2024:DHC:9343-DB

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : 22November 2024**
Judgment pronounced on: 03 December 2024

\+ W.P.(C) 3016/2019

TELECOMMUNICATIONS CONSULTANTS INDIA LTD. .....Petitioner

Through: Mr. Tarun Gulati, Sr. Adv. with Mr. Rajat Bose, Mr. Ankit Sachdeva, Ms. Shohini Bhattacharya & Ms. Shruti Kulkarni, Advs.

versus

UNION OF INDIA& ORS. .....Respondents

Through: Mr. Bhagvan Swarup Shukla, CGSC with Mr. Sarvan Kumar, Adv. for Resp./UOI.
Mr. Harpreet Singh, SSC with Ms. Suhani Mathur, Adv.
Mr. Dinesh Agnani, Sr. Adv. with Ms. Leena Tuteja& Ms. Ishita Kadyan, Advs. for R-5/ BSNL.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

DHARMESH SHARMA, J.

1. The petitioner herein invokes the extra ordinary writ jurisdiction of this Court under Article 226 of the Constitution of India, 1950, seeking the following reliefs against the respondents herein:

> "(a) Issue a writ of certiorari or any other appropriate writ(s),order(s) or direction(s) in the nature -thereof, to call for therecords and set aside the Advance Ruling No.AARJST/3/2018 dated 23 March 2018 passed by Respondentno.2;and
> (b) Issue a writ of mandamus or any other appropriate writ(s),order(s) or direction(s) in the nature thereof, to hold that theservices provided by the Petitioner to Respondent No. 5under purchase order- P.O. No. CT/P0/04/2014-15 dated 9September, 2014 are exempt from Service Tax being servicesprovided to the Government of India;
> (c) Alternately, issue a writ of mandamus or any otherappropriate writ(s), · order(s) or direction(s) in the naturethereof, directing the Respondent No. 1 to issue necessarydirections for ensuring that the services rendered by variouscontractors under the same Purchase Order/Tender issued byRespondent No. 5 are taxed uniformly without anydiscriminatory treatment to the Petitioner, in violation of Article 14 of the Constitution of India.
> (d) Issue any other writ(s), order(s), or direction(s) as may be deemed fit and proper by this Hon'ble Court."

FACTUAL MATRIX:

2. Shorn of unnecessary details, on 21 June 2013, the respondent No.5 herein i.e., Bharat Sanchar Nigam Limited **['BSNL'],**a Public Sector Undertaking under the Department of Telecommunications **['DoT'],** Ministry of Communication and Information Technology **['MCIT'],** in the capacity of an "implementing agency", floated a tender[1]to roll out an exclusive and dedicated 'Optical Fiber Cable Network' to be owned and operated by the Defence Services under the **'NFS**[2] **Project'**in different regions of the country. It is stated that

[1]CA/CNP/NFS-OFC/T-441/2013
[2]Network for Spectrum

alongwith the tender document, a specific format for the Bill of Quantities **['BoQ']** was attached by the BSNL for the use of the successful bidder at the time of submission of the tender, and the said format itself contained a separate 'Service Tax' component.

3. The petitioner herein, a Government of India Enterprise under the administrative control of the DoT, MCIT, being one of the successful bidders, managed to secure the tender for a portion of the work for the said Project (Package 'C': for Rajasthan, Uttar Pradesh and Uttarakhand circles)*vide* Advance Purchase Order No. CT/APO/04/14-15 for installation of the optical fibre cable, as well as other services incidental thereto. Subsequent thereto, the BSNL raised a Purchase Order **['PO']** bearing No. CT/P0/04/2014-15 dated 09 September 2014 upon the petitioner herein, towards Supply of Material, NLD services, Access Services and Training, under the said Project, for an aggregate value of Rs. 14,48,60,76,007/-.Admittedly, clause (36) of the said PO specifically provided that 'Service Tax' is not applicable on the said PO.

4. Thereafter, the petitioner herein issued separate POs to various sub-contractors for carrying out a variety of work for the NFS Project, and charged applicable service tax on its invoices for the reason that the BoQ which stood approved by way of the PO dated 09 September 2014, included a separate service tax component. However, the BSNL allegedly refused to pay the service tax amount charges on the said invoices on the ground that the services performed by the petitioner

under the PO dated 09 September 2014 were eligible for exemption by virtue of a 'Specific Exemption' provided under Entry 12A of the 'Mega Exemption Notification' bearing Notification No. 25/2012-Service Tax dated 20 June 2012 (as amended by Notification No. 9/2016-Service Tax dated 01March 2016) notified in terms of Section 93(1) of the Finance Act, 1994 (32 of 1994). The said provision is reproduced hereinunder:

> "**12A.** Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-
> **(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;**
> (b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or(iii) an art or cultural establishment; or
> (c) a residential complex predominantly meant for self~use or the use their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act.;
> under a contract which had been entered into prior to the **1st March, 2015**and on which appropriate stamp duty, where applicable, had been paid prior to such date:
> provided that nothing contained in this entry shall apply on or after the 1st April, 2020;"**{bold emphasis supplied}**

5. Upon receiving the said response from the BSNL, the petitioner ceased to charge service tax on its invoices on BSNL with effect from 01 April 2016. However, due to the failure on the part ofthe BSNL and DoT to provide any certificate of exemption or any clarity on the issue despite the service of numerous letters by the petitioner herein,

the petitioner, in the period between 01 April 2016 and 30 June 2017 was constrained to raise invoices with the following rider:

> *"Service Tax is not applicable under Notification No, 2512015Service Tax dated 20.06.2012, clause 12a being theServices provided to the Ministry of Defence, Government ofIndia in reference to clause 36 of BSNL PO No.CT/P0/04/2014-15 dated 09.09.2014.*
> *In the event the Service Tax is applicable I payable underthis BSNL PO as per the Order by the Competent Authority,then TCIL shall raise separate invoice for claiming theService Tax and other related Cess of this Invoice along with interest, which shall be payable by BSNL to TCIL."*

6. Clouded with confusion regarding the issue of liabilityto pay service tax, the petitioner filedan application bearing No. AAR/44/ST-1/16/2017before the respondent No.2 i.e., the Customs Authority for Advance Rulings{Erstwhile Authority for Advance Rulings (Central Excise, Customs and Service Tax} constituted under **Section 28E** of the Customs Act, 1962, seeking an advance ruling on the said issue. In the said proceedings, the respondent No.3 i.e., Commissioner of Central Goods & Services Tax, Commissionerate Delhi South (Erstwhile Commissioner of Service Tax, Delhi-II) took a contradictory stand that the exemption provided under the Mega Exemption Notification shall not be applicable on the PO and accordingly, the Project workshould be subject to service tax in terms of the relevant provisions of theFinance Act, 1994.

7. The said application came to be decided by the respondent No.2 *vide* Ruling No. AAR/ST/3/2018 dated 23 March 2018, which is presently impugned before us, *inter alia* making the following

observationsin respect of the Purchase Order dated 09 September 2014:

> a. "*Bharat Sanchar Nigam Ltd. is the recipient of service in the present case.*
> b. *Bharat Sanchar Nigam Ltd. does not qualify under the definition of "Government" as per the Notification No. 25/2012-ST dated 20.06.2012.*
> c. *The scope of work awarded by the Applicant does not related to civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession."*

8. In the aforesaid backdrop, the said advance ruling dated 23 March 2018is being assailed by the petitioner herein, thereby contending that the BSNL had floated the tender only in the capacity of an "implementation agency" which was receiving 7.5% as "implementation charges" for the 'NFS Project', andthe ultimate beneficiary of which is the armed forces i.e., Ministry of Defence, Government of India.

ANALYSIS AND DECISION

9. Upon hearing the learned counsels for the parties and on perusal of the record,it is manifest that the Government of India, rather than BSNL, is the "recipient of service" in this case. In other words, the Defence Services, Government of India, is the beneficiary of the services provided by the petitioner through its subcontractors. It is but also apparent that the services provided by BSNL to theDoT by way of implementation of the Projectare also exempted from the applicable service tax in terms of Entry 12A of the 'Mega Exemption

Notification' dated 20 June 2012 read with Section 102[3] of the Finance Act, 1994,and by the same logic the notional services provided by the petitioner to BSNL wouldalso be exempt from the applicability of service tax, by virtueof Entry 29(h) provided under the said 'Mega Exemption Notification' dated 20 June 2012 which reads as under:

> "**29.** Services by the following persons in respective capacities-
> **(h)** sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;"

10. In reaching the aforesaid view, we may refer to the decision of the Supreme Court in **State of Andhra Pradesh v. Larsen & Toubro Limited**[4]. It was a case where the respondent was engaged for

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[3]**102.Special provision for exemption in certain cases relating to construction of Government buildings.** –
(1) Notwithstanding anything contained in section 66B, no service tax shall be levied or collected during the period commencing from the 1st day of April, 2015 and ending with the 29th day of February, 2016 (both days inclusive), in respect of taxable services provided to the Government, a local authority or a Governmental authority, by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of—
(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry or any other business or profession;
(b) a structure meant predominantly for use as—
(i) an educational establishment;
(ii) a clinical establishment; or
(iii) an art or cultural establishment;
(c) a residential complex predominantly meant for self-use or for the use of their employees or other persons specified in Explanation 1 to clause (44) of section 65B of the said Act, under a contract entered into before the 1st day of March, 2015 and on which appropriate stamp duty, where applicable, had been paid before that date.
(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.
(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2016 receives the assent of the President.

[4](2008) 9 SCC 191

execution of civil, mechanical and other building works throughout India, including theState of Andhra Pradesh. The respondent, in order to execute the said work, entered into contracts with its clients (contractees) and under the contract, the respondent with the consent of the contractee, was permitted to assign parts of the construction work to the sub-contractors. Accordingly, the respondent placed orders with the sub-contractors for the agreed price inclusive of applicable taxes. The overall work was done under the supervision of the consultants nominated by the contractee. The sub-contractors purchased goods and chattels in the nature of bricks, cement, steel etc. and brought the same to the site which remained the property of the sub-contractors. The respondent was served with a notice to the effect that the company had failed to disclose the turnover of the sub-contractors for a certain period. The liability was disputed and on the matter reaching the Apex Court, in the aforesaid backdrop, it was held as under:

> **"18.** As stated above, according to the Department, there are two deemed sales, one from the main contractor to the contractee and the other from sub-contractor(s) to the main contractor, *in the event of the contractee not having any privity of contract with the sub-contractor(s).*
> **19.** If one keeps in mind the abovequoted observation of this Court in Builders' Assn. of India the position becomes clear, namely, that **even if there is no privity of contract between the contractee and the sub-contractor, that would not do away with the principle of transfer of property by the sub-contractor by employing the same on the property belonging to the contractee. This reasoning is based on the principle of accretion of property in goods. It is subject to the contract to the contrary. Thus, in our view, in such a case, the work**

> **executed by a sub-contractor, results in a single transaction and not as multiple transactions. This reasoning is also borne out by Section 4(7) which refers to the value of goods at the time of incorporation in the works executed. In our view, if the argument of the Department is to be accepted, it would result in plurality of deemed sales which would be contrary to Article 366(29-A)(b) of the Constitution as held by the impugned judgment of the High Court. Moreover, it may result in double taxation which may make the said 2005 Act vulnerable to challenge as violative of Articles 14, 19(1)(g) and 265 of the Constitution of India as held by the High Court in its impugned judgment**."**{bold emphasis supplied}**

11. Applying the same analogy to the instant matter, the notification dated 20 June 2012 wholly exempts certain taxable services from the service tax leviable under Section 66B of the Finance Act, 1994, *vide* afore-referredEntry 12A(a)which categorically exempts services provided to the government or a government authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of a civil structure or any other original works meant predominantly for use other than for commerce, industries or any other business or profession.

12. Undoubtedly, the work in the nature of laying down of 'Optical Fibre Cable Network' is in the nature of setting up a civil infrastructure so as to benefit the defence forces of this country in having a better communication network. The said services are clearly exempted from imposition of services tax for the ultimate beneficiary being the Government of India. Further, Entry 29 (h) of the aforesaid notification also provides that the sub-contractor providing services by

way of works contract to another contractor providing works contract services are also exempt from imposition of service tax.

13. Interestingly, despite the passing of the impugned ruling that service tax would be applicable on the services provided by the petitioner under the said PO, the BSNL has continued to maintain the position that the services provided for the 'NFS project' under the PO dated 9 September 2014 is eligible for service tax exemption in terms of the said Mega Exemption Notification. It is pertinent to mention that the BSNL has in fact, released a fraction i.e., a sum of Rupees 28.62 crores out of the total service tax component amounting to approximately Rupees 80 crores, as claimed by the petitioner herein through its invoices but only on a reimbursable basis where the release of any amount is subject to the petitioner first depositing the amount of the service tax.

14. Intriguingly, learned counsel for the petitioner also pointed out that out of the 7 POs which were issued under the same tender floated by the BSNL, in respect of the PO dated 09 September 2014 which was issued to the petitioner, the impugned ruling dated 23 March 2018 has been pronounced, contrary to their over ruling in respect of another PO dated 30 July 2014 which was issued to one M/s Vindhya Telelinks Limited ['VTL'], wherein quite the opposite approach has been taken by the respondents inasmuch as a Refund Order dated 12 October 2018 has been issued to VTL in terms of Section 102 of the Finance Act, 1994. The relevant extract of the Order dated 12 October

2018 passed by the respondent No.4 i.e., Assistant Commissioner (Refund) of Central Goods & Services Tax, Commissionerate Delhi South,reads as under:

> "**20.** I find that the claimant has acted as project implementation agency of MCIT/DoT, GoI as per the MOU between MOD and MCIT/DoT M/s BSNL has thereforeworked as a pure agent between the GoI (through MCIT/DoT) and the contractors/sub-contractors and has gotcleared their bills from the government on actual basis. Forthis, M/s BSNL has issued a notice inviting tender relating toworks contract for procurement, supply, trenching, laying,installation, testing and maintenance of Optical Fibre Cable,PBL DUCT and Accessories for construction of ExclusiveOptical NLD Backbone and Optical Access routes onTurnkey basis for Defence Network against Package B ofTender No. CA/CNP/NFS/T-441/2013 dated 21.06.2013. Theabove notice inviting tender was issued on behalf of ProjectImplementation Core Group (PICG), Ministry of Defence,Government of India. M/s VTL was awarded the project videpurchase order dated 30.07.2014 by M/s BSNL. During thetime of award ofpurchase order (prior to 01.04.2015) theservices provided to Government in relation to construction,erection, commissioning, installation etc. for a project otherthan commerce or industry were exempt from Service Tax.Accordingly, clause (36) of the purchase order awarded bythe Claimant stated that Service Tax was not applicable inrespect of the activities undertaken for the project and theexemption was withdrawn vide Notn. No. 6/2015-ST w.e.f1.04.2015 and again restored vide Notn. No. 09/2016-STdated 01.03.2016 with retrospective effect and consequently refund is available as per Section 102 of the Finance Act,1994."

15. It is matter of record that both the POs were similar in nature and scope, the only difference being that the PO issued to the petitioner was for Rajasthan, Uttar Pradesh and Uttarakhand region, whereas the PO issued to VTL was for Punjab, Himachal Pradesh, Haryana and NCR region. Evidently, the respondents have applied

dual standards, resulting in differential tax treatment to similarly placed assesses without any rational basis. This discriminatory treatment violates the rights of the petitioner protected under Article 14 of the Constitution of India, 1950.

16. In view of the foregoing discussion, the present writ petition is allowed and a writ in the nature of *certiorari* is issued thereby holding the impugned advance ruling dated 23 March 2018 passed under Section 28E of the Customs Act, 1962 to be not sustainable in law, and is therefore, hereby quashed. The petitioner shall be entitled to claim consequential reliefs in light of the observations appearing hereinabove.

17. The present writ petition stands disposed of accordingly.

YASHWANT VARMA, J.

DHARMESH SHARMA, J.

DECEMBER 03, 2024
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