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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 02.05.2023

+ **W.P.(C) 31/2013 & CM APPL. 68/2013**

M/S ENGINEERING PROJECTS (INDIA) LTD..... Petitioner

Through: Mr. J.K. Mittal, Ms. Vandana Mittal
and Ms. Ashna Suri, Adv.

Versus

UNION OF INDIA AND ANR.

..... Respondents

Through: Ms. Anushree Narain, Standing
Counsel with Mr. Mayank Srivastava,
Adv.

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HON'BLE MR JUSTICE VIBHU BAKHRU

HON'BLE MR JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying as under:

“A) issue writ of certiorari/ mandamus or an appropriate Writ or order or direction against the Respondent by quashing the impugned sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with clause (30a) and (91a) of section 65 (as amended) or Chapter V of the Finance Act, 1994 at page no.9&11 of petition inasmuch as the levy of the service tax on the “works contract” per se as well as entry against Serial No.7, 7(a), 10 and 10(a) of Notification No.1/2006-ST, dated 01.03.2006 (as amended) at Page no.14 of Petition by declaring the same are ultra vires the Constitution of India and section 64, 66 and 67 of the Finance

Act, 1994 and against the constitutional scheme of the legislation for levying service tax in India;

B) issue a Writ of certiorari/ mandamus or any other appropriate Writ / order / direction for quashing the impugned Order-in-Original dated 30.11.2012 by the Respondent no.2 confirming demand of Rs.4,91,85,132/- with interest as well as levying penalties under Section 77 and 78 of the Finance Act, 1994;

C) issue a writ of certiorari / mandamus or any other appropriate Writ / order / direction declaring that the Parliament is not competent to levy service tax on works contract per se, hence, construction activity both commercial & residential using the materials (works contract) per se are not liable to service tax under the provisions of Chapter V of the Finance Act, 1994;”

2. The petitioner is engaged, *inter alia*, in the business of civil construction works. The petitioner entered into contracts for construction of various projects. The principal controversy involved in the present petition is whether the petitioner is liable to pay service tax, in addition to the tax paid by the petitioner, in respect of the said contracts.

3. The Adjudicating Authority had issued a show cause notice dated 07.04.2010 proposing a demand of a sum of ₹4,91,85,132/- in respect of taxable services under Sub clauses (zzq) and (zzzh) of Section 65(105) of the Finance Act, 1994 (hereafter ‘**the Act**’). The said show cause notice was adjudicated by the concerned authority and by an order-in-original dated 30.11.2012 (which is impugned in the present petition), the Adjudicating Authority confirmed a demand of service tax of ₹4,91,85,132/- along with interest and penalties after

providing an exemption of 67% on account of the contracts being composite contracts.

4. The services relating to commercial and industrial construction were brought into the net of service tax, with effect from 10.09.2004, by introduction of Sub clause (zzq) under Sub-section (105) of Section 65 of the Act. The services relating to construction of complex were chargeable to service tax with effect from 16.06.2005, with the introduction of Sub clause (zzzh) of Section 65(105) of the Act.

5. The impugned order-in-original quantified the demand in respect of ten composite contracts. A tabular statement setting out the breakup of the demand raised in respect of the ten composite contracts as culled out from the impugned order-in-original dated 30.11.2012 is set out below:

"S. No.	Particulars	Sub-clause of Section 65(105)	All taxable services	Service Tax Amounts Rs.
1	DDA Dwarka project for construction of multi-storeyed houses	(zzzh)	Construction of complex services	41,10,519/-
2	MTNL Project – construction of telephone exchange building at Minto Road	(zzq)	Commercial or Industrial Construction services	11,01,731/-
3	HUDCO Project for construction of 319 transit flats at HUDCO Palace	(zzzh)	Construction of complex services	64,12,549/-
4	Construction of Jharkhand Bhawan	(zzzh)	Construction of complex services	16,91,831/-
5	PNB Project – for	(zzq)	Commercial	12,30,906/-

	construction of Zonal Office of PNB Ludhiana		or Industrial Construction services	[admitted already paid Rs.26,31,270/- and informed by letter dated 28.10.2009]
6	Construction of residential and non-residential buildings at Nainital and Haldwani, Uttarakhand	(zzzh)	Construction of complex services	51,73,893/-
7	OIDB Project for construction of Civil and Structural works at OIDB House, NOIDA	(zzq)	Commercial or Industrial Construction services	1,26,66,678/-
8	NTPC Talcher-II Civil and Structural works for NTPC. [in this case, alleged some material was supplied as steel as cement, hence service tax was demanded on full value without abatement of 67%]	(zzq)	Commercial or Industrial Construction services	38,52,604/-
9	NTPC Rihand – civil works	(zzq)	Commercial or Industrial Construction services	12,58,343/-
10	DDCA Project – construction of Cricket Stadium complex at Delhi	(zzq)	Commercial or Industrial Construction services	1,16,86,078/-
	Total Service Tax Demand Rs.			4,91,85,132/-"

6. Accordingly, the Adjudicating Authority confirmed the demand of service tax proposed under the show cause notice amounting to ₹4,91,85,132/- under Sub-section (1) of Section 73 of the Act read with Section 95 of the Finance Act, 2004 and Section 140 of the Finance Act, 2007 along with cess and interest at applicable rates on the delayed

payment; interest of ₹4,856/- under section 75 of the Act, penalty of ₹4,91,85,132/- under Section 78 of the Act, and penalty of ₹10,000/- under Section 77 of the Act.

7. The question whether the composite contracts were taxable under the service tax prior to 01.06.2007, is no longer *res integra*. The Supreme Court in the case of ***Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited: (2016) 1 SCC 170*** had referred to taxable services covered under Sub-clause (g),(zzd), (zzh), (zzq) and (zzzh) of Section 65(105) of the Act and authoritatively held that the said taxable services referred only to service contracts simpliciter and not to composite works contracts. The relevant extract of the said decision reads as under:

“23. A close look at the Finance Act, 1994 would show that the five taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines “taxable service” as “*any service provided*”. All the services referred to in the said sub-clauses are service contracts simpliciter without any other element in them, such as for example, a service contract which is a commissioning and installation, or erection, commissioning and installation contract. Further, under Section 67, as has been pointed out above, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This would unmistakably show that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts, such as are contained on the facts of the present cases. It will also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid sections by deducting from the gross value of the works contract the value of property in goods transferred in the execution of a works contract.”

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“41. We need only state that in view of our findings that the said Finance Act lays down no charge or machinery to levy and assess service tax on indivisible composite works contracts, such arrangement must fail. This is also for the simple reason that there is no subterfuge in entering into composite works contracts containing elements both of transfer of property in goods as well as labour and services.

42. We have been informed by the counsel for the Revenue that several exemptions notifications have been granted qua service tax “levied” by the 1994 Finance Act. We may only state that whichever judgments which are in appeal before us and have referred to and dealt with such notifications will have to be disregarded. Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise. With these observations, these appeals are disposed of.”

8. Admittedly, the challenge raised by the petitioner to the validity of Sub-clause (zzq) and (zzzh) of Section 65(105) of the Act, is squarely covered by the decision of the Supreme Court in ***Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited*** (*supra*).

9. In view of the law laid down by the Supreme Court in ***Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited*** (*supra*), the impugned order-in-original dated 30.11.2012, which proceeds on the basis that composite contracts involving transfer of goods as well as services were covered under the taxable services under Sub-clause (zzq) and (zzzh) of Section 65(105) of the Act, cannot be sustained.

10. Accordingly, we set aside the impugned order-in-original dated 30.11.2012 and remand the matter to the Adjudicating Authority to adjudicate the show cause notices, afresh in light of the law laid down by the Supreme Court in the case of *Commissioner, Central Excise and Customs, Kerala v. Larsen and Toubro Limited* (*supra*).

11. The petition is disposed of in the aforesaid terms.

MAY 02, 2023
'gsr'

VIBHU BAKHRU, J

AMIT MAHAJAN, J