IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.13921 of 2024

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M/S MKB Power Construction Private Limited having its head/registered office at 1st Floor, U/454, Lohia Nagar, P.S. Kankarbagh, District-Patna, Bihar duly represented by its Director Mukesh Kumar Bhardwaj, aged about 49 years, Gender-Male, son of Dharamdeo Rai, resident of Azad Nagar, Road No. 1, Kankarbagh, P.s.-Kankarbagh, District-Patna, Bihar.

... ... Petitioner

Versus

1. The Union of India through Revenue Secretary, Ministry of Finance, Department of Revenue, Nehru Place, New Delhi, Delhi 110019.
2. The Commissioner, CGST and CX Division, Patna Central Revenue (Annex) Building, Bir Chand Patel Path, Patna, Bihar.
3. Assistant Commissioner, CGST and CX, Patna (Central) Division, Patna, Office of the Assistant Commissioner, Service Tax Division, Patna, Ground Floor, Chandpura Palace, Opposite Dadi Maa Temple, Bank Road, West, Gandhi Maidan, Patna-800001.
4. M/s Powertech Engineers through its Director situated 215, Jagdamba Tower, 13-Commercial Complex, Preet Vihar, P.S.-Preet Vihar, State-Delhi.
5. M/s Kanti Prasad Mittal through its Director situated at 165 Gupta Colony, T.P. Nagar, Meerut, P.S.-T.P. Nagar, Meerut U.P.

... ... Respondents

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Appearance :
For the Petitioner/s : Mr. Rahul Kumar, Advocate
For the Respondent/s : Mr. Anshuman Singh, Sr. SC, CGST & CX
Mr. Shivaditya Dhari Sinha, AC to ASG

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 11-04-2025

This writ application has been preferred for the following reliefs:-

> "(i) For issuance of an appropriate writ, order or direction in the nature of certiorari for quashing of and setting aside the order dated 09.02.2024 passed by the Commissioner, Goods and Service Tax (GST) as

contained in impugned order to the present writ application.

(ii) For issuance of any other appropriate writ/writs, order/orders, direction/directions for which the writ petitioner would be found entitled under the facts and circumstances of the case."

Brief facts of the case

2. The petitioner is a private limited company registered under the Companies Act having its head office/registered office at Patna in the State of Bihar. It is carrying on business of construction of efficient and reliable power substation and electrical transmission and distribution systems. The petitioner claims that it is often engaged in power construction works as a subcontractor on behalf of the primary contractors. It is stated that the petitioner-company has obtained all necessary licences and permissions from the State and local authorities according to the applicable laws.

3. According to the petitioner, one M/s Powertech Engineers (respondent no.4), having its registered office at Rajnagar in Ghaziabad in the State of Uttar Pradesh and M/s Kanti Prasad Mittal (respondent no.5) having its head office at Meerut in the State of Uttar Pradesh on 25.05.2015 received a work order from the Bihar State Power Transmission Company Limited, Patna (in short 'BSPTCL'). A copy of the work order has been placed on record as Annexure 'P/1' to the writ application.

4. The petitioner-company received the work order of sub-contract from respondent nos.4 and 5 on 27.02.2015 and 30.05.2015 respectively. The copy of the sub-contract work orders with respondent nos.4 and 5 have been brought on record as Annexure ‘P/2’.

5. The petitioner-company was served with a demand-cum-show cause notice on 12.10.2021 alleging to have provided taxable services to its various clients as defined under Section 65B of the Finance Act, 1994 (hereinafter referred to as the ‘Act’) which falls neither under any of the clauses of Section 66D of the Act, as amended from time to time, nor under any of the entries of the Mega Exemption Notification No. 25/2012-ST dated 20.06.2012, as amended. It was alleged that the petitioner company has contravened the provisions of Sections 67, 68 and 70 of the Act read with Rules 4, 6 and 7 of the Service Tax Rules, 1994 (hereinafter referred to as the ‘Rules’) inasmuch as during 2016-17 to 2017-18 (up to June) (hereinafter referred to as the ‘relevant period’) the petitioner company failed to make proper assessment of it’s service tax liability and the applicable cesses amounting to Rs. 7,41,09,408/-. There was an allegation that the service tax has been evaded by the petitioner company which is liable to be recovered under proviso to Section 73(1) of the Act

along with applicable interest under Section 75 of the Act, penalties under Section 78, 77(1)(a) and 77(1)(c) of the Act. The allegation was that of willful act of suppression of facts with intent to evade payment of service tax and failure to take registration in accordance with the provisions of Section 69 of the Act read with Rule 4 of the Rules. There was also a failure on the part of the petitioner-company to produce documents called for by the department.

6. It appears from the records that pursuant to the demand-cum-show cause notice dated 12.10.2021, the petitioner did not submit any defence reply against the charges alleged in the impugned show cause notice. *Vide* Letter dated 18.09.2023, the Chief Commissioner, Central GST & CX, Ranchi Zone, Patna accorded approval of transfer of total 34 files including the instant case to the Commissioner, Central GST & CX, Audit Commissionerate, Patna for adjudication. Since the authority to adjudicate was reassigned, in the light of paragraph 2.11 of the Master Circular No.1053/02/2017 dated 10.03.2017, a corrigendum to this effect was issued on 07.11.2023 by the Principal Commissioner, Central GST and CX, Patna i.e. the show cause notice issuing authority.

7. The petitioner-company was granted an opportunity of personal hearing on 22.11.2023 in response to which the authorized representative of the petitioner appeared and sought time to present his case which was also granted. The respondent authorities of the department, however, found that the representative of the petitioner did not produce the copies of the work orders, VAT returns, etc. to show that the income accrued under Section 194C of 26AS statement pertains to work done for the principal contractor as claimed by him. The representative of the petitioner claimed that in the work order, it is clearly mentioned that the liability is to be borne by the principal contractor in the case and on this ground adjournment was sought for which was also granted. The petitioner-company submitted documents in relation to respondent no.4 *viz*. the contract, work order and the service tax payment challans borne by them for the relevant period but the petitioner could not submit the full documents for the other vendor M/s Kanti Prasad Mittal. It is stated in the impugned order which has not been denied by the petitioner that on 27.12.2023, the petitioner produced an agreement copy between the original recipient of the service i.e. BSPTCL and M/s Kanti Prasad Mittal stating that the liability of service tax shall be borne by M/s Kanti Prasad Mittal. However,

the petitioner could not produce any payment challan of service tax payment. It is recorded that he also made a written submission stating that the liability on account of payment of service tax lies on his primary/principal contractor (respondent no.4 and respondent no.5); he has not charged any service tax nor collected on his invoice as the liability of payment of service tax is on principal contractor. On these grounds, the petitioner-company prayed for dropping the proceedings.

8. Learned counsel for the petitioner submits that in the case of **State of Andhra Pradesh vs. Larsen and Toubro Limited** reported in **(2008) 17 VST 1**, the Hon'ble Supreme Court while affirming the judgment of the Hon'ble Andhra Pradesh High Court in the case of **Larsen and Toubro Limited vs. State of Andhra Pradesh** reported in **2006 148 STC 616 (AP)** has held that (i) The Sub-contractor is an agent of main contractor and has no privity of contract with the contractee, (ii) Property in goods in a sub-contract works contract passes directly from the sub-contractor to the contractee and there can be only one sale recognised by legal fiction created under Article 366 (29A) of the Constitution of India; and (iii) Taxation of contractor and sub-contractor on the same works contract (or a part thereof) would mean double taxation. It is submitted that the above principles laid

down by the Hon'ble Supreme Court in the context of Value Added Tax (VAT), could be relevant for service tax in appropriate cases.

9. It is submitted that the Commissioner, CGST Patna has passed the order dated 09.02.2024 (the impugned order) affirming demand of service tax amounting to Rs. 7,41,09,408/- inclusive of all cesses against the petitioner under the proviso to Section 73(1) of the Act read with Section 174 of the CGST Act, 2017. Further, a demand of interest on amount of service tax at the prescribed rate under the provisions of Section 75 of the Act, as amended, read with Section 174 of the CGST Act, 2017 and penalty of Rs. 7,41,09,408/- upon the petitioner under Section 78 of the Act, as amended, read with Section 174 of the CGST Act, 2017 penalty of Rs. 10,000/- under Section 77(1)(a) of the Act and a penalty of Rs. 10,000/- under Section 77(1)(c) of the Act have been imposed ignoring the submission of the petitioner that the primary contractor has paid the service tax pertaining to the work order by the BSPTCL.

10. A counter affidavit has been filed on behalf of the respondent nos. 1, 2 and 3 sworn by the Assistant Commissioner, CGST and CX, Patna (Central Division). At the outset, a plea has been raised that the petitioner has moved this Court under Article

226 of the Constitution of India without exhausting an equally efficacious alternative statutory remedy of appeal available under the CGST Act, 2017. Learned ASG representing the department has relied upon the judgment of the Hon'ble Supreme Court in the matter of **Assistant Collector of Central Excise, West Bengal vs. Dunlop India Limited and Ors.** reported in **(1985) 1 SCC 260:AIR 1985 SC 330**. Further reliance has also been placed on the judgment in the case of **Tata Engineering and Locomotive Company Limited vs. Assistant Commissioner of Commercial Taxes and Anr.** reported in **AIR 1967 SC 1401**. It is submitted that the remedy under Article 226 is an extraordinary remedy which is to be used sparingly. This jurisdiction is not appellate and it is not a substitute for the ordinary remedies at law.

11. Learned ASG submits that on perusal of the impugned order itself it would appear that the adjudication is based on various factual aspects of the matter. It is pointed out that the petitioner-company did not cooperate at the stage of investigation. Paragraph '1.3' of the impugned order has been placed before this Court to point out that the petitioner was requested by the Range Superintendent to submit documents required for ascertaining liability of service tax upon them *vide* letter dated 11.05.2020, email dated 14.05.2021 followed by a

reminder dated 29.06.2021 and a summon dated 04.08.2021 requiring them to appear in person and to give evidence along with documents relevant to the inquiry in the case but the petitioner remained unresponsible. It is pointed out that at a belated stage, the representative of the petitioner appeared, he was given a personal hearing but despite several opportunities granted to him, he failed to produce the documents called for by the department. It has also been found that the petitioner-company had not taken registration in accordance with the provisions of Section 69 of the Act read with Rule 4 of the Rules. The adjudicating authority has upon analysis of the materials placed before him found that the work orders submitted by the petitioner would show that the petitioner had supplied works contract services as a subcontractor, like civil structural works and erection, testing and commissioning for different grid sub-station to respondent no.4 and respondent no.5 who are the primary/principal contractors. Work orders issued by both the primary/principal contractor to petitioner has a mention that “Prices are exclusive of service tax at the rate 15 percent or as applicable. However, TDS will be deducted on the presentment of your invoice as per applicable rates on total value of works contract. Service tax on the value of services after applicable abatement rate will be borne by us. All other statutory

taxes, if any, will be deducted from the payment. All incidental charges incurred by you to fufill your obligations for completion of work shall be to your account."

12. Learned ASG submits that the adjudicating authority has upon perusal of the details of the challans of service tax payments made by respondent no. 4 and respondent no.5 found that those were the payments of mixed up liabilities on account of works contract services, legal consultancy services, and GTA services including Krishi Kalyan Cess and Swachchh Bharat Cess and the head-wise payments have been discussed in paragraph '4.4' of the impugned order. The petitioner-company failed to establish that the due service tax has been paid to the government exchequer.

13. Learned ASG submits that in the facts of the present case, it would not be appropriate to exercise the extraordinary writ jurisdiction of this Court even as the case in question would not require any interference with the impugned order, leaving it open to the petitioner to seek his remedy in appeal in accordance with law.

Consideration

14. We have heard learned counsel for the petitioner and learned ASG for the respondent nos. 1 to 3. In the present case,

admittedly the petitioner has a remedy available under Section 35 (ख) of the Central Excise Act, 1944 read with Section 86 of the Finance Act, 1994. The appeal is required to be filed within a period of three months from the date of impugned order before the Tribunal. The impugned order has been passed on 13.02.2024 and the same has been communicated to the petitioner *vide* Memo No. 535 dated 13.02.2024. The present writ application seems to have been presented in this Court on 26.07.2024, thus it is evident that much after expiry of the period of limitation for filing appeal before the Tribunal, the present writ application has been preferred.

15. On perusal of the averments made in the writ application, this Court finds that some of the important factual aspects discussed by the adjudicating authority in the impugned order has not been contested by the petitioner. For example, in paragraph '1.3' of the impugned order, the adjudicating authority has clearly stated that the noticee was requested by the Range Superintendent to submit documents required for ascertaining liability of service tax upon them *vide* letter dated 11.05.2020, email dated 14.05.2021 followed by a reminder dated 29.06.2021 and a summon dated 04.08.2021 requiring them to appear in person and to give evidence along with documents relevant to the

inquiry in the case but the noticee remained unresponsive. This assertion of the adjudicating authority in paragraph ‘1.3’ of the impugned order has not been controverted by the petitioner in the writ application.

16. This Court further finds that the petitioner was given personal hearing through its representative. Several dates were fixed one after another giving opportunity to the representative of the petitioner to produce the documents. The adjudicating authority has found that the noticee was providing taxable services to their various clients. In fact, in the writ application, there is no contest that the petitioner as a subcontractor was providing taxable services to its clients. The only submission on behalf of the petitioner is that the liability on account of service tax has been duly discharged by the primary contractor/principal contractor. It is the submission of the petitioner that there cannot be a double taxation, however, even on this point we find that the adjudicating authority has discussed the matter, for this purpose the challans showing deposit of service tax by respondent no.4 and respondent no.5 have been taken into consideration. The adjudicating authority having examined the challans recorded a finding in paragraph ‘4.5’ of the impugned order. We reproduce paragraph ‘4.5’ of the impugned order as under:-

"4.5 From the above, it is found that Grand total of Service Tax claimed to be paid comes to Rs. 1,03,16,628/- whereas the noticee vide its letter dated 09.01.2024 has submitted that an amount of Rs. 82,75,288/- has been paid by the referred two Primary/Principal Contractors. Thus, I find that the submissions of the noticee and corresponding tax payment challans are contradictory and bad in taste too. Further, the noticee has also submitted Certificates dated 18.06.2019 & 12.09.2017 from M/s Powertech Engineers & M/s Kanti Prasad Mittal to the effect that they have paid Service Tax amounting to Rs. 60,39,674/- and Rs. 29,20,335/- respectively which is also not in the line with the noticee's letter dated 09.01.2024 wherein he has stated that Service Tax amounting to Rs. 82,75,288/- has been paid by the duo. Thus, I find that the noticee has miserably failed to establish that due Service Tax has been paid to the Government Exchequer. Besides, the noticee in its above referred letter has also declared that Service Tax amounting to Rs. 1,03,44,112/- has been deducted by M/s BSPTCL (original service recipient) from their Primary/Principal Contractors but no payment particulars have been submitted. Besides, the noticee has also not submitted any invoice in order to prove that Service Tax has not been charged by the noticee from their Primary/Principal Contractors. In the instant case, service tax was required to be paid by the noticee as a sub-contractor and Primary/Principal contractors were not liable to pay service tax on behalf of sub-contractor. Hence, the above declaration/certificate about payment of Service Tax submitted by the noticee is not tenable and acceptable. Further, the

> services provided by the noticee is an input service for the Primary/Principal contractors, who further issued invoices to actual service recipient i.e. BSPTCL charging for the contract value. Statute has laid down proper recourse to follow in such situations, whereupon the noticee required to pay service tax which could be availed as Cenvat Credit by the Primary/Principal contractors and utilized by them, for payment of service tax on the taxable value involved in their execution of works as per work orders. I am of the view that when explicit provisions are available in the law, the noticee cannot put the Department to task for verifying whether the Primary/Principal contractors have actually and correctly paid service tax on the works contract services which also included services rendered by them to such Primary/Principal contractors."

17. In paragraph '4.6' of the impugned order, it has been further recorded that "Regarding the main issue i.e. the contention that the noticee is not liable to pay service tax as their Primary/Principal contractors have already paid the same, though this aspect could not be proved by the noticee, I find no ambiguity in the legal position. Under the Act, the liability for payment of service tax has been fixed upon the service provider. Though service provider has a right to collect service tax from the person to whom service is provided. When the noticee has admittedly provided taxable services to another person and charged them for providing such taxable services, statute makes them liable to pay

service tax on the taxable value. They cannot escape taxability merely because such another person happened to be their main contractor, who further issued invoices to the original service recipient and paid service tax on the amount charged by them."

18. We have gone through the judgments of the Hon'ble Andhra Pradesh High Court in the case of **Larsen and Toubro Limited** *(supra)* and the Hon'ble Supreme Court in the case of **Larsen and Toubro Ltd.** *(supra)*. The distinguishable feature of the said judgment may be noticed from the fact that in the said case, the question which fell for consideration before the High Court was as to whether the goods utilised by a contractor in the execution of a building contract (one of the categories of the works contracts) could legitimately be made exigible to the sales tax in exercise of the legislative competency under entry 48 of the List II of the Seventh Schedule to the Government of India Act, 1935 (which corresponds to the present entry 54 of the List II of the Seventh Schedule to the Constitution of India). It was the case of the petitioners that the amount of tax paid by the subcontractors must be given credit to while computing the tax liability of the first petitioner on the turnover relating to a particular contract or a set of contracts executed during a specified period relevant for the assessment under the VAT Act. The Hon'ble High Court noticed

that neither the Act nor the Rules made thereunder make a specific provision for giving of credit such as the one claimed by the petitioner except a credit on the inputs contemplated under Section 13 of the Act. Section 13(1) of the Act authorises such a credit to a VAT dealer who purchases taxable goods under certain circumstances. Thus, the crucial question which fell for consideration was whether in a transaction of entrustment of a works; works contract by the contractor to the sub-contractor, there is one taxable event under the VAT Act or two. The Hon'ble High Court held that in a transaction of a works contract, the property in goods passes directly to the employer by the theory of accretion. The Court held that "it does not appear to us that at any point of time, the property in the goods passes to the contractor where the work is executed by a sub-contractor…."

19. To this Court, it appears that the principles discussed in the judgment of **Larsen and Toubro Limited** (*supra*) would only support the impugned order wherein the adjudicating authority has held on the strength of the judgment of the Tribunal in the case of **Murari Lal Singhal vs. Commissioner of Central Excise and Service Tax, Jaipur-I** reported in **2019 (25) G.S.T.L. 45** and in the case of **Larsen and Toubro Ltd. vs. Commissioner of Central Excise, Raipur** reported in **2019 (26) G.S.T.L. 83**

(Tri.-Del.) that the service tax is chargeable from the noticee on the taxable services provided by them to their primary/principal contractors as part of execution of works as per referred work orders. In the case of **Murari Lal Singhal** (*supra*) case, the learned Tribunal has held that "…….The fact that a given taxable service is intended for use as an input service by another service provider does not alter the taxability of the service provider. Such proposition finds support from the basic rule of cenvat credit and service of a sub contractor may be input service provided for a contractor if there is integrity between the services. Thus tax paid by a sub contactor may not be denied to be set off against the ultimate service tax liability of the contracts if the contractor is made liable to service tax for the same transaction, though the exchequer cannot be enriched on account of double taxation. ....." In the case of **Larsen & Toubro Limited** (*supra*), the paragraph '16' of the judgment of the Tribunal has been quoted in paragraph '4.8' of the impugned order which we reproduce as under:

> "**4.8** Further, Hon'ble Tribunal in the case of Larsen & Toubro Limited Vs. Commissioner of Central Excise, Raipur, reported in 2019 (26) G.S.T.L. 83 (Tri. - Del.), wherein in para 16 held as under:
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> > **"16**. As a result of entire above discussion, we are of the firm opinion that the liability which has been discharged by M/s. Larsen and Toubro is on the gross value of the entire project. Appellant

> being one of the service provider admittedly, providing taxable services to Larsen & Toubro and receiving the service charges from them cannot get absolve his liability towards Service Tax under the pretext of discharge being made by the service recipient. Otherwise also, service tax is to be deposited to the Govt., not by the recipient but by the provider, who is the appellant in the present case."

20. The discussions and the findings recorded in the impugned order, in our considered opinion, are wholly in accordance with law. The petitioner is not able to make out a case for interference with the impugned judgment/order.

21. In ultimate analysis, we find no merit in the writ application. It is dismissed accordingly.

(Rajeev Ranjan Prasad, J)

Ramesh Chand Malviya:- I Agree.

(Ramesh Chand Malviya, J)

Rishi/-

AFR/NAFR	
CAV DATE	04.03.2025
Uploading Date	11.04.2025
Transmission Date	