IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.09.2023

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.26405 of 2023
and
W.M.P.No.25820 of 2023

M/s.VGN Infra India (P) Ltd.,
3rd floor, Y-222, Kimbarley Towers,
2nd Avenue, Cream Stone,
Anna Nagar, Chennai - 600 040.

Previously at,
No.153, Wallace Garden,
2nd Street, Nungambakkam,
Chennai – 600 006. ... Petitioner

Vs

The Commissioner of GST & Central Excise,
Chennai North Commissionerate,
No.26/1, Mahatma Gandhi Road,
Chennai - 600 034. ... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified, quashing the impugned Order-in-Original No.03/2023 CH.N.GST dated 28.04.2023, on the grounds of that the impugned order is arbitrary in violation of various provisions of the Finance Act, 1994 and in violation of Articles 19(1)(g) and 265 of the Constitution of India.

For Petitioner	:	Mr.S.Jaikumar
For Respondent	:	Mrs.Hema Muralikrishnan Senior Standing Counsel

ORDER

Mrs.Hema Muralikrishnan, learned Senior Standing Counsel takes notice on behalf of the respondent.

2. The petitioner is aggrieved by the impugned Order-in-Original No.03/2023 CH.N.GST dated 28.04.2023 passed by the respondent herein.

3. The specific case of the petitioner appears to be that the respondent had not given abatement that is available to the petitioner under Rule 2A(ii) of Service Tax (Determination of Value) Rules, 2006. It is submitted that the petitioner is entitled to abatement in terms of the above provision and that on a cogent reading of Notification No.30/2012-ST dated 20.06.2012, the petitioner is required to pay only 50% of the

Tax liability of the abated value in terms of Rule 2A(ii) of the Service Tax (Determination of Value), Rules, 2006.

4. That apart, the learned counsel for the petitioner submits that as far as the Service Tax payable by the petitioner as works contractor himself is concerned, the petitioner proposes to file an appeal. It is submitted that the impugned order has been passed without jurisdiction and by improperly applying the provisions of the Service Tax (Determination of Value) Rules, 2006. It is therefore submitted that the impugned order is liable to be quashed. Hence, the learned counsel also prays for interim stay of the impugned order pending disposal of the present writ petition.

5. The learned Senior Standing Counsel for the respondent would submit that the petitioner cannot filed an appeal against a part of the order and challenge another part of the order before this Court on the ground that it is without jurisdiction. That apart, it is submitted that the explanation to Rule 2A of the Service Tax (Determination of Value) Rules, 2006, is categorical. Unless, the petitioner has produced the

documents to substantiate that the person who rendered services to the petitioner as a works contracts has not availed CENVAT credit, the question of claiming abatement under the aforesaid provisions will not apply.

6.The learned Senior Standing Counsel for the respondent specifically submits that this issue has been answered by the respondent, in the impugned order which reads as under:

> (iv)The assessee pleaded that while quantifying the service tax demanded in the Show Cause Notice, 50% of the value has been taken into account whereas only 40% of the 50% of the value has to be taken into account for calculating the service tax payable under RCM. As per Explanation 2 to Rule 2A(ii) of Service Tax (Determination of Value) Rules, 2006, to pay service tax on 40% of the total amount, the provider of service should not have taken credit paid on any inputs used in the relation to the said works contract. In the instant case, the demand is against the assessee who is a recipient of the service. It is also pertinent to mention that as per Explanation II to Notification No.30/2012-ST dated 20.06.2012 as amended, the service recipient has the option to choosing the valuation method as per their choice, independent of valuation method adopted by the provider of service viz., their Sub-Contractors. Therefore, to adopt the valuation as per the provisions of Rule 2A(ii) ibid, the assessee has to demonstrate that the condition prescribed under

Explanation 2 to Rule 2A(ii) ibid is complied with. In as much as the assessee in the instant case has not adduced any material to establish compliance of the provisions of Rule 2A(ii) ibid, I find that the claim to pay service tax on 40% of the total amount charged is not legally tenable and hence I reject the same. As per Notification No.30/2012-ST dated 20.06.2012, the assessee is liable to pay 50% of the tax payable. Accordingly, the liability is worked out as follows:

Amount on which service tax is payable		Rs.30,94,43,237/-
Rate of Tax and Tax Payable	15% of Rs.30,94,43,237/-	Rs.4,64,16,486/-
50% of Tax payable as per Notification No.30/2012-ST dated 20.06.2012	50% of Rs.4,64,16,486/-	Rs.2,32,08,243/-
Service Tax Payable		Rs.2,32,08,243/-

Hence, he submits that the writ petition is liable to be dismissed.

7.By way of rejoinder, the learned counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in ***CC and CE and ST, Noida*** Vs. ***M/s.Interarch Building Products Pvt Ltd*** reported in 2023 (5) TMI 138-SC, wherein, the Hon'ble Supreme Court has framed the following question of law which reads as under:

> 8.The short question which is posed for consideration before this Court is as to whether an assessee who is liable to pay service tax under works contract service has the legal right not to follow Rule 2A of the Service Tax (Determination of Value) Rules, 2006 nor the Composition Scheme on the ground that in terms of Section 67 of the Finance Act, 1994 an assessee is entitled to take the total contract value which includes both goods and services and remit service tax on the entire value as works contract service and in the process also entitled to avail the CENVAT Credit?

The learned counsel for the petitioner has drawn attention to para 9 wherein the Hon'ble Supreme Court has answered as follows:

> 9.In view of the above the impugned judgment and order passed by the CESTAT taking the contrary view is unsustainable by which it is held that the assessee is entitled to take the total contract value which includes both goods and services and remit service tax on the entire value as 'works contract' and the assessee is also entitled to avail the CENVAT Credit on the same.

8.I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent.

9.That cannot be dual determination of tax liability of the service tax in appeal and before the Appellate Authority. In any event, it was incumbent on the part of the petitioner to establish that the services provider has not availed CENVAT credit. If CENVAT credit was availed by the service provider, then question of abatement under Rule 2A(ii) of the Service Tax (Determination of Value) Rules, 2006 will not apply. These issue are better left to be decided by the Appellate Authority in the hierarchy prescribed under the Finance Act, 1994. Further, there are several disputed question of facts and therefore appellate remedy cannot be given under revisional jurisdiction of this Court under Article 226 of the Constitution of India.

10.In case, the Tribunal also dismisses the appeal, the petitioner is always entitled to approach before the Division Bench by way of CMA before this Court.

11.Therefore, this writ petition is dismissed with liberty to the petitioner to file a statutory appeal to work out the remedy before the Tribunal, in accordance with Section 86 of the Finance Act, 1994. The

Tribunal shall pass appropriate orders on merit and in accordance with law without getting influenced by any of the observations contained herein regarding Rule 2A(ii) of the Service Tax (Determination of Value), Rules, 2006. No costs. Consequently, connected writ miscellaneous petitions are closed.

08.09.2023

Index : Yes/No
Internet : Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation : Yes/No

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To

The Commissioner of GST & Central Excise,
Chennai North Commissionerate,
No.26/1, Mahatma Gandhi Road,
Chennai - 600 034.

C.SARAVANAN, J.

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