$~104 to 107

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

\+ W.P.(C) 9445/2016, CM APPLs. 37829/2016 & 25650/2022

HIND CONSTRUCTION CO. .....Petitioner

Through: Ms.Anusuya Salwan, Ms.Nikita Salwan, Mr.Rachit Wadhwa and Ms.Sonika Singh, Advs.

versus

SOUTH DELHI MUNICIPAL CORPORATION AND ORS .....Respondents

Through: Mr.Prasanta Varma, ASC with Ms.Prativa Rani Varma and Mr.Rakesh Kumar, Advs.

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\+ W.P.(C) 9448/2016, CM APPLs. 37841/2016 & 25646/2022

HIND CONSTRUCTION CO .....Petitioner

Through: Ms.Anusuya Salwan, Ms.Nikita Salwan, Mr.Rachit Wadhwa and Ms.Sonika Singh, Advs.

versus

NORTH DELHI MUNICIPAL CORPORATION AND ORS .....Respondents

Through: Mr.Tushar Sannu. SC for MCD.

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\+ W.P.(C) 4926/2019 & CM APPL. 25651/2022

M/S KHAJAN SINGH .....Petitioner

Through: Ms.Anusuya Salwan, Ms.Nikita Salwan, Mr.Rachit Wadhwa and

Ms.Sonika Singh, Advs.

versus

DIRECTOR (DEMS) NORTH DELHI MUNICIPAL CORPORATION AND ORS. .....Respondents

Through: Mr.Tushar Sannu, SC for MCD.

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\+ W.P.(C) 4965/2019 & CM APPL. 25659/2022

M/S KHAJAN SINGH .....Petitioner

Through: Ms.Anusuya Salwan, Ms.Nikita Salwan, Mr.Rachit Wadhwa and Ms.Sonika Singh, Advs.

versus

SOUTH DELHI MUNICIPAL CORPORATION AND ORS. .....Respondents

Through: Mr. Siddhant Nath, SC along with Mr. Bhavishya Makhija, Adv. for MCD.

CORAM:
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% 07.08.2024

1. The petitioners in this batch of writ petitions are praying for the following directions:-

> *"In the facts and circumstances hereinabove stated, the Petitioner most humbly prays that this Hon'ble Court may be pleased to:-*
>
> *(a)issue a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the Respondents to release the amount of Rs.70,02,956/- (Rupees Seventy Lakhs Two Thousand Nine Hundred And Fifty Six Only) being alleged dues on service tax, illegally deducted against monthly bills of the petitioner for the period from*

April 2012 to June 2016;

(b)issue a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondents to release the amount of 44,10,202/- illegally deducted on account of escalation of labour charges,

(c)issue a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondents release payment against the bills for the months of July & August 2016 i.e. an amount of Rs. 66,32,943/-illegally withheld by the Respondents;

(d)issue a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondents release the amount of Rs.1,26,557/- illegally withheld from the bills;

(e)issue a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondents to pay interest @12% on the delayed payments of bills by the respondents to the petitioner,

(f) issue a writ in the nature of mandamus or any other appropriate writ, order or direction, directing the respondents to pay interest @ 12% on currently withheld amount that are due and payable by the respondents to the petitioner;

(g)issue a writ in the nature of prohibition or any other appropriate writ, order or direction, directing the respondents to desist from withholding any sum towards alleged service tax or otherwise from the bills of September 2016 onwards as the same are due and payable by the respondents

(h)issue a writ in the nature of mandamus or any other appropriate writ, order or diction, directing the Respondents to make monthly payment against the bills raised;

(i) pass any other or further order which this Hon'ble Court may deem fit and proper in the interest of justice.

2. The facts are extracted from W.P.(C) 9445/2016, which would indicate that on 15.03.2012, Municipal Corporation of Delhi (MCD) invited offer for hiring of LMV(Small) with auto tipping facility with driver for

narrow lanes with one labour, T&P fuel, lubricant for lifiting/collecting of garbage/malba/drain silt etc. upon full load and dumping the same in the nearby designated site with minimum travelling distance upto 30 km per day with 8 hours working.

3. The petitioner appears to be the successful bidder of hiring of Auto-tippers to be deployed in Najafgarh Zone. The petitioner quoted a rate of Rs.1971/- per day per vehicle. On the basis of the acceptance of the petitioner's bid, a work order came to be issued to the petitioner on 02.06.2012. The petitioner, thereafter, deployed 46 vehicles in Najafgarh Zone and accordingly, started the work in the concerned zone.

4. According to the petitioner, in the month of April 2015, the MCD withheld the contractual payment which resulted in causing various operational inconveniences to the petitioner. Thus, the petitioner made a representation to ascertain the cause of withholding and on inquiry, it was found that some excess payment came to be made to the petitioner, as has been pointed out in the audit.

5. The said excess payment is stated to have been made on account of service tax and escalation of labour rate. Since the petitioner made various representations for the release of the payment under the aforenoted two categories and since the same was not acceded to, the petitioner approached this Court in the instant writ petition seeking for the aforesaid relief.

6. The respondent-MCD has filed its counter-affidavit and has opposed the submissions made by the petitioner.

7. In paragraph no.6 of the counter-affidavit, the respondent-MCD has taken a position that during the audit of the year 2013-2014, it was revealed that the Department has released excess and undue amount on account of

escalation of labour rates amounting to Rs.35,77,864/- as well as an irregular sum amounting to Rs.59,75,224/- was released on account of service tax.

8. The respondent-MCD has taken the following position in terms of paragraph no.7 of its counter-affidavit:-

> *"7. That the Petitioner firm aggrieved with the audit conducted by the department and withholding the excess amount that was paid, the Petitioner filed the present Writ Petition to release Rs.70,02,956/- from monthly bills with respect to service tax and Rs 44,10,202/- with respect to escalation of labour charges and Rs: 1,26,557/- with respect to withheld amount and to release payment against the bills for the months of July & August 2016 of Rs 66,32,943."*

9. At the outset, the Court takes note of the decision passed by this Court in W.P.(C) 12084/2016 titled as ***Metro Waste Handling Pvt. Ltd v. SDMC,*** wherein, in terms of the final decision dated 12.05.2020, this Court considered almost a similar controversy with respect to the deduction of service tax. Paragraph nos.2 to 4 of the aforesaid decision reads as under:-

> *"2. The issue revolves around the act of the respondent in deducting the service tax amounts from the consideration payable to the petitioner on the alleged ground that the petitioner was liable to pay service tax under the contract but was exempted and hence, the consideration payable by the respondent gets reduced.*
>
> *3. As per the petitioner, the respondent has withheld a sum of Rs.l,97,00,109/- towards the element of service tax from the running account bills raised by the petitioner for the period w.e.f. June, 2012 to May, 2016.*
>
> *4. The case of the petitioner is that it was providing the services of lifting/collecting of municipal solid waste/garbage/malba/drain silt etc. and dumping the same to nearby designated site. It is pleaded that the services provided by the petitioner to the respondent under the said work order are exempted from taxable services as the same form part of the exempted list of services under section 93 of the Finance Act, 1994. It is also pleaded that the service tax was not applicable on the services provided by the petitioner to the respondent either at the time of award of the contract or presently."*

10. The Court, after a detailed discussion, in concluding paragraph nos.29

and 30 has held as under:-

> *"29. Hence, normally a writ petition would not lie for recovery of money. However, depending on the facts and circumstances of a case, the power to direct refund can be exercised sparingly. In my opinion the facts of this case warrant exercise of this power to direct the respondent to release amounts wrongly withheld for a non-existing service tax. The petitioner was the lowest bidder at Rs.1972/- per vehicle per day. This amount after negotiations was reduced to Rs.1934/- per day. When the tender was floated on 15.03.2012 or when the negotiation of rates took place or on 02.06.2012 when the work order was issued or on 27.08.2012 when the Agreement was executed, there was no service tax leviable on Service of Waste Collection or disposal. Simply because the existing position was re-interacted by the State by issue of a notification dated. 20.06.2012 did not warrant the act of the respondent to in 2015 claim refund of payments already made on the plea that the petitioner is wrongly being paid an amount for service tax. The respondent has acted in a grossly arbitrary manner and cannot justify withholding the said amount.*
> *30. Accordingly, in my opinion, the respondent have acted illegally, wrongly and malafidely withholding the amount on the alleged ground that service tax is not applicable to the agreed rate. A writ is issued to the respondent directing release all pending payments to the petitioner deducted on the ground of non-payment of service tax. Needful be done within two months from today."*

11. On examination of the facts and situation, the Court finds that so far as the controversy with respect to deduction of service tax is concerned, the same stands covered by the decision in the case of ***Metro (supra)***. According to the petitioners, this batch of writ petitions is also entitled for the similar relief. Accordingly, it is directed that the withheld amount of the service tax be released in favour of the petitioners within two months from today.

12. So far the relief with respect to the difference of labour charge is concerned, the learned counsel appearing for the petitioners prays for liberty to take appropriate remedy in accordance with law.

13. The Court, therefore, reserves the aforesaid liberty in favour of the petitioners.

14. Accordingly, with the aforesaid observations, the instant writ petition along with pending application stands disposed of.

PURUSHAINDRA KUMAR KAURAV, J

AUGUST 7, 2024/MJ