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WP.Nos.25212, 30736 & 30737 of 2007

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2024

CORAM :

**THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN**

**W.P.Nos.25212, 30736 & 30737 of 2007
and MP.Nos.1, 1 & 1 of 2007**

WP.No.25212 of 2007

M/s.Bharathi Constructions,
63, Periyanna Street, Erode,
638 001.

... Petitioner

VS

1.Union of India rep. by its Secretary
Ministry of Finance
Department of Revenue
Government of India
North Block
New Delhi-110 001.

2.The Commissioner of Central Excise,
No.1, Foulks Compound, Anai Medu,
Salem-636 001.

3.The Assistant Commissioner of Central Excise,
Range-1, 81 Bharathi Nagar,
Choolaimedu, Erode-638 004.

.. Respondents



WP.Nos.25212, 30736 & 30737 of 2007

Prayer in WP.No.25212 of 2007: Writ Petition filed under Article 226 of the Constitution of India praying to issue a writ of Declaration, to declare Explanation in Sl.No.7 of Notification No.1/2006-ST dated 01.03.2006 as ultra vires Sections 65(105)(zzq), 65(zzzh), 66 and 67 of the Finance Act, 1994 as amended and also ultra vires Articles 14 and 265 of the Constitution of India in so far as the petitioner is concerned.

AND

WP.Nos.30736 & 30737 of 2007

A.T.Somasundaram ... Petitioner in WP.30736 of 2007

M/s.Shri Rathinagiri Murugan Construction,
Rep. by its Managing Partner
A.T.Somasundaram,
No.17, Bharathidhasan Street,
Karapakkam,
Chennai-600 098. ... Petitioner in WP.30737 of 2007

VS

- 1.Union of India
Rep. by its Secretary,
Ministry of Finance,
Department of Revenue, Government of India
North Block, New Delhi-110 001.
- 2.Directorate General of Central Excise Intelligence,
Rajaji Bhavan, Beasant Nagar,
Chennai-600 090.
- 3.The Commissioner of Service Tax,



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MHU Complex,
No.692, Anna Salai, Nandanam,
Chennai-600 035.

4.The Additional Commissioner of Service Tax,
MHU Complex,
No.692, Anna Salai, Nandanam,
Chennai-600 035.

.. Respondents in WP.30736 &
30737 of 2007

Common Prayer in WP.Nos.30736 & 30737 of 2007: Writ Petitions filed under Article 226 of the Constitution of India praying to issue a writ of Declaration, to declare Explanation in Sl.No.7 of Notification No.1/2006-ST dated 01.03.2006 as ultra vires Sections 65(105)(zzq), 65(zzzh), 66 and 67 of the Finance Act, 1994 as amended and also ultra vires Articles 14 and 265 of the Constitution of India in so far as the petitioner is concerned.

For Petitioners : Ms.Radhika Chandrasekar
(In WP.25212 of 2007)

Mr.S.Rajasekar
(In WP.30736 & 30737 of 2007)

For Respondents: Mr.S.Gurumoorthy
Senior Panel Counsel
(In WP.25212 of 2007)

Mr.M.Santhanaraman
Senior Standing Counsel
(In WP.30736 & 30737 of 2007)



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COMMON ORDER

(Order of the Court was made by Dr.ANITA SUMANTH.,J.)

The prayers are for writs of declaration to declare Explanation in Sl.No.7 of Notification No.1/2006-ST dated 01.03.2006 as ultra vires under various provisions of the Finance Act, 1994 and Articles 14 and 265 of the Constitution of India.

2.All learned counsel would accede to the position that this issue has to be decided in favour of the assessee in view of the judgment of the Hon'ble Supreme Court in *Commissioner of Service Tax v. Bhayana Builders (P) Ltd.*, [2018 (10) G.S.T.L. 118 (SC)], where the identical issue has been decided. The operative portion is as follows:

'18. In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the learned counsel for the Revenue as it says '33% of the gross amount 'charged' from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are



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supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 01, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'.

19. Matter can be looked into from another angle as well. In the case of Commissioner, Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. - (2016) 1 SCC 170 = 2015 (39) S.T.R. 913 (S.C.). This Court was concerned with exemption notifications which were issued in respect of 'taxable services' covered by sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with 1 (2016) 1 SCC 170 clause (30a) and (91a) of Section 65 of Chapter V of the Act. This Court in the aforesaid judgment in respect of five 'taxable services' [viz. Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh)] has held as under:

"23. A close look at the Finance Act, 1994 would show that the fixed 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'.

Further, while referring to exemption notifications, it observed:



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"42. ...Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise."

It is clear from the above that the service tax is to be levied in respect of 'taxable services' and for the purpose of arriving at 33% of the gross amount charged, unless value of some goods/materials is specifically included by the Legislature, that cannot be added.

20. It is to be borne in mind that the notifications in questions are exemption notifications which have been issued under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any 'taxable service' defined in any of sub-clauses of clause (105) of Section 65. Thus, exemption under Section 93 can only be granted in respect of those activities which the Parliament is competent to levy service tax and covered by sub-clause (zzq) of clause (105) and sub-clause (zzzh) of clause (105) of Section 65 of Chapter V of the Act under which such notifications were issued.

21. For the aforesaid reasons, we find ourselves in agreement with the view taken by the Full Bench of CESTAT in the impugned judgment dated September 6, 2013 and dismiss these appeals of the Revenue.

*22. Insofar as Civil Appeal No. 3247 of 2015 is concerned, where the assessee is Gurmehar Construction, it may additionally be noted (as pointed out by the learned counsel for the respondent) that the assessee was a sole proprietorship concern of Mr. Narender Singh Atwal, who died on February 24, 2014. This is so stated in the counter affidavit filed by the respondent on May 16, 2017 and this position has not been disputed by the Department. This appeal, in any case, has abated as well in view of the judgment of this Court in *Shabina Abraham & Ors. v. Collector of Central Excise & Customs - (2015) 10 SCC 770 = 2015 (322) E.L.T. 372 (S.C.).**



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3. These writ petitions are hence allowed. No costs. Connected miscellaneous petitions are closed.

[A.S.M., J] [G.A.M., J]
07.11.2024

Index: Yes/No
Speaking order
Neutral Citation: Yes
vs

To

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Ministry of Finance,
Department of Revenue, Government of India
North Block, New Delhi-110 001.
2. The Commissioner of Central Excise,
No.1, Foulks Compound, Anai Medu,
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3. The Assistant Commissioner of Central Excise,
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DR. ANITA SUMANTH,J.
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