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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.12.2024

CORAM:

THE HONOURABLE MR. JUSTICE **C.SARAVANAN**

W.P.No.5280 of 2022

and WMP.Nos.5365 & 5366 of 2022

M/s.Ganesan Builders Ltd.,
Rep.by its Wholetime Director,
R.Karthik Narayanan
46A, C.P.Ramaswamy Road, Abiramapuram,
Chennai 600 004. ... Petitioner

Vs

The Principal Commissioner
of GST & Central Excise,
Chennai North Commissionerate
GST Bhawan, 3rd floor, 26/1,
Mahatma Gandhi Salai,
Nungambakkam,
Chennai 600 034 .... Respondent

Prayer: Writ petition filed under Article 226 of the Constitution of India, praying to issue a writ of certiorari to call for the records pertaining to the Show Cause Notice No.300/2009 issued from C.No.IV/9/234/2009-STC ADJ dated 31.07.2009 issued by the

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respondent demanding tax, interest and imposing penalty on the petitioner and quash the same.

For Petitioner : Mr.V.Pramila

For Respondents : Mr.H.Siddarth
Junior Standing Counsel

ORDER

This writ petition has been filed for issuance of a writ of certiorari to call for the records pertaining to the Show Cause Notice No.300/2009 issued from C.No.IV/9/234/2009-STC ADJ dated 31.07.2009 issued by the respondent demanding tax, interest and imposing penalty on the petitioner and quash the same.

2. The learned counsel for the petitioner submitted that it is for the first time the respondent has alluded to the existence of the CERA order in the counter that has been filed before this Court. It is submitted that Show Cause notice dated 31.07.2009 was replied by the petitioner in the year 2010 and the petitioner had also appeared for personal hearing

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before the adjudicating authority. However, no order was passed for the reasons best known to the respondent.

3. It is submitted that under similar circumstances a catena of decisions have been rendered by the Courts including this High Court wherein show cause notice proceedings have been quashed. The learned counsel for the petitioner drew the attention of this Court to the recent decision of the Hon'ble Supreme Court in the case of ***Union of India and others Vs ATA Frieght Line (1) Pvt.Ltd.,*** reported in ***2023 (2) TMI 1131*** Vs AI which affirms the decision of the Bombay High Court court in the case of ***ATA Freight Line (1) Pvt Ltd., Vs Union of India, Commissioner of CGST & Central Excise Mumbai East, Commissioner of Service Tax-I, Mumbai, Additional Commissioner Service Tax – Mumbai*** reported in ***2022 (3) TMI 1162*** 805 rendered on 24.03.2022 dealing with an identical situation. That apart the learned counsel for the petitioner submitted that Circular No.1053/2/2017-CX dated 10.03.2017 was issued by the Central Board of Excise and Customs wherein at para 9.4 it has been clarified that a formal

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communication should be issued to the noticee, where the case has been transferred to the call book.

4. The learned counsel also referred to an earlier circular of the Central Board of Excise and Customs dated 26.05.2003 bearing reference CIR.No.719/35/2003-CX, wherein it was clarified that the earlier circular of the Board dated 14.12.1995 Circular No.162/73/95-Cx wherein it was reiterated and the Board clarified as under:-

(i) cases in which the Department has gone in appeal to the appropriate authority.

(ii) cases where injunction has been issued by Supreme Court/High Court/CEGAT, etc.,

(iii) cases where audit objection are contested.

(iv) cases where the Board has specifically ordered the same to be kept pending and to be entered into the call book.

5. It is submitted that the respondent had not complied with any of the requirements of the 2003 and 2017 circulars as referred supra, even

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after substantial lapse of time, after the case was allegedly transferred to the Call Book. Defending on the stand of the department, the learned counsel for the respondent submitted that the show cause notice has been issued in the back ground of CERA audit and the case was transferred to the Call Book on 30.12.2011, wherein a reference has been made to statement of facts given by the department pursuant to the CERA objection on 09.06.2009.

6. It is submitted that although the department was not inclined to issue show cause it was compelled to issue show cause in view of the CERA objection. It is submitted that the objection of the department was not accepted and therefore the case was transferred to the Call Book. It is further submitted that in response to the objection of the department, the Senior Audit Officers of CERA RP-III, over ruled the objection and therefore the department had transferred the case to call book to wait for further clarification and that only on 18.01.2021 the under Secretary (PAC) directed the department to proceed with the adjudication of the impugned show cause notice No.300/2009 dated 31.07.2009. It is

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submitted that in pursuance of the aforesaid communication of the under Secretary (PAC), the case was taken out from the call book by the Principal Commissioner on 22.01.2021 and therefore the impugned show cause notice was taken up for personal hearing. That part, it is submitted that the petitioner also appeared for a personal hearing before the office of the respondent on 28.02.2022 and sent a letter on 28.02.2022 and sought for further time to trace out the old records. However, ended up filing the present writ petition on 01.03.2022.

7. I have considered arguments advanced by the learned counsels for the petitioner and the respondent.

8. There is an enormous delay in adjudication of the Show Cause Notice No.300/2009 that was issued on 31.07.2009. There is no dispute that the petitioner had also replied to the show cause on 27.08.2010 and on 07.09.2010 and thereafter on 27.06.2011. The dispute in the show cause notice is on account of adoption of different method of valuation of service provided by the petitioner for payment of service tax. The

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petitioner initially had received an advance of Rs.2,50,00,000/- for carrying out certain construction activities for M/s.RAS Adyar Hotels Pvt.Ltd., during the month of May 2007. On the aforesaid amount the petitioner also paid service tax @ 12.36 % on the 33% of the advance amount, claiming abatement by treating the service as Commercial and Industrial Construction service as defined in Section 65 (25 b) of the Finance Act, 1994 liable to service tax in terms of Section 65 (105) ZZQ of the Finance Act, 1994 with effect from 01.06.2007. The amendment to Finance Act, 1994 vida Finance Act, 2007 came into force as a result of which persons like the petitioner were also entitled to opt to pay service tax as that of a works contract service in terms of Section 65 (105) ZZZZ (a). The department has concluded that the petitioner was not entitled to alter the basis of valuation for the purpose of payment of service tax under the provisions of Finance Act, 1944 by placing reliance on the department Circular No.98/1/2008-ST dated 04.01.2008.

9. The fact remains that the department decided to transfer the case to the call book as the department itself was not convinced with the audit

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objection but had proceeded to issue the impugned show cause notice dated 31.07.2009 and was awaiting for further clarification from the Board. For issuance of show cause the machinery that is prescribed under the Finance Act is under Section 73. The said Section 73 of the Finance Act, 1994 reads as under:-

73. Value of taxable service escaping assessment:- If -

(a) the Central Excise Officer has reason to believe that by reason of omission or failure on the part of the assessee to make a return under Section 70 for any quarter or to disclose wholly and truly all material facts necessary for his assessment for any quarter, the value of taxable service for that quarter has escaped assessment or has been under-assessed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Central Excise Officer has in consequence of information in his possession, reason to believe that the value of any taxable service assessable in any quarter has escaped assessment or has been under assessed,

he may, in case falling under clause (a) at any time within five years and in cases falling under clause (b) at any time within six months from the date for filing the return, serve on the assessee a notice containing all or any of the

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requirements which may be included in a notice under sub-section (2) of section 70 and may proceed to assess or re-assess the value of taxable service, and the provisions of this Chapter shall so far as may be apply as if the notice were a notice issued under that sub-section.

10. It is not to be resorted by the department where particular there is a conflicting view of the Central Excise Officer. In event, the Audit objection and decision to raise objection by the department is an internal arrangements between the department. The fact remains that the department itself had concluded in Reply to Statement of Facts No.127/2008-09 as follows:-

"***3. During the course of audit of account, CERA has raised an objection that as the assessee had started paying Service tax for the above mentioned project, under Commercial or Industrial Construction Service, the assessee could not change the classification for the purpose of payment of service tax on or after 01.06.2007 and they were not entitled to avail the composition scheme in respect of this project, as clarified by the department in the circulars 98/1/2008 ST dated 04.01.2008.***

The contention of CERA is not accepted as the assessees have got endorsement of works contract service in the Registration certificate on 30.05.2007. They had started construction in August 07 only and

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> ***paid service tax under – " Works Contract Service". However for the advance amount received in May 2007, service tax was paid under Commercial or Industrial construction service, even though at the material time there was no construction activity. For the advance received the assessee had no other option, as at the material time, works contract service has not come into force. Hence the payment of Service Tax under works contract service adopted by the assessee is in order".***

11. In fact, the respondent had also recommended for closure and dropping of the proposal in the show cause notice. However, the issue is kept alive for over two decades and for the first time the department woke up only on 19.01.2021, pursuant to which the Principal Commissioner has accorded permission for adjudication. The adjudication of the show cause at this distant point of time is unnecessary and unwarranted, particularly in the light of the SoF of the department having difference of opinion with the CERA audit objection. Therefore, the impugned show cause notice ought not to have been issued and not proceeded and in any event ought to have been dropped. The fact remains that the petitioner has discharged service tax liability as a service provided in works contract service as defined in Section 65 (95) (ZZZA)

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of the Finance Act, 1994.

12. Therefore, this Court is of the view that the writ petition has to be allowed. The excess amount deposited by the petitioner during the course of investigation by CERA has to be refunded by the respondent within a period of two months together with interest @ 6% from the date of payment till the date of payment.

13. Accordingly, the writ petition is allowed. No costs. Consequently connected miscellaneous petitions are also closed.

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Index: Yes/No
Speaking order / Non speaking order

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To

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of GST & Central Excise,
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