IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.01.2018

CORAM:

The Hon'ble Mr.Justice T.S.Sivagnanam

W.P.No.13518 of 2017
and
W.M.P.Nos.14600 & 14616 of 2017

East Coast Constructions & Industries Limited,
represented by its General Manager Finance S.Suresh ... Petitioner

vs.

The Additional Commissioner,
Service Tax II Commissionerate,
Newry Towers, No.2054-I, II Avenue,
Anna Nagar,
Chennai - 600 040. ... Respondent

Prayer:
Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, to call for the records of Order in Original No.13/2017-ST-II, dated 07.02.2017, in C.No.IV/9/10/2013-STC, issued by the Respondent and to quash the same as arbitrary and illegal.

For Petitioner : Mr. Joseph Prabakar

For Respondent : Mr.K.Magesh
Senior Standing Counsel

ORDER

Heard Mr. Joseph Prabakar, the learned counsel appearing for the petitioner and Mr.K.Magesh, the learned Senior Standing Counsel, accepting notice on behalf of the respondent.

2. The petitioner is a Company, registered under the Companies Act, 1956, engaged in the construction activities, and the present case covers the construction of underground sewerage at Ramanathapuram and Tirunelveli Districts of Tamil Nadu, for

the Tamil Nadu Water and Drainage Board (TWAD Board).

3. The petitioner has filed this Writ Petition, challenging the order-in-original, dated 07.02.2017, by which, the demands made in four show causes notices towards payment of service tax has been confirmed by the respondent.

4. The learned Senior Standing Counsel for the Revenue raised preliminary objection as regards the maintainability of the Writ Petition, on the ground that, what the petitioner seeks to canvass before this Court is a classification dispute, which cannot be decided in a Writ Petition. Secondly, it is contended that, as against the impugned order, the petitioner has an effective alternate remedy of filing an Appeal before the Commissioner (Appeals), and, without exhausting such remedy, the petitioner has approached this Court, and hence, the Writ Petition is not maintainable.

5. Heard the learned counsel appearing for the petitioner, on the above submissions.

6. The learned Senior Standing Counsel for the Revenue is justified in his submission, in contending that the classification dispute cannot be decided/resolved by this Court, in a Writ Petition. Equally well settled legal principle is that, when there is an effective and efficacious alternate remedy available under the relevant statute, the party should be relegated to avail such remedy. However, in the instant case, I seek to make a small departure for the reasons (mentioned infra).

7. In the show cause notice issued to the petitioner, a proposal was made to classify the nature of activity done by them as 'Erection, Commissioning or Installation services', by bringing the same under Section 65 (39a) of the Finance Act, 1994. Whereas, the petitioner, while submitting their reply, contended that, major portion of the contract involves erection, installation and commissioning of the pre-fabricated structures, like M.S.Pipes and RCC spun pipes and other structures for collection and conveying system, and also the erection and installation of machineries required for pumping station, and not much work of construction of civil structures are involved, excepting, very few structures like, manholes, etc, as they cannot be classified under Commercial Construction Services.

8. It was further contended that, the activities carried on by the assessee, such as erection of structure and laying of pre-fabricated pipes, viz., M.S.Pipes and RCC Spun pipes, joining and testing the laid pipes, erection of other concrete structures needed for collection and conveyance system,

installation and commissioning of machineries needed for pumping station etc., which may also involve erection of structures, shall be classified under Erection, Commissioning and Installation services, more aptly, rather than under Commercial and Industrial Construction services. During the personal hearing, the assessee contended the work involves construction of pipelines and constructions of structures, and hence, classifiable under Commercial and Industrial Constructions Services. In support of their contention, the assessee relied upon various decisions, including the decision in the case of M/s. Larsen and Tourbro Ltd., Vs. Commissioner of Service Tax reported in 2011 (22) STR 459 (Tri. Ahmd.). It was argued that the said decision wholly covers the case of the petitioner. However, the respondent, while rejecting the reply/objection made by the assessee and confirming the demands among other things, held that, he is not inclined to follow the decision, in the case of M/s. Larsen and Tourbro Ltd. (supra), as the Department has not accepted the judgment, and Appeal is pending before the Hon'ble High Court of Gujarat.

9. The learned counsel appearing for the petitioner would argue that, mere pendency of the Appeal without an interim order is not a ground for the respondent to refuse to follow the decision of the Tribunal, and judicial discipline requires that the decision in the case of the M/s. Larsen and Tourbro Ltd., (supra) ought to have been followed. In support of such contention, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court, in the case of Union of India Vs. Kamlakshi Finance Corporation Ltd., reported in [(1991) 55 E.L.T. 433 (SC)], wherein, it is held that, 'the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not acceptable to the Department, in itself, an objectionable phrase, and is the subject-matter of an appeal can furnish no ground for not following it, unless, its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.' By applying the decision in the case of Kamlakshi Finance Corporation Ltd. (supra), the respondent could not have refused to take note of the decision in the case of M/s. Larsen and Tourbro Ltd., (supra).

10. Be that as it may, there is a decision of the jurisdictional High Court, (viz., Division Bench) in the case of Commissioner of C. Ex. Tiruchirappalli Vs. Indian Hume Pipes Co. Ltd., reported in [(2015) 40 S.T.R. 214 (Mad.)]. In the said case, the assessee was manufacturer of pre-stressed concrete pipes and was supplying the same to Tamil Nadu Water Supply and

Drainage Board, for use in water supply projects, and the assessee succeeded before the Tribunal, as it was held that the activity carried on by them would not fall within the definition of the expression, "commissioning or installation of construction service'' and the activity has to be considered to be part of construction activity, which is covered not commercial in nature, and hence, was exempt. The Division Bench held that, the Tribunal rightly followed the decision of the Larger Bench, in the case of Lanco Infratch Ltd., Vs. Commissioner of Customs, Central Excise and Service Tax, Hyderabad, reported in [(2015) 38 S.T.R. 709 (Tri. Bangalore) and held as follows :-

> " The second aspect is that, if there is no dipsute about the nature of the activity carried on, whether the assessee would be liable to pay service tax or not.
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> 9. It is seen that, with effect from 16.06.2005, the definition of the expression, " commissioning or installation of construction serfice'' under Section 65 (25b) was amended to include the construction of a pipeline or conduit. Therefore, after 16.06.2005, there was no dispute. Consequently, the Department cannot now raise a question as to the very nature of the activity carried on by the appellant.
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> 10. On the question as to what happens, if the case is covered by Section 65 (25b) a Large Bench of the Customs, Excise and Service Tax has already held in Lanco Infratch Ltd., Vs. Commissioner of Customs, Central Excise and Service Tax, Hyderabad [(2015) TIOL - 758- CESTAT -Bang-LB = 2015 (38) S.T.R. 709 (Tri. Bangalore) as follows:-
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>> 11. "Consider in the light of the precedents referred to herein above; the definitions of ECIS and CICS; the Board clarification dated 07.01.2010; the Dictionary meanings ascribed to the word "conduit"; and provisions of Section 65A(2)(a) and (b), we conclude that construction of a pipeline/conduit, construction of pumping stations together with associated machinery and other

construction works, including for transmission of water in lift irrigation projects, cannot be classified under ECIS. These services are only classifiable as CICS. Where the pipeline/conduit laying is executed for Government or Government undertaking as part of irrigation, water supply, or sewerage projects, the works are not exigible to service tax under CICS (prior to 01.06.2007), since these are not primarily for commercial or industrial purposes and are excluded from the scope of the taxable services qua the exclusionary clause definition of CICS, in Section 65 (25b) of the Act."

12. As rightly pointed out by the Tribunal, the assessee was entrusted with the task of laying a long distance pipeline to enable the Tamil Nadu Water Supply and Drainage Board to supply water. It was an activity in public interest, to take care of the civic amenities liable to be provided by the State. Therefore, the Tribunal was right in holding in favour of the assessee. Hence, the question of law is answered in favour of the assessee."

11. Unfortunately, in the instant case, the petitioner/assessee did not place the decision of the Division Bench of this Court, in the case of Commissioner of C. Ex. Tiruchirappalli Vs. Indian Humes Pipes Co. Ltd. (supra) nor the decision in the case of Lanco Infratch Ltd., Vs. Commissioner of Customs, Central Excise and Service Tax, Hyderabad (supra) before the respondent, at the time of adjudication. However, prima facie, it appears that, in the case of Indian Hume Pipes Co. Ltd. (supra), the nature of activity done by the petitioner was to lay long pipelines to enable the TWAD Board to supply water, and the activity was found to be in public interest to take care of civic amenities, liable to be provided by the State. Thus, the Appeal filed by the Revenue was dismissed by the Division Bench.

12. Considering the above facts, this Court is inclined to grant one more opportunity to the assessee to go before the Assessing Officer and putforth their case, despite the fact that

they have failed to place the decision in the cases of i) Indian Humes Pipes Co. Ltd. (supra) and ii) Lanco Infratch Ltd., (supra) before the respondent at the time of adjudication. This observation is made for two reasons. Firstly, with a view to provide the assessee an opportunity without non suiting them on technical grounds. Secondly, for the reason that, though order of adjudication has been passed, it remained as paper orders, as the same has been stayed by this Court till the Writ Petition is heard and disposed for.

13. Accordingly, this Writ Petition is allowed and the impugned order is set aside and the matter is remanded to the respondent for fresh consideration, who shall afford an opportunity of personal hearing, during which, the petitioner will be entitled to submit objections to the show cause notice, enclosing the decision in the cases of i) Commissioner of C. Ex. Tiruchirappalli Vs. Indian Humes Pipes Co. Ltd. (supra) and ii) Lanco Infratch Ltd., Vs. Commissioner of Customs, Central Excise and Service Tax, Hyderabad (supra) and the respondent shall hear the authorized representative of the petitioner, in person and redo the assessment in accordance with law. No costs. Consequently, connected Writ Miscellaneous Petitions are closed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Additional Commissioner,
Service Tax II Commissionerate,
Newry Towers, No.2054-I, II Avenue,
Anna Nagar, Chennai - 600 040.

+1cc to Mr.Joseph Prabakar, Advocate in sr.333

W.P.No.13518 of 2017

CS/21/02/18