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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
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\+ **SERTA 6/2017**

SWADESHI CONSTRUCTION CO. ..... Appellant
Through: Mr J.K. Mittal and Mr Rajveer Singh, Advocates

versus

COMMISSIONER OF SERVICE TAX, DELHI ..... Respondent
Through: Mr Harpreet Singh, Senior Standing Counsel with Ms Namrata Bharti, Advocates

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

<u>O R D E R</u>
% **22.09.2017**

<u>CM 34933/2017 (exemption)</u>
1. Allowed, subject to all just exceptions.

<u>SERTA 6/2017 & CM 34932/2017 (stay)</u>
2. **Admit**.

3. The following substantial question of law is framed for consideration of this Court:

> "Whether the CESTAT was justified in remanding the matter to the Adjudicating Authority on the question whether the contract in question was a composite works contract and whether it was liable for service tax as such?

4. The facts in brief are that the Appellant-Assessee, which undertakes

execution of construction contracts, is registered with the Service Tax Department ('Department'). It had undertaken two civil construction projects: one was the Dilli Haat, INA, New Delhi and the other the Dilli Haat, Pitampura, Delhi.

5. The Department issued a Show Cause Notice ('SCN') dated 27th May, 2011 to the Assessee stating that the aforementioned construction projects were entirely commercial in nature and were amenable to service tax under the category of Commercial and Industrial Construction Service falling under Section 65(105) (zzq) of the Finance Act, 1994 (FA).

6. The SCN issued by the Department *inter alia* referred to the fact that the Assessee was entitled to the benefit of the exemption notification No.15/2004-ST dated 10th September, 2004. Paras 3.5 and 3.6 of the SCN read as under:

> "3.5. Whereas, Notification No. 15/2004-ST dated 10.09.2004 referred to above, was rescinded vide Notification No. 2/2006-ST dated 01.03.2006 and exemption Notification No. 1/2006- ST dated 01.03.2006 was issued. However, the conditions for availing the abatement of 67% of the gross taxable value as well as the 'Explanation' of gross amount charged under the said notifications were retained in respect of 'Commercial or Industrial Construction Service'.
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> 3.6. In view of above, it appears that the assessee was engaged in the 'Construction Services' as defined under Section 65 (105) (zzq) of the Act ibid and an amount of Rs. 93,01,154/- towards Service Tax (including Education Cess and Secondary & Higher Education Cess) along with interest appears to be recoverable from them."

7. By the adjudication order dated 27th April, 2012, the Commissioner

concluded that the since neither the Dilli Haat at INA nor at Pitam Pura could be termed as a commercial construction, the demand of service tax had to be dropped. Aggrieved by the said order, the Department went in appeal before the CESTAT.

8. The Assessee contended before the CESTAT that in view of the decision of the Supreme Court in ***Commissioner of Central Excise, Kerala v. Larsen & Toubro Ltd. 2015 (39) STR 913 (SC)***, no service tax could be charged on composite works contract prior to 1st June, 2007. It was specifically contended that the construction contracts executed by the Assessee were composite contracts involving both labour and service components and therefore in terms of the aforementioned judgment, no service tax could be levied prior to 1st June 2007.

9. It appears that the CESTAT in the impugned order agreed with the Assessee that in the event the contracts executed by it partook the nature of composite works contract, they would not be amenable to service tax prior to 1st June, 2007. However, the CESTAT remanded the matter to the Adjudicating Authority for verifying whether in fact composite works contracts had been executed by the Assessee.

10. Mr J.K. Mittal, learned counsel for the Appellant is right in his contention that there was in fact no dispute that what was executed by the Appellant was a composite contract of labour and services. In the circumstances, there was no occasion for the CESTAT to remand the matter to the Adjudicating Authority for verifying that fact.

11. Mr Harpreet Singh, learned Senior Standing Counsel submitted that the Assessee had sought to plead a new case before the CESTAT that the contracts executed by it were composite contracts and it was for this reason that the CESTAT remanded the matter to the adjudicating authority.

12. On a plain reading of the SCN, it is apparent that it was never disputed by the Department that what was undertaken by the Appellant was a composite contract of construction which involved labour and service elements. The grant of rebate to the Assessee as noted in the SCN was itself an acknowledgment of this. If that was never in issue, the question of remanding the matter to the Adjudicating Authority for verifying that fact did not arise.

13. The CESTAT had to examine if the nature of the contracts executed by it was such that would be covered by the decision of the Supreme Court in ***Commissioner of Central Excise, Kerala v. Larsen & Toubro Ltd.*** (*supra*). In this context paras 24 and 31 of the said decision are relevant and read thus:

> "24. 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.

31. In the aforesaid judgment, it was held that the levy of service tax in Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh) is good enough to tax indivisible composite works contracts. Various judgments were referred to which have no direct bearing on the point at issue. In paragraph 23 of this judgment, the second *Gannon Dunkerley* judgment is referred to in passing without noticing any of the key paragraphs set out hereinabove in our judgment. Also, we find that the judgment in *G.D. Builders* (supra) went on to quote from the judgment in *Mahim Patram Private Ltd. v. Union of India, 2007 (3) SCC 668*, to arrive at the proposition that even when rules are not framed for computation of tax, tax would be leviable.

14. It was further clarified by the Supreme Court in para 44 of the said judgment that any exemption notification that had been issued by the government would be redundant as far as such composite construction contracts were concerned. The said passage read thus:

"44. We have been informed by counsel for the revenue that several exemption 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."

15. In that view of the matter, the question framed is answered in the

negative i.e. in favour of the Assessee and against the Department. The appeal is accordingly allowed and the impugned order of the CESTAT is hereby set aside. The appeal of the Department is restored to the file of the CESTAT and directed to be listed before it on 20th November, 2017. Either of the parties, if earlier not already done, will place before the CESTAT before the above date, the complete copies of the relevant contracts.

16. *Dasti* under the signatures of the Court Master.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

SEPTEMBER 22, 2017
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