IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 25.03.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.3139 of 2010
and
M.P.No.1 of 2010

B.Ramadass,
Contractor, ... Petitioner

Vs.

1. The Union of India,
Rep. by the Secretary,
Ministry of Finance,
New Delhi.

2. The Assistant Commissioner of Central Excise
Ranipet Division
Central Excise Complex,
SIPCOT,
Ranipet - 632 403. ... Respondents

Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records relating to the show cause notice C.No.IV/161/116/2009-S.Tax (ADJN) dated 12.05.2009 of the 2^{nd} respondent and quash the same.

For Petitioner : Mr.R.Saravana Kumar

For R1 : Mr.J.Madhanagopal Rao

For R2 : Mrs.R.Hemalatha
Standing Counsel

ORDER

This Writ Petition has been filed seeking to quash the show cause notice C.No.IV/161/116/2009-S.Tax(ADJN) dated 12.05.2009 issued by the second respondent.

2. The petitioner submitted that he is a Class - I road contractor engaged in laying or relaying of roads for PWD and other local corporations based on the contracts awarded by the

Government organizations or undertakings. When the petitioner was working in the State Highways Department/Local Authorities based on the contract, he used to purchase raw materials for laying or relaying of roads and after completion of the contract, there is a transfer of property in the goods utilized by the petitioner for the said work, from the petitioner to the Highways Department/Local Authority. The said nature of the contract awarded to the petitioner squarely falls under the definition of 'works contract' under the Tamil Nadu General Sales Tax Act, 1959 and the Tamil Nadu Value Added Tax Act, 2006 and the petitioner was a registered dealer under the erstwhile TNGST Act, 1959 and presently now under the TNVAT Act, 2006 and he has been regularly assessed to the levy of sales tax in respect of the contracts executed by him for laying or relaying of roads.

3. The petitioner further submitted that as per the provisions of the TNGST Act 1959 and 2006, the contractee deducts tax at source and pays the same to the State Government, and TDS under the Income Tax Act is also deducted by the contractee and paid to the Union Government. As per sub-clause (zzzza) to clause 65(105) of the Finance Act, 1994 was inserted by Section 135 of the Finance Act, 2007 (22 of 2007) with effect from 01.06.2007, where transfer of property in goods is involved in the execution of a contract leviable to tax as sale of goods, then such a contract is a "works contract". In the present case, there is transfer of property in goods involved in the execution of the contract and sales tax due on such transfer of property in goods as sale of goods has been duly paid over to the Commercial Taxes Department. Therefore, the contract undertaken and executed by the petitioner is a "works contract".

4. The petitioner also submitted that in view of the unequivocal terms of exclusion set fourth in sub-clause (zzzza) of Section 65(105) of the Finance Act 1994, the petitioner has not registered himself as assesses on the file of the Service Tax Department. In any event the petitioner is continue to be assessed under the TNVAT Act, 2006 for the levy of tax on deemed sale of goods involved in the execution of the works contract and taxes are being duly remitted under the TNVAT Act, 2006.

5. The petitioner further submitted that in spite of the above provision of law, the 2nd respondent issued a letter in file C.No.IV/161/116/2009-S.Tax(ADJN) dated 12.05.2009 based on the information by the Highways Department, informing the petitioner that the services undertaken by him are covered under "Management, Maintenance and Repair Services" and are liable for payment of Service Tax under the Provisions of Finance Act, 1994 (32 of 1994) during the period from 16.06.2005 to September 2008. Thereafter, the the 2nd respondent issued a show cause

notice C.No.IV/161/116/2009-S.Tax(ADJN) dated 12.05.2009, which is impugned in this Writ Petition, contending that the petitioner has contravened the provisions of Sections 73, 75, 76, 77 and 78 of the Finance Act, 1994 and has deliberately with an intention to evade payment of service tax, suppressed the fact of rendering the said taxable services and value of consideration in money realized from the Highways Department, Vellore, thereby, rendering himself for demand of Service Tax under the proviso to Section 73(i) of the Finance Act, 1994.

6. The petitioner also submitted that by the impugned show cause notice, the 2nd respondent directed the petitioner to show cause as to why (i) the Service Tax amount of Rs.3,29,760/-, Education Cess of Rs.6,595/- and Secondary and Higher Education Cess of Rs.1,115/- totaling to Rs.337470/- for the taxable services provided during the period from 16.06.2005 to September 2008 on the value of Maintenance and Repair Service of Highways Roads should not be demanded under proviso to Section 73(i) of the Finance Act, 1994 (32 of 1994) (ii) interest under Section 75 of the Finance Act, 1994 (32 of 1994) as applicable at the material time should not be recovered for the unpaid Service Tax; (iii) penalty under Section 78 of the Finance Act, 1994 (32 of 1994) should not be imposed for willful suppression of the fact of rendering taxable services with an intention not to pay service tax on the consideration in money received from the Highways Department, Vellore and (iv) Penalty should not be imposed under Section 77 of the Finance Act, 1994 for non Registration of their service and for failure to furnish S.T.-3 Half-Yearly returns.

7. Challenging the said impugned show cause notice, the present Writ Petition has been filed by the petitioner, stating that when the provisions of the Act excludes the works executed by the petitioner from the purview of the Service Tax, it is illegal on the part of the respondent in issuing the present impugned notice. Further, the respondent has not disputed the fact that the work done by the petitioner is laying/relaying of roads. That being the case, the respondent is wrong in classifying the same under maintenance, management or repair service when a more specific definition of works contract and exclusion of works contract in relation to roads is found in Section 65(105)(zzza) of the Finance Act, 1994. Moreover, it has been stated that the respondent ought to have seen that the petitioner has been assessed to sales tax for the very same contract in respect of the deemed sales of goods in the works contract and the very same contract cannot be classified under maintenance, management or repair service when a specific service of works contract is available under the Finance Act, 1994. Further, the respondent erred in ignoring Section 65A and Section 65(2)(a) of the Finance Act, 1994, which clearly provide

that the sub-clause which provides the most specific definition has to be adopted for the purpose of classification of service.

8. Denying the allegations of the petitioner, the respondent has filed a counter affidavit, wherein, it has been contended that the services rendered by the petitioner fall under the category of "Maintenance or Repair Service/Management" and thereby, the petitioner is liable to pay Service Tax under Section 65(105)(zzg) of the Finance Act 1994, but, the petitioner, neither provided the required details nor paid the appropriate service tax payable and therefore, the impugned show cause notice was issued, demanding service tax for the period from 16.06.2005 to 30.09.2008. Further, it has been contended that the works contract in respect of roads has only been excluded from service tax liability in Section 65(105)(zzza) of the Finance Act, 1994, whereas the management, maintenance or repair of roads has been defined as a taxable service in Section 65(105)(zzza) of the Finance Act, 1994. As such, the respondent reiterates his stand that the services of the petitioner, fall under the definition of Section 65(105)(zzza) of the Finance Act, 1994 and thereby, he is liable to pay service tax.

9. The learned counsel for the petitioner has produced a copy of the orders passed by this Court in W.P.No.5156 of 2012 dated 20.07.2018 and W.P.No.6814 of 2011 dated 12.12.2018, wherein, it is seen that similar matter has been dealt with by this Court and both the Writ Petitions were allowed by this Court, based on the provision of Section 97 of the Finance Act, 1994, as inserted by Finance Act 23/12 dated 28.05.2012. The said provision reads as follows:-

> "97. Special Provision for exemption in certain cases relating to management etc., of roads
>
> (1) Notwithstanding anything contained in Section 66, no service tax shall be levied or collected in respect of management, maintenance or repair of roads, during the period on and from the 16th day of June, 2005 to the 26th day of July, 2009 (both days inclusive)."

10. In view of the above provision, it is categorically clear that no service tax shall be levied or collected in respect of management, maintenance or repair of roads, during the period from 16.06.2005 to 26.07.2009 (both days inclusive). Since the services of the petitioner would not fall under the definition of Section 65(105)(zzza) of the Finance Act, 1994, he is exempted from the service tax payable during the period from 16.06.2005 to 30.09.2008 for which service tax has been claimed from him. Therefore, this Court is inclined to allow this petition.

11. Accordingly, this Writ Petition is allowed and the impugned show cause notice C.No.IV/161/116/2009-S.Tax(ADJN) dated 12.05.2009 of the 2nd respondent is hereby quashed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

raja

To

1. The Secretary,
   Union of India,
   Ministry of Finance,
   New Delhi.

2. The Assistant Commissioner of Central Excise
   Ranipet Division,
   Central Excise Complex,
   SIPCOT,
   Ranipet - 632 403.

+1 cc to Mr.R.Saravanakumar, Advocate Sr.No.28313
+1 cc to Mr.J.Madanagopal Rao, Advocate Sr.No.28943
+1 cc to M/s.R.Hemalatha, Advocate Sr.No.28266

Order in

W.P.No.3139 of 2010
and M.P.No.1 of 2010

BS(CO)
CSL/23.04.2019