

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF JULY, 2024

PRESENT

THE HON'BLE MR JUSTICE KRISHNA S DIXIT

AND

THE HON'BLE MR JUSTICE RAMACHANDRA D HUDDAR

WRIT APPEAL NO.856 OF 2022 (T-RES)



BETWEEN:

1. PRINCIPAL ADDITIONAL DIRECTOR GENERAL
DIRECTORATE GENERAL OF GST INTELLIGENCE
BENGALURU ZONE UNIT,
#112, K H ROAD, S P ENCLAVE,
ADJ. TO KARNATAKA BANK,
BENGALURU – 560 027.
2. PRINCIPAL COMMISSIONER OF CENTRAL GST
SOUTH COMMISSIONERATE,
C R BUILDINGS, QUEENS ROAD,
BENGALURU – 560 001.
3. CENTRAL BOARD OF INDIRECT TAXES
AND CUSTOMS, NORTH BLOCK,
NEW DELHI – 110 001.
4. UNION OF INDIA,
MINISTRY OF FINANCE,
REP BY SECRETARY
NORTH BLOCK, NEW DELHI – 110 001.
5. ASSISTANT COMMISSIONER OF CENTRAL TAX
SOUTH DIVISION-6, 2ND FLOOR,
TTMC/BMTC BUILDING,
KANAKAPURA ROAD,
BANASHANKARI,
BENGALURU – 560 070.

...APPELLANTS

(BY SRI.AMIT A DESHPANDE., ADVOCATE)

AND:

M/S RAJIV GANDHI UNIVERSITY OF HEALTH SCIENCES,
KARNATAKA,
4TH T BLOCK, JAYANAGAR,
BENGALURU – 560 041.
REPRESENTED BY REGISTRAR,
MR.SHIVANAND KAPASHI,
AGED ABOUT 55 YEARS,
S/O MR. BHIMAPPA KAPASHI.

...RESPONDENT

(BY SRI. RAGHURAMAN., SENIOR COUNSEL FOR
SRI. RAGHAVENDRA C R., ADVOCATE)

THIS WRIT APPEAL IS FILED UNDER SECTION 4 OF THE
KARNATAKA HIGH COURT ACT PRAYING TO I) SET ASIDE THE
IMPUNGED ORDER DATED 26/07/2022 PASSED IN WP
NO.57941/2018 BY THE LEARNED SINGLE JUDGE OF THIS
HON'BLE COURT AND PASS SUCH OTHER ORDER, DIRECTION.

THIS WRIT APPEAL HAVING BEEN RESERVED FOR
ORDER, COMING ON FOR PRONOUNCEMENT THIS DAY,
KRISHNA S. DIXIT.J., PRONOUNCED THE FOLLOWING:

CORAM: HON'BLE KRISHNA S DIXIT.J.,
and
HON'BLE RAMACHANDRA D. HUDDAR.J.,

CAV JUDGEMENT

(PER: HON'BLE KRISHNA S DIXIT.J.,)

This intra-court appeal seeks to call in question a
learned Single Judge's judgment dated 26.07.2022
whereby, respondent-University's W.P.No.57941/2018
(T-RES), having been favoured, the impugned Show Cause
Notice dated 20.04.2018 coupled with the Statement of
Demand dated 28.02.2019 respectively at Annexures-C &

U to the petition came to be quashed. The practical implication of the judgement is that the respondent-University being an 'educational institution' is not within the Service Tax net and even otherwise, it enjoys exemption from the liability under the Finance Act, 1994 and therefore, it need not seek Service Tax registration too.

II. BRIEF FACTS OF THE CASE:

(a) Respondent-University is established under Section 3 of Rajiv Gandhi University of Health Sciences Act, 1994, a State legislation. A set of subordinate legislations nomenclatured as 'Statutes' have been promulgated under the provisions of this Act. It has constituent colleges; several private colleges have been affiliated to it, as well. Levies in respect of affiliation are borne by the affiliated colleges, in certain sums of money, in the form of fees, delayed fees, charges, fines, penalties, etc. The University apart from imparting education *inter alia* at the Post Graduate level, normatively regulates the

affiliated colleges. The University owns properties, some of which are rented out.

(b) The appellant-Revenue issued a Show Cause Notice dated 20.04.2018, complaining that: during the period between July 2012 and September 2016, no Service Tax has been paid on the amount received by way of fees, charges & penalties, whilst granting affiliation/renewal and the rental income from its buildings; it also called for the explanation as to why the University has not been registered under the Finance Act, 1994. A demand notice dated 28.02.2019 followed asking the University to remit a total of Rs.7,40,28,684/- plus. Aggrieved thereby, the University filed the writ petition with a slew of prayers. The learned Single Judge partly allowed the petition granting relief *qua* the Show Cause Notice and Demand Notice. That is how, the present appeal at our hands has arisen.

III. SUBMISSIONS MADE ON BEHALF OF APPELLANTS:

Learned CGC Mr.Amit A Deshpande sought to falter the impugned judgment contending that:

(a) Writ petition was not maintainable against the Show Cause Notice and the proposed demand, option to reply to the same being available to the Noticee; learned Single Judge has treated only one single contention i.e., as to Service Tax payable on the rentals without touching several other grounds specifically urged; the Rulings of Madras & Gujarat High Courts being *per incuriam* do not lay down the correct position of law.

(b) University regardless of imparting education, has the predominant function of regulating the affiliated colleges and therefore, it cannot be treated as an educational institution within the terminology of 'Service Tax Law' and therefore, is liable to pay Service Tax; even otherwise, it is liable to pay Service Tax because of renting of its properties whereby it has generated income, the said activity not being in furtherance of education.

(c) The collection of rents, affiliation charges & fines/penalty are not a statutory function in its true sense; they are all commercial activities that generate revenue. Therefore, they are not covered in the Negative List enacted in section 66(1)D and section 65B(44) of Finance Act, 1994.

Learned Panel Counsel pressed into service certain Rulings in support of his submission.

IV. CONTENTIONS URGED ON BEHALF OF UNIVERSITY:

Learned Sr. Advocate Mr.Raghuraman appearing for the University per contra made submissions in justification of the impugned judgment contending that:

(a) There is no Thumb Rule that no person can invoke writ jurisdiction against the Show Cause Notice even when it is absolutely without jurisdiction; where authorities act with demonstrable incompetence, a litigant cannot be relegated to the sending of reply to such notices.

(b) University like the respondent herein cannot be anything but an educational institution; it does not lose its character as an educational institution merely because it has rented out certain spaces and generates income therefrom; granting of affiliation, its denial or renewal do not have commercial elements and therefore the amounts such as fees, late fees, fines, penalties, etc., generated on account of said acts do not admit the idea of 'consideration' as employed in section 65B(44) of the Finance Act, 1994. The statutory bodies which grant affiliation as a matter of statutory policy have the trappings of 'State Authorities' and their activities are pregnant with abundant public elements. Activities of educational/professional regulatory bodies cannot be

termed as 'commercial' vide ACIE (Exemption vs. Ahmedabad Urban Development Authority).¹

(c) Every educational institution during the particular period in question was not within the ambit of Finance Act, 1994; even otherwise, because of Exemption Notifications issued & continued from time to time, they are immune from service tax liability; the clarificatory circulars issued by CBEC being statutory bind the Revenue, especially when they have been acted upon;

(d) The decisions of Madras & Gujarat High Courts relied upon by the learned Single Judge correctly lay down the law and contra argument is unsustainable. The Rulings pressed into service by the Revenue are not relevant to the case at hand. Learned Sr. Advocate also banked upon certain Rulings in support of his stand.

V. We have heard learned Panel Counsel appearing for the Revenue and learned Sr. Advocate appearing for the University. We have perused the Appeal Papers and the Rulings cited at the Bar. Our discussion follows as under:

(A) A BRIEF HISTORY OF SERVICE TAX:

(a) The Finance Act, 1994 for the first time introduced levy of Service Tax w.e.f. 1.7.1994. This

¹ [2022] 143 taxmann.com 278

statute was structured on the recommendation of Raja Challaiah Committee on Tax Reforms, 1991. *"...The source of concept of Service Tax lies in economics. It is an economic concept. It has evolved on account of Service Industry becoming a major contributor to the GDP of an economy, particularly knowledge-based economy.... as an economic concept, there is no distinction between the consumption of goods and consumption of services as both satisfy human needs. ... it is important to note that service tax is a value added tax which in turn is a general tax which applies to all commercial activities involving production of goods and provision of services. ..."* observed the Apex Court in **ALL INDIA FEDERATION OF TAX PRACTITIONERS vs. UNION OF INDIA.**²

(b) Service tax is a levy on the transaction of certain services specified in the Act. It is an indirect tax akin to Excise Duty or Sales Tax, in the sense that normally the service provider pays it and thereafter recovers the same from the recipient of taxable service. To begin with, the taxation was on the **Positive List** basis, that is to say, the levy was only on the activities enlisted as 'Service'. Thus, the journey of taxation of services began by selective levy on just three services, namely, General Insurance Service (Non-Life insurance), Telephone Service & Stock Broker Service. Subsequently, this list

² AIR 2007 SC 2990.

grew: for the Financial Year 2003-2004 as many as 62 services were enlisted; for the following year it was 75; for the Financial Year 2011-12 this list consisted of 119 services.

(c) The Service Tax law took giant leaps in the next seven years of its initiation both in terms of wider coverage and increase in tax rate. The newer additions to the Positive List of services often raised issues of overlap with the previously existing services confounding both sides as to whether some activities were taxed for the first time or were already covered under an earlier, even if under a little less specific head. With the accumulated experience, Budget 2012 ushered a new system of taxation of services, popularly known as **Negative List**. The next changes are a paradigm shift from the existing system where, only services of specified descriptions are subjected to tax. In the new system, all services, except those specified in the Negative List, are subject to taxation.

(B) A THUMBNAIL DESCRIPTION OF RELEVANT PROVISIONS OF THE FINANCE ACT, 1994:

(a) As already mentioned, 1994 Act enacts the law relating to Service Tax. Sec.66 till 30.06.2012 and Sec.66B w.e.f. 01.07.2012 are the charging provisions. They provide for levy of tax at the rate of 12% on the value of all services other than those enlisted in the

Negative List. Sec.68(1) imposes the obligation to pay the tax on the provider of service, whereas Sec.68(2) r/w. Rule 2(1)(d)(i) of the Rules speaks of special circumstances to decide as to on whom this obligation rests i.e., whether the service provider or the service recipient. 'Service' is defined in Clause 44 of Section 65B, to mean any activity for *consideration* carried out by a person for another. To remove some ambiguities, certain activities have been specifically defined by description as 'Services' and are referred to as 'Declared Services' as defined under Section 65B(22) which in turn refers to those enlisted in Section 66E. The definition of "service" is both inclusive in certain aspects and exclusive in other.

(b) Section 66D creates "Negative list of services" which are outside the levy of service tax. Clause (l) of this Section as it existed upto 14.05.2016 enlisted certain types/levels of education namely: education upto higher secondary level; education which was a part of curriculum for obtaining a qualification recognized by any law; education as a part of an approved vocational education course. The Negative List entry in this clause came to be omitted by 2016 Amendment w.e.f. 14.05.2016. With this omission, specified educational services became liable to service tax. However, for the period between 14.05.2016 & 31.03.2017, the educational institutions were granted exemption vide Entry 9 of Notification No. 25/2012-ST and Exemption Notification No.9/2016-ST dated

01.03.2016 issued by the Central Government under Section 93 of the Act. There is Exemption Notification No.25/2012-ST. Section 68 is the charging section; it says that Service Tax shall be levied on all services *provided or agreed to be provided* in a *taxable territory* other than those specified in the Negative List u/s 66D.

(c) The Central Government being the delegate, has promulgated rules for the determination of *place of provision of service*. These are called 'Place of Provision of Services Rules, 2012'. 'Taxable Territory' is defined under Section 65B as the territory to which the Act applies.

C. EDUCATION IN ANCIENT INDIA AND IN POST CONSTITUTION ERA:

(a) To be fair to the subject and to qualify the discussion, a brief etymological advertence to the concept of University with global dimension & diversified form is not out of the place. '*Nahi gnyaanena sadrusham pavitramiha vidyate*' says Bhagavad Gita³ which nearly means that in this world, there is nothing as sublime & pure as knowledge. Greek historian Megasthenes during 302 to 298 BCE and Chinese Buddhist scholar Hiuen Tsang, during 629-645 A.D traveled throughout India and recorded their appreciation for our civilization. In ancient India, there had been thousands of schools (*gurukuls*) spread all over and catering to the educational needs of

³ Indian Epic, (approx 400 BCE), Shloka Sankhya-38

people, free of cost. There were at least two dozen Universities of great repute to which even foreign students in huge numbers thronged. Takshashila, Nalanda, Mithila, Telhara, Sharadapeet, Vallabhi, Pushpagiri, Odantapuri, Vikramashila, Somapura, Vikrampura, Kanathalloor Sala, Jagaddala, Nadia & Nagarjuna are only a few to name. Rollin M Perkin⁴ writes which is largely true of other parts of the globe but not India:

"...All advanced civilizations have needed higher education to train their ruling, priestly, military, and other service elites, but only in medieval Europe did an institution recognizable as a university arise: a school of higher learning combining teaching and scholarship and characterized by its corporate autonomy and academic freedom. The Confucian schools for the mandarin bureaucracy of imperial China, the Hindu gurukulas and Buddhist vihares for the priests and monks of medieval India, the madrasa for the mullahs and Quranic judges of Islam, the Aztec and Inca temple schools for the priestly astronomers of pre-Columbian America, the Tokugawa Han schools for Japanese samurai – all taught the high culture, received doctrine, literary and/or mathematical skills of their political or religious masters, with little room for questioning or analysis..."

Since almost the Medieval history, unfortunately in India as elsewhere, educational facilities were denied to the downtrodden. This is despicable. Tagore penned: *'...Where knowledge is free; where the world has not been broken*

⁴ (2007), History of Universities, In J.F. (Eds), International Handbook of Higher Education, Springer Publication, P.159-205.

*up into fragments by narrow domestic walls... into that heaven of freedom, my father, let my country awake...'*⁵ WILL DURANT⁶, a great historian of yester century, said: *'Education is the transmission of civilization. Without education, a man is so circumstanced that he knows not how to make the best of himself'*. Thanks to the Reverse Discrimination Polices devised by the Governments.

(b) Our glorious Constitution as progressively interpreted by the Apex Court, echoes all the above. In **MOHINI JAIN vs. STATE OF KARNATAKA**,⁷ it is declared *'The right to education flows directly from right to life. The right to life under Article 21 and the dignity of an individual cannot be assured unless it is accompanied by the right to education.'* In **T.M.A.PAI FOUNDATION vs. STATE OF KARNATAKA**,⁸ an Eleven Judge Bench observed: *'...Education plays a cardinal role in transforming a society into a civilized nation. It accelerates the progress of the country in every sphere of national activity. No section of the citizens can be ignored or left behind because it would hamper the progress of the country as a whole. It is the duty of the State to do all it could, to educate every section of citizens who need a helping hand in marching ahead along with others...'*. It is regrettable to note that since some time, the elements of

⁵ WHERE THE MIND IS WITHOUT FEAR, (1910)

⁶ Lessons of History (1968), p. 101

⁷ AIR 1992 SC 1858

⁸ (2002) 8 SCC 481, para 287

business or including the field of education. That is not a good thing to happen. Article 21A introduced vide 86th Constitutional Amendment w.e.f. 12.12.2002, has added greater impetus to this invaluable right to primary education.

(c) This discussion assumes significance because of statutory policy enacted in Finance Act, 1994 as amended from time to time and the subordinate legislations promulgated thereunder which intended to keep a class of educational services / institutions away from their embrace. It is relevant to mention that learned Sr. Advocate Mr.Raghuraman appearing for the University succinctly put forth a two-fold submission viz., Act is not applicable to the University till particular period, and later when the Act was made applicable, the University has been immune from the tax liability by virtue of Exemption Notification. In other words, the educational institutions, according to him, stand as a class apart for a favourable treatment even in the GST Law.

D. NATURE & FUNCTIONS OF RESPONDENT UNIVERISTY:

(a) Earlier, all colleges/institutions in the State were affiliated to conventional universities in the region; these universities ordinarily had one constituent college of their own. However, that had created some functional difficulties and therefore, as a matter of policy, separate

universities for the branches of knowledge concerned, came to be established, such as Visvesvaraya Technological University (Belgaum) for Engineering, Agricultural Universities (Bangalore & Dharwad) for the field of farming, Veterinary University (Bidar) for animal sciences, Rajiv Gandhi Health University (Bangalore) for medical sciences, Karnataka Law University (Hubli) for legal studies, etc. Specialization appears to have become order of the day, whichever be the realm.

(b) The Central Council of Health has recommended establishing Health Universities in all the States in the Country. The Rajiv Gandhi University of Health Sciences Act, 1994 (hereafter RGUHS Act) came to be passed vide Karnataka Act No.44 of 1994. The respondent-university has been established u/s.3 of this Act. The objective of the University is to upgrade standards of teaching, research, publication and dissemination of knowledge in all branches of health sciences and bring all the health science institution under one umbrella and thereby, to upgrade the standard of health science education. The University initially set up an affiliating body and in a phased program, it envisaged to develop a campus of its own for advanced teaching, training & research in specialized fields of Health Sciences. It has established Curriculum Development Cell, Research Center and Library & Information Center for the development of knowledge in the field of Health Sciences for promoting qualitative Education Standards. There are

548 Colleges conducting undergraduate courses, 129 institutions conducting Post Graduation Courses and 6 institutions offering super Speciality Courses in the field of Health Sciences such as Medical, Dental, Nursing, Pharmacy, Physiotherapy, Ayurveda, Homoeopathy, Unani & Para-Medical under the suzerainty of RGUHS in the State.

(c) The University has a constituent college called 'University College' as defined u/s.2(q). Sec.4 of the Act speaks of powers & functions of the university. The following clauses being relevant are reproduced below:

"(i) to provide for instruction and training in such branches of medicine and allied sciences, as may be considered suitable and to make provision for research and for the advancement and dissemination of knowledge in health sciences, striving to maintain at all times highest possible standards of academic excellence.

....

(iv) to hold examinations and to confer honorary degrees or other distinctions under conditions as may be prescribed;

....

(vii) to affiliate or recognize colleges and institutions and to withdraw such affiliation or recognition;

(viii) to institute, suspend or abolish University Professorships, Associate Professorships, Readerships, Assistant Professorships, Lecturerships and other teaching posts in the University and to make suitable appointments thereto;

(ix) to institute and award fellowships, scholarships, studentships, stipends, medals and prizes;

...

(xvi) to undertake publication of works of merit and research pertaining to health sciences;

...

(xx) to establish and maintain University Libraries, Research Station, Museums and Press and Publication Bureau;

(xxi) to establish research posts and to appoint suitable persons to such posts; ..."

(d) Section 5 r/w sections 45 & 46 *inter alia* provides for privileges, recognition and affiliation of all colleges and autonomous institutions of health sciences that were affiliated to conventional universities. Sec.48 provides for their withdrawal. Section 7 empowers the Government to transfer its colleges to the university and on transfer they become university colleges. Their assets & liabilities shall vest in the university. Further all their employees become the employees of the university. Section 8 provides for Government's inspection & control over the university. Chapter III comprising of sections 9 to 19 specifies officers of the university which would *inter alia* include the Governor of State as the Chancellor, the Minister in-charge of medical education as the Pro-Chancellor, and the Vice-Chancellor. Section 12 prescribes the procedure for selection & appointment of the Vice-Chancellor and section 13 specifies his powers. Section

14 provides for the appointment of Deans of Faculties. Section 15 & 16 provide for the appointment of Registrar & Registrar (Evaluation) respectively. Chapter IV comprising of sections 20 to 32 *inter alia* provides for the establishment of Authorities such as, Senate, Syndicate, Academic Council, etc. Chapter V comprising of sections 33 to 36 provides for promulgation of Statutes, Ordinances & Rules. Chapter VIII comprising of sections 49 to 54 provides for selection & appointment of teachers and other employees of the university. Section 53 & 54 provides for conditions of service, pension, gratuity, etc. All other provisions are not much significant to the case at hand.

VI. AS TO MAINAINABILITY OF WRIT PETITION, WITHOUT EXPLORING ALTERNATIVES:

(a) The first contention of the Revenue that whenever a Show Cause Notice has been issued by the statutory authority, the same cannot be challenged in a writ petition, the right remedy being to send reply to the same, does not much impress us. This contention cannot be urged as a Thumb Rule. Ordinarily, it is open to the noticee to show cause by sending a reply. However, at least there are three conventional exceptions to this general rule: firstly, when the authority lacks competence to issue such a notice; secondly, when jurisdictional facts for issuing notice are lacking and thirdly, when it can be reasonably gathered that the authority issuing notice is

determined to proceed with the proposed action and any solicited reply would make no difference.

(b) The case of the respondent-University has been structured on the first two exceptions and therefore, the Panel Counsel's submission that the writ petition should have been thrown out at the threshold, is misconceived, more particularly, when a slew of prayers were made therein. It is a specific case of the assessee that it is miles away from the precincts of the Finance Act, 1994 more particularly because of Sec.66D(I) which enacts Negative List and the educational services rendered by the University therefore are not taxable. It is a further case that in any event, the University enjoys exemption granted to educational institutions vide Notifications dated 25.06.2012, 01.03.2013, 11.07.2014, 01.03.2016 & 08.03.2017, all issued by the Central Government u/s.93. Thus there is an eminent case for examination on merits. Therefore, the preliminary objection to the very entertainment of writ petition cannot be sustained.

VII. AS TO RESPONDENT-UNIVERSITY NOT BEING AN EDUCATIONAL INSTITUTION:

(a) The second contention of learned Panel Counsel that University as such is not an educational institution and therefore, it is very much within the precincts of Finance Act, 1994, has many reflections & repercussions. Essentially, this contention is structured on a premise that

the University in question is a statutory body which only affiliates institutions of health sciences, and nothing beyond that. This is only a partial truth. As already mentioned above, section 4 of RGUHS Act, 1994 prescribes powers & functions of the University. Clause (i) of this section obligates the University to provide for instruction & training in the branches of medicine & allied sciences; it also requires making a provision for research & advancement and dissemination of knowledge in health sciences; clause (iii) requires the University to start & upgrade departments in medical specialities and to provide instruction for courses of study. Clause (iv) provides for holding examinations and conferring honorary degrees/distinctions; clause (vi) requires the University to establish institutes of research and other institutions; clause (xxi) provides for establishing research posts and to appoint researchers; clause (xi) enables the University to exercise control over 'the students of the University' as also 'the students of affiliated colleges'. There are several PG courses in the field of medicine which the University itself conducts. This apart, it has constituent colleges as distinguished from affiliated ones. The former are an integral part of the University whereas the latter happen to be independent bodies.

(b) All the above wealth of material both intrinsic to the RGUHS Act and extrinsic, would leave no manner of doubt that the Respondent-University is an 'educational

institution'. This view gains support from the decisions of Madras High Court & Gujarat High Court. In **MADURAI KAMARAJ UNIVERSITY vs. JOINT COMMISSIONER OF GST & CEX**,⁹ it is rightly observed: '*The word "educational institution", cannot denote only the college affiliated to the university, but, it includes the university...without the university, college cannot impart education on its own.*' Similarly, in **SAHITYA MUDRANALAYA PRIVATE LIMITED vs. ADDITIONAL DIRECTOR GENERAL**¹⁰ read as under:

"the word 'education' cannot be given a narrow meaning by restricting it to the actual imparting of education to the students but has to be given a wider meaning which would take within its sweep, all matters relating to imparting and controlling education. Examination is an essential component of education as it is one of the major means to assess and evaluate the candidate's skills and knowledge, be it a school test, university examination, professional entrance examination or any other examination...Thus, education would mean the entire process of learning, including examination and grant of certificate or degree or diploma, as the case may be and would not be limited to the actual imparting of education in schools, colleges or institutions only... without a degree or diploma being conferred by the University, college education would not be complete. Therefore, examinations are an indispensable component of education... Therefore, to say that Boards/Universities are not "educational institutions" would amount to divorcing examinations from education..."

⁹ (2021) 54 GSTL 385 (Madras), at para 22.

¹⁰ (2021) 46 GSTL 245 (Gujarat), paras 13.21 & 13.22.

(c) Section 66 of 1994 Act provides for charging service tax at 12% of the value of taxable services that were enumerated in the specified clauses of section 65, whereas section 66B *inter alia* excludes the services specified in the Negative List provided u/s 66D. Clause (I) of section 66D enlists services by way of pre-school education and education up to higher secondary school or equivalent; education as part of curriculum for obtaining a qualification recognized by law; and education as a part of approved vocational education course. Obviously, the services catered by the respondent-University are by way of education as a part of curriculum for obtaining a qualification recognized by any law as stated in sub-clause (ii) of clause (I). It is so because the University confers degrees/diplomas in the branches of allopathy, ayurveda, dental science, etc., and they are recognized under the Indian Medical Council Act, 1956 or such other kindred statutes. The services rendered by the University would also fall within the precincts of sub-clause (iii) of clause (I) inasmuch as the students undergo approved vocational education courses, such as MBBS, MD, MS, BAMS, BUMS, BHMS, BNYS, BDS, MDS, B.PHARM, M.PHARM, M.Sc.Nursing, etc. Added, there are 14 Ph.D. programmes and Fellowships. These services being specified in the Negative List, are not within the tax net. What is significant to note is that the exclusion occurring in the Negative List is service-specific, and not service provider-

specific. This was the position up to 14.05.2016, and thereafter, the Finance Act, 2016 omitted the same. As a consequence, *education* no longer continues as an item in the Negative List.

The fall out of above discussion is that the income earned by the University on account of specified educational services is not within the tax net because of Negative List. However, the income earned by the University by any other activity like renting out buildings, etc. is within the taxability, unless the same falls in the Exemption Notifications issued by the Central Government u/s.93 of the Act.

VIII. AS TO TAXABILITY OF INCOME FROM AFFILIATION AND ALLIED FUNCTIONS:

(a) The University being a statutory body, accords affiliation to the health science colleges on the recommendation of the State Government. This is done under Section 45 of the RGUHS Act. Affiliation results into certain benefits/privileges; at the same time, it also makes the affiliated colleges to undergo certain supervision at the hands of the Syndicate. Section 48 provides for withdrawal of affiliation. Similarly, Section 46 provides for grant of recognition by the Syndicate to any institution of health sciences, even if it is situated outside the University Area. Such recognition can be withdrawn also under sub-Section (2). Grant or renewal of affiliation/recognition is subject to payment of specified fees, late fees & penalties. Learned counsel for the Appellant–Revenue argued that granting affiliation/recognition is a service as defined under clause

(44) of Section 66B of the 1994 Act and therefore, the income accruing therefrom is liable to service tax. Learned Sr. Advocate representing the University repels this submission contending that the statutory activities of an entity that lack commercial elements do not answer this definition. Substantive part of Clause 44 reads as under:

"Service" means any activity carried out by a person for another for consideration, and includes a declared service.."

It is apparently a "means, includes & excludes" definition. It is not the case of either party that the exclusion part of the definition is invocable, and therefore a long list of exclusion is not reproduced.

(b) The substantive definition of 'service' has four building blocks namely: "activity"; "carried out"; "by one person for another" and, "for consideration". The word 'activity' has not been defined in the Act. In common parlance, it would mean an act, a deed, a work, an operation or the like. An 'activity carried on' means an act executed, a deed done, a work accomplished or an operation carried out. This expression has a wider connotation and includes both active and passive act. The second component of the definition is consideration, which again is not well defined. However, as per Explanation (a) to section 67 of the Act, 'consideration' includes any amount that is payable for the taxable services provided or

to be provided. This Explanation does not make the idea clear.

(c) Let us see the definition of consideration u/s 2(d) of the Indian Contract Act, 1872, which reads:

"When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called consideration for the promise".

The purpose of consideration is to put some legal limits on enforceability of agreements, in the sense that only those promises which are supported by consideration are enforceable, and others not binding, despite intent of the promisor to be bound by. Consideration is an index of the seriousness of the parties to be bound by the bargain. It also serves evidentiary and formal function. Lord Denning in *COMBE vs. COMBE*¹¹ said: *'The doctrine of consideration is too firmly fixed to be thrown by a side wind... it still remains a cardinal necessity of the formation of a contract...'* Consideration in the sense of law means something valuable vide **CHIDAMBARA IYER vs. RENGAIYER**.¹² In simple terms, consideration means everything received or recoverable in return for a provision of service which may be monetary or non-monetary. To be taxable, an activity should be carried out by a person for consideration. Thus, an activity carried out without any

¹¹ [1951] 1 ALL.ER.767

¹² AIR 1966 SC 193

consideration like donations, gifts or free charity ordinarily is outside the ambit of service. The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing the activity does so at the desire of another in exchange for a consideration. There should be something like quid pro quo. An activity done without such a relationship i.e., without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity. Thus, an award received in consideration for contribution over a life time like Nobel Prize, Jnana Peeta, etc., will not be a consideration. There can be many activities without consideration. An artist performing on a street does an activity without consideration even though passersby may drop a coin in his bowl. They are, however, under no obligation to pay any amount for his performance since they have not engaged him for that. On the other hand if the same person is called to perform on payment of an amount of money, then the performance becomes an activity for a consideration.

(d) In the above backdrop, let us examine 'affiliation' which has yielded income to the respondent-University. This word is not defined either in the RGUHS Act or in the Finance Act. The word 'affiliation' is derived from Latin word *affiliare* which means 'to adopt as a son.'

In Ramanath Iyer's 'The Law Lexicon',¹³ it is described as under:

"Affiliation' of college. To university means such a connection between an existing university and a college as shall be entered into by their mutual consent, under the conditions approved by the University Commissioners or other proper authorities."

The Apex Court in **BHARATIYA EDUCATION SOCIETY vs. STATE OF HIMACHAL PRADESH**¹⁴ observed:

"In the context of NCTE Act, 'affiliation' enables and permits an institution to send its students to participate in the public examinations conducted by the Examining Body and secure the qualification in the nature of degrees, diplomas, certificates..."

Affiliation creates a kind of umbilical chord between affiliating body and the affiliated entity. Section 2(a) of RGUHS Act, defines 'Affiliated College' to mean *a college or institution... affiliated to the University in accordance with the Statutes*. It also includes the institutions that are deemed to be affiliated to the University. Deeming part is not relevant for our discussion. Section 4 of this Act which enlists the powers & functions of the University, at clause (vii) reads *'to affiliate or recognise colleges and institutions and to withdraw such affiliation or recognition'*. Section 45 provides for affiliation and the procedure therefor. For grant of admission, affiliation is a pre-condition under sub-section (10). Section 48 provides for withdrawal of

¹³ 2nd Edition Reprint 2010, LexisNexis, page 73,

¹⁴ (2011) 4 SCC 527, para 19

affiliation on fault grounds. For the grant or renewal of affiliation, the University levies fees, late fees, fines & penalties in terms of extant statutes of the University. However, the act of granting, renewing or withdrawing is done in discharge of public duties enjoined by law. Therefore, such acts do not fit into the expression '*activities carried on for consideration*', more particularly, when they do not have commercial elements, as rightly contended by Mr. Raghuraman. Added, the idea of '*activities carried on for consideration*' as employed in the definition of service u/s 65B(44) of the Finance Act ordinarily obtains in the realm of freedom of contract and not in the field of public law. Of course, the concept of *sovereign function* being impertinent, does not factor in the discussion. The function related to affiliation cannot be treated as a 'bundled service' under clause (3) of section 66F of the Finance Act, 1994, either. The interests/fines/penalties leviable on account of default also have a thick connect with the fees regularly leviable and therefore, they would partake the character of fees only. In view of all this, the Revenue is not justified in levying Service Tax on the income accruing to the University on account of affiliation during the academic year between 2012-13 and 2016-17. The periodicity of collection of affiliation related fees pales into insignificance.

IX. INCOME FROM NON-EDUCATIONAL ACTIVITIES OF EDUCATIONAL INSTITUTIONS AND SERVICE TAX LIABILITY:

(a) Learned Panel Counsel appearing for the Appellant-Revenue vehemently argued that the University derives income by way of rents from the buildings leased out for canteen, bank & such other facilities and that the very activity amounts to service, as defined under Section 65B(44) and therefore, regardless of nature of the service provider such as educational institutions, the same is liable to service tax. He hastened to add that the focal point of levy is not the nature of institution but the nature of activities carried on by them for consideration. Mr. Raghuraman, per contra contended, that the said activities are incidental to catering of educational services, such services being in the Negative List; in any event, the University enjoys immunity from the levy in terms of Exemption Notifications issued from time to time, since they have binding effect at least as between the Revenue and the Assessee, of course subject to all just exceptions.

(b) The contention of the CGC that the levy of tax is 'activity-centric' and it does not depend on the nature of service provider, in our view is broadly true. The text of Clause (I) of Section 66D of the Finance Act, being supportive of this view, is reproduced:

"(I) Services by way of-

(i) pre-school education and education up to higher secondary school or equivalent;

(ii) education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force;

(iii) education as a part of an approved vocational education course; ...”

[This provision is deleted by the Parliament w.e.f. 14.05.2016]. Although one can assume that the educational services are ordinarily provided by the educational institutions such as universities, colleges & schools, one cannot rule out such services being catered by entities that do not conventionally answer the notion of educational institution. This view is adumbrated by the text of Exemption Notifications. For instance, Notification No.25/2012-ST specifically states at para 9: '*Services provided to or by an educational institution in respect of education... by way of auxiliary educational services...*' In other words, the Negative List is activity-centric whereas, Exemption Notifications contemplate both the nature of service provider and the nature of activity. In the light of this, it can be stated with no risk of contradiction that the educational services rendered by the University do fall within the ambit of Sub-Clause (ii) of Clause (I) of Section 66D which mentions "*education as a part of curriculum for obtaining a qualification recognized by any law for the time being in force*", inasmuch as obviously, the degrees, diplomas & certificates awarded by the University are recognized by the statutes like Indian Medical Council Act, 1956, Dentists Act, 1948, etc and therefore, they are not liable to service tax.

(c) The primary object of education is to become knowledgeable and thereby, to acquire capacity to make the life meaningful/beautiful. Education gives nobility to the mind and refines sensibilities of human beings. It enables individuals to make appropriate choices, in the given circumstances. 'Ignorance is bliss...' said by Oscar Wilde (1854-1900) emphasizes its negative rhetoric. A constitutionally ordained Welfare State like ours has to create opportunity for education to one & all, of course subject to availability of resources. Ideally speaking, education i.e., the acquisition of knowledge should be free which Tagore had poetically advised, at times is enacted, albeit in a limited way. That is the reason why education & educational institutions are ordinarily given concession from tax, subject to the pragmatics of community living. Negative List enacted in section 66D(I) is one such measure. Immunity from taxation in terms of Exemption Notifications is such another. When an activity figures in the Negative List, the same is not liable to service tax at all. This is one scenario. The other is a case of exemption from tax by virtue of statutory notifications. Former is a case of non-applicability of charging section whereas, the latter is a case of its applicability. There lies a subtle difference between these two, and mistaking one to be other will have implications to Caesar & Citizen. Not recognising this difference, is consequential. Initial taxability of services is one thing and its exemption from tax is another. To put it succinctly, the question of

exemption from tax liability arises when exempted activity/entity does not figure in the Negative List. This logic accords with the opinion of the great jurist of yester decades Mr.Nani A. Palkhivala that *Mother Teresa was not taxable because the Nobel Prize was not 'income' and therefore, the question of giving her any special exemption did not arise.*¹⁵

(d) Mr.Raghuraman is right in telling us that the successive Exemption Notifications that obtained during the period between 1.7.2012 and 1.4.2017 exempted the University from service tax otherwise payable on the income *inter alia* derived from 'renting of immovable property'. The Exemption Notification No.25/2012-ST w.e.f. 20.06.2012 has the following text:

"(f) auxiliary educational services means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge - enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution.

¹⁵ 'Nani A.Palkhivala - A Life' by M.V.Kamath Pages 74-75

(oa) "educational institution" means an institution providing services specified in clause (1) of section 66D of the Finance Act, 1994 (32 of 1994);]"

As already discussed above, the respondent-University answers the definition of *educational institution* since it provides services that fall into sub-clause (ii) of clause (I) of section 66D of the Finance Act, 1994. In fact, the education catered by the University broadly fits into the definition of *auxiliary educational services*. He is also right in pointing out that an otherwise interpretation of this Exemption Notification would defeat the very purpose for which it has been issued. The said exemption is continued vide Notification No.3/2013-ST dated 1.3.2013, as well. He justified in submitting that the said Notifications having been issued u/s 93 of the Finance Act, 1994 are instruments of law and therefore, the Assessee can take benefit of the same vide **CCE vs. RATAN MELTING AND WIRE INDUSTRIES**.¹⁶ No contention is taken up by the Revenue as to why these Notifications should not be taken cognizance of for according benefit claimed by the Assessee thereunder. They are not shown to be contrary to the intent & policy content of the parent statute, either.

¹⁶ (2008) 13 SCC 1

X. EXEMPTION NOTIFICATIONS OF THE YEARS 2014-2017:

(a) The aforesaid 2012 & 2013 Exemption Notifications defined the 'auxiliary educational services' and 'educational institution' for the purpose of granting exemption from service tax liability. In text & context, they are almost identical. However, the subsequent Notifications have the text much in variance with these two. Notification No.6/2014-ST dated 11.7.2014, Notification No.9/2016-ST dated 1.3.2016 and Notification No.10/2017-ST dated 8.3.2017, retain the definition of 'educational institution' as it is. However, the adjective 'auxiliary' is dropped from the definition of 'services'. This definition in all these Notifications remains substantially same and it is as under:

"9. Services provided,-

- (a) by an educational institution to its students, faculty and staff;*
- (b) to an educational institution, by way of-*
 - (i) transportation of students, faculty and staff;*
 - (ii) catering, including any mid-day meals scheme sponsored by the Government;*
 - (iii) security or cleaning or house-keeping services performed in such educational institution;*
 - (iv) services relating to admission to, or conduct of examination by, such institution;]"*

What is conspicuous from the aforesaid subsequent Notifications is the absence of the term '*renting of immovable property*'. The intent of this is as clear as *gangetic waters* that the activity whereby income is derived by way of renting immovable property is no longer exempted from taxable service.

(b) The vehement submission of Mr.Raghuraman is that the students, faculty & staff need the facilities of banking, canteen & the like; added, service by way of 'catering' is specifically exempted under clause (ix)(b)(ii). The submission is partly acceptable and partly not: if intention of the Board/Government was to continue exemption in respect of income by way of renting, the terminology of earlier Notifications would have been continued; however, that is not the case. The other terminology does not imply or indicate the intent which Mr.Raghuraman wants us to assume. We are not construing a provision of statute of West Minister Abbey; what we are interpreting is only a piece of delegated legislation namely the Exemption Notifications which essentially address the educational institutions; their terminology has to be construed in the common parlance. It is true that banking service has become essential to daily life, whichever be the field. However, that does not mean that the said facility should be provided in the very campus of the University.

(c) The above apart, the argument that the banking facilities should be treated as being incidental to education, is bit difficult to countenance. Education is imparted through schools, colleges and other such institutions. There could be activities incidental to providing education, cannot be denied. One example is of textbooks. In **ASSAM STATE TEXTBOOK PRODUCTION AND PUBLICATION CORPORATION vs. CIT**,¹⁷ it is observed that dealing in textbooks is part of a larger educational activity and that if an institution facilitated learning of its pupils by sourcing and providing textbooks, such activity would be incidental to education. Providing hostel facilities to pupil is also an activity incidental to imparting education. The predominant object test must be applied; the purpose of education should not be submerged by a profit making motive. more often than not, such renting or licensing is done through public tender and ordinarily, highest bid is accepted. Thus, when the University rents out its property for running a bank, the profit motive is abundant. It is not the case of University that the banking services are agreed to be provided on '*no profit no loss basis*' by prescribing license fee as contradistinguished from rentals. However, providing banking facilities by no stretch of imagination can be held to be incidental to education. The term 'educational

¹⁷ (2009) 17 SCC 391

services' has been employed in these Exemption Notifications in a reasonable sense if not restrictive. In ascertaining whether banking service is part of educational service in the contemplation of the subject Notifications, there is no scope for employing the '*predominant object*' test, either, in the light of latest decision of the Apex Court in NEW NOBLE EDUCATIONAL SOCIETY vs. CHIEF COMMISSIONER OF INCOME TAX¹⁸. Therefore, we are of the considered view that the income from the rentals of buildings leased/licensed for banking facilities is not exempted from service tax.

(d) The above being said, there is force in the submission of Mr.Raghuraman that the income accruing to the University because of renting of property for providing canteen facilities is entitled to be exempted from service tax. It is a matter of common knowledge that normatively the campuses of universities nowadays are huge and their areal hugeness would justify providing canteen facilities within the campus, especially when the courses comprise of long hours. Otherwise, interest of the teachers and taught is likely to be affected since they have to spend time in traveling to the eateries ex-campus. It is presumably with that purpose, the Exemption Notifications of the years 2014 to 2017 specifically immuned the catering services provided by an educational institution to

¹⁸ (2023) 6 SCC 649

its students, faculty & staff. There may be economic considerations too. Clause (ix)(b)(ii) is printed in all these Notifications, almost verbatim, is not in dispute. The said clause is inclusive. Apparently it is not self-catering-specific. The word 'catering' employed in these notifications, in the context does not imply that the University/Educational Institution itself should undertake that activity, in order to claim exemption. It can do it on its own or cause it to be done through agencies, regard being had to intricacies involved in the venture. The contention of learned CGC to the contrary if countenanced would defeat the intent of granting exemption and therefore does not merit acceptance. His submission that clause (d) of section 96D of the Finance Act, 1994 itself is deleted w.e.f. 14.05.2016 and therefore, whatever protection the educational services enjoyed under the Exemption Notifications would come within the taxability after the said date, is only a partial truth. As already stated, the Exemption Notifications issued post this deletion would bind the authorities. There is nothing repugnant to the policy content of the Finance Act, 1994.

In the above circumstances, we make the following

ORDER

[1] The appeal is allowed in part. The impugned judgment is modified to the following effect that the quashment of Show Cause Notice bearing No.22/2018-19

dated 20.04.2018 at Annexure-B to the Writ Petition No.57941/2018 is set at naught only to the extent:

(i) it seeks to levy service tax on the income accruing on account of or attributable to grant, renewal, withdrawal or denial of affiliation/recognition to the institutions concerned and that such income/service would include fee, late fee, fine, penalty and the like; and

(ii) it holds that under the extant Exemption Notifications, the University is not immune from the levy of service tax on the income earned by leasing/licensing its immovable properties for providing or causing to be provided certain canteen facilities to the students, faculty & staff.

[2] The appellant-Revenue shall restructure & reissue the subject Show Cause Notice in the light of observations herein above made within six weeks; however, for all practical purposes, the said notice shall be treated to have been issued on 20.04.2018 itself. It is open to the respondent-University to send its reply to the said notice in contemplation, within six weeks following the date of receipt thereof.

[3] The appellant-Revenue shall decide the matter afresh within next eight weeks following the receipt of reply; it shall provide an opportunity of personal hearing to the lawyer/representative of the University if requested, since matter involves complexities. However, unnecessary adjournment/time shall not be granted to the University.

[4] All contentions of the parties other than those foreclosed by the observations herein above made including as to the requirement of registration, etc., are kept open for being retraded in accordance with law.

Costs made easy.

**Sd/-
(KRISHNA S DIXIT)
JUDGE**

**Sd/-
(RAMACHANDRA D. HUDDAR)
JUDGE**

Snb/cbc/bsv