$~39

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 23.11.2023*

\+ **<u>W.P.(C) 7724/2021</u>**

BSES RAJDHANI POWER LTD. & ANR. ..... Petitioners

Through: Mr Sandeep Sethi, Sr Adv. with Mr Anupam Varma, Mr. Nikhil Sharma, Ms Manu Tiwari, Ms Shreya Sethi, Ms Riya Kumar and Mr Sumer Dev Seth, Advs.

versus

NORTH DELHI MUNICIPAL CORPORATION & ORS. ..... Respondents

Through: Mr Sanjeev Sagar with Ms Tanya Singh, Advs. for R-1 to 3/MCD.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

<u>RAJIV SHAKDHER, J.:</u> (ORAL)

1. We had heard this matter at some length on 14.08.2023. After hearing counsel for the parties, we had etched out the broad contours of the case. For convenience, the relevant parts of the order dated 14.08.2023 are set forth:

> "*1. This writ petition was filed in the era when there were three Municipal Corporations in Delhi, i.e., North Delhi Municipal Corporation (NDMC), East Delhi Municipal Corporation (EDMC), and South Delhi Municipal Corporation (SDMC).*
>
> *2. As of now a unified Municipal Corporation, i.e., Municipal Corporation of Delhi (MCD) is in place.*

3. The issue which arises for consideration is: whether MCD should be called upon to reimburse the Goods and Services Tax [in short, "GST"] paid by the petitioners under the Central Goods and Services Tax Act, 2017 [in short, "CGST Tax"] and Delhi Goods and Services Tax Act, 2017 [in short, "DGST Tax"]?

4. The period for which the GST has concededly been paid by the petitioner, commences from 01.07.2017 and extends up until today.

5. The MCD, however, took the stand that the petitioners were not required to pay GST, as they were rendering purely services.

6. For this purpose, they seek to reply [sic…rely] upon the notification dated 28.06.2017 [see Annexure P-18, annexed at page 255 of the casefile], issued by the Government of India, Ministry of Finance, Department of Revenue.

7. This notification broadly indicates that where purely services are rendered, inter alia, in relation to functions entrusted to a municipality under Article 243W of the constitution, they shall be taxed at "nil" rate.

8. On the other hand, the petitioners contend that the services that they render are composite in nature, which involves not only the maintenance of street lights by way of service, but also involves provisioning certain components which, concededly, includes cables through which electricity is supplied.

9. The petitioners also contend that the goods that they supply for maintenance of street lights form more than 25% of the value of services rendered by them.

10. Therefore, the petitioners' claim that the notification dated 28.06.2017 has no application, and thus petitioner has rightly been paying GST, for which they only seek reimbursement from the MCD.

11. We may also note that after the notification dated 28.06.2017, another notification dated 25.01.2018 was issued, which adverted to the fact that even where service of composite nature was rendered, the rate of tax would be nil, provided that the value of goods supplied was not more than 25% of the total invoice value.

12. As indicated above, it is the petitioners' case that the goods supplied by them were ordinarily more than 25% of the invoice value and wherever the value of goods supplied fell below that percentage, GST was not paid and hence is not claimed.

13. As regards this issue, i.e., reimbursement of GST by MCD, the petitioner and MCD have exchanged correspondence since 2017.

14. The first letter in this behalf was issued by the petitioner no.1 on 06.07.2017.

15. The then NDMC responded to this communication via letter dated 21.08.2017, wherein it took the stand, as indicated above, that since the petitioner no.1 rendered purely services, nil rate of GST was applicable.

16. This stand was reiterated by NDMC via yet another communication dated 17.10.2017.

17. The petitioner no.1 on its part, via letter dated 27.10.2017, reemphasised the fact that this was a case of composite service and in support of this plea, brought to the notice of the NDMC, FAQ 25 released by the Central Board of Excise and Customs (CBEC).

18. For the sake of convenience, the said FAQ and the answer set forth in the said document, are extracted hereafter:

> *"**Question 25:** What is the scope of "pure services" mentioned in the exemption notification No. 12/2017-Central Tax (Rate), dated 28.06.2017?*
>
> ***Answer**: In the context of the language used in the notification, supply of services without involving any supply of goods would be treated as supply of "pure services". For example, supply of man power for cleanliness of roads, public places, architect services, consulting engineer services, advisory services, and like services provided by business entities not involving any supply of goods would be treated as supply of pure services. **On the other hand, let us take the example of a governmental authority awarding the work of maintenance of street lights in a Municipal area to an agency which involves apart from maintenance, replacement of defunct lights and other spares. In this case, the scope of the service involves maintenance work and supply of goods, which falls under the works contract services. The exemption is provided to services involves only supply of services and not for works contract services**."*

[Emphasis is ours]

19. Therefore, the moot question which arises is: whether the petitioner ought to be reimbursed by the MCD [sic…for] the service tax [sic…goods and service tax] which they have paid, at the rate prevalent during the relevant period.

20. We may note that during the period commencing from 01.07.2017 and up until 20.09.2017, the petitioners appear to have paid CGST at the rate of 9% and likewise have paid DGST at the rate of 9%, pursuant to notification no. 11/2017-Central Tax (Rate) dated 28.06.2017 and *notification o. [sic… no.] 11/2017-Central Tax (Rate) dated 30.07.2017.*

21. Insofar as the period spanning between 21.09.2017 and 28.01.2018 is concerned, the petitioners appear to have paid the aforementioned taxes, i.e., CGST and DGST, at the rate of 6% in consonance with notification no. 24/2017-Central Tax (Rate) dated 21.09.2017 and the notification no. 24/2017-State Tax (Rate) dated 06.11.2017."

22. The prevalent rate we are told is 6% both for CGST and DGST.

23. Concededly the GST has been regularly paid by the petitioner from 01.04.2017 up until today, which has been collected by the concerned tax authorities.

24. However, the record reveals that although respondents no. 4 to 6 represent the tax authorities, they have not filed their counter-affidavit(s) in the matter.

25. Furthermore, the record discloses that Mr Ravi Prakash had entered appearance on behalf of respondents no. 4 to 6. Mr Ravi Prakash, is today, represented by Mr Yasharath Shukla, advocate. Respondent [sic…Respondents] 4 to 6 are directed to file an affidavit within three weeks from today indicating clearly:

> ***(i) Whether the tax was payable and continues to remain payable by the petitioners for maintenance of street lights during the period in issue commencing from 01.07.2017 up until today?***
>
> ***(ii) Whether the stand of the MCD that since, according to it, the petitioners were rendering "pure service", the GST was payable by them at "nil" rate in terms of notification dated 28.06.2017 is correct or not?***

26. We may also note that the petitioners have relied upon the order of the Orrisa Appellate Authority for Advance Ruling for GST dated 05.03.2019, which takes the position that for maintenance of street lights, GST is payable.

27. Respondent [sic…Respondents] 4 to 6 will also take this aspect as well as the judgment of [sic…the] coordinate bench of this Court rendered on 24.08.2022 in WP(c) No. 11127/2009, titled BSES Rajdhani Power Ltd. & Anr vs Municipal Corporation of Delhi and Ors. [although in a context of service tax], into the account while framing the affidavit.

28. List the matter on 01.11.2023.

29. Respondent [sic…Respondents] No. 4 and 6 will furnish a copy of the said affidavit to the counsel for the petitioners and Mr Sanjeev Sagar, learned counsel, who appears on behalf of MCD."

[Emphasis is ours]

2. The record shows that on 14.08.2023, we had directed respondents no. 4 to 6 to file affidavits in the matter, bearing in mind the issue captured in paragraph 25 of the order dated 14.08.2023. Since then, respondent no. 4 has filed an affidavit, in and about 31.10.2023.

2.1 The record also shows that on 08.11.2023, we had directed that a correction be made in the second line of paragraph 19 of the order dated 14.08.2023, to remove the confusion concerning the reference made to 'service tax', under the Finance Act, 1994. 'Service tax', in this context, refers to the 'goods and *service*' tax payable under the relevant Goods and Services (GST) Act.

2.2 The record, thus, shows that insofar as the petitioners are concerned, an aspect also noted in paragraphs 20 and 21 of the order dated 14.08.2023, that the petitioners have paid Central GST (CGST) and Delhi GST (DGST) at the rate of 9% each for the period spanning between 01.07.2017 and 20.09.2017. Likewise, for the period spanning between 21.09.2017 and 28.01.2018, the petitioners have paid CGST and DGST at the rate of 6% each. The relevant notifications, issued under the GST framework, for the aforementioned periods, are also adverted to in paragraphs 20 and 21 of the order dated 14.08.2023.

2.3 Similarly, in paragraph 22 of the order dated 14.08.2023, we noted that, presently, the petitioners are paying CGST and DGST at the rate of 6% each.

3. Thus, what is not in dispute is that the petitioners have been paying both CGST and DGST from 01.04.2017, at the rates indicated hereinabove, up until today.

4. The only defence offered by respondents no.1 to 3/MCD is that it was not obliged to reimburse the GST paid by the petitioners as they had rendered 'pure services' as against composite service and therefore, were taxable at 'nil' rate, as per the terms of the Notification dated 28.06.2017.

5. It is in this context that we directed respondents no. 4 to 6 to file their respective affidavits. The affidavit filed on behalf of respondent no. 4 adverts to the following:

(i) First, the services provided by the petitioners are not 'pure services', and therefore, the petitioners are not exempted from the liability to pay CGST.

(ii) Second, the petitioners provide 'composite services' which involve repair and maintenance of street lights.

(iii) Third, the petitioners have not claimed exemption from payment of GST as they were aware that no such exemption obtains under the GST regime.

6. We may note that Mr Rajeev Aggarwal, who appeared on behalf of respondents no. 5 and 6 on 17.11.2023, has adopted the stand taken by Mr Ramachandran, who appeared on behalf of respondent no. 4.

7. Given this position, in our view, the issue raised in the instant writ petition is covered by the judgment of a coordinate bench in the matter of ***BSES Rajdhani Power Ltd. & Anr. Vs. Municipal Corporation of Delhi & Ors.***, 2022:DHC:3352-DB. The operative directions issued in the said judgment are extracted hereafter for the sake of convenience:

> "*16. Thus, for the foregoing reasons, we are inclined to hold as follows:*
> *(i) During the relevant period, there was no exemption operating qua the payment of service tax on the maintenance of street lights.*
> *(ii) The petitioners, rightly, paid the service tax as a service provider in the first instance.*
> *(iii) Since service tax has been paid by the petitioners, respondent no.1/MCD, being the recipient of the service, will have to bear the burden and consequently reimburse the same.*"

8. It is also relevant to note that the MCD had preferred a Special Leave Petition [i.e., Special Leave Petition (Civil) Diary No. 42299/2022] against the said judgment, which was dismissed by the Supreme Court, on merits, *via* order dated 30.01.2023. The observations made by the Supreme Court are set forth hereafter:

> "*Delay condoned.*
>
> *Having heard learned counsel for the respective parties and having gone through the impugned judgment and order passed by the High Court, and the reasoning given on the exemption notification, we see no reason to interfere with the impugned judgment and order passed by the High Court. As such, we are in complete agreement with the view taken by the High Court.*
>
> *The Special Leave Petitions stand dismissed.*
>
> *Pending application(s), if any, shall also stand disposed of.*"

9. Mr Sanjeev Sagar, who appears on behalf of respondents no. 1 to 3/MCD, states that the petitioners have an alternate remedy available to them and therefore, the writ petition should not be entertained.

10. On the other hand, Mr Sandeep Sethi, learned senior counsel, who appears on behalf of the petitioners, contends that the petitioners do not have any remedy under the CGST and DGST Acts for seeking reimbursement of tax already paid by them

11. According to us, in this particular case, we are not inclined to accept this plea since the 'alternative remedy' is a doctrine of restraint, self-imposed by the courts which does not, in any way, hamper the court from entertaining the writ petition that is otherwise maintainable.

11.1 In this matter there is disputation between contesting parties concerning facts. The action of the respondents, in not reimbursing the tax paid to the concerned statutory authorities, in our view, is unlawful.

11.2 Besides, the issue involved in the matter has already been settled by this court, which has been affirmed by the Supreme Court in the petitioners' case, as adverted to hereinabove.

12. Given this position, we are of the opinion that the relief sought in the writ petition would have to be accorded to the petitioners.

13. Therefore, the MCD is directed to reimburse the tax paid by the petitioners along with interest at the rate of nine (9) percent, with effect from 01.07.2017. Needless to add, since there has been a long gap concerning reimbursement of tax paid by the petitioners, the MCD will reimburse the amount at the earliest, though not later than eight (08) weeks from the date of receipt of a copy of the judgment.

14. The writ petition is disposed of in the aforesaid terms.

15. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 23, 2023

pmc