IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2021

CORAM:

THE HONOURABLE MR. JUSTICE C.SARAVANAN

W.P.Nos.23621 & 26902 of 2016
and
W.M.P.Nos.20230 & 23128 of 2016

M/s.Johnson Lifts Pvt Ltd,
1, East Main Road, Anna Nagar Western Extension,
Chennai - 600 101.
(Represented by M.Padmanaban, Senior Manager,
Taxation and Authorised Signatory)
... Petitioner in both W.Ps.

Vs.

The Commissioner of Central Excise,
Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar, Western Extension,
Chennai - 600 101. ... Respondent in both W.Ps.

PRAYER in W.P.No.23621 of 2016:- Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, to call for the records comprised in Order C.No.V/15/ST/218/2014-LTU Adjn date 14.06.2016 on the file of the respondent and quashing the same, and consequently direct the respondent to pass an appropriate order after rectifying the error apparent on the face of the record.

PRAYER in W.P.No.26902 of 2016:- Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, to call for the records comprised in Order C.No.V/15/ST/103/2015-LTU Adjn date 14.06.2016 on the file of the respondent and quashing the same, and consequently direct the respondent to pass an appropriate order after rectifying the error apparent on the face of the record.

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For Petitioner : Mr.D.Naveen
(in both W.Ps)

For Respondent : Mr.A.P.Srinivas
in W.P.No.23621 of 2016 Senior Standing Counsel
For Respondent
in W.P.No.26902 of 2016 : Hema Muralikrishnan
Senior Panel Counsel for CG

C O M M O N O R D E R

By this common order both these writ petitions have been disposed.

2.In these writ petitions, the petitioner has challenged the impugned communication of the Respondent Commissioner of Central Excise LTU rejecting the application filed under Section 74 of the Finance Act, 1994. The reasons communicated in the impugned order reads as under:

> Please refer to your letter dated 25.05.2016. The impugned order has been passed after taking into consideration of the reply to the SCN and also the submissions made during the Personal Hearing. If you are aggrieved by the impugned order, you may to file appeal under Section 35B of the Central Excise Act 1944 with the appropriate authority as mentioned in the Preamble attached t the O-I-O.

3.The facts of the case is that the petitioner is engaged in manufacturer of sales installation and commissioning of lifts for its customs. On the manufacturing component, the petitioner paid excise duty. On the sale component, the petitioner has paid tax as works contract wherever such sale involved service also.

4.The issue as to the correct valuation adopted by the petitioner was subject matter of two show cause notices for the purpose of service tax under the Finance Act, 1994. Ultimately, these show cause proceedings culminated in Order in Originals as detailed below:-

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Sl.No	Period	Show cause notice date	Order in Original Date
1.	2012-13	SCN.No.LTUC/334/2014-(C) 15.10.2014	LTUC/167/2016 31.03.2016

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Sl.No	Period	Show cause notice date	Order in Original Date
2.	2013-14	SCN.No.LTUC/120/2015-(C)	LTUC/239/2016-C
		10.04.2015	29.04.2016

5.The petitioner therefore filed an application before the respondent/Commissioner LTU, Commissioner of Central Excise under Section 74 of the Finance Act, 1994 for rectification of the mistake. The contention of the petitioner before the respondent was that the petitioner was required to value the works contract in terms of Explanation B to Rule 2A(1) of the Service Tax Department of Value Rules, 2006.

6.On the other hand, it is the contention of the respondent Commissioner of Central Excise LTU that the petitioner had wrongly determined the value under Rule 2A(1) read with Explanation B instead of Rule 2(A)(ii) and therefore the petitioner was liable to pay tax on the differentiate tax.

7.The petitioner had uniformly apportined 85% of the value for payment of VAT and service tax on the balance 15% of the value. On the other hand, it is the contention of the department that petitioner has to pay service tax on the works contract component on 40% of the value in terms of Rule 2A (ii) of the Service Tax as follows:

> a.in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract.

8.It is the contention of the petitioner that there cannot be taxation on the same transaction and placed reliance on the decision of the Hon'ble Supreme Court in M/s.Gannon Dunkerley and Co and Others Vs. State of Rajasthan and Others (1993) 1 SCC 364.

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9.The learned counsel for the petitioner submits that in the context of valuation under the Central Excise Act, 1944, the Assistant Commissioner of Central Excise had recognized 15% abatement for determining the value for the purpose of Central Excise Valuation Rules, 1944 towards post manufacturing expenses and therefore petitioner cannot be made to pay service tax on the balance 25% (40-15) as been determined by the respondent.

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Under these circumstances, it is submitted that the respondent erred in rejecting the application filed by the petitioner before the respondent under Section 74 of the Finance Act, 1994.

10.Defending the impugned order, the learned counsel for the respondent submitted that the petitioner as an alternate remedy by way of an appeal before the Customs Excise Tax Appellate Tribunal of the present writ petition has been filed to get over mandatory pre-deposit under section 35F of the Central Excise Act 1994. It is further submitted that scope of rectification under Section 74 of the Finance Act, 1995 is limited only for rectifying error apparent on the face of the record and not on account of any detailed consideration of law and therefore the writ petition filed by the petitioner was liable to be dismissed. It is submitted that petitioner wrongly filed petition under Section 74 as there is no error apparent on the face of the record for any rectification of the mistake and it has been rightly rejected by the respondent/commissioner.

11.I have considered the arguments advanced by the learned counsel for the petitioner and the respective counsels for the respondents in the respective writ petitions.

12.It is not open for the respondent to reject the application in a summary without giving reasons. Both the impugned order reads as under:-

> Please refer to your letter dated 25.05.2016. The impugned order has been passed after taking into consideration of the reply to the SCN and also the submissions made during the Personal Hearing. If you are aggrieved by the impugned order, you may have to file appeal under Section 35B of the Central Excise Act 1944 with the appropriate authority as mentioned in the Preamble attached to the O-I-O.

I therefore set aside the impugned order to remit the case back to the respondent to pass a speaking order giving reasons as to why the application under Section 74 of the Finance Act, 1994 filed by the petitioner was not maintainable. If there is no error apparent on the face of the records, same may be communicated to the petitioner by passing speaking order on merits in accordance with law after hearing the petitioner, for the petitioner to file an appeal before the CESTAT.

13.Under these circumstances, the impugned orders passed by the respondent is set aside with a direction to pass a speaking order within a period of three months from the date of receipt of a copy of this order. Before passing such order, the petitioner shall be heard.

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14.Writ petition stands allowed with the above observations. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

The Commissioner of Central Excise,
Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Anna Nagar, Western Extension,
Chennai - 600 101.

+1cc to M/s.Hema Muralikrishnan, Advocate Sr.14774
+2cc to M/s.S.Durairaj, Advocate Sr.14698
+1cc to M/s.A.P.Srinivas, Advocate Sr.14904

W.P.Nos.23621 & 26902 of 2016
and
W.M.P.Nos.1 & 2 of 2012

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srg 09/07/2021

HIGH COURT OF JUDICATURE MADRAS
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