

(2014) 01 DEL CK 0164

In the Delhi High Court

Case No : Writ Petition (C) 1342 and 6058 of 2008 and 6803 of 2013

YFC Projects P. Ltd.

APPELLANT

Vs

UOI
 Skyline Engineering Contracts (India)(P) Ltd. Vs
UOI and Others
 National Building Construction
Ciroiratuib Kunuted (NBCC) Vs UOI and Another

RESPONDENT

Date of Decision : 09-01-2014

Acts Referred:

Constitution of India, 1950 — Article 366(29-A)

Finance Act, 1994 — Section 65 65(105) 65(105)(zzd) 65(105)(zzh) 65(105)(zzq)

Citation : (2014) 44 GST 334 : (2014) 35 STR 8 : (2014) 69 VST 153

Hon'ble Judges : Siddharth Mridul, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : J.K. Mittal and Mr. Varun Gaba, for the Appellant; Rajeeve Mehra, ASG, Mr. Mukesh Anand, Standing Counsel, Ms. Anjana Gosain and Mr. Ashish Virmani for R-1/UOI in these writ petitions, Ms. Sonia Sharma and Mr. Sonakshi Dhiman for R-2 in WP(C) Nos. 6058/2008 and 6803/2013, for the Respondent

Final Decision : Dismissed

Judgement

Badar Durrez Ahmed, J.—These writ petitions raise common issues and are, therefore, being disposed of together. Writ Petition (Civil) No. 1342/2008 (YFC Projects Pvt. Ltd. vs. Union of India) was taken as the lead matter and all reference to this batch of matters will be in relation to the pleadings in YFC Projects Pvt. Ltd. In these petitions, as would be evident from the prayer in M/s. YFC Projects Pvt. Ltd., challenges have been raised to the constitutional validity of Section 65(105)(zzd), Section 65(105)(zzq) and Section 65(105)(zzzh) of the Finance Act, 1994. The prayers made in YFC Projects Pvt. Ltd. are as under:-

A) Issue a writ of certiorari/mandamus or any other appropriate writ/order/direction against the respondent by quashing the impugned provisions viz. Section 65(105)(zzd) read with section 65(29) and section 65(39a), Section 65(105)(zzq) read with section 65(25b), section 65(105)(zzzh) read with section 65(30a) and section 65(91a) of Chapter V of the Finance Act, 1994 as much as

levying the service tax on the works contract and Ready-mix Concrete (RMC) as unconstitutional and also quashing of clarification given through Instruction No. C. No. IV/16/56/07/STC dated 7-11-2007 (at Annexure P-3) and under Reference Code No. 097.03/04.01.08 of the Circular No. 98/1/2008 dated 04.01.2008 (at Annexure P-4) issued by the respondent as illegal and unconstitutional by declaring that "works contract" of the petitioner were not subject to tax prior to the enactment of the Finance Act, 2007 as levied on "works contract services" u/s 65(105)(zzzza) of Chapter V of the Finance Act, 1994;

B) issue a writ of certiorari/mandamus or any other appropriate writ/order/direction against the respondent declaring that the production and supply of ready-mix Concrete (RMC), which is covered under the Tariff Item No. 3824 50 10 by specifying Nil rate of duty of excise under the Central Excise Tariff Act, 1985 read with Central Excise Act, 1944, is not a taxable service under the Finance Act, 1994, hence service tax collected on the same is illegal and unconstitutional;

C) issue a writ of certiorari/mandamus or any other appropriate writ/order/direction against the respondent declaring that the works contract started prior to 01.06.2007 are also eligible to pay the tax under the "works contract services" u/s 65 (105)(zzzza) of the Finance Act, 1994 read with Rules made thereunder by Notification No. 32/2007 dated 22.05.2007;

D) issue such other writ/order/direction against the respondent for refund of the service tax illegally collected from the petitioner for the period from September 2004 till May 2007;

E) issue such other writ/order/direction and further orders as the Hon"ble Court may deem just and proper in the facts and circumstances of the case.

2. The petitioner in YFC Projects Pvt. Ltd. is, inter alia, engaged in the business of commercial construction, construction of multi-storeyed residential complexes and also construction of structures and finishing works. YFC Projects Pvt. Ltd., is also engaged in the business of manufacture and supply of ready-mix concrete.

3. The relevant pleadings in YFC Projects Pvt. Ltd. tracing the genesis of the aforesaid three provisions were as under:-

7. That the respondent amended the Finance Act, 1994, w.e.f. 01.07.2003 through the Finance Act, 2003 by introducing "Commissioning or Installation Services" (later on renamed as "Erection, Commissioning or Installation Services") under sub-clause (zzd) of clause (105) read with clause (29) and clause (39a) of Section 65 of Chapter V of the Finance Act, 1994 vide Notification No. 7/2003 dated 20.06.2003. To enlarge the scope of this taxable service, aforesaid provisions were amended by the Finance (No. 2) Act, 2004, w.e.f. 10.09.2004, to include the erection services within its ambit, again by the Finance Act, 2005, w.e.f. 16.06.2005, to include specific installation services and

again by the Finance Act, 2006, w.e.f. 01.05.2006 to include erection, commissioning or installation of structures, whether pre-fabricated or otherwise under the service tax net. The aforesaid provisions, as amended time to time, are reproduced as under:-

Section 65(105)(zzd): "taxable service means any service provided or to be provided, to a customer, by a commissioning and installation agency in relation to erection, commissioning or installation".

Section 65(29): "commissioning and installation agency means any agency providing service in relation to erection, commissioning or installation".

Section 65(39a): "erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to,-

(i) Erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise; or

(ii) Installation of-

(a) electrical and electronic devices, including wirings or fittings therefore; or

(b) plumbing, drain laying or other installations for transport of fluids; or

(c) heating, ventilation or air-conditioning including related pipe work, ductwork and sheet metal work; or

(d) thermal insulation, sound insulation, fire proofing or water proofing; or

(e) lift and escalator, fire escape staircases or travelators; or

(f) such other similar services.

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10. That the respondent amended the Finance Act, 1994 w.e.f. 10.09.2004 through the Finance (No. 2) Act, 2004 by introducing another taxable services as "Construction Service" (later on renamed as "Commercial or Industrial Construction Services") under sub-clause (zzq) of clause (105) read with clause (25b) of Section 65 of Chapter V of the Finance Act, 1994. To enlarge the scope of this taxable service, aforesaid provisions were amended by the Finance Act, 2005, w.e.f. 16.06.2005 to include completion and finishing services and construction of pipeline under the service tax net. The aforesaid provisions, as amended time to time, are reproduced as under:

Section 65(105)(zzq): "Taxable service means any service provided or to be provided, to any person, by any other person, in relation to commercial or industrial construction service.

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 conduit; 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.

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14. That the respondent through the Finance Act, 2005, w.e.f. 16.06.2005 (vide Notification No. 15/2005 dated 07.06.2005) further amended Clause (105) of Section 65 of the Finance Act, 1994 to extend the scope of the "taxable services", so as to include the service of Construction of Residential Complex Services" u/s 65(105)(zzzh) and further defined "Construction of Complex" and "Residential Complex" under sub-clause (30a) and (91a) respectively of Clause (105) of Section 65 of the Finance Act, 1994. The aforesaid provisions are reproduced as under:

Section 65(105)(zzzh): "Taxable service means any service provided or to be provided, to any person, by any other person, in relation to construction of complex".

Section 65(30a): "construction of complex" means-

(a) construction of a new residential complex or a part thereof; or

(b) completion and finishing services in relation to residential complex 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; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex.

Section 65(91a): "residential complex" means any complex comprising of-

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system, located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing of planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation.-For the removal of doubts, it is hereby declared that for the purposes of this clause,-

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence.

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16. That the respondent issued Notification No. 1/2006, 01.03.2006 to consolidate the various exemption Notifications issued under service tax including aforesaid Notification No. 19/2003, dated 21.08.2003, Notification No. 15/2004, dated 10.09.2004 and Notification No. 18/2005, dated 07.06.2005.

4. It may be pointed out at this juncture that w.e.f. 01.06.2007 a further amendment to the Finance Act, 1994 was made whereby Section 65(105)(zzzza) was introduced whereunder "works contract service" was identified as a taxable service. It is pertinent to note that in the present petitions we are not concerned with the period on or after 01.06.2007 but with the period prior to 01.06.2007.

5. The short point involved in these petitions is that the impugned three provisions pertain, inter alia, to composite contracts involving erection, commissioning or installation services, commercial or industrial construction as well as construction of residential complexes. Such composite contracts may have service as well as supply components. It is an accepted position that, insofar as the sale/supply of materials is concerned, they fall under Entry 54 of List II of the Seventh Schedule to the Constitution of India and, therefore, fall within the exclusive domain of the State Legislature. This is, of course, to be read with Article 366(29-A) of the Constitution. It is, therefore, clear that Parliament cannot legislate in respect of the sale of goods component involved in such a composite contract. Service tax, however, falls within the exclusive domain of Parliament. This is under the residual Entry 97 of List I of the Seventh Schedule to the Constitution. The point taken by the learned counsel for the petitioner is that while this clear-cut bifurcation has been made out in the constitutional scheme, Parliament has encroached upon the exclusive powers of State Legislatures by imposing service tax on a composite contract which necessarily includes the sale of goods component.

6. On the other hand, Mr. Rajeeve Mehra, learned Additional Solicitor General of India, submits that Parliament has not encroached upon the powers of the State Legislature, inasmuch as, the provisions which are being impugned in these writ petitions are relatable only to the service component of composite contracts. Mr. Mehra submitted that this has also been held by another Division Bench of this Court in G.D. Builders Vs. UOI and Another, . He submitted that the very issues that are sought to be raised by Mr. Mittal, who appears on behalf of the petitioners, were also raised before that Bench. This, according to Mr. Mehra, would be evident from paragraph 2 of the said decision in G.D. Builders (supra) wherein the contentions of the petitioners in those matters have been crystallized. Paragraph 2 of the said decision reads as under:-

2. Contentions of the petitioners can be crystallized as under:-

(i) Service tax levied from time to time by Finance Act, 1994 and subsequent amendments is in exercise of power under residual entry 97 of List I of the Seventh Schedule of the Constitution of India. It is levied on taxable service as defined in Section 65(105) read with definition clauses.

(ii) Service tax is applicable only in respect of service element and the Central Government does not have any power under the residual entry to impose tax on entries under List II of the Seventh Schedule of the Constitution.

(iii) The Parliament cannot impose service tax on material or goods used in execution of works/composite contract. Central Sales Tax is payable and levied on material used in works contract with effect from 11th May, 2002 after amendment of the Central Sales Tax Act, 1956 vide Finance Act, 2002.

(iv) The composite or works contracts are excluded from the ambit of levy of service tax u/s 65(105)(zzq) and (zzzh).

(v) Section 65(105)(zzq) and (zzzh) apply only to "service contracts" and not to composite or works contract, therefore, exemption under notification to the extent of 67% to set off value of the goods involved in execution of composite contract is contrary to the charging provision and a nullity, as it amounts to enlarging and widening of charging section and would have the effect of including or imposing service tax even on goods or material used in a composite/works contract. It is well settled that a notification cannot expand or enlarge the charging section or even amend the statutory provisions or the main enactment.

(vi) The exemption notifications by which 67% of the contract value in a composite contract is abated has the effect of imposing service tax on "composite or works contract" which is not covered by the main statutory provision. Thus, what is not covered and cannot be covered by the principal enactment, have been covered and brought under the service tax ambit by the explanations appended to the notifications. Thus, abatement granted in the notifications is invalid and contrary to main enactment. The said argument is equally applicable to column 4 of serial numbers 5, 7 and 10 of the 2006

notification.

(vii) As per Section 93 of the Finance Act, 1994, the Central Government is empowered to grant exemption from levy of service tax either wholly or in part but as "composite contracts" and "works contracts" are not covered u/s 65(105)(zzq) or (zzzh) Central Government cannot grant exemption by way of notification.

(viii) Service tax has been imposed on services involved in execution of "composite/works contract" only with effect from 1st June, 2007 u/s 65(105)(zzzza). Rule 2A of Service Tax (Determination of Value) Rules, 2006 determines value of services involved in works/composite contracts and it is levied @ 2%, enhanced to 4% with effect from 1st March, 2008. The said levy is not applicable to services covered u/s 65(105)(zzq) and (zzzh).

(ix) There is a conflict between Section 65(105)(zzzza), (zzq) and (zzzh) and what is covered by Section 65(105)(zzzza) cannot be covered by Section 65(105)(zzq) and (zzzh). The two sets of provisions cannot coexist. Subsequent legislation shows that the earlier legislation will not cover composite or works contract.

(x) Section 66 is the charging section and provisions of Section 67 are the valuation provisions. Value of taxable services u/s 67 is the gross amount charged by the service provider for such "services provided or to be provided". Service tax can be charged only for the "specified taxable services" as defined in sub-clauses of Section 65(105). Tax can be only on the value of services and not beyond. There is no provision for a notional value or to enable the authorities to reduce or subtract value of material or goods. The gross amount charged or the value of service cannot include value of goods and material supplied/used.

(xi) Vagueness or uncertainty makes a levy invalid and illegal.

7. It was submitted by Mr. Mehra that the very issue with regard to the applicability of service tax only on the service element had been specifically raised in that batch of matters. In fact point Nos. (ii), (iii) and (iv) are specific to that aspect of the matter.

8. Adverting further to the said decision in G.D. Builders (supra), Mr. Mehra also drew our attention to the following paragraphs:-

17. It was accepted and stated on instructions by the respondents that the notifications in question (or rather partly in question) are optional and an assessee need not take benefit of the said notifications, if he so desires, but the service tax is to be levied and is payable on the service component of a composite contract, which can be computed. The notifications also specifically stipulate, when they apply and the preconditions which must be satisfied before they can be applied.

18. Service tax in the facts in question has been imposed in three stages. In the

first stage, service tax was imposed on construction of industrial and commercial complexes. In the second stage, service tax was imposed on residential complexes of 12 or more residential units and in the third stage, service tax was imposed on works contracts of any nature except for the exclusion in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Each provision or levy has its own scope and ambit, while the first two provisions were primarily specific and targeted, the third inclusion i.e. works contract is very broad and wide term and will include within its ambit and scope construction of industrial and commercial complex or construction of residential complexes as specified. Introduction and imposition of service tax on works contract by Finance Act, 2007 does not mean that we have to read down, the scope and ambit of the provisions enacted levy tax on contracts relating to "commercial and industrial construction" service or "construction of (residential) complexes" services as specified by Finance Act 2004 and Finance Act 2005 respectively. The new levy imposed by Finance Act 2007 does not indicate or show that works contract relating to "construction of industrial and commercial complexes" or "construction of (residential) complexes" as specified, would be only applicable when the contractor was providing labour or service and was paid for the same and not to composite contracts when the contractor was providing labour/services as well as goods used for construction of industrial and commercial complexes or residential complexes as specified. It would cover any and every contract, when the contractor was only supplying labour or undertaking construction services, whether with or without supply of material, i.e. composite contract. The levy is valid when the provisions of Section 65(105)(zzh) and 65(105)(zzq) of the Act are satisfied. The only condition and requirement is that the service tax should be levied and imposed on the "service" element and not levied and charged on material or goods used, as the power to levy sales tax or value added tax on the sales of goods is with the State Governments.

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31. The contention of the petitioners that the impugned notifications override the statutory provisions contained in Section 65(105), which defines the term "taxable service", Section 66, which it is claimed is a charging section, and Section 67, the valuation provisions of the Finance Act, 1994, has to be rejected. We have, as already stated above, rejected the argument of the petitioners on bifurcation/vivisection and held that as per the provisions of Section 65(105)(zzq) and (zzzh), service tax is payable and chargeable on the service element of the contract for construction of industrial and commercial complexes and contract for construction of complexes as specified and in case of a composite contract, the service element should be bifurcated and ascertained and then taxed. The contention that the petitioners are paying sales tax or VAT on material in relation to execution of the contract under composite contracts for construction of industrial/commercial complexes and construction contracts as specified u/s 65(105)(zzq) and (zzzh) therefore fails. The contention that there was/is no valid levy or the charging section is not applicable to composite contracts under

clauses (zzq) and (zzzh) of Section 65(105) stands rejected. But the petitioners have rightly submitted that only the service component can be brought to tax as per provisions of Section 67 which stipulates that value of taxable service is the "gross amount charged" by the service provider for such services provided or to be provided by him and not the value of the goods provided by customers of service provider and the service tax cannot be charged on the value of the goods used in the contract.

32. Similarly, the contention that exemption notification could be issued u/s 93 of the Finance Act in respect of any "taxable service" defined in Section 65(105), misses the legal position and has to be rejected. The notifications in questions dated 10th September, 2004, 7th June, 2005 and 1st March, 2006 granting exemption of 67% towards the value of the material used for computing the service tax payable ensure that the service element is taxable. It is an alternative to an otherwise subjective determination in each case, which may be cumbersome and require a detailed examination for ascertainment of the service element. The formula prescribed is not mandatory or compulsory. Further, it will apply at the option of an assessee. It will be applicable only when the required parameters are met and is not illegal and ultra vires the Act, i.e. the Finance Act, 1994. It is also not contrary to the charging section/provisions of the Finance Act imposing levy of service tax. The aim and purpose of the said notifications is to provide a convenient, alternative, optional and hassle free method for payment of service tax, provided the requirements mentioned in the notifications are satisfied....

33. When the charging provisions are attracted, question of computation or measure to compute tax would arise and value of taxable service has to be determined. There is a well settled distinction between subject matter or object of tax; and the measure or computation of the tax imposed. The distinction between the two has to be kept in mind (see Gujarat Ambuja Cements Ltd. and Another Vs. Union of India (UOI) and Another,).

9. The Division Bench culled out the following principles which are set out in paragraph 36 of G.D. Builders (supra):-

36. The aforesaid judgments and discussion highlight the following facets/principles:-

(1) After 46th Amendment to the Constitution, composite contracts can be bifurcated to compute value of the goods sold/supplied in contracts for construction of buildings with labour and material. The service portion of the composite contracts can be made subject matter of service tax. Aspect doctrine is applied for bifurcating/vivisecting the composite contract.

(2) Service tax can be levied on the service component of any contract involving service with sale of goods etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for

computation, it does not follow that no tax is leviable.

(3) The notifications in question are in alternative and optional. An assessee may take advantage or benefit of the notifications, but cannot be compelled to pay service tax on the proportion or value of a composite contract as per the notification. This is because the formula framed by way of delegated legislation is presumptuous and based on assumption.

(underlining added)

10. Finally, Mr. Mehra submitted that in view of the decision of G.D. Builders (supra) nothing further remains to be decided in the present petitions, particularly because the Division Bench in G.D. Builders (supra) had specifically held that it is only the service element of a composite contract which would be exigible to service tax under the impugned provisions.

11. We may point out that in G.D. Builders (supra) the challenge was with respect to the notifications dated 21.08.2003, 10.09.2004 and 07.06.2005 and, in particular, to the explanation contained in those notifications. All those notifications had been issued in respect of Sections 65(105)(zzd), 65(105)(zzq) and 65(105)(zzzh) respectively.

12. A challenge was also made to notification No. 1/2006 dated 01.03.2006 which superseded the above mentioned three notifications. The Division Bench in G.D. Builders (supra) held the said notifications to be intra vires the provisions which are impugned herein.

13. Considering the arguments raised by counsel for the parties and having gone through the impugned provisions, we feel that the manner in which the Division Bench has read the said provisions in order to decide as to whether the notifications in question were intra vires the said provisions or not have adequately addressed the issue which is sought to be raised by the petitioners herein. The Division Bench has clearly and categorically interpreted the said provision as imposing service tax only on the service component of the composite contracts which fall under the impugned provisions. The Division Bench in G.D. Builders (supra) held that it is the service portion of the composite contract which alone could be made the subject matter of service tax and that the aspect doctrine would be applicable for bifurcating/vivisecting the composite contract into its service component and sale of goods component. While the sale of goods would be taxable under the authority of the State Legislature, the service component would be taxable by virtue of Parliamentary legislation which includes the Finance Act, 1994. It was further observed in G.D. Builders (supra) that the computation of the service component was only a matter of detail and not a matter relating to the validity of imposition of service tax. It was also observed that the notifications which were impugned before it were in the alternative and optional and it was for the assessees to take advantage or benefit of the said notifications, if the assessees so desired. However, it was also made clear that the assessee cannot be compelled to pay service tax on a proportion or

value of a composite contract as per the notification.

14. On going through the impugned provisions, we do not find any encroachment by Parliament on the powers of the State Legislature to impose a tax on the sale of goods. The provisions clearly relate only to the service component of the composite contracts referred to in the impugned provisions.

15. The grievance of the petitioner with regard to assessment and computation cannot be equated with the challenge to the constitutional validity of the impugned provisions. It is open to the petitioner to raise issues of computation before the appropriate Adjudicating Authority/Appellate Authority and demonstrate the extent to which service tax can be imposed on the services that are provided by them. To be clear, it is open to the petitioner to demonstrate the extent of the service element included in the composite contract and to pay service tax only on that component.

16. The Division Bench in *G.D. Builders* (supra) has already interpreted the impugned provisions and has taken the view that it is only the service element which is to be taxed under the impugned provisions. We agree with that view. As such, there is no encroachment by Parliament on the exclusive powers of the State Legislature in respect of Entry No. 54, List II and, therefore, the said provisions are constitutional. The computation of service tax is, of course, left to the Adjudicating Authority/Appellate Authority.

17. Insofar as the question of the ready-mix concrete is concerned, it is true that the petitioner manufactures the same and either supplies it to third parties or uses it in its own works. It is not the entire ready-mix concrete which is to be taxed under the provisions of service tax but, only the service element in relation to the use of the ready-mix concrete which would be amenable to service tax. Therefore, in the case of ready-mix concrete also the challenge does not hold good. Consequently, the impugned provisions are valid but, are to be applied in the manner indicated above. The writ petitions are dismissed. The parties shall bear their own costs.