

2011 (24) S.T.R. 387 (Mad.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[MADURAI BENCH]

Vinod K. Sharma, J.

STRATEGIC ENGINEERING P. LTD.

Versus

ADDITIONAL COMMUR., C. EX., MADURAI

W.P. (MD) No. 11427 of 2006, decided on 8-8-2011

CASE CITED

Sri Palani Dhandayuthabani Devasthanam v. Commercial Tax Officer — 2001 (ST4)-GJX-0280-MAD. — *Referred*

REPRESENTED BY : Shri Joseph Prabakar, Advocate, for the Petitioner.

Shri B. Vijaykarthikeyan, SSC, for the Respondent.

[Order]. - The petitioner has invoked the writ jurisdiction of this court, under Article 226 of the Constitution of India, to challenge the order passed by the Commissioner of Central Excise, Madurai, dated 20th November 2006, confirming the demand of service tax against the petitioner.

2. It is not in dispute that the petitioner has an alternative statutory remedy of appeal against the impugned order.

3. The respondent had challenged the maintainability of the writ petition, due to availability of alternative statutory remedy.

4. The learned counsel for the petitioner vehemently, contended that the question of maintainability stood decided, at the time of admission.

5. This contention is not correct, as the order clearly shows that the writ petition was admitted, without notice to the respondent. However, the subsequent records show, that after filing on affidavit, challenging the maintainability of the writ petition, the respondent were directed to file counter on merit the claim of the petitioner on merits. Therefore, it may not be appropriate at this stage to relegate the petitioner to alternative statutory remedy.

6. The learned counsel for the petitioner has placed reliance on the judgment of the Division Bench of this court, in the case of *Sri Palani Dhandayuthabani Devasthanam v. Commercial Tax Officer, Palani Circle-II, Palani* [2001-(ST4)-GJX-0280-MAD.], in support of the contention that after the admission of the writ, the court should normally hear the case on merit.

7. Keeping in view the fact that the question raised, in this petition, is purely legal, this court feels that this can be decided on merit.

8. The petitioner Company were engaged in manufacture of FRP Pipes, falling under Chapter No. 7014.00 of the Central Excise Tariff. The petitioner Company also carries on the business of laying of GRP Pipes to its customers from whom it receives the labour charges. The GRP Pipes are laid inside the trench in case of underground-buried construction. The Buried pipe laying activity involves trenching, bedding and laying inside the trench and aligning appropriately. The pipe lowering into the trench is executed by two men using ropes and anchored to stakes. Erection of pipes involves connecting the laid

pipes and subjecting the pipes to carry fluids. This activity is done by the customers as per their own needs and requirements.

9. The petitioner was issued a show cause notice, dated 30-5-2005, demanding service tax under following categories :-

- (a) under the taxable category of 'Erection, Commissioning and Installation' for receipt of labour charges for Erection of pipes and laying of pipes; and
- (b) under the taxable category of 'Scientific or Technical Consultancy services' rendered by the Petitioner company to its non-resident clients.

10. The petitioner submitted detailed reply taking a positive stand, that the petitioner's case did not fall under the 'Commissioning and Installation services', in view of the definition given under Section 65(28) of the Finance Act 1994, which reads as under :-

"65(28) "commissioning or installation" means any service provided by a commissioning and installation agency in relation to commissioning or installation of plant, machinery or equipment."

11. It is not disputed, that laying of the GRP pipe, does not fall under Section 65(28) of the Finance Act, 1994.

12. The submission of the petitioner also finds support from the additional counter affidavit filed on behalf of the respondent, wherein, in para 6 and 7, it is stated as under :-

"6. Section 65(28) was omitted and a new Section 65(39a) was inserted with effect from 10-9-2004 vide Section 90 of the Finance (No. 2) Act, 2004 as follows :

"(39a) 'erection, commissioning or installation' means any service provided by a commissioning and installation agency in relation to erection, commissioning or installation of plant, machinery or equipment."

7. Section 65(39a) was amended by substituting vide Section 88 of the Finance Act, 2005, which is reproduced below :

"(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 or equipment; 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, duct work 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."

13. Thus, the plumbing, drain laying or other installations for transport of fluids etc., was included in the definition of 'erection commissioning or installation', for the first time, on 16th June 2005.

14. The only contention raised by the respondent is, given in para 11 and 12 of the additional counter affidavit, which reads as under :-

"11. The contention of the petitioner is that GRP pipes definitely

not a plant, machinery or equipment and hence their services of laying of GRP pipes would not attract service tax. As per the contract order, dated 12-9-2003, the petitioner was to render the services of fabrication, erection, alignment and hydro-testing of GRE piping at the LGN Terminal Site, Hazira of M/s. Petron Engineering Constructions Ltd. GRE Piping is an integral part of a plant or extension of a plant which includes machinery. The said piping was to provide fluid for the operation of the plant and machinery at the above mentioned site. Without the impugned piping, the plant comprising machinery is not complete and cannot be commissioned for operation of the intended purpose. Therefore, the contention of the petitioner that laying of pipes is not a plant, machinery or equipment is not sustainable.

12. It is submitted that service tax was levied on "commissioning and installation of plant, machinery and equipment " with effect from 1-7-2003. The general practice in the trade and industry is that "erection, commissioning and installation" are contracted as a composite package. The Central Board of Excise and Customs vide Circular No. 80/10/2004-S.T., dated 17-9-2004 had clarified that in case of a composite contract for erection, commissioning and installation, the erection charges would be taxed as part of commissioning and installation service. Therefore, the contention of the petitioner is not sustainable."

15. The reading of the additional counter shows, that the respondent has demanded the service tax from the petitioner, by treating it to be carrying on business for execution of work contract.

16. This plea of the respondent deserves to be noticed to be rejected, as the work contract was, first time, included under 65(105)(zzzza) with effect from 1st June 2007, which is defined, as under :-

"9. So far as the execution of the works contract is concerned, the work contract is defined under section 65(105)(zzzza), which reads as under :

(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.

Explanation. - For the purposes of this sub-clause, 'works contract' means a contract wherein, -

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out, -
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircase or elevators; or
 - (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
 - (c) construction of a new residential complex or a part thereof; or
 - (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
 - (e) turnkey projects including engineering, procurement and

construction or commissioning (EPC) Projects.”

17. The facts stated herein above prove beyond the doubt, that the demand raised against the petitioner is not sustainable law, as the period for which the demand has been raised does not cover the services of the petitioner for imposition of service tax.

18. The show cause notice as well as the impugned order, therefore, is out come of misreading of the provisions of the Finance Act, 1994, which cannot be sustained in law.

19. For the reasons stated above, the writ petition is allowed, impugned order is quashed. No costs.
