

(2018) 12 CAL CK 0056

In the Calcutta High Court

Case No : Writ Petition No. 1114 Of 2009, General Application No. 2368 Of 2018

Simplex Infrastructures Ltd. & Anr

APPELLANT

Vs

Commissioner Of Service Tax Commissionerate, Kolkata &
Ors

RESPONDENT

Date of Decision : 12-12-2018

Acts Referred:

Service Tax Act, 1994 — Section 65A, 65(25b), 65(105)(zzzq), 65(105)(zzzza)
Constitution of India 1950 — Article 226

Citation : (2018) 12 CAL CK 0056

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Abhratosh Majumder, Nilanjana Banerjee Pal, K.K. Maiti

Final Decision : Disposed Off

Judgement

DEBANGSU BASAK, J.

The petitioners have assailed a show-cause-cum-demand notice dated September 7, 2009 in the writ petition. It has assailed the consequent order in original dated February 6, 2012 in the interim application.

Learned Additional Advocate General appearing for the petitioner has questioned the assumption of jurisdiction to issue the impugned show-cause-cum-demand notice. He has submitted that, the impugned show-cause-cum-demand notice is without jurisdiction in as much as, Service Tax is not payable in respect of a composite contract. According to him, a composite works contract is not exigible to Service Tax when, such contract cannot be dissected into a compartment which allows imposition of Service Tax on a quantum of the contract. He has drawn the attention of the Court to the fact that the subject contracts were entered into before June 1, 2007. He has relied upon 2016 Volume 1 Supreme Court Cases page 170 (Commissioner, Central Excise and Customs, Kerala v. Larsen & Toubro Ltd.) in support of his contentions. He has pointed out that, an order in original has since been passed in the proceeding emanating out of the

impugned show-cause-cum-demand notice. Since the impugned show-cause-cum-demand notice is without jurisdiction, such order in original is also without jurisdiction.

Learned Advocate appearing for the respondents has submitted that, disputed questions of facts are involved. Consequently, a Writ Court should not intervene when such disputed questions of facts are involved. He has relied upon provisions of the Service Tax Act, 1994 particularly to Section 65 (25b), 65 (105) (zzzzq), 65 (105) (zzzza) and 65A of the Act of 1994 and has submitted that, disputes regarding classification existed. Such disputes ought to be decided by the authority prescribed by statute. On the question of maintainability of the writ petition and that, a Writ Court need not enter into disputed questions of fact, learned Advocate for the respondent has relied upon 2012 (278) Excise Law Times page 26 (SC) (Union of India v. Guwahati Carbon Ltd.), 1996 (81) Excise Law Times page 7 (SC) (Assistant Commissioner of Sales Tax, Kerala v. P. Kesavan & Co.), 1988 (38) Excise Law Times page 583 (Cal.) (Stores Supply (India) Agency v. Asstt. Collector of Customs), All India Report 1964 Supreme Court page 1419 (Thansing Nathmal & Ors. v. A. Mazid, Superintendent of Taxes), 1996 Volume 6 Supreme Court Cases page 584 (Haryana Urban Development Authority & Anr. v. Ruchira Ceramics & Anr.), 2016 Volume 340 Excise

Law Times page 133 (Sova Solar Ltd. v. Commissioner of Customs, Central Excise & Service Tax, Durgapur), 2014 Volume 1 Supreme Court Cases page 603 (Commissioner of Income Tax & Ors. v. Chhabil Dass Agarwal). He has drawn the attention of the Court to the reply given by the petitioners to the impugned show-cause-cum-demand notice. According to him, since an order in original has been passed, no interference is called for by the Writ Court.

The first petitioner has claimed itself to be engaged in the business of construction of roads, bridges, flyovers, transport terminals, power contracts and other infrastructures. The first petitioner has claimed itself to be an assessee under the Service Tax Act, 1994. The first petitioner had entered into four several works contract for the period from September 10, 2004 to June 15, 2005. According to the petitioners, none of the four contracts are exigible to Service Tax. The department had sought clarification from the first petitioner with regard to Service Tax payable under the four contracts entered into by the first petitioner during such period. The first petitioner had responded thereto by a writing dated September 25, 2008 claiming that, the contracts in question were works contract and were not exigible to Service Tax. The department had thereafter issued the impugned show-cause-cum-demand notice dated September 7, 2009. The first petitioner had replied thereto by a writing dated October 8, 2009. During the pendency of the writ petition, the impugned show-cause-cum-demand notice has been adjudicated upon and an order in original has been passed.

The issue as to whether Service Tax can be levied on indivisible works contract

prior to the introduction on June 1, 2007 of the Finance Act, 2007 has been considered in *Larsen & Toubro Ltd. (supra)*. It has held that, "a works contract is a separate species of contract distinct from contracts for services simpliciter recognised by the world of commerce and the law as such, and has to be taxed separately as such". It has also held that, there are three components of the tax law each of which must be satisfied for a person to be liable to pay tax. The tax law must identify the subject of the tax, the person who is liable to pay tax and the rate at which the tax is to be paid. If there is any ambiguity regarding any of those three ingredients in a taxation statute, then there is no tax in law.

Larsen & Toubro Ltd. (supra) has considered the applicability of Service Tax as obtaining prior to the amendment to the Service Tax Act, 1994 in 2007 in respect of a works contract. It has held that, infrastructure projects such as works contract in respect of roads, airports, airways, transport, bridges, tunnels and tanks have been excluded prior to the introduction of the amendment in 2007 in view of the ratio laid down in *Larsen & Toubro Ltd. (supra)*.

In the facts of the present case, the four works contract which the first petitioner had entered into for the period from September 10, 2004 to June 15, 2005 are indivisible. The contracts relate to infrastructure projects. In my view, such contracts are not exigible to Service Tax under the Service Tax Act, 1994 prior to its amendment in 2007.

Guwahati Carbon Ltd. (supra), *Stores Supply (India) Agency (supra)*, *Thansing Nathmal & Ors. (supra)*, *Ruchira Ceramics & Anr. (supra)*, *Sova Solar Ltd. (supra)*, *Chhabil Dass Agarwal (supra)* have held that, jurisdiction under Article 226 of the Constitution of India need not be invoked when there are statutory alternative remedies available particularly when, there is a dispute with regard to the classification of the goods involved. None of the authorities cited above suggests that, existence of statutory alternative remedy is an absolute bar to the exercise of jurisdiction under Article 226 of the Constitution of India. In the facts of the present case, there is no dispute with regard to the classification of the goods. Although learned Advocate for the respondent has contended that, there are classification disputes, in my view, such contention is fallacious. The issue in the present proceedings is whether, the authorities were correct in assuming jurisdiction on the basis of the four works contracts entered into by the petitioner between the period September 10, 2004 to June 15, 2005. The authorities ought to have understood the ratio of *Larsen & Toubro Ltd. (supra)* in its correct perspective and applied such ratio to the facts obtaining in the present case.

In the facts of the present case, none of the four works contract entered into by the petitioner between the period September 10, 2004 to June 15, 2005 being exigible to Service Tax on the ground that, they are indivisible works contract, the assumption of jurisdiction by the authorities is without any basis. The impugned show-cause-cum-demand notice dated September 7, 2009 is quashed. All consequential steps taken on the basis of the impugned show-cause-cum-demand notice including the order in original dated February 6, 2012 are also

quashed.

W.P. No.1114 of 2009 and G.A. No. 2368 of 2018 are accordingly disposed of. No order as to costs.