

**HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO
AND
HONOURABLE SRI JUSTICE K. LAKSHMAN**

WRIT PETITION No. 5980 of 2017

ORDER: (Per Sri Justice M.S.Ramachandra Rao)

1. In this Writ Petition, petitioners assail the Order-in-Original No.49/2016 (Service Tax)(R) dt.24.10.2016 passed by the Assistant Commissioner of Service Tax, Division III, Hyderabad (1st respondent) refusing the claim of the petitioners for refund of an amount of Rs.33,77,539/-, and for a direction to the 1st respondent to refund the same.

2. The petitioners, under a registered Sale Deed dt.09.05.2014, had purchased office space admeasuring 20,101 sft along with undivided share of land admeasuring 492 sq.yards in a complex named as Meenakshi's Techpark from M/s. Meenakshi Infrastructure Private Limited(4th respondent) for valuable consideration.

3. The 4th respondent, in addition to the consideration agreed upon, also demanded and received from the petitioners an amount of Rs.33,77,539/- as service tax payable in respect of the sale of the said property in their favour on the ground that such an activity is considered '*commercial and industrial construction*' service covered by Section 65(105)(zzq) of Finance Act,1994 (as amended from time to time).

4. Petitioners contend that they were initially under a bonafide impression and belief that the said sale and purchase

of the commercial property including the undivided share of land is exigible to service tax under the provisions of the said Act and had paid the said amount as demanded by the 4th respondent towards service tax.

5. Petitioners contended that subsequently, they came to know that in respect of the composite contracts, like the one entered into by the petitioners for purchase of the immovable property along with goods used therein and also a part of the undivided land, service tax cannot be levied on composite price as per the provisions of the Act, inasmuch as the said statute did not contain any mechanism to segregate/bifurcate the value of goods and the cost of land *from the gross value for determining the value of service*, on which service could be levied. They relied upon the decision of the High Court of Delhi in the case of **Suresh Kumar Bansal v. Union of India**¹.

6. It is contended by the petitioners that the consideration paid by the petitioners was towards purchase of immovable property included undivided share of land, and the claim of service tax on such transaction of immovable property by the respondents would be clearly outside the purview of the service tax regime as contained in the Act.

7. Petitioners filed an application with the 1st respondent on 19.08.2015 seeking refund of the said amount of Rs.33,77,539/- from the 1st respondent. Petitioners enclosed

¹ 2016 SCC Online Del. 3657

required documents enclosing receipt of payment of service tax to the 4th respondent and also provided details of 4th respondent along with it's Service Tax Registration number and address to enable the 1st respondent to verify the payment and grant refund to the petitioners.

8. Petitioners had contended in the said application that they are entitled to the refund of service tax paid under mistake of law and the provisions under Section 11B of Central Excise Act, 1994 would apply to the refund under the service tax law as well.

9. The 1st respondent passed the impugned order on 24.10.2016 rejecting the claim of the petitioners for refund of the above amount on the following four(4) grounds:

(a) The claim for refund is barred by limitation.

(b) The petitioners did not furnish documents to prove that the said service tax amount had actually been deposited with the Central Government, i.e., a Chartered Accountant Certificate or undertaking from the vendor of the petitioner, M/s. Meenakshi Infrastructures Pvt. Ltd., certifying that the service tax has been deposited/credited to Central Government or ledger copies or challans or ST-3 returns of the vendor have not been produced by the petitioners.

(c) That the Delhi High Court in **GD Builders v. Union of India**² had taken the view that after 46th amendment to the Constitution, composite contracts can be bifurcated to compute value of the goods sold/supplied in contracts for construction of buildings with labour and material; that the service portion

² 2013(32) STR 673 (DEL)

of the composite contracts can be made subject matter of service tax; that Aspect Doctrine is applied for bifurcating/vivisectioning the composite contract; that service tax can be levied on the services component of any contract involving service with sale of goods etc.; that computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax; and that merely because no rules are framed for computation, it does not follow that no tax is leviable.

(d) The provision mentioned and time period in the judgment relied upon by the petitioners pertain to the period prior to 2012 i.e., before the negative list and change in valuation provisions; that the ratio in that decision would not apply for the current period under consideration as the levy is made under Section 66E of the Finance Act, 1994 and Section 67 read with Rule 2A of the Service Tax (Determination of Value) Rules, 2006 (as amended by Service Tax (Determination of Value)(2nd amendment) Rules 2012 w.e.f. 01.7.2012), which prescribe a mechanism for ascertaining value in case of composite contracts.

10. Challenging the same, this Writ Petition is filed.

11. Heard, Sri Kailash Palagummi, Counsel representing Sri T.Bala Mohan Reddy, counsel for petitioners and Sri Swaroop Oorilla, counsel for respondents 1 to 3.

RE: The plea of Limitation

12. As regards the first ground of bar of limitation, from the facts narrated above, it is clear that the payment by the petitioners to the 4th respondent of the service tax of the sale transaction dt.09.05.2014 occurred on 19.06.2014. Copy of the

receipt obtained by the petitioners from the 4th respondent is filed along with Annexure P3 to the Writ Petition.

13. Section 11B of the Central Excise Act, 1944 deals with claims for refund of duty and interest if any paid on such duty. Under sub-Section(1) thereof, any person claiming refund of any duty and of interest, if any paid on such duty, may make such application for refund of duty and interest if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise, before the expiry of **one year** from the relevant date in such form and manner as may be prescribed; and the application shall be accompanied by such documentary or other evidence, including the documents referred to in Section 12A as the applicant may furnish to establish that the amount of duty of excise in relation to which such refund is claimed was collected from or paid by him; and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person.

14. It is the contention of Sri Swaroop, counsel for respondents 1 to 3, that the said provision is applicable to the claim of refund made by the petitioners and therefore the claim of the petitioners is time barred.

15. This contention is refuted by the counsel for the petitioners by relying upon the decision of the Madras High

Court in **Natraj and Venkat Associates v. Assistant Commissioner, Service Tax, Chennai-II**³.

16. In **Natraj and Venkat Associates (3 Supra)**, there was a claim for refund of service tax erroneously paid on construction activity undertaken in Srilanka by a firm rendering architectural services. The petitioner therein had received payment from a client in Srilanka on 27.05.2005 in US Dollars and the petitioner had paid a sum of Rs.8,67,800/- on 04.07.2005 towards service tax. After realizing that the services rendered for construction of a building in Srilanka would not attract service tax, petitioner made a claim for refund on 20.09.2006. On 23.05.2007, the respondents therein rejected the claim of the petitioner for refund on the ground that it is time barred and also on the ground that the claim was not in proper formant. Petitioner filed appeal to the Commissioner of Central Excise (Appeals), which was rejected by an order dt.21.11.2008 on the ground that even if the tax was collected without authority of law, the claim for refund cannot be entertained beyond the period mentioned in 11B of the Central Excise Act, 1944. Petitioner assailed the same before the Madras High Court and the Madras High Court allowed the Writ Petition and held that sub-Section (1) of Section 11B dealt with only the claim of refund of “any duty of excise”; and that the word “duty” is not defined under the Act. It held that *if what*

³ 2010(2) Tax;mann.com 598 (Madras)

was paid cannot be taken to be duty of excise, the bar of limitation under Section 11B(1) cannot be applied. It held that the bar of limitation prescribed under sub-Section (1) of Section 11B applies only to “any person claiming refund of any duty of excise and interest”. It therefore held that the claim of the petitioner for refund can be entertained by the High Court as there was no dispute about the fact that no service tax was payable by the petitioner on the transaction in question and what was paid by them was not therefore service tax.

17. Similar view was taken by the Division Bench of Karnataka High Court in ***Commissioner of Central Excise (Appeals), Bangalore v. KVR Constructions***⁴. In that case, the assessee was a construction company rendering services under category of “Construction of Residential Complex Service” and was paying service tax. During the relevant period, the assessee had constructed various buildings for one ‘A’ and had paid service tax on same. Subsequently, the assessee filed an application for refund of the service tax paid on the ground that the building construction, which was done by it for ‘A’, was a non-profit organization and it was not liable to pay such tax in the light of a circular No.80/10/2004, dt.17.09.2004. The Assistant Commissioner rejected the claim for refund on the ground that the application was filed beyond the period of limitation prescribed under Section 11B, though the amount paid by the assessee was not service tax, but it was in the

⁴ 2012(22) taxmann.com 408(Kar.)

nature of deposit with the Department. The High Court held that the amounts collected erroneously have to be returned to the assessee. It also held that the claim of the petitioner that it was exempted from payment of service tax by virtue of Circular dt.17.09.2004 was not denied by the Department and it is not even denying that the nature of construction/services rendered by the petitioner was exempted from the payment of service tax; that *one has to see, whether the amount paid by the petitioner under mistaken notion was payable by the petitioner at all*; though under the Act, such service tax was payable, by virtue of the circular, the petitioner was not liable to pay it as there was an exemption because of the nature of the institution for which they have made construction and rendered services. It held that if the respondent had not paid those amounts, the authority could not have demanded the assessee to make such payment and that it had lacked the authority to levy and collect such service tax. It observed that if the department were to demand such payments, petitioner could have challenged it as unconstitutional and without authority of law. Therefore, in a converse situation, merely because there is payment of amount, it would not authorize the department to regularize such payment. It held that *if the department had no authority to demand service tax from the assessee because of its Circular dt.17.09.2004, the payment made by the assessee would not partake the character of "service tax" paid by them and mere payment made by the assessee will neither validate the nature of*

the payment nor the nature of the transaction. In other words, mere payment of amount would not make it a 'service tax' payable by them and once there is lack of authority to demand service tax from the assessee, the department lacks authority to levy and collect it. According to the Court, when once there is a lack of authority to collect such service tax, it would not give the department the right to retain the amount paid by the assessee, which would actually not payable by them.

18. Having regard to these decisions, we are of the opinion that if the petitioners were not liable to pay 'service tax' on the transaction of the purchase of the constructed area along with goods apart from undivided share of land at all, the payment which was made by the petitioners would not be a payment of service tax at all; that the department also could not have demanded payment of the same from the petitioners; and merely because the petitioners made the payment, it would not partake the character of 'service tax' and the department cannot retain the amount paid by the petitioners which was in fact not payable by them.

19. The aspect whether the petitioners were liable to pay service tax at all on the transaction is discussed separately below.

Re: Plea of revenue that documents were not produced before it as proof of payment of 'service tax'

20. With regard to the second ground in the impugned order that the petitioners did not furnish any document to prove that the said service tax amount was actually deposited with the Central Government by 4th respondent is concerned, it is not in dispute that the 1st respondent never asked the petitioners to produce such material in the first place. It is also not the case of the 1st respondent that it had asked the 4th respondent, who according to the petitioner received the said payment on 19.06.2014, as to whether the 4th respondent had credited the same to the Central Government or not. Also, it is not the case of the respondents that the vendor of the petitioners did not pass on the service tax collected from the petitioners to the Central Government. The petitioners had given even the service tax registration number of the vendor (4th respondent). Nothing prevented the 1st respondent from verifying whether the said payment of Rs.33,77,539/- made by the petitioners on 19.06.2014 was passed on by the 4th respondent to the Central Government by verifying the Service Tax Returns filed by the 4th respondent.

21. In any event, petitioners have filed along with the reply affidavit in this Writ Petition, proof of payment of service tax by the 4th respondent collected from petitioner no.1 to the Central Government, in relation to the property sold to the petitioner

under the sale deed dt.09.05.2014. This is not disputed by the respondents. So, even on this aspect there is no dispute now.

22. Therefore, this ground raised by the 1st respondent in the impugned order also cannot be accepted.

RE: GD Builders' case relied by the respondents

23. Coming to the *third ground* raised by the 1st respondent in the impugned order for rejecting the claim of the petitioners, the 1st respondent had relied upon the decision in **GD Builders's** case (2 supra), but the said decision was overruled by the Supreme Court in **Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited**⁵, specifically. The Supreme Court held that the judgment in **GD Builders's** case (2 supra) was wholly incorrect in its conclusion that the Act contains both the charge and machinery for levy and assessment of service tax on indivisible works contracts.

24. Therefore, the said ground of rejection of the claim of the petitioners also cannot be accepted.

RE: No mechanism for ascertaining value of service component in contracts for construction of complexes

25. Coming to *fourth ground*, whether there is a mechanism for ascertaining value of service component in case of composite contracts is concerned, to levy service tax, we would like to state that Section 65-BB(44) of the Act defines the term "service" as an activity carried out by a person for another for

⁵ 2016(1) SCC 170

consideration, and includes a declared service, but would not include an activity which constitute merely a transfer of title in case of immovable property by way of sale, gift or in any other manner, or such transfer, delivery or supply of any goods, which is deemed to be a sale within the meaning of clause (29-A) of the Article 366 of the Constitution of India or a transaction in money or an actionable claim. There are two other categories also mentioned with which we are not concerned.

26. Section 66E lays down what constitute “declared services”. Clause (b) thereof mentions construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale by a buyer fully or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.

27. Clause (h) of Section 66E mentions that the “service portion in the execution of a works contract” is also a declared service.

28. No doubt, the Service Tax (Determination of Value) Rules, 2006 were notified vide Notification No.12/06-ST, dt.19.04.2006 and were amended vide Notification No.11/2014-ST, dt.11.07.2014 w.e.f. 01.10.2014. The said Rules were framed in exercise of power conferred on the Central Government by clause AA of sub-Section (2) of Section 94 of the Act.

29. Rule 2A of the Service Tax (Determination of Value) Rules, 2006 deals with determination of value of service portion in the execution of a works contract mentioned **only** in clause(h) of Section 66E of the Act.

30. The petitioners claim that there is no rule framed by the Central Government in the above Rules to determine the value of service component in a composite contract for sale of immovable property and goods including a service component mentioned in Clause (b) of Sec.66 E, it is the plea of the respondents that Rule 2A would apply to the situation as well.

31. We are of the opinion that Rule 2A of 2006 Rules deals **only** with determination of the value of the service portion in execution of a works contract referred to **clause(h) of Section 66E** of the Act; and even as of date, no rule has been enacted by the Central Government dealing with determination of value of service portion in a composite contract of sale involving not only a service component but also sale of built up area along with undivided share of land involving also sale of goods included in the total consideration paid for their purchase falling in clause (b) of Sec.66 E, as in the instant case.

32. This aspect has been dealt with by the Delhi High Court in **Suresh Kumar Bansal's** case (1 supra) and it explained that the contract between a buyer and the builder/promoter/developer in development and sale of a complex is of a composite one; that arrangement between the buyer and the developer is not for

procurement of services *simplicitor*; that agreement between a flat buyer and a builder/developer of a complex, who is developing the complex for sale is, essentially, one of purchase and sale of developed property; that the arrangement between the buyer and the builder is a composite one which involves not only *the element of services but also goods and immovable property*; while the legislative competence of the parliament to tax the element of service involved cannot be disputed but *the levy itself would fail, if it does not provide for a mechanism to ascertain the value of the services component which is the subject of the levy*. The Delhi High Court was of the view that the service tax cannot be levied on the value of undivided share of land acquired by a buyer of a dwelling unit or on the value of goods which are incorporated in the project by a developer and that levying a tax on the constituent goods or the land would clearly intrude into the legislative field reserved for the States under List II of the Seventh Schedule of the Constitution of India. The Bench observed that *there is no machinery provision for ascertaining the service element involved in the composite contract and in order to sustain the levy of service tax from the services, it is essential that the machinery provisions provide a mechanism for ascertaining the measure of tax, i.e., the value of services which are charged to service tax*. It referred to the Service Tax (Determination of Value) Rules, 2006 and observed that *none of the rules provides for any machinery for ascertaining the value of services involved in relation to construction of a*

complex. Referring to Rule 2A, Division Bench stated that it provides for mechanism to ascertain the value of services in a composite works contract involving services and goods, but it does not cater to determination of value of services in case of a composite contract which also involves sale of land. According to the Division Bench, the gross consideration charged by a builder/promoter of a project from a buyer would not only include an element of goods and services but also the value of undivided share of land which would be acquired by the buyer and since neither the Act nor the Rules framed therein provide for a machinery provision for excluding all components other than service components from ascertaining the measure of service tax, the same cannot be levied.

33. We are in complete agreement with the above view.

34. Though Sri Swaroop, counsel for respondents sought to contend that construction of the complex is also a 'works contract' and falls under Section 66E(h), we do not accept the said interpretation because if such an interpretation was to be correct, the Legislature would not have created a separate category of services relating to construction of a complex in clause(b) of Section 66E, and the same cannot be rendered otiose by the Court.

35. Though a plea was also raised by the respondents about the maintainability of the Writ Petition, we are of the opinion that the claim in the Writ Petition is for refund of the amount

collected as service tax without authority of law. Article 265 of the Constitution of India states that 'no tax shall be levied or collected except by authority of law'.

36. In **Corporation Bank v. Sarawati Abharawsala**⁶, the Supreme Court interpreted this constitutional provision and held that all acts relating to the imposition of tax providing, *inter alia*, for the point at which the tax is to be collected, the rate of tax as also its recovery must be carried out strictly in accordance with law. In that case, the assessee had paid excess amount of tax to the State, which the State had refused to refund and the Supreme Court held that the Writ Petition to recover the excess amount paid by the assessee, was maintainable.

37. In the instant case also, there are no disputed questions of fact, which need to be gone into for deciding the claim for refund and since the claim for refund is based on the decision of the Delhi High Court in **Suresh Kumar Bansal**'s case (1 supra) which was decided on 03.06.2016, and since the application for refund was filed on 19.08.2016, barely two months after the decision of the Delhi High Court in **Suresh Kumar Bansal**'s case (1 supra), it cannot be said that there is any inordinate delay in the petitioners seeking refund of the tax paid by them to the 4th respondent.

⁶ 2009(1) SCC 540

38. For all these reasons, this Writ Petition is allowed and the 1st respondent is directed to refund a sum of Rs.33,77,539/- to the petitioners with interest @ 9% per annum from the date of payment of the same by the petitioners to the 4th respondent i.e., 19.06.2014 till the date of payment to the petitioners. No costs.

39. Pending miscellaneous petitions, if any, shall stand closed. No order as to costs.

M.S.RAMACHANDRA RAO, J

K.LAKSHMAN, J

Date: -12-2019
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