IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2017

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.21630 of 2017 & W.M.P.No.22643 of 2017

M/s.Sree Daksha Property Developers
Pvt. Ltd., rep. by R.Mohan,
Managing Director and Authorised
Signatory, No.1, Gandhi Layout, 1st Floor,
Sree Veeras Towers, Vadavalli,
Coimbatore-641 046. ... Petitioner

Vs.

The Commissioner of Central Excise,
6/7, ATD Street, Race Course,
Coimbatore-641 018. ... Respondent

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus, to call for the records comprised in the Order Sl.No.33/2016-COMMR dated 30.12.2016 on the file of the respondent and quash the same, and consequently direct the respondent to pass an appropriate order taking into consideration Section 129 of the Finance Act, 2017 and Circular dated 05.09.2016.

For Petitioner : M/s.D.Naveena

For Respondents : Mr.A.P.Srinivas,
Senior Standing Counsel

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ORDER

Heard M/s.D.Naveena, learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the respondent.

2.In this writ petition, the petitioner challenges an Order-in-Original dated 30.12.2016, whereby the respondent classified the services rendered by the petitioner as “Works Contract Services” in terms of Section 65 (105)(zzzza) of the Finance Act, 1994 (hereinafter referred as “the Act”) for the period from 01.04.2010 to 30.06.2012, upheld the invocation of extended period of time under proviso to Section 73(1) of the Act, confirmed the demand of service tax as proposed in the show cause notice, demanded interest and imposed penalties.

3.As noticed above, the impugned demand is for the period from 01.04.2010 to 30.06.2012, and for the subsequent period i.e., from July, 2012 to September, 2013 an order was passed, which was challenged by the petitioner on the ground that it is in violation of principles of natural justice, as they were not heard in the matter. Therefore, the petitioner instead of filing an appeal, filed an application for rectification of the mistake. This application was rejected and the same was challenged in a writ petition in W.P.No.14636 of 2016. This Court after considering the submissions on either side, disposed of the writ petition vide order dated 07.06.2016, reported in ***2016 (44) S.T.R. 236 (Mad.).*** The operative portion of the order reads as follows:

> *"4.The respondent by the impugned proceedings held that no action under Section 74 of the Act is required and such power could be exercised for rectification only if there is an error apparent from the records of the case and it cannot be a long drawn process of reasoning on the points where there may conceivably be two opinions. The respondent in the impugned order referred to the decision of the Hon'ble Supreme Court in the case of Sant Lal Gupta vs. Modern Co-op. Group Housing Society [2010 (262) ELT 6 SC].*
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> *5.After hearing the learned counsel appearing for the parties and perusing the materials placed on record, in my view, the power under Section 74 of Finance Act to rectify a mistake cannot be put under a straight jacket formula and each case has to be tested on its own facts. What is a mistake apparent from the*

record will have to be decided based on the facts which are placed before the concerned authority. The specific case of the petitioner in the reply to the show cause notice was that the value of the land has been included in the amount charged. Along with the reply to the show cause notice, the petitioner has furnished details of the undivided land sale transactions.

6.The learned counsel for the petitioner submitted that several box files containing particulars and documents were furnished to the authority along with the reply to the show cause notice. However, while considering the reply, the respondent merely averred that there is no corroborating or convincing evidence given in support of their claim. There is no averment in the impugned order as to the relevance or irrelevance of the records produced by the petitioner.

7.Therefore, if the records produced by the petitioner prima facie show that there was sale of undivided share of the land, then the authority ought to have taken into consideration of the same and examined as to whether those could have been included in the total value. This undoubtedly is an error apparent on the face of the record. Therefore, the respondent could not *have rejected the application for rectification for the reasons assigned in the impugned order. Furthermore, in their application under Section 74, the petitioner has specifically sought for a personal hearing which was also not been offered.*

8.Accordingly, the writ petition is allowed and the impugned order is quashed. The matter is remanded to the respondent to consider the application filed by the petitioner under Section 74 of the Finance Act, after granting an opportunity of personal hearing. Consequently, connected miscellaneous petition is closed. No costs."

4.On remand, the respondent has issued a show cause notice and fixed the personal hearing on 26.05.2017. However, before orders could be passed, the learned Commissioner has been transferred and the new Commissioner is yet to take charge. In the meantime, for the earlier period, the present writ petitions are entertained. The grounds raised by the petitioner in the earlier round of litigation is identical to the grounds raised herein and one more additional point is with regard to retrospective effect of Finance Act, 2017. This issue has been specifically canvassed in this writ petition. So far as the demand for the period October, 2013 is concerned, I am informed by the learned counsel for the petitioner, that the same has been dropped by Order-in-Original dated 14.11.2017, wherein it has been held as follows:

> *"29. Consequent on the substitution of the aforesaid new provisos to Rule 2A of the Service Tax (Determination of Value Rules, 2006) in the Finance Bill, 2017 which has been given retrospective effect from 08.05.2013, I notice that the Service Tax liability on the works contract service provided by the service provider has been reduced from 40% to 25%, provided the total amount charged for the works contract includes the value of the goods as wells as land or undivided share of the land and where the works contract for construction of residential units having a carpet area up to 2000 square feet or where the amount charged per residential unit from service recipient is less than Rupees one crore.*
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> *31. I observe that the demand of Service Tax of Rs.3,15,80,790/- was slapped on the service providers due to the reason that they had paid Service Tax on 25% of the gross receipts (including the cost of land) as applicable for Construction service as defined under Section 66E(b) of the Act, in terms of Notification*

No.26/2012 ST dated 20.06.2012, instead of making payment of Service Tax on the 40% of the value as applicable for Works Contract Service, in terms of Rule 2A(ii) of the Service Tax (Determination of value) Rules, 2006. This allegation withers away in view of the fact that the taxable value in terms of Rule 2A(ii) of the Valuation Rules, 2006 has been brought down to 25%, subject to the condition mentioned in the said Rules. In view of this position, there is no differential service Tax liability payable by the service provider."

5.In the light of the above discussion, this Court is of the view that the issue, which is covered in the present writ petition viz., the demand of service tax for the period from 01.04.2010 to 30.06.2012, also requires to be re-done. Since the remand, which was ordered by this Court for the period from July 2012 to September, 2013 is yet to attain finality and for the subsequent period, the demand has been dropped by a speaking order, the impugned issue requires re-consideration.

6.Thus, for the above reasons, the writ petition is allowed, the impugned order is set aside and the matter is remanded to the respondent for fresh consideration, who shall take up the case for fresh adjudication along with the matter, which is now pending on the file of the respondent pursuant to the order of remand in W.P.No.14736 of 2016, for the period from July, 2012 to September, 2013, afford an opportunity of personal hearing to the petitioner and pass fresh orders on merits and in accordance with law. While doing so, the respondent shall take into consideration the order in original dated 14.11.2017, in the assessee's own case, where the demand for the period from 01.10.2013 to March, 2015 has been dropped. No costs. Consequently, connected miscellaneous petition is closed.

11.12.2017

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Index:Yes/No

To

The Commissioner of Central Excise,
6/7, ATD Street, Race Course,
Coimbatore-641 018.

T.S.SIVAGNANAM, J.
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W.P.No.21630 of 2017

11.12.2017