IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 16.08.2017

Date of Reserving the Order	*Date of Pronouncing the Order*
08.08.2017	**16.08.2017**

CORAM:

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.21026 of 2017
and
W.M.P.No.21926 of 2017

M/s.FL Smidth Private Limited,
Rep., by its Chief Financial Officer,
'FL Smidth House',
34, Egatoor, Kelambakkam,
Rajiv Gandhi Salai,
Chennai, Tamil Nadu – 603 103. ..Petitioner

Vs.

1.The Commissioner of Central Excise,
Puducherry Commissionerate,
No.1, Goubert Avenue,
Puducherry – 605 001.

2.The Commissioner of Service Tax,
No.2054, Newry Towers,
12th Main Road, II Avenue,
Anna Nagar,
Chennai – 600 040. ..Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the first respondent in the impugned Order in Original No.30/2017 (C) (ST) (Denovo), dated

09.05.2017, quash the same as it is violative of the law laid down by the Larger Bench of the Supreme Court in the case of ***Kone Elevators India Pvt., Ltd., vs. State of Tamil Nadu (2014) 34 STR 641;*** and travelling beyond the scope of Section 65(105)(zzzza); Section 66B; Section 66E(h); Section 67 of the Finance Act 1994, as amended read with Rule 2A of the Service Tax (Determination of Value) Rules 2006; Entry 92A of the Union List, Seventh Schedule of the Constitution of India, as it seeks to levy service tax on value of goods supplied as far as the petitioner is concerned or to issue any other appropriate Writ or order.

For Petitioner	: Mr.A.R.L.Sundaresan Senior Advocate assisted by Mr.V.S.Manoj
For Respondents	: Mrs.R.Hemalatha Senior Panel counsel

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ORDER

The petitioner is a registered as an assessee on the file of the first respondent under the provisions of Chapter V of the Finance Act, 1994, as amended and also a dealer under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act), and the Central Sales Tax Act, 1956.

2. In this Writ Petition, the petitioner challenges an order passed by the first respondent, dated 09.05.2017, in Order-in-Original No.30 of 2017. By the said order, the first respondent has held that the services rendered by the

petitioner for a project, which commenced prior to 01.06.2007 and completed after 01.06.2007, are considered as a single composite contract classifiable under the service category of “Works Contract Service”, as defined under Section 65(105)(zzzza) of the Finance Act, 1994 read with Section 65A ibid for the period upto 30.06.2012, as a declared service under clause (h) of Section 66E for the period from 01.07.2012 onwards; that the services rendered by the petitioner after 01.06.2007, is classifiable under service category of “Works Contract Service”; and that service tax is liable to be collected on such works contract service as per the Works Contract (Composition Scheme for Payment of Service Tax) Rules 2007 on the gross value of the said service, including the value of goods supplied in relation to the said contract, where the petitioner has opted to pay service tax under the said scheme; the value of the Works Contract Service is liable to be arrived in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 and for the other contract and service tax liability thereon be assessed accordingly and confirmed the demand of Rs.1,28,35,06,641/- towards differential service tax payable for the period from 2008-09 to 2012-13 and interest and imposed penalty under Section 77(2) and Section 78 of the Finance Act, 1994.

3. It is not in dispute that as against the impugned order, the petitioner has an alternate remedy by way of an appeal to the Customs Excise and Service Tax Appellate Tribunal, Chennai. Without exhausting such remedy, the petitioner has approached this Court by way of this Writ Petition. Thus, the Court posed a preliminary question to the learned Senior counsel appearing for the petitioner, as to how the Writ Petition is maintainable and why the petitioner should not be directed to avail the alternate remedy provided under the Act.

4. The learned Senior counsel after referring to the factual position, submitted that earlier the petitioner had approached this Court and filed W.P.No.38178 of 2016, to quash an order of assessment under the Finance Act, dated 31.08.2016. The principal on ground which, the order was challenged is that the first respondent while passing the order took into account extraneous material, inasmuch as he adverted to a decision of the Supreme Court in State of ***Andhra Pradesh vs. M/s.Kone Elevators (India), Limited,*** reported in ***2005 (181) ELT 156,*** which has been overruled by the Larger Bench of the Supreme Court in case of ***M/s.Kone Elevators (India), Limited vs. State of Tamil Nadu,*** reported in ***2014 (34) STR 641 (SC).*** While issuing notice in the said Writ Petition on 03.11.2016, after a detailed discussion, the Court granted time to the respondent's counsel to take instruction in the matter and advance

arguments on the said aspect. The Court, by order dated 05.12.2016, disposed of the Writ Petition. While doing so, the Court pointed out that while the petitioner's say is that the transactions are separate and not composite in nature. It is the contention of the respondents that the transactions are composite in nature and that they have been artificially "split". It was further pointed out that whether or not, the impugned transactions are composite in nature, as alleged by the respondents, is a mixed question of fact and law. It was observed that concededly, the order impugned in the said Writ Petition refers to a judgment, which has been overruled by the Larger Bench of the Supreme Court, as to what extent, the Adjudicating Authority was influenced by the ratio of the first judgment in M/s.Kone India, cannot be known. Whether the first judgment in M/s.Kone India, has had a bearing on the manner in which the subject contract has been viewed. Therefore, having regard to the aforesaid circumstances, the Court set aside the impugned order and ordered as follows:-

> *13.1. Furthermore, the petitioner is directed to appear before the Adjudicating Authority/respondent No.1 on 19.12.2016 at 11.00 a.m. In case, for some reason, the aforementioned date is not convenient to the Adjudicating Authority/respondent No.1, the Adjudicating Authority/respondent No.1*

> *will be at liberty to fix another date, which would be proximate to the date fixed by the Court.*
>
> *13.2. Upon hearing the petitioner, the Adjudicating Authority/respondent No.1 will pass a fresh order, after affording due opportunity to the petitioner. Needless to say, the copy of the order will be supplied to the petitioner.*
>
> *13.3. I may also make it clear the fact that the impugned order has been set aside by this Court, will not be taken as a reflection on the merits of the matter.*

5. From the above order, it is clear that the matter was remanded to the Adjudicating Authority on the sole ground that the authority referred to a judgment of the Supreme Court, which was overruled by the Larger Bench of the Supreme Court. The Court made it clear that setting aside the impugned order will not be taken as a reflection on the merits of the matter. In paragraph 12 of the order, dated 05.12.2016, the Court has summarised the submissions and while doing so, it has made an observation that the question whether the impugned transaction is composite in nature as alleged by the respondent is a mixed question of fact and law.

6. The learned Senior counsel invited the attention of this Court to several paragraphs of the impugned order, and submitted that the allegation in the show cause notice was that the composite works contract has been artificially vivisected into contracts for supply and contract for service and service tax was paid on the service portion treating the said service component alone instead of classifying the entire composite work as "Works Contract Service". After referring to the decision of the Larger Bench in ***M/s.Kone Elevators (India), Limited*** (supra), it is submitted that if there are two separate contracts for supply and services, they should be taken separately and aspect theory has no relevance. After referring to the nature of contract executed by the petitioner, it is submitted that the first respondent misapplied the decision of the Supreme Court without appreciating the scope of the contract and that the contracts are separate and independent in nature.

7. Reference was made to the decision of the Supreme Court in the case of ***Dy. Commissioner of Sales Tax (Law) vs. Advani Coorlikon (P) Ltd.***, reported in ***1981 ELT 801 A (SC)*** to support his submission that the sale value declared to the authorities under the Central Sales Tax Act, will be the correct sale value which has to be accepted by the first respondent department. Reliance was placed on the decision of the Supreme Court in the case of ***EID***

Parry (I) Ltd., vs. Assistant Commissioner of Commercial Taxes & Anr., reported in ***[2000] 117 STC 457.*** To support the contention that there is no artificial vivisection of the contracts and the whole deal constituted one contract, reliance was also placed on the decision of the Hon'ble Supreme Court in the case of ***CCE vs. L&T Ltd.,*** reported in ***(2015) 39 STR 913.*** It was submitted that when the parties have identified specific consideration for each element, then it is a vivisection which cannot be ignored and in the instant case, the contracts are separate in terms as well as value and there are amendments to particular contract and therefore, the vivisection cannot be ignored to conclude that the same is a composite contract. Therefore, it is submitted that the impugned order is without jurisdiction, as it seeks to levy service tax on supply of goods; goods exported and the value of the goods in the course of interstate transaction. Further, the learned counsel made elaborate submissions touching upon the merits in particular reference to the finding rendered by the first respondent in paragraph 60 of the impugned order.

8. The learned Senior Standing counsel appearing for the respondent would submit that the main allegation in the notice is that all contracts entered into by the petitioner are lumpsum composite contracts involving both supply of goods and provision of taxable services. The petitioner has grossly inflated the value of the goods supplied by them under such contracts upto 178

to 219% of the value at which they purchased the goods from their vendors. Further, it is submitted that the questions involved in the instant case being factual, the petitioner should be directed to file an appeal against the impugned order.

9. I have heard Mr.A.R.L.Sundaresan, learned Senior counsel assisted by Mr.V.S.Manoj, learned counsel appearing for the petitioner and Mrs.R.Hemalatha, learned Senior Standing counsel for the respondents.

10. The petitioner at the first instance has to satisfy this Court it need not avail the appellate remedy provided under the Act. In the preceding paragraphs, this Court has summarized the grounds raised by the petitioner to justify the challenge to the impugned order by way of a Writ Petition. As prefaced, the petitioner though successful in the earlier attempt in getting the order set aside by filing W.P.No.38178 of 2016, the Court made it clear that setting aside of the order passed by the first respondent, dated 31.08.2016, will not be taken as a reflection on the merits of the matter. I find that the grounds which have been raised in the earlier Writ Petition with regard to the nature of the contract, the value thereof etc., are exactly the same as canvassed in this Writ Petition. Earlier, the Court after hearing the counsels on either side, summarized the rival contentions and recorded as hereunder in

paragraph 12 of its order:-

> *12. A perusal of the record and submissions shows that at the heart of the case is the two diametrically opposite stands taken by the parties. While the petitioner's say is that the transactions are separate and not composite in nature, it is the contention of the respondents that the transactions are composite in nature and that they have been artificially "split".*
>
> *12.1. Whether or not, the impugned transactions are composite in nature, as alleged by the respondents is a mixed question of fact and law.*
>
> *12.2. Having said so, concededly, the impugned order refers to a judgment, i.e., Kone-I and the principles articulated therein, which has been overruled by a Larger Bench of the Supreme Court 13 in Kone-II. 12.3. As to what extent the Adjudicating Authority/respondent No.1 was influenced by the ratio of the judgement in Kone-I cannot be known. The judgement in Kone-I has had a bearing on the manner in which subject contracts have been viewed. (emphasis supplied)*

11. In the above order, the Court rendered a finding that the impugned transaction whether it is a composite in nature or not, is a mixed question of

fact and law. This finding had been accepted by the petitioner, as the petitioner appears to have not canvassed the matter on merits, though the Court observed that an overruled judgment of the Supreme Court has been relied on. Apart from that, the Court also held that it cannot be known as to what extent, the first respondent was influenced by referring to an overruled judgment and as to how the overruled judgment has had a bearing on the manner in which the subject contracts have been viewed. Thus, the petitioner did not canvass the merits of the case and appears to have been satisfied with the order passed by the Court remanding the matter for *denova* consideration to consider as to what extent the Adjudicating Authority was influenced by the ratio of the overruled judgment in the case of ***Kone Elevators India Pvt., Ltd.,(supra)***, did it have a bearing on the manner in which the subject contracts have been viewed.

12. Thus, when the Court at the very threshold held that question as to whether the transaction is composite in nature or not, is a mixed question of fact and law, and it would be the answer to the petitioner's present challenge of the impugned order raising factual questions. The Tribunal being the last fact finding authority in the hierarchy of authorities is entitled to appreciate and re-appreciate the scope of the contract, whether it is composite in nature or otherwise and this exercise cannot be done in a Writ Petition. It appears

that for this reason, the Court in the earlier Writ Petition pointed out that this question is a question of mixed question of fact and law. The Court was careful to make an observation that the question as to whether to what extent the first respondent was influenced by the overruled judgment, also cannot be known. Thus, the petitioner cannot now canvass the merits of the case in a Writ Petition, call upon this Court to examine as to whether the transaction is composite in nature or otherwise, whether the valuation made was correct or incorrect; what is the yardstick to be applied to the sale value, etc. Therefore, the petitioner has to necessarily avail the appellate remedy and the contentions raised by the petitioner being mixed questions of fact and law cannot be adjudicated in a Writ Petition under Article 226 of the Constitution of India.

13. In the result, the Writ Petition is dismissed as not maintainable, leaving it open to the petitioner to avail the appellate remedy, if so advised. No costs. Consequently, connected Miscellaneous Petition is also closed.

16.08.2017

pbn
Index:yes/no
Internet:yes/no

Note: Registry is directed to return the original impugned order after

***substituting the same with the certified copy*.**

To

1.The Commissioner of Central Excise,
Puducherry Commissionerate,
No.1, Goubert Avenue,
Puducherry – 605 001.

2.The Commissioner of Service Tax,
No.2054, Newry Towers,
12th Main Road, II Avenue,
Anna Nagar,
Chennai – 600 040.

T.S.SIVAGNANAM, J

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