(2009) 03 KL CK 0057

In the High Court Of Kerala

Case No : WP (C) No. 26882 of 2008 (A)

Sreedhanya Construction Company APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 37B
Finance Act, 1994 — Section 65(105), 65(25), 65(64), 65A

Citation : (2009) 224 CTR 573 : (2009) 14 STR 738 : (2009) 22 STT 278 : (2009) 24 VST 456

Hon'ble Judges : K.M. Joseph, J

Bench : Single Bench

Advocate : A.N. Rajan Babu, for the Appellant; P. Parameswaran Nair, Asst. Solicitor, for the Respondent

Final Decision : Allowed

Judgement

K.M. Joseph, J.—Prayers in the writ petition are as follows.

(i) To issue a writ of certiorari or appropriate writ direction or order quashing Exts. P5, P7, P10, P11 and P12.

(ii) To declare that the civil works maintenance of roads executed by the petitioner as per RMC 14, RMC 15, RMC 28, RMC 29 and RMC 38 in respect of Vizhinjani - Kattakada road, Varkala - Kallambalam road, Mavelikkara - Thiruvalla road, Kayamkulam - Mavelikkara road, Kidangara - Nerattupuram road, etc. are not taxable services under the Finance Act.

(iii) To declare that the maintenance and repair of roads are not taxable services under the Head maintenance or repair of immovable property.

(iv) To issue a writ of prohibition restraining the respondents from proceedings against the petitioner pursuant to Exts. P5, P7, P10, P11 and P12.

2. Case of the petitioner in brief is as follows.

Petitioner is specialized in road works. The issue relates to the exigibility of the works undertaken by the petitioner to service tax. There are three provisions which arise for consideration. Firstly, Section 65(25b) provides for commercial or industrial construction service. It reads as follows.

Section 65(25b) "commercial or industrial construction service" means:

(a) construction of a new building or a civil structure or a part thereof; or

(b) construction of pipeline or conduct; or

(c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or

(d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is:

(i) used, or to be used, primarily for; or

(ii) occupied, or to be occupied, primarily with; or

(iii) engaged, or to be engaged, primarily in, commerce or industry, or work intended for commerce or industry, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Then, the next provision is Section 65(105)(zzg). It reads as follows.

Section 65(105)(zzg). to any person, by any person in relation to management, maintenance or repair.

The third provision is Section 65(105)(zzza). It reads as follows.

Section 65(105)(zzzza). to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

According to the petitioner, a perusal of Section 65(25b) makes it clear that the service mentioned thereunder could not include such services provided in respect of roads. He also relies on Section 65(64). It reads as follows.

Section 65(64). "management, maintenance or repair" means any service provided by:

(i) any person under a contract or an agreement; or

(ii) a manufacturer or any person authorised by him, in relation to,:

(a) management of properties, whether immovable or not;

(b) maintenance or repair of properties, whether immovable or not; or

(c) maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle.

According to the petitioner, the petitioner has executed works of the Government of Kerala. Agreements mentioned in paragraph 9 of the writ petition are stated to have been executed in 2003 or 2004 before Clause (zzg) of Section 65(105) of the Act was brought into force. According to the petitioner, Clause (zzg) came into force with effect from 1-5-2006 and works are executed and completed before 1-5-2006 and except two works, the amount received before 1-5-2006. The petitioner relies on Ext. P1 in this regard. Ext. P2 is the extract of the statutory provision. Exts. P3 and P3(a) are agreements. According to the petitioner, as contemplated in the PWD Manual the works executed by the petitioner is not for maintenance or repair, Ext. P4 is the extract of the Manual. According to him, at any rate, the works contract relate to roads and, therefore, it is excluded from service tax by virtue of Clause (zzzza) of Section 65(105) of the Act. The petitioner received Ext. P5 notice. He was asked to produce month-wise details of payment. The petitioner gave Ext. P6 reply. Thereafter, he was informed that there is no exemption. Ext. P8 is a communication from the Deputy Commissioner indicating that the work is taxable. The petitioner sent representation to the Directorate General of Service Tax to examine the provision vide Ext. P9. Ext. P10 is communication to the Director General of National Highways Builders Federation indicating that maintenance or repair of road is exigible to service tax u/s 65(105)(zzg). Ext. P11 is issued by the Assistant Director of Directorate General of Service tax enclosing Ext. P10. Petitioner is served with Ext. P12 summons. It is accordingly he has approached this Court with the aforesaid prayers.

3. Counter affidavit is filed to which a reply affidavit is filed.

4. I heard learned Counsel for the petitioner Mr. A.N. Rajan Babu and Mr. P. Gopinath Menon, learned Senior Central Government Standing Counsel appearing on behalf of respondents 1 to 3. Learned Counsel for the petitioner reiterated the contentions and contended that the works executed by the petitioner would not come within the scope of Section 65(105)(zzg) and he would submit that at any rate they would be works contracts falling within Section 65(105)(zzzza). He would contend that in view of Ext. P10 read with Ext. P11, there may not be any purpose in going to the officers as they have made up with their minds and they will be bound by it. Learned Central Government Standing Counsel, on the other hand, referred to Section 65A which provides for classification of service in case of ambiguity. According to him, the provisions contained in Section 65(105)(zzg) would cover the contracts in question. He would further submit that it is for the petitioner to produce materials to convince the authorities that the case would fall within the ambit of Section 65(105)(zzzza) and establish that it is a works contract relating to road which is exempt from the levy of service tax or that it falls within the ambit of Section 65(25b).

He would further submit that the fact that Ext. P10 read with Ext. P11 is issued would not leave the concerned officer bound by the said communication. In this regard, he relied on Section 37B of the Central Excise Act and, therefore, he would submit that the officer will take a decision after considering the legal provision and the materials made available by the petitioner and considering Exts. P10 and P11 also. But, that is not to say that he will feel bound by Exts. P10 and P11, he submits. In other words, it will constitute a material before him in the matter of taking a decision in accordance with law. In the light of this, I feel that this is a matter where the petitioner can produce all materials. It is submitted that the petitioner has produced a number of materials before the authority pursuant to Ext. P12 summons. Learned Counsel for the petitioner seeks some more time to produce more materials. The petitioner is free to produce whatever materials he is advised to produce within a period of three weeks from today before the 3rd respondent and the 3rd respondent will consider the issue and take a decision in the matter. Mr. P. Gopinath Menon submits that, at this stage, it is for the petitioner to produce such material as he is advised to produce and, thereafter, the officer may decide to drop proceedings. Otherwise, he may decide to proceed further in the matter, in which case, he will issue a show cause notice and at this stage the petitioner will also be given an opportunity of being heard before the adjudicating authority, he points out.

In such circumstances, writ petition is disposed of relegating the petitioner to produce such materials as the petitioner feels free to produce before the 3rd respondent. Needless to say that the 3rd respondent can summon any further document and thereafter the 3rd respondent will consider the matter and take a decision in accordance with law not feeling bound by Exts. P10 and P11.