IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.04.2018

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.6059 of 2018 &
W.M.P.No.7472 of 2018

The Superintending Engineer
Bus Route Roads Department
Greater Chennai Corporation
Ripon Buildings
Chennai - 600 003 ... Petitioner

v.

1 The Director General of Central Excise
Chennai Zonal Unit
C-3, C-Wing, II Floor, Rajaji Bhavan
Besant Nagar
Chennai - 600 090

2 The Director General of Goods & Service Tax Intelligence
Chennai Zonal Unit
C-3, C-Wing, II Floor, Rajaji Bhavan
Besant Nagar
Chennai - 600 090

3 The Commissioner of GST and Central Excise
Chennai North Commissionerate
26/1, Uthamar Gandhi Road
Nungamabakkam
Chennai-600 034 .. Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records of the impugned show cause notice No.93/2017 in F.No.IV/DGCEI/CHZU/ST/184/2016 O.R.No.049/2017 dated 22.11.2017 on the file of 2nd respondent and to quash the same.

For Petitioner : Ms.Narmadha Sampath,
Additional Advocate General
for Mr.V.Selvasekaran

Respondents : Mr.V.Sundareswaran,
Senior Standing Counsel for - R1 & R2

Mr.S.R.Sundar
Standing Counsel - for R3

ORDER

Heard Ms.Narmadha Sampath, learned Additional Advocate General for Mr.V.Selvasekaran, learned counsel appearing for the petitioner-Chennai Corporation, Mr.V.Sundareswaran, learned Senior Standing Counsel for the respondents 1 and 2 and Mr.S.R.Sundar, learned Standing Counsel, for the 3rd respondent.

2. The petitioner is the Superintending Engineer, Bus Route Roads Department, Greater Chennai Corporation and the challenge in this writ petition is to a show cause notice issued by the 2nd respondent dated

22.11.2017, answerable to the 3rd respondent-Adjudicating Authority.

3. In the impugned show cause notice, the 2nd respondent has proposed as to why the service rendered by the petitioner should not be classified as "Renting of immovable property" services as per section 65B(22) read with Section 66E(a) of the Finance Act; as to why an amount of Rs.3,85,67,112/- [Rupees three crores eighty five lakhs sixty seven thousand one hundred and twelve only] payable towards service tax for the period from 2012-13 to 2016-17 should not be demanded from the petitioner under "Renting of immovable property" services; as to why interest under section 75 of the Act should not be demanded; as to why penalty should not be imposed under sections 76, 77 and 78 of the Act. In terms of the impugned show cause notice, the petitioner was required to produce all the evidences which they intend to rely upon in support of their defence at the time of showing cause . Further, the petitioner was to indicate in the written reply as to whether they wish to be heard in person before the case is adjudicated.

4. The learned Senior Standing Counsel appearing for the respondents 1 and 2 raised a preliminary objection regarding maintainability of writ petition as the impugned order in the writ petition is a show cause notice and submitted that the petitioner should be

directed to file a reply to the show cause notice and participate in the adjudication process before the 3rd respondent.

5. In reply to the said preliminary objection, the learned Additional Advocate General submitted that the nature of services rendered by the Corporation of Chennai is services rendered to the general public and no service tax is payable. It is further submitted that the Telecom Companies, who are permitted to lay Optical Fibre Cables, are paying GST and the said payment is inclusive of all taxes and therefore, no separate payment for service tax is maintainable against the petitioner. Further, the 2nd respondent has no jurisdiction to demand service tax, since the services are rendered for the general public and no GST is leviable on a public duty performed by the Corporation of Chennai. Further it is submitted there are two types of activities involved in the process of laying the optical fibre cables, viz., excavation, which is done by the contractor, who remit the payment inclusive of all taxes and the other being work of restoration, which is done by the Corporation of Chennai. The learned Additional Advocate General submitted that the Central Government in exercise of power conferred under section 93(1) of the Act has issued Mega Exemption Notification 25/2012, dated 20.06.2012 in and by which certain taxable services have been exempted from the whole of the service tax leviable thereon under section 66B of the Act.

Referring to clause 13 of the Mega Exemption Notification, it is submitted that services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance for the use of , renovation or alteration for the use of general public is wholly exempted from the payment of service tax and therefore, the 2nd respondent has no jurisdiction to issue the impugned show cause notice. Further, it is reiterated that the transaction has already suffered tax when the excavation is done and if the 2nd respondent is to adjudicate the impugned show cause notice and levy service taxation, it will amount double tax. On the above ground, learned Additional Advocate General sought for quashing the impugned show cause notice.

6. While reiterating the preliminary objection, the learned Senior Standing Counsel appearing for the respondents 1 and 2 submitted that on and from 01.07.1962, all activities are liable for payment of service tax except the services which are exempted. Referring to the averments/allegations in the impugned show cause notice, it is submitted that the nature of activity, which is proposed to be taxed is renting of immovable property to various Telecom Companies and it has got nothing to do with the excavation work which was carried out by the contractor. The learned Senior Standing Counsel submitted that on facts and considering the nature of services for which there is a proposal to tax

the petitioner, the Mega Exemption Notification will have no application to the case on hand.

7. The learned Standing Counsel appearing for the 3rd respondent reiterated the submissions put-forth by the learned Senior Standing Counsel appearing for the respondents 1 and 2.

8. After elaborately hearing the learned counsel for the parties and carefully perusing the materials on record, I am of the considered view that the writ petition is not maintainable and it is premature, firstly for the reason that the impugned order in the writ petition is only a show cause notice and not an order for the petitioner to be aggrieved. The petitioner challenges the impugned show cause notice on the ground of jurisdiction. The petitioner has challenged the impugned show cause notice primarily on two grounds. Firstly on the ground that it performs public duty and in the process of doing so, there is excavation work and for the said excavation work the concerned contractor, is remitting tax, which is is inclusive of service tax. Secondly, jurisdictional issue is raised by placing reliance on Mega Exemption Notification dated 20.06.2012.

9. On a perusal of the impugned show cause notice, it is seen that

what is being sought to be taxed is the renting of immovable property and not for excavation work. Therefore, if any remittance being made by the Contractor who has excavated the earth for the purpose of renting of immovable property, will not absolve the petitioner from the proposal made in the show cause notice. The second aspect is whether Mega Exemption Notification would be applicable to a particular nature of service is purely a question of fact. Therefore, if the petitioner's case is that clause 13 of the Mega Exemption Notification 25/2012, is applicable to them, they have to bring the nature of services within the ambit of clause 13 of the Mega Exemption Notification, as the legal principle being that strict interpretation would be given to any exemption notification. Therefore, the disputed questions of fact as to whether the nature of services proposed to be taxed, viz., renting of immovable property would fall under clause 13 of the Mega Exemption Notification has to be adjudicated before the authority. Thus, the jurisdictional issue, which is pointed out by the learned Additional Advocate General is not purely a jurisdictional issue as it primarily involves adjudication of facts. Therefore, I am of the considered view that the petitioner has to necessarily submit their reply to the impugned show cause notice and participate in the adjudication process. Therefore, on the grounds raised by the petitioner, the show cause notice cannot be quashed.

10. For the above reasons, the writ petition is dismissed as not maintainable. However, it is made clear that the observation made in this order are only *prima facie* observations made while testing the legal question as to whether the writ petition is maintainable or not and these observations will have absolutely no impact in the adjudication process and the Adjudicating Authority shall decide the matter independently applying his mind and without being in any manner influenced by the observations made in this order. Considering the fact that the writ petition is pending since 14.3.2018 and time limit prescribed in the show cause notice for submitting reply has expired, this court directs the petitioner to submit their reply to the show cause notice within a period of thirty days from the date of receipt of a copy of this order. The reply to be filed by the petitioner shall be in addition to the reply already filed by the petitioner dated 13.03.2018 and the adjudicating authority shall proceed to adjudicate the show cause notice in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

24.04.2018

Index : Yes/No

Rj

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T.S.SIVAGNANAM, J

Rj

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