



W.P.Nos.15652 & 19567 of 2020

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.06.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.Nos.15652 & 19567 of 2020 and
WMP.Nos.19496, 19499 & 24183 of 2020
and 12325 of 2022

M/s Mantri Developers Pvt Ltd
Rep by its AGM-Raghavendra N
No.5, Palm Garden 4th Cross
East Coast Road (ECR), Akkarai,
Chennai 600119.

... Petitioner in W.P.No.15652 of 2020

M/s Ramcons Engineers and Builders,
Rep by its Proprietor Mr.K.Ramanujam
Old No.28, New No.80, Josier Street,
Nungambakkam,
Chennai - 600 034.

... Petitioner in W.P.No.19567 of 2020

Vs

The Commissioner of GST and Central Excise,
Chennai Outer
Newry Towers, No 2054-I,
2nd Avenue Anna Nagar
Chennai -600040.

... Respondent in both W.P.'s

Prayer in W.P.No.15652 of 2020: Writ Petition filed under Article 226 of the
Constitution of India, praying to issue a writ of Certiorari, to call for the records



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of the Respondent in the impugned order Order-in-Original No.43/2019(R) dated 30.12.2019 quash the same as it is passed beyond time limit prescribed under Section 73(4B) of the Finance Act, 1994 and without jurisdiction as it seeks to levy service tax on immovable property which falls outside the ambit of works contract service in terms of Section 65(105) (zzzza) of the Finance Act, 1994, and outside the purview of definition of service within the meaning of Section 65B(44) and in violation of Section 67 of the Finance Act, 1994.

Prayer in W.P.No.19567 of 2020: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a writ of Certiorari, to call for the records of the Respondent in the impugned Order in Original No.69 of 2020 dated 06.11.2020, quash the same as it is passed beyond time limit prescribed under Section 73(4B) of the Finance Act, 1994 and without jurisdiction as it seeks to levy service tax on construction of an independent villa which falls outside the ambit of Construction of Complex Service in terms of Section 65(105) (zzzh) of the Finance Act, 1994 for the period prior to 01.07.2012 and is exempted by the entry 14 of Notification No.25/2012 dated 20.06.2012 thereafter and is in complete contradiction to the decisions of the Jurisdictional Tribunal and the Hon'ble Supreme Court.

In both W.P.'s
For Petitioner : Mrs.Radhika Chandra Sekhar

In W.P.No.15652 of 2020
For Respondent : Mr.A.P.Srinivas
Senior Standing Counsel and
Mr.K.S.Ramaswamy
Junior Standing Counsel



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In W.P.No.19567 of 2020
For Respondent : Mr.M.Santhanaraman
Senior Panel Counsel

COMMON ORDER

A common order is passed in these two writ petitions as the legal issue that arises for consideration is similar and the relevant dates and sequence of events is also more or less similar.

2.Both the petitioners are companies engaged in the business of Construction and Development of Integrated Townships. Both petitioners have registered with the Service Tax Department, one under the head 'construction of residential complex' and the other under the head 'works contract service'.

3.Show cause notices had been issued in the case of the petitioner in WP.No.15652 of 2020 (hereinafter referred to as 'first petitioner') for the period October 2009 to September 2013 and in the case of the petitioner in WP.No.19567 of 2020 (hereinafter referred to as 'second petitioner') for the period August 2008 to July 2013, calling upon them to respond as to why various proposals for payment of service tax over and above that offered by the



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petitioners in their returns as well as for levy of interest and penalty, not be confirmed.

4.The show cause notices are dated 05.05.2015 and 29.06.2013. Both petitioners filed their responses on 01.07.2015 and 21.11.2013 respectively. Personal hearing was conducted on 10.12.2015 in the case of first petitioner. In the case of the second petitioner, a first hearing was conducted on 13.05.2016, the second on 29.12.2016 and the third on 11.04.2017. Thereafter, there was no further progress in the matter of assessment.

5.It is to be noted that the personal hearing in the case of both petitioners transpired prior to the onset of the Goods and Service Tax (GST) regime. The Central, State and Integrated Goods & Service Tax Act came into effect on and from 01.07.2017. The show cause notices issued in the earlier regime were thus re-assigned to an officer, incidentally, the same officer who had adjudicated the proceedings even in the era of service tax prior to the onset of GST. The re-assignment was made under order dated 29.09.2017.

6.The impugned orders have come to be passed on 30.12.2019 and 06.11.2020 without any personal hearing having been afforded to the



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petitioners, proximate to the impugned orders having been passed. It is in these circumstances, that the present two writ petitions have come to be filed.

7.The submissions of the petitioners revolve mainly on the undue delay in adjudication between the issuance of show cause notices and passing of the impugned orders. Mrs.Radhika Chandra Sekhar, learned counsel for the petitioners would point out that in both cases, personal hearings have been conducted in the years 2015 and 2016/2017 and orders have been passed a couple of years thereafter.

8.She relies on a judgment of the Hon'ble Supreme Court in the case of *Umesh Rai @ Gora Rai v. State of U.P.* (2023 LiveLaw (SC) 448), wherein the Hon'ble Supreme Court has, in the context of the proper practice and procedure to be adopted by the Courts, held that if a judgment is not delivered within six months after reserving the same, it should be assigned to another Bench for fresh hearing and not to the same Bench.

9.In the present case, final hearings were conducted on 10.12.2015 and 2016/April 2017 respectively and the impugned orders have been passed on 30.12.2019 and 06.07.2020. Hence, in all probability, the officer might not even have re-collected what had transpired in the hearings. That apart, much water would have flown under the bridge between the date of hearing of date of



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order and the intervening events could well have an impact of the decision to be taken. It is for this reason that proper procedure requires the order of adjudication to be passed proximate to the date of personal hearing.

10.The learned counsel for the petitioners has placed reliance on the provisions of Section 73(4B) of the Finance Act, 1994 that prescribe a time frame of six months under Clause (a), and a limitation of one year from the date of notice, where it is possible to do so, under Clause (b) thereof, for determination of the amount of service tax.

11.In the present cases, the show cause notices have been issued as early as on 05.05.2015 and 29.06.2013 respectively and the period of one year has long gone by the time the impugned orders were passed.

12.In this context, she relies on a decision of the Delhi High Court in the case of *Sunder System Pvt. Ltd. v. Union of India* [2020 (33) G.S.T.L. 621 (Del.)] where, the defence putforth by the respondent was that the show cause notice was even prior to the insertion of sub-Section (4B) to Section 73 and thus, there was no limitation at all that was provided for adjudication under service tax law.

13.That argument was repelled by the Bench stating that even if there was no time period prescribed under Statute, the statutory authority must



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exercise discretion in matters of adjudication within a reasonable period, in the absence of which the proceedings will be vitiated. In that context, they have referred to several judgments of the Hon'ble Supreme Court and the decisions of the High Courts including two decisions of this Court and the decisions are (i) *State of Punjab v. Bhatinda District Coop. Milk P Union Ltd.*, [(2007) 11 SC 363, (ii) *S.B.Gurbaksh Singh v. Union of India & Ors.* (1976 (37) STC 425), (iii) *Government of India v. The Citedal Fine Pharmaceuticals, Madras* (AIR 1989 SC 1771 and (iv) *J.M.Baxi & Co. v. GOI*, [2016 (336) E.L.T. 285 (Mad.)].

14.That apart, in Circular No.32/80-CX.6 dated 26.07.1980, the Board has indicated that an order of adjudication must be passed and such decision communicated within five days from hearing. Where it was not practically possible to adhere to the aforesaid time limit, the order should be issued within 15 days or at the most, within one month from the date of conclusion of personal hearing.

15.The above decision was reiterated in Circular bearing No.732/48/2003-CX. Dated 5.8.2003. Under Instruction in F.No.280/45/2015-CX.8A dated 17.09.2015, while dealing with the subject of streamlining of the processee of adjudication, the Commissioners have been directed to adhere to



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the time limit set out under Board letter dated 11.03.2015, setting out a time limit for completion of proceedings as follows:

*“F.No.275/17/2015-CX.8A GOVERNMENT OF INDIA
MINISTRY OF FINANCE DEPARTMENT OF REVENUE
CENTRAL BOARD OF EXCISE & CUSTOMS (LEGAL
CELL) NEW DELHI*

Dated: March 11, 2015

Sub: Steps needed to be taken to improve indirect tax administration-reg.

I am directed to say that of late it has been observed that sometimes Show Cause Notices have been issued, which become unsustainable in the legal process. Creating such avoidable SCNs not only does become burden on the Government revenue, it also impacts the precious time of Trade & Industry as well as Appellate Authorities/Courts.

The National Litigation Policy (NLP) formulated by the Government of India aims to reduce Government litigation so that Government ceases to be a compulsive litigant. The purpose underlying this Policy is to ensure that valuable time of the Courts is spent in resolving pending cases and in bringing down the average pending time in the Courts. To achieve this, the Government should become an ‘efficient’ and ‘responsible’ litigant.

2. In order to achieve the goals envisaged in the NLP, it is emphasised that:-

(i) SCNs should be issued after thorough examination and keeping in mind that grounds given in the SCNs are cogent, sustainable and backed by legal provisions and pronouncements.



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(ii) *Need to pass quality adjudicating orders, which can stand legal scrutiny of the Appellate Authority/Courts.*

(iii) *Urgent requirement of passing the adjudication orders within the specified time.*

(iv) *Judicial discipline should be followed while deciding pending show cause notices/appeals.*

(v) *Instructions issued with regard to the threshold limits for filing appeals before various for a must be applied scrupulously.*

(vi) *There should be proper system of monitoring and handling the litigation at the field level to prevent delays.*

3. *It is requested that above instructions to be issued to all concerned under your charge for information and guidance.*

This issues with approval of the Member [L&J].”

16. Per contra, Mr.A.P.Srinivas, learned Senior Standing Counsel and Mr.M.Santhanaraman, learned Senior Panel Counsel appearing for GST and Central Excise Department would defend the impugned orders stating that they are not in breach of the statutory provisions. Section 73(4B) directs orders of adjudication to be passed within one year from date of notice only in situations '*where it is possible to do so*'. Thus, in cases where there was a practical impossibility of passing of orders within the time stipulated, the Department is well within its right to pass orders as expeditiously as possible, and that is what has been done in the present case.



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17.They would submit that with the coming into force of GST on 01.07.2017, the show cause notices were re-assigned by order dated 29.09.2017. They circulate the order of re-assignment under which 102 show cause notices have been re-assigned to the Commissioner who has passed the impugned orders. Thus, in addition to his regular charge as Commissioner, GST Central Excise, Chennai Outer Commissionerate, he was also given the responsibility of dealing with 102 show cause notices relating to Chennai North/South Commissionerates of GST and Central Excise.

18.That apart, the onset of GST had itself brought with it, several difficulties including integration with technology and streamlining of processes, and hence all officers were required to address the difficulties on a real-time basis. This is what had led to the delay in adjudication. They would point out that this was not a case where the delay had been either wanton or wilfull, but the officer had been truly burdened with the pressure of work.

19. However, they cannot but accede to the fact that there has been no personal hearing afforded to the assessee proximate to the passing of the impugned order. In addition and on the merits of the matter, they would point out that substantial issues have been taken note of by the assessing authority and even on this score, the impugned orders of assessment must be confirmed.



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20. On the ground of bar of limitation of delay in adjudication, I would agree with the petitioner that the reasons assigned for such delay on the part of the Department do not justify the same. However, in deciding matter whether such delay is fatal to the proceedings, it is urged that the Court take note of the merits of the issues as well.

21. In the case of the first petitioner the issue that arose on merits related to the quantification of the receipts offered towards construction. The first petitioner, had entered into construction agreements, which were not required to be registered at that point in time and were, hence, unregistered-Registered sale deeds were executed.

22. While the construction agreement reflected the value of the land as 'X', the registered sale deed reflects an amount less than 'X'. According to the Department, the difference between X and Y, in fact, represents receipts from construction services hitherto suppressed and hence, such alleged suppressed receipts were brought to tax.

23. In arriving at this conclusion, the assessing authority has compared the value of land as adopted under the construction agreement and that, as adopted in the registered sale deeds. In the reply filed, the submission of the petitioners is legalistic, to state that land value could not be presumed to be



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suppressed receipts from construction services. While theoretically, the petitioner may be right, it is the case of the assessing officer that the veil is to be lifted and the true receipts from the constructions are to be determined. The response of the assessee does not reveal any satisfactory explanation in regard to the difference in land cost vis-a-vis the construction agreement and sale deeds.

24.As far as the case of the second petitioner is concerned, its case is that the classification of the service is itself incorrect and that the petitioner had constructed only individual villas, the receipts from which would not be amenable to tax at all. It has relied upon the judgment of the Hon'ble Supreme court in the case of *Macro Marvel Projects Ltd v Commissioner of Service Tax* (12 STR 603) as well as other judgments that according to it, have not been considered in proper perspective. For the above reasons, and on a consideration of the rival contentions noted as above, the impugned order is set aside and this matter is remitted to the file of the respondent for de novo consideration as well.

25.Since these are legacy matters pertaining to service tax, a date of hearing is fixed. The petitioners will appear before the respondent on 30.06.2023 at 10.30 a.m. without expecting any further notice, with responses



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in hand both to the show cause notices as well as to the orders-in-original treating the same to be show cause notices and after hearing the petitioners, orders shall be passed within a period of four (4) weeks from 30.06.2023, i.e. on or before 01.08.2023.

26.Bearing in mind, the trajectory of events that have taken place in this matter, the respondent shall ensure that orders are passed on or before 01.08.2023, after hearing the petitioners, failing which the benefit of remand granted under these orders would be unavailable to the respondent and these writ petitions would stand allowed on the ground of bar of limitation without further reference to the parties.

27.Both the writ petitions are disposed as above. No costs. Connected miscellaneous petitions are closed.

20.06.2023

vs

Index : Yes

Speaking order

Neutral Citation : Yes

To

The Commissioner of GST and Central Excise,
Chennai Outer
Newry Towers, No 2054-I,
2nd Avenue Anna Nagar
Chennai -600040.



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Dr.ANITA SUMANTH, J.

VS

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