Professional endeavours. In case of any query/information, please do not hesitate to write back to us.*

Thanks & Best Regards,

Mobile : +91 9810604563 ; E-mail : bimaljain@hotmail.com

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## **Bimal Jain**

FCA, FCS, LLB, B.Com (Hons)

**Author of a book on Goods and Services Tax, titled, "GOODS AND SERVICES TAX – INTRODUCTION AND WAY FORWARD" (1<sup>st</sup> Edition)**

## **A2Z TAXCORP LLP**

### **Tax and Law Practitioners**

#### **Delhi:**

Flat No. 34B, Ground Floor,  
Pocket – 1, Mayur Vihar Phase-1  
Delhi – 110091 (India)  
Tel: +91 11 22757595/ 42427056

#### **Allahabad:**

B2-3/4-31 Sarojani Apartments  
Sarojani Naidu Marg  
Allahabad - 211001

#### **Chandigarh:**

H. No. 908, Sector 12-A,  
Panchkula, Haryana – 134115

#### **Kolkata:**

Ist Floor, 10 R G Kar Road  
Shyambazar, Kolkata – 700 004

Email: [bimaljain@hotmail.com](mailto:bimaljain@hotmail.com)

Web: [www.a2ztaxcorp.com](http://www.a2ztaxcorp.com)

LinkedIn: <https://in.linkedin.com/pub/bimal-jain/14/601/4b4>

Face book: <https://facebook.com/bimal.jain.90>

Twitter: <https://twitter.com/JainTax>

YouTube: <https://www.youtube.com/channel/UCp0tT5ShjB4KHJRSIPc3t5w>

Mobile : +91 9810604563 ; E-mail : [bimaljain@hotmail.com](mailto:bimaljain@hotmail.com)

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