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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 02.05.2023

+ **W.P.(C) 3544/2012**

**M/S PIYARE LAL HARI SINGH
BUILDERS PVT. LTD.**

..... Petitioner

Through: Mr. J.K. Mittal, Ms. Vandana Mittal
and Ms. Ashna Suri, Advs.

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Ms. Anushree Narain, Standing
Counsel with Mr. Mayank Srivastava,
Adv.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MR JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying as under:

“A) issue writ of certiorari/ mandamus or an appropriate Writ or order or direction against the Respondent by quashing the impugned sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with clause (30a) and (91a) of section 65 (as amended) of Chapter V of the Finance Act, 1994 inasmuch as the levy of the service tax on the “works contract” per se as well as entry against Serial No.7, 7(a), 10 and 10(a) of Notification No.1/2006-ST, dated 01.03.2006 (as amended) by declaring the same are ultra vires the Constitution of India and section 64, 66 and 67 of the Finance Act, 1994 and against the constitutional scheme of the

legislation for levying service tax in India and further quash the impugned demand of Rs.33,07,450/- confirmed in the Order-in-Original dated 28.03.2012 by the Respondent no.2 under the impugned provisions in respect of works contract.

B) issue a writ of certiorari / mandamus or any other appropriate Writ/ order/ direction declaring that the Parliament is not competent to levy service tax on works contract per se, hence, construction activity both commercial & residential using the materials (works contract) per se are not liable to service tax under the provisions of Chapter V of the Finance Act, 1994;”

2. It is the petitioner’s case that it is not liable to pay any service tax either under Clause (zzzh) of Sub-section (105) of Section 65 of the Finance Act, 1994 (hereafter ‘**the Act**’) or under Clause (zzq) of Sub-section (105) of Section 65 of the Act on the works executed by it pursuant to the composite contracts entered into for construction of residential/commercial flats.
3. The petitioner contends that the contracts executed by it are composite contracts, which entail provision of services as well as sale and purchase of goods.
4. Article 366 of the Constitution of India was amended by insertion of Sub-article (29A), which expressly provides for tax on sale and purchase of goods in respect of properties involved in the execution of works contract. The petitioner claims that since no machinery provision is available for separating the component relating to services in a composite contract, no service tax could be levied.
5. It is also the petitioner’s case that Clauses (zzq) and (zzzh) of Sub-section (105) of Section 65 of the Act are not applicable to

composite contracts; the said clauses apply only where the activity entails rendering of taxable services “*in relation to commercial or industrial construction*” and in relation to “*construction of complex*”. The composite contract, which involves both service and supply of goods are not covered under the said descriptions, which relate solely to providing services.

6. The petitioner is aggrieved by the order-in-original dated 28.03.2012, whereby the Adjudicating Authority has confirmed the demand of ₹33,07,450/- on the premise that the petitioner is rendering taxable services under Section 65(105)(zzq) and Section 65(105)(zzzh) of the Act (that is services in relation to “*commercial or industrial construction*” and in relation to “*construction of complex*”). Admittedly, Section 65(105) of the Act was amended by the Finance Act, 2007 by introducing Clause (zzzza) with effect from 01.06.2007 to include services “in relation to execution of a works contract”. Admittedly, composite contracts are covered under taxable services under Section 65(105)(zzzza) of the Act. However, the Adjudicating Authority has held that it was not permissible for the petitioner to reclassify its services as works contract under Clause (zzzza) of Sub-section (105) of Section 65 of the Act and the services rendered by the petitioner would continue to be classified under Section 65(105)(zzq) and Section 65(105)(zzzh) of the Act.

7. The petitioner was registered under the provisions of the Act for payment of service tax under the category of “*construction of complex*”, which was covered under Section 65(105)(zzzh) of the Act

and the petitioner had paid the service tax, after availing of abatement, as applicable for taxable services under Section 65(105)(zzzh) of the Act, for the period prior to 01.06.2007. However, with effect from June, 2007, the petitioner claimed that the services rendered by it were covered under Section 65(105)(zzzza) of the Act – services in relation to execution of a works contract – and had paid service tax at the rate of 2% on the contract value under the ‘Works Contract (Composition of Scheme for Payment of Service Tax) Rules, 2007’.

8. The Adjudicating Authority issued a show cause notice dated 20.10.2008, demanding:

- a) Service tax of ₹1,38,78,743/- under Section 73 of the Act and Rule 6(1) of the Service Tax Rules, 1994 (hereafter ‘the Rules’) along with due interest under Section 75 of the Act.
- b) Education cess and secondary and higher education cess of ₹4,27,315/-.
- c) Interest amounting to ₹4,856 /- under Section 75 of the Act.
- d) Penalty under Sections 76, 77 and 78 of the Act.

9. Another show cause notice dated 30.9.2009 was served upon the petitioner by the Assistant Commissioner of Service Tax Delhi demanding service tax of ₹3,07,115/- along with cess of ₹9,214/- paid at the rate of 2.06% applicable at the time of provision of services instead of 4.12% applicable at the time of receipt of the value of taxable services.

10. The Adjudicating Authority [Commissioner (Adjudication), Service Tax, New Delhi] passed the order-in-original dated 28.03.2012 holding –

(a) that the activities of the petitioner constitute “*construction of complex services*” and are taxable under Sub-section (30a) of Section 65 of the Act read with Section 65(105) (zzzh) and therefore, is liable to pay service tax from 16.06.2005.

(b) that the switching over of the petitioner to the “*works contract*” category after 01.06.2007 was in gross violation of the classification provisions of the Act

(c) The petitioner could not exercise the option to pay service tax under Rule 3(1) of Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 for the ongoing composite contract.

11. Accordingly, the Adjudicating Authority confirmed the demand proposed under show cause notices for (i) service tax of ₹35,18,231/- (₹32,11,116/- + ₹3,07,115/-), (ii) education cess of ₹1,05,548/- (₹96,334/- + ₹9,214/-), (iii) interest of ₹4,856/- under section 75 of the Act, (iv) interest on service tax and education cess under section 75 of the Act, (v) penalty of ₹50,00,000/- under section 78 of the Act, (vi) penalty under section 76 of the Act for non-payment of service tax of ₹200 for each day during which failure continues or 2% of

such tax per month whichever is higher and (vii) penalty of ₹10,000/- under section 77 of the Act.

11. The question whether the composite contracts were taxable under the service tax prior to 01.06.2007 is no longer *res integra*. The Supreme Court in the case of ***Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited: (2016) 1 SCC 170*** had referred to taxable services covered under Clause (g),(zzd), (zzh), (zzq) and (zzzh) of Section 65(105) of the Act and authoritatively held that the said taxable services referred only to service contracts simpliciter and not to composite works contracts. The relevant extract of the said decision reads as under:

“23. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines “taxable service” as “any service provided”. All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.”

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“41. We need only state that in view of our findings that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such arrangement must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

42. We have been informed by the learned counsel for the Revenue that several exemptions notifications have been granted qua service tax “levied” by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of.”

12. Admittedly, the challenge raised by the petitioner to the validity of Section 65(105)(zzzq) and (zzzh) of the Act is squarely covered by the decision of the Supreme Court in *Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited* (*supra*).

13. In view of the law laid down by the Supreme Court in *Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited* (*supra*), the impugned order-in-original dated 28.03.2012, which proceeds on the basis that composite contracts involving transfer of goods as well as services were covered under the taxable services under Section 65(105)(zzzq) and (zzzh) of the Act, cannot be sustained.

14. Accordingly, we set aside the impugned order-in-original 28.03.2012 and remand the matter to the Adjudicating Authority to adjudicate the show cause notices afresh in light of the law laid down

by the Supreme Court in the case of *Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited* (*supra*).

15. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MAY 02, 2023

‘gsr’

