

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 23.01.2013

+ **W.P.(C) 5636/2010**

VISTAR CONSTRUCTION (P) LTD

..... Petitioner

versus

UNION OF INDIA & ORS

..... Respondents

+ **W.P.(C) 3632/2012**

PIYARE LAL HARI SINGH BUILDERS

PVT LTD

..... Petitioner

versus

UNION OF INDIA AND ORS

..... Respondents

Advocates who appeared in this case:

For the Petitioner : Mr J K Mittal, Mr Arun Gulati and Mr Rajan Bharti,
Adv.

For the Respondent : Mr Sumeet Pushkarna, Adv. for UOI in WP(C)
5636/2010
Ms Sonia Sharma, Mr V C Jha and Mr Ashish Virmani,
Adv. for UOI in WP(C) 3632/2012

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

These writ petitions are being disposed of together as they raise common issues. Both the writ petitions are directed against the instruction dated 28.04.2008 issued by the Tax Research Unit, Department of Revenue, Ministry of Finance, Government of India

purportedly in exercise of the powers under Section 37B of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. The petitioners in these writ petitions challenge the said instruction on the ground that it is contrary to the law as declared by the Supreme Court.

2. The main issue in these writ petitions is with regard to the applicability of the rate of service tax in respect of the Works Contract Service which is defined in Section 65(105)(zzzza) of the Finance Act, 1994. The case of the petitioner is that the said services were rendered prior to 01.03.2008 when the rate of service tax on the said service was increased from 2% to 4%. It is an admitted position that the services were rendered prior to 01.03.2008 as would be apparent from the counter affidavit in WP(C) 5636/2010 wherein, in reply to ground F, inter alia, the following is stated :-

“The impugned demand of service tax has been issued to the petitioner as they received payment after 01.03.2008 i.e. after the enhancement of rate of tax from 2% to 4% for the services provided by them on or before 01.03.2008.”

In the other writ petition there is no denial of the averment made by the petitioner that the services were rendered prior to 01.03.2008.

3. It is the case of the respondents that by virtue of the impugned instruction dated 28.04.2008, the rate of service tax is to be determined based on the date of receipt of payment and not on the date of rendition of service.

4. Before we deal with this issue on the point of law it would be appropriate for us to indicate certain other facts. In WP(C) 5636/2010 the challenge is both to the instruction dated 28.04.2008 as also to the show cause notice dated 16.02.2009 but, only to the extent that a demand is sought to be raised based on the issue of rate of service tax to the extent of ₹1,43,191/- which is bifurcated into two amounts of ₹1,39,021/- being the service tax element and ₹4,170/- being the education cess on the said service tax element. It is clearly understood by the petitioner and the respondent that the challenge to the show cause notice dated 16.02.2009 is only limited to this demand of ₹1,43,191/- and insofar as the remaining portion of the show cause notice is concerned that is not the subject matter of this writ petition and has been challenged separately by way of another writ petition with which we are not concerned today.

5. In so far as the WP(C) 3632/2012 is concerned that petition also challenges the instruction dated 28.04.2008 but, in addition, a challenge has been made to the show cause notice dated 30.9.2009 and the adjudication order dated 28.03.2012 whereby a demand of ₹3,16,329/- has been confirmed against the petitioner. The said sum of ₹3,16,329/- is partly on account of service tax employing the higher rate of tax of 4% and is to the extent of ₹3,07,115/- and the balance amount of ₹9,214/- represents the education cess on the said service tax element. It is relevant to point out that the show cause notice dated 30.09.2009 is entirely on the issue of rate of tax and there is no other issue raised in the show cause notice dated 30.09.2009 as also in the adjudication order dated 28.03.2012 which is a common order dealing with the said show cause notice dated 30.09.2009 and certain other show cause notices. However, the learned counsel for the petitioner has made it clear that adjudication order dated 28.03.2012 has been challenged in this matter only to the extent of ₹3,16,329/- which pertains to the rate of service tax on the said services rendered by it.

6. With these facts out of the way, the main issue that has to be considered by us is whether the instruction dated 28.04.2008 is valid or not. The said instruction reads as under :-

“F.No.545/6/2007-TRU
Government of India
Ministry of Finance
Department of Revenue
(Tax Research Unit)

Room No.146, North Block,
New Delhi, the 28th April, 2008

To,

The Chief Commissioner of Central Excise
Delhi Zone,
C.R.Building, I.P.Estate,
New Delhi-110002

Madam,

Subject : Service provided/to be provided- issue of relevant date

I am directed to refer to letter C.No.ST/1/Misc/2007/Pt.1 dated 16.04.2008 from Commissioner (Service Tax), Delhi and copy endorsed to Commissioner (Service Tax), CBEC seeking clarification on the applicable rate of service tax for the Works Contract service [Sec.65(105)(zzzza)] where the payment for the said service provided or to be provided is received on or after 1.3.2008.

2. A person providing Works Contract service can opt to pay service tax under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. As per the composition scheme, the service provider was having an

option to pay 2% of the gross amount charged for the works contract as service tax. However, the rate of 2% has been revised to 4% with effect from 1.3.2008. Commissioner (ST), Delhi has indicated his view that the applicable rate would be the rate prevailing on the date the services were agreed to be provided and not the date of actual provision of service.

3. As per section 66 of the Finance Act, 1994, service tax shall be levied at the rate of 12% of the value of the taxable service. Section 67 pertains to valuation of taxable services for charging service tax. As per rule 6(1) of Service Tax Rules, 1994, service tax is required to be paid by the 5th of the month immediately following the calendar month in which the payments are received towards the value of taxable services. Service tax shall, therefore, become chargeable on receipt of payment and on the amount so received for the service provided or to be provided, whether or not services are preformed. The rate applicable to a taxable transaction shall be the rate in force at the time the service tax becomes chargeable. This is a well settled legal position. The date on which the services were agreed to be provided has no relevance to determine the applicable tax rate when the service is already taxable at the time of revision of rate.

4. In view of the above, it is clarified that the rate of 4% is applicable for the Works Contract Service where the payment for the service is received on or after 1.3.2008.

5. This issues with the approval of Member (B& ST).

Yours faithfully,
SD/-
(Nishith Goyal)
O.S.D. (TRU)
Tel : 23092374

Copy to :

- (i) Commissioner (Service Tax), CBEC, North Block, New Delhi
- (ii) Director General, Directorate General of Service Tax, 9th Floor, Piramal Chambers, Jijibhoy Lane, Lalbaug, Parel, Mumbai-400012
- (iii) Commissioners of Service Tax, Ahmedabad/ Bangalore/Chennai/Delhi/Kolkata/ Mumbai”

7. On going through the said instruction and particularly para 3 thereof it appears that that the view of the respondents is that service tax becomes chargeable on receipt of payment for the service whether or not the services are performed. This view is clearly wrong. We say so because the Supreme Court in the case of Association of Leasing & Financial Service Companies Vs. UOI : 2010 (20) STR 417 (SC) has categorically held as under :

“Thus, the impugned tax is levied on these services as taxable services. It is not a tax on material or sale. The taxable event is rendition of service.”

8. Therefore, the taxable event, in so far as service tax is concerned, is the rendition of the service. That being the position, the taxable events in the present writ petition had admittedly occurred prior to 01.03.2008. At that point of time the rate of service tax applicable in respect of the services in question was 2% and not 4%, which came into effect only on

or after 01.03.2008. In both the writ petitions the date of receipt of payments was subsequent to 01.03.2008 but that would not make any difference because it is not receipt of payment which is the taxable event but the rendition of service. In WP(C) 5636/2010 the relevant period is March, 2008 and in WP(C) 3632/2012 the relevant period is April, May and July, 2008.

9. It should also be mentioned that at that point of time neither was Rule 5B of the Service Tax Rules, 1994 in effect nor was Section 67A of the Finance Act, 1994 inasmuch as the latter provision was inserted in 2012 which came in effect from 28.02.2012. Furthermore, even Rule 4(a)(i) of the Point of Taxation Rules, 2011 was not applicable to the facts of the present case in as much as those rules also came into effect much later in 2011. Recently, we had to consider a similar issue in **Commissioner of Service Tax Vs. Consulting Engineering Services (I) Pvt. Ltd.** in St.Appl.76/2012 decided on 14.01.2013 wherein we held that in the absence of any rules, we would have to examine as to what is the taxable event. In that context we had held that the taxable event as per the Finance Act, 1994 was the providing or rendition of the taxable

services. This is exactly what the Supreme Court had held in *Association of Leasing & Financial Service Companies (supra)*.

10. Therefore, the rate of tax applicable on the date on which the services were rendered would be the one that would be relevant and not the rate of tax on the date on which payments were received. The instruction dated 28.04.2008 which is contrary to the law declared by the Supreme Court is clearly invalid. In *Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries 2008 (12) STR 416 (SC)*, a constitution bench of the Supreme Court observed as under :

“Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the Court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the Court to declare what the particular provision of statute says and it is not for the Executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

11. It is obvious that the said instruction being contrary to the law as declared by the Supreme Court can have no existence in the eye of the

law. As a result we declare the instruction dated 28.04.2008 to be invalid. Consequently, the show cause notices and all the demands raised against the petitioner which are impugned in these writ petitions are also invalid.

12. The learned counsel for the respondent had argued that the petitioner has an alternative remedy by way of appearing in the adjudicatory process as also by way of an appeal as provided under the statute. However, we do not agree with this proposition inasmuch as the basis of the show cause notice as well as the adjudication order is the instruction dated 28.04.2008. Unless and until that instruction is set aside the statutory authorities would continue to apply that instruction and the petitioner would have no remedy before the said authorities. Since the instruction dated 28.04.2008 has been held by us to be invalid, the show cause notice pertaining to the subject matter indicated by us as also the adjudication order would also have to go and it is for this reason that we have entertained these writ petitions and allowed the same.

13. The decision relied upon the learned counsel for the respondent in the case of **Union of India and Anr. Vs. Vicco Laboratories : (2007) 13**

SCC 270 is not applicable in the facts and circumstances of the present case inasmuch as the very basis of the show cause notices in the present case is the instruction dated 28.4.2008 which is contrary to the law declared by the Supreme Court.

14. The writ petitions are allowed to the aforesaid extent. The adjudication order dated 28.03.2012 is also set aside to the extent indicated above.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

JANUARY 23, 2013

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