

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI.**

PRINCIPAL BENCH,  
COURT NO. I

**SERVICE TAX APPEAL NO. 2258 OF 2012**

[Arising out of the Order-in-Original No. 73-74/GB/2012 dated 26/04/2012 passed by Commissioner (Adjudication), Service Tax Commissionerate, New Delhi.]

**The Commissioner,  
Service Tax Commissionerate,**  
17-B, IAEA House, IP Estate,  
New Delhi.

**Appellant**

VERSUS

**M/s L.R. Sharma,**  
V-17, Green Park Extension,  
New Delhi -110 016.

**Respondent**

**APPEARANCE**

Shri Ravi Kapoor, Authorized Representative (DR) – for the Department  
Shri J.K. Mittal, Advocate, Ms. Aashana, Advocate – for the respondent.

**CORAM : HON'BLE SHRI JUSTICE DILIP GUPTA, PRESIDENT  
HON'BLE SHRI C.J. MATHEW, MEMBER (TECHNICAL)**

**FINAL ORDER NO. 50862/2022**

DATE OF HEARING : 07.09.2022

DATE OF DECISION: 15.09.2022

**C.J. MATHEW**

This appeal of Revenue, filed against order-in-original no. 73-74/GB/2012 dated 24 April 2012<sup>1</sup> of Commissioner of Service Tax, Delhi dropping proceedings initiated in show cause notice of 15 October 2010 for recovery of ₹ 22,60,09,148/- as tax liability under section 73 of Finance Act, 1994 on gross receipts for

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<sup>1</sup> Impugned order

providing of 'erection, commissioning and installation service' amounting to ₹ 201,83,25,807/- between 2005-2006 and 2009-2010, on ₹ 2,08,51,440/- as consideration for providing 'supply of tangible goods service' from 2007-2008 to 2009-2010 and on ₹ 23,41,500/- received as consideration for 'renting of immovable property' between 2007-2008 and 2009-2010, has had more than its share of tortuous twists and turns including appellate intervention of the High Court on several occasions besides writ remedy having been sought during the stage of investigations against summons for contracts and other documents pertaining to execution of works for Delhi Jal Board<sup>2</sup> and Delhi Metro Rail Corporation<sup>3</sup> which, surprisingly, continues to plague the proceedings before us even now after elapse of over a decade as a primary submission on the part of Learned Authorized Representative appearing for appellant-Commissioner. Recountal of the facts and circumstances is, thus, unavoidable and even at the cost of tedious elaboration.

2. The impugned order adjudicated notice dated 14<sup>th</sup> October 2011 for recovery of ₹ 14,05,90,649/- on the same services for 2010-2011 also. M/s LR Sharma & Co, a partnership firm and respondent in the appeal, had filed memorandum of cross-objections. Though the notices pertained to three 'taxable services' rendered by the respondent herein, appeal against order of the adjudicating authority is limited to taxability of receipts from Delhi Metro Rail Corporation (DMRC) on execution

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<sup>2</sup> DJB

<sup>3</sup> DMRC

of contracts for laying of water pipelines and we restrict our exposition, as also the proceedings, to that aspect alone.

3. M/s LR Sharma & Co was among the many of its ilk engaged for laying long-distance pipelines by Delhi Jal Board (DJB) and for shifting these to enable Delhi Metro Rail Corporation (DMRC) in execution of the metro rail network and who had been served with letters of inquiry in 2010 by jurisdictional tax authorities for submission of relevant tax returns and contracts. Their representational body took up the issue with Commissioner of Service Tax in communication of 29<sup>th</sup> October 2010 and the response of 24<sup>th</sup> November 2010 reiterated the legality of the contemplated proceedings arising from taxability under section 65(105)(zzd) of Finance Act, 1994 with effect from 16<sup>th</sup> June 2005 and definition of 'erection, commissioning or installation' in section 65(39a) of Finance Act, 1994. In the meanwhile, writ petition before the Hon'ble High Court of Delhi was disposed off on the submission of Commissioner of Service Tax that the letters were intended to obtain documents and was not demand for payment of tax for which procedure laid down in law would be followed.

4. It is on record that the respondent herein had furnished only the balance sheets but the adjudication order also notes that

*'8. .... but have not submitted documents called for by this office from time to time which are relevant to the investigation being conducted to ascertain the service tax liability.*

9. On scrutiny of some of the documents submitted by the party... As per the copies available in the records it appears that the party is engaged in providing/laying/jointing/ replacement/shifting of water pipelines for Delhi Metro Rail Corp. (DMRC), Delhi Jal Board (DJB) and similar other companies but are not paying service tax on such activities which are squarely covered under the taxable services w.e.f. 16.06.05 which is classifiable under Erection, Commissioning or Installation as per the definition provided under Section 65 (39 a) of the Act. Sample copies of Delhi Jal Board (DJB) contracts No. DJB/EE (c) /DRX/208/1620 dated 12.11.08, No. DJB/EE (c) /DR.VI/WO/07-08/1235 dated 16.11.07, No. F6 (3)/EE (Project)/W-II/2007/814 dated 26.07.07, No. F-7 (75) EE (Pr) W-VII/2007/3501 dated 10.12.07 and No. F2 (153)/EE (W) C VIII/2005 /3973 dated 9.12.05 submitted by the party -related nature of work as "shifting of existing 1050 mm dia sewer line (Rising main) and laying of 1000 mm dia MS/DI pipe at Ghazipur crossing, National Highway No. 24, P/L/J 1000-800-700 mm dia DI peripheral water main along Sagarpur and Old Mehrauli Road for reservoir CT-1-Dwarka etc. The party has not submitted all the copies of the contracts except seven work orders submitted vide their letter dated 25.09.09, in spite of repeated reminders by this office.....

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14. The party was requested vide this office letter dated 6.09.10 & subsequent reminder dated 21.09.10 to submit copies of the contracts and balance sheet for the year 2009-10 (Trial balance if the audited is not available) but the same was not submitted even in spite of reminding telephonically to the Chartered Accountant of the party.... During this visit they were requested to furnish the copies of contract is executed by them as well as the balance sheet for the year 2009-10 (Trial balance if the audited is not available) which they promise to submit on 5.10.10, but the same have not been submitted till 7.10.10 in spite of telephonic reminder to the CA. Therefore, service tax liability for the Financial Year 2009-10 shall be taken into account on the basis of best judgment assessment as provided under Section 72 of the Act.....

During the year 2008-09 the party had shown the following receipts under the following taxable services:-.....

The details of "Contract Receipts", "Machine Hiring Charges" & "Rental Income" for the above. And the service tax liability thereon has per figures given in the relevant balance sheets 2005-06 to 2008-09 as well as calculated above for the year 2009-10 under Section 72 of the Act is as under:-

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*Bi-furcation of the figures w.e.f. 16.6.05, 18.4.06, 11.5.07, 01.6.07, 16.5.08 & 24.2.09 for charging service tax at the relevant rate not available. Hence service tax charged on the above yearly figures/amount.'*

thus setting the tone for adversarial contentions in appellate proceedings thereafter.

5. The impugned order, taking note of the definition of 'erection, commissioning or installation' in section 65 (39a) of Finance Act, 1994 with coverage of the alleged activity solely under the 'installation' component, the clarification of Central Board of Excise & Customs<sup>4</sup> dated 21 August 2003 as well as the doctrine of *noscitur a sociis* and of *ejusdem generis*, and decisions of the Tribunal, concluded that

*'3. Keeping in view the circular the judicial pronouncements it can be said that plumbing work or drain laying or installation of pipeline that form part of a structure (say within an industrial plant or water treatment/sewerage disposal plant) would certainly fall within the ambit of the taxing entry. However, drain or pipeline of water and sewerage pipelines of Delhi Jal Board (DJB), Delhi Metro Rail Corporation (DMRC), Public Works Department (PWD) and Central Public Works Department (CPWD) are not that type of pipelines. It does not form part of any structure of plant. Therefore, this activity does not fall under either the taxable service of 'erection, commissioning and installation' or 'commercial construction'.*

*32. It is, therefore, very clear that as per the consistent judicial views taken in similar cases, as also the clarification issued by the Board, the activity of laying pipelines for conveyance of water or sewerage, cannot be called is taxable service classifiable under section 65 (39a) of the Act and charged to tax. Therefore, the demand, on that account needs to be dropped.'*

6. Aggrieved by this order, appeal was filed by the Commissioner of Service Tax, as directed by the authority

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<sup>4</sup> CBEC

competent to review adjudication orders, along with application for condonation of delay which was responded to by the assessee in memorandum of cross-objections. The maintainability of the appeal was challenged in writ proceedings before the Hon'ble High Court of Delhi and, in order dated 2<sup>nd</sup> November 2012 of the High Court, liberty was granted to the assessee to plead so before the Tribunal. The grounds in the cross-objections on the scope of statutory review and application of mind thereto was found sufficient by the Tribunal, in final order no. 56165/2013 dated 26<sup>th</sup> April 2013, to dismiss the appeal even while noting that sufficient grounds existed for condonation of delay.

7. On successful challenge by Revenue in the High Court of Delhi which, by order dated 20<sup>th</sup> March 2014, reversed the finding on maintainability and directed restoration of appeal before the Tribunal, application for such restoration was moved and the Tribunal, *vide* miscellaneous order no. 54030/2014 dated 25<sup>th</sup> November 2014, dismissed the same as misconceived in view of the specific order of the High Court. Two applications - by the respondent-assessee challenging the maintainability of an appeal naming a respondent other than the noticee and by the appellant-Commissioner seeking early hearing - were disposed of by miscellaneous order no. 50052-50053/2017 dated 8<sup>th</sup> February 2017 rejecting the former and allowing the latter.

8. On submission of the Learned Authorized Representative that 'relied upon documents' and annexures were not part of the

appeal records and, being required for supporting the contentions of appellant-Commissioner, seeking time to obtain them as well as directions to the respondent-assessee to provide these, interim order no. 3/2018 dated 11<sup>th</sup> January 2018 adjourned the proceedings to 28<sup>th</sup> February 2018. Thereafter, *vide* final order no. 51851/2018 dated 17<sup>th</sup> May 2018, the Tribunal remanded the dispute back to the original authority with the observation that

*'14. After appreciating the submissions by both sides, we are of the view that the relevant contracts executed by the respondent with Delhi Metro Rail Corporation will need to be scrutinised for taking a definitive view whether such activities will be liable to Service Tax under the category of 65 (39 a) of the Act. Since the relevant agreements have not been produced for our perusal, we are left with no option remanded the matter to the June in Authority for de novo decision after perusing the relevant contracts with Delhi Metro Rail Corporation.'*

9. The respondent-assessee thereafter sought rectification of mistake apparent in the record under section 35C of Central Excise Act, 1944, as made applicable to Finance Act, 1994, in the order of the Tribunal for erroneous citing of the respondent therein and for not having taken into account the submission pertaining to the decision of the Hon'ble Supreme Court in **Commissioner of Central Excise, Kerala** versus **Larsen & Toubro Ltd.**<sup>5</sup>, which, *vide* miscellaneous order no. 50052/2019 dated 25<sup>th</sup> January 2019, was disposed of by substitution of the respondent. In appeal against the final, as well as subsequent miscellaneous order, Hon'ble High Court of Delhi, in order dated 13<sup>th</sup> November 2019 disposing of SERTA 12/2019, held that

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<sup>5</sup> 2015 (39) S.T.R. 913 (S.C.)

*'4. Having heard Learned counsel for the parties, the Court is of the view that the matter ought to be remanded to the CESTAT for a fresh consideration of the department's appeal. It is pointed out by Mr Mittal, Learned counsel for the Appellant that all the relevant documents, including the contract in question, were already produced in the enquiry prior to the issuance of the show cause notice ('SCN') and was already available with the department. Mr Harpreet Singh, Learned Senior Standing Counsel appearing for the department, assures the Court that on the date that may be fixed by this Court for appearance of the parties before the CESTAT, the documents relied upon by the department will be produced before the CESTAT. It is pointed out by Mr Mittal that only such documents referred to in the SCN, ought to be permitted to be relied upon by the Department before the CESTAT. It will be open to the Appellant herein to make submissions in this regard before the CESTAT.*

*5. Since the enquiry in the matter started in 2007, we request the CESTAT to dispose of the appeal at the earliest convenience, and preferably within six months from the date fixed by this Court for listing of the appeal before it for directions.*

*6. The appeal of the department... will now be listed before the CESTAT for directions on 2<sup>nd</sup> December, 2019.'*

10. At the hearing before the Tribunal on 10<sup>th</sup> February 2020, the matter was adjourned to 25<sup>th</sup> February 2020 with the direction that

*'Learned Departmental Representative ..... prepare paper book of documents/agreements, as directed in the remand order of the High Court. Copy of such paper book should be given to the Counsel for the assessee/respondent at least three days before the next week of hearing.'*

11. It would appear from the above that the impugned order was found by the Committee of Chief Commissioners to be fit for appeal on the ground that the treatment accorded to Delhi Jal Board (DJB) and Delhi Metro Rail Corporation (DMRC) was erroneously equated in the adjudication order, that the activity of the respondent is in conformity with section 65 (105) (zzd) of Finance Act, 1994 and that the commercial character of the



recipient disentitled the provider from claiming that their service was rendered to 'public utility' excluded from leviability. From the remand order of the Hon'ble High Court, it would appear that responsibility devolves on the appellant to provide documents required for supporting the grounds of appeal and, in the circumstances, it was imperative that the Tribunal conclude proceedings within the time-frame prescribed therein. Bearing these two aspects in mind, we take up the appeal for disposal.

12. Drawing our attention to the first of the show cause notices dated 15 October 2010, Learned Authorized Representative contends that the 'relied upon documents', designated therein as RUD-I, RUD-II and RUD-III, are essential for determining the nature of the service, and particularly so for evaluation of the contention of the respondent that their activity arises from their engagement in a composite contract, and that Learned Counsel be directed to instruct the respondent to furnish the same. This plea was firmly refuted by Learned Counsel to contend that, in the light of the remand order of the Hon'ble High Court of Delhi and the impugned order, it is apparent that the intent was to reopen the enquiry which led to the issue of show cause notice comprising entirely of presumptions and suppositions that the adjudicating authority found fit to discard.

13. We find that the appeal memorandum preferred on the directions of the competent reviewing authority has not relied upon any of the contracts, or the absence thereof, as a reference

for challenge to the impugned order which rests upon the conformity of the activity of the respondent with the entry in section 65 (105) of Finance Act, 1994 and that the organizational objective of the recipient precludes the privilege accorded to Delhi Jal Board on exemption from taxability.

14. It may well be that the assessee had failed to produce the relevant contracts and that the adjudicating authority has, admittedly, not examined each of the contracts exhaustively. Nonetheless, from the absence of such documents for arriving at the proposal for recovery in the show cause notices, it is reasonable to conclude that the impugned order - the cause of action - did not find it necessary to ascertain the contents thereof and, indeed, has not dropped proceedings owing to lack of such. On the contrary, the recovery proposed in the show cause notice has not made any adverse inference from such lack but has taken recourse to 'best judgment' assessment permissible under section 72 of Finance Act, 1994 thereby obliterating the presence, and necessity, of those contracts insofar as the impugned proceedings are concerned. We also find that the designated 'relied upon documents' are nothing but correspondence with the assessee seeking documents that have not been specifically enumerated. We note that Learned Authorized Representative had been highlighting the handicap caused by the non-availability of the contracts in determining the classification of the service. Doubtlessly, the noticee had presented an alternative classification based on judicial decisions

which the adjudicating authority did not consider necessary to delve into and, consequently, was not within the ken of the competent reviewing authority. Any submissions made for introduction of facts and material that is not referred to in the show cause notice would have the effect of a fresh investigation and expanding of the framework of the notice itself; that is clearly not permissible. The remand order of the Hon'ble High Court of Delhi had accepted the submission of the tax authorities that documents, if any, required for arguing the appeal would be made available to the bench by them. In these circumstances, the plea of Learned Authorized Representative is not tenable.

15. Learned Authorized Representative contends that the plea of having rendered service in terms of a composite contract is not acceptable without any evidence being furnished in support. He argued that laying of water pipelines for Delhi Metro Rail Corporation (DMRC) was in furtherance of the establishment of their network of train stations that could, therefore, not draw upon the ratio of the decisions that the adjudicating authority relied upon for excluding the taxability of work undertaken for Delhi Jal Board which stands on a different footing. He argued further that their claim of having discharged appropriate taxes on the material component of the contracts cannot, in the absence of evidence to that effect, immunise them from tax due on service *simpliciter*.

16. Learned Counsel for the respondent contended that their submissions on the nature of the work undertaken by them as well as the discharge of tax liability on supply of materials, taken note of in the impugned order, had not been controverted either by the adjudicating authority or in the proceedings of the review. He placed reliance on the decision of the Hon'ble Supreme Court in **Fuerst Lawson Ltd versus Jindal Exports Ltd.**<sup>6</sup> and in **Assistant Commissioner, Income Tax, Rajkot versus Saurashtra Kutch Stock Exchange Ltd.**<sup>7</sup>, of the Hon'ble High Court of Gujarat in **RPG Life Sciences Ltd versus Union of India**<sup>8</sup>, of the Hon'ble High Court of Bombay in **Stanlek Engineering Pvt. Ltd. versus Commissioner of Central Excise, Mumbai-II**<sup>9</sup> and of the Tribunal in **Hindustan Lever Ltd. versus Commissioner of Central Excise, Mumbai-I**<sup>10</sup> to support his contention that the binding decision of the highest court must be applied even if brought to the notice of the Tribunal or adjudicating authority at any stage.

17. He argued that the distinction drawn by the Hon'ble Supreme Court in **Commissioner of Central Excise, Kerala versus Larsen & Toubro Ltd.** on the 'taxable services' existing prior to the incorporation of 'works contract service' encompassing those very services and to be applied only to services *simpliciter* erases the allegation of taxability as the

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<sup>6</sup> (2001) 6 SCC 356

<sup>7</sup> 2008 (230) ELT 385 (SC)

<sup>8</sup> 2005 (187) ELT 433 (Guj)

<sup>9</sup> 2008 (229) ELT 61 (Bom)

<sup>10</sup> 2008 (10) STR 91 (Tri-LB)

charge of 'value-added tax' on the material supplied in accordance with the composite contract is not in dispute. Relying upon the decision of the Larger Bench of the Tribunal in **Lanco Infratech Ltd. versus Commissioner of Central Excise & Service Tax, Hyderabad**<sup>11</sup> holding that

'18.....

(q) We are thus left with the activity of construction of pipelines/conduits under the turnkey/EPC mode. When the construction is for Government/Government undertakings and for water supply or sewerage disposal purposes, prior to 1-6-2007 this activity is classifiable under CICS and is excluded from the purview of the definition. Under clause (b) under Explanation (ii) of WCS, construction of a pipeline or a conduit primarily for the purposes of commerce industry is an activity falling within the definition of WCS. This provision in the definition of WCS is extracted from the definition of CICS, in parimateria. Construction of pipelines or conduit (otherwise than under a turnkey/EPC mode), when executed for Government/Government undertakings for transmission of water or sewerage would be outside the ambit of levy of tax, in terms of the definition itself, since the Sudan disputable fall within the ambit of sub- clause (b) of WCS.'

and the decision of the Hon'ble High Court of Madras that

'11. As rightly pointed out by the Tribunal, the assessee was entrusted with the task of laying a long distance pipeline to enable the Tamil Nadu Water Supply and Drainage Board to supply water. It is an activity in public interest, to take care of the civic amenities liable to be provided by the State. Therefore, the Tribunal was right in holding the favour of the assessee. Hence, the question of law is answered in favour of the assessee.'

in **Commissioner of Central Excise, Tiruchirappalli** versus **Indian Hume Pipes Co. Ltd.**<sup>12</sup> settles the issue in dispute in their favour. Again, according to him, the decision of the Tribunal in **International Metro Civil Contractors** versus **Commissioner of Service Tax, Delhi** holding that

<sup>11</sup> 2015 (28) STR 709 (Tri-LB)

<sup>12</sup> 2015 (40) STR 214 (Mad)

'9. Seeing from another angle that the services provided by the appellant is the construction of rapid rail corridor withstands excluded otherwise from the tax ambit event of the works contract service. Though it is the case of the Department that the exemption is for Railways and the metro corridor do not classify to be called a database foreign being a commercial concern. But this ground has already been adjudicated by Apex Court in **Jagjeet Cotton Textile Mills versus Chief Commercial Superintendent**<sup>13</sup>, wherein the Apex Court has held that Delhi Metro Rail is a Government railway as defined in Indian Railway Act. Since Railway also is meant to run on commercial basis, Delhi Metro Rail Corporation cannot be distinguished from being called as railways merely on the ground that it involves a commercial angle. This decision has been followed by High Court as well in Delhi Metro Rail Corporation (DMRC) itself titled as **Delhi Metro Rail Corporation (DMRC) versus Municipal Corporation of Delhi**<sup>14</sup>. High Court of Karnataka in **Delhi Metro Rail Corporation (DMRC) versus Ministry of Finance**<sup>15</sup> has also held that were contract services in respect of Railways are excluded under Clause 1 of 65 (105) zzzza of the Act i.e. such contracts will fall outside the definition of taxable service and consequently no tax shall be leviable under Section 66 of the Act on the value of such services. This Tribunal in **M/s. IRCON International Ltd. versus C.S.T. Delhi**<sup>16</sup> [IRCON is one of the company constituting the joint-venture i.e. the appellant] has held a composite work contracts irrespective include the category of service of erection, commissioning and installation irrespective that the said service is taxable since 1-7-2003 but since the services rendered is classified as works contract and the work contract in respect of railways is excluded from the tax liability as per the statutory definition itself, no question of levy of any service tax on such contract arises. It was also clarified that it is a well settled legal position that metro work is nothing but railways work.'

also offers ground for discard of the appeal of Revenue which is, according to him, further stated in **Afcons Infrastructure Ltd. versus Commissioner of Central Excise, Mumbai-II**<sup>17</sup> holding that

'7. It is also a well-known fact that the Indian Railway itself as an organisation, which is meant to run on commercial basis. Recognising these facts, there is a provision for a separate Railway-Budget to be presented before the Parliament and whenever there is a surplus, the Railways declared a dividend and pass it onto the Consolidated Fund of India. Therefore, the argument that only Delhi Metro Rail Corporation (DMRC) is run on commercial basis and not Indian Railway, is not an acceptable proposition. In view of the specific exclusion of 'railways' from commercial and industrial

<sup>13</sup> **1988 (5) SCC (126)**

<sup>14</sup> **2008 (103) DRJ 369**

<sup>15</sup> **2013 (6) TMI 78**

<sup>16</sup> **2017 (4) TMI 1086 (Tri-Del)**

<sup>17</sup> **2015 (38) STR 194 (Tri-Mumbai)**

*construction service, the question of imposing any Service Tax on the railways run by the Delhi Metro Rail Corporation (DMRC) does not arise at all.'*

Citing the decision in **Magma Sharchi Finance Ltd.** versus **Commissioner of Service Tax, Kolkata**<sup>18</sup> holding that

*'25. The question is really of interpretation. In Sundaram Finance Ltd. (supra) the Supreme Court gave the interpretation of the transaction resulting from the agreement and other documents executed in that case. Here too the Revenue has urged interpretation of, as according to it, the true nature of transactions emanating from the appellant's documents as constituting transactions of taxable services on which Service Tax has not been paid. The Commissioner gave his interpretation while the Tribunal did not but remanded the matter with direction for taking additional evidence. The Revenue was unable to show that there was any material before the Tribunal that could persuade us to consider an interpretation possible otherwise than that given by the Commissioner, for the purpose of upholding the impugned order.*

*26. There is no record in the impugned order that the appellant refused, failed or neglected to produce any document or evidence before the Tribunal. Where investigation and inquiry were unable to bring to light material which could be the basis for directions to take additional evidence, we find that such directions in the impugned order have been made without reason. The adjudicating authority cannot be directed to fish out evidence. The Central Excise Intelligence and Investigation Manual require the SCN to be issued only after proper inquiry/investigation i.e., when the facts used are ascertained and allegations justified. The other particulars in the said Manual relied upon by the appellant also assume significance. The adjudicating authority is to adjudicate on the demand in the SCN based on the allegations made therein. There is no finding in the impugned order setting aside as erroneous a finding of the adjudicating authority, on the basis of materials that were there either before the adjudicating authority or before the Tribunal.'*

he contended that the plea of the Learned Authorized Representative is tantamount to that disapproved by the Hon'ble High Court of Calcutta.

18. He further contends that the facts relating to the dispute have been incorrectly adduced in the appeal in as much as the work undertaken is that of shifting of water pipelines to enable setting up of the rail network on the planned sites without

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<sup>18</sup> **2017 (6) GSTL 238 (Cal)**

impinging upon the access of Delhi Jal Board to infrastructure belonging to them; the pipelines are not intended for use of Delhi Metro Rail Corporation. He points out that the contracts had not been awarded directly to the respondent herein and that the respondent had, in turn, awarded the work to M/s Larsen & Toubro Ltd. According to him, the exclusion of any proceedings against any of the others for rendering the same service to Delhi Metro Rail Corporation (DMRC) establishes the lack of propriety in the proceedings initiated against the respondent which had been correctly dropped by the adjudicating authority.

19. From a perusal of the records and the submissions of both sides, we find that the allegations against the respondent herein for fastening the tax liability rests upon the allegation that 'erection commissioning or installation service' has been rendered. The said service was, along with others, included within the scope of 'work contract service' upon incorporation in Section 65 (105) of Finance Act, 1994 with effect from 1<sup>st</sup> June 2007 and it has been held by the Hon'ble Supreme Court in **M/s Larsen & Toubro Ltd.** that the distinction between the separate enumerations and the composite enumeration within 'works contract service' lies on the absence of supply of material insofar as the former is concerned. It is seen from the sample contracts that respondent herein was also responsible for supply of material on which tax has been claimed to have been discharged; in the absence of any controverting of this submission, or



contrary evidence, the 'taxable service' within which the respondent was sought to be fitted would not apply.

20. Though we are not required to examine the fitment within the claimed enumeration of 'works contract service', we find that the respondent was involved in the shifting of the existing water pipelines belonging to Delhi Jal Board which, by implication, ultimately is rendering of services to that agency which the grounds of appeal admits to being eligible for exclusion from tax. In terms of the decision of the Hon'ble High Court of Madras in **M/s Indian Hume Pipes Co Ltd**, the laying of pipelines as an adjunct of civil structure would alone bring the activity within the ambit of section 65 (105) (zzd) of Finance Act, 1994 and from the nature of the work undertaken, it is apparent that the activity contracted out by the respondent does not relate to civil work for facilitating the network of Delhi Metro Rail Corporation.

21. The grounds of appeal are limited to the distinguishability of Delhi Metro Rail Corporation from Delhi Jal Board insofar as the organizational objectives are concerned. The exclusion of the alleged 'taxable service' sought to be fastened on them from any contract other than service *simpliciter* erases the distinction of commercial outcome suggested by the reviewing authority. In any case, even if Delhi Metro Rail Corporation were to be the final recipient of the service rendered by the respondent, the decision of the Hon'ble High Court of Calcutta in **M/s Afcons**

**Infrastructure Ltd.** categorising them as 'railway' forecloses taxability even if the dispute pertains to laying of water pipelines.

22. In view of the overwhelming factual matrix precluding the taxability as proposed in the show cause notices, the grounds of appeal preferred by the appellant-Commissioner does not sustain and appeal is, accordingly, dismissed.

(Order pronounced in open court on 15/09/2022.)

**(JUSTICE DILIP GUPTA)**  
**PRESIDENT**

**(C.J. MATHEW)**  
**MEMBER (TECHNICAL)**

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