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

Date of Decision: 12th February, 2025

\+ **SERTA 3/2025 & CM APPL. 8378/2025**

PRINCIPAL COMMISSIONER, CENTRAL TAX COMMISSIONERATE, GST DELHI WEST .....Appellant

Through: Ms. Anushree Narain, Sr. SC with Mr. Ankit Kumar, Adv. (M: 9910014337)

versus

M/S ALKARMA .....Respondent

Through: Mr. Kamal Aggarwal, Adv.

CORAM:
JUSTICE PRATHIBA M. SINGH
JUSTICE DHARMESH SHARMA

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.

CM APPL. 8377/2025 (for exemption)

2. Allowed, subject to all just exceptions. Application is disposed of.

SERTA 3/2025 & CM APPL. 8378/2025

3. The present appeal has been filed under Section 35 G of the Central Excise Act, 1944 challenging the impugned order dated 4th June, 2024. Vide the said order it has been held by the ld. CESTAT that the Show Cause Notice (hereinafter "*SCN*") dated 11th February, 2009 stood quashed and therefore, the discharge of the said SCN was held to be in accordance with law.

4. The matter has a chequered history. The Respondent was registered with the Service Tax Department as of 12th April, 2005. The Respondent was engaged in the business of fabrication and fixing of aluminium window/doors, glazing, cladding and partition works *etc.,* falling under completion and finishing services in relation to building or civil structures.The Respondent

had availed CENVAT credit on inputs and input services as per their ST-3 returns for the period 10th September, 2004 to 31st March, 2007.

5. A SCN was issued on 11th February, 2009 by which a demand of Rs. 8,51,54,804/- was raised against the Respondent. The said SCN was then challenged by the Respondent in ***W.P.(C) 5666/2010*** titled ***M/s Alkarma v. UOI & Ors.*** The said writ petition was decided by the Coordinate Bench of this Court on 8th December, 2016, which quashed the impugned SCN, following the decision in ***Era Infra Engineering Ltd. vs. Union of India*** [***W.P.(C) 3048/2008***] and ***Y.F.C Projects Ltd. vs. Union of India*** [***W.P.(C) 1342/2008***]. The Court therein observed as under:

> "*The issue involved in this petition which seeks multiple reliefs is whether the show cause notice dated 11.02.2009 calling upon the petitioner why it should not be proceeded against for wrongly availing the benefit under Notification Nos.15/2004-ST dated 10.09.2004, 18/2005-ST dated 7.6.2005 and 1/2006-ST dated 1.3.2006 and Works Contract (Composition Scheme for Payment of Service Tax), Rules, 2007 should not be drawn. The show cause notice recites that the petitioner was availing a self assessment procedure and had not disclosed that it was providing only completion and finishing services in relation to building or civil structures and that it had received materials such as glass and aluminium free of cost from their clients and that value of such materials was not added and disclosed to the service tax authorities while reporting taxable turn over. The petitioner also impugns a Circular dated 4.1.2008, inasmuch as it clarifies that goods free of cost would also be leviable to service tax.*
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> *In view of the above rulings as well as the judgments of this Court in Era Infra Engineering Ltd. v. UOI, W.P.(C)3048/2008, decided on 17.10.2016, this writ petition has to succeed. The impugned show cause notice*

is hereby quashed. The respondents are directed to proceed strictly in accordance with the directions in Era Infra Engineering Ltd. and Y.F C. Projects Pvt. ltd. (supra) and exclude the value of free materials used by the petitioner in its commercial/business activities.
The writ petition is allowed in the above terms. There shall be no order as to costs."

6. The above order was then challenged before the Supreme Court by the Department in ***SLP(C) No.026491/2017*** and the same was tagged along with the lead matter, *i.e.,* ***Civil Appeal Nos.1335-1358/2015*** titled ***Commissioner of Service Tax Etc. v. M/s. Bhayana Builders (P) Ltd. Etc.***. The Supreme Court vide judgment dated 19th February, 2018, decided the question of law in the above stated matters *i.e.,* whether a service which has been provided free of cost or material which has been provided free of cost, would be included in the gross value for the purposes of service tax or not. The said issue was decided in favour of the assessees. The relevant portion of the judgment has been extracted below:

11) As already pointed out in the beginning, all these assessees are covered by Section 65(25b) of the Act as they are rendering 'construction or industrial construction service', which is a taxable service as per the provisions of Section 65(105)(zzq) of the Act. The entire dispute relates to the valuation that has to be arrived at in respect of taxable services rendered by the assessees. More precisely, the issue is as to whether the value of goods/materials supplied or provided free of cost by a service recipient and used for providing the taxable service of construction or industrial complex, is to be included in computation of gross amount charged by the service provider, for valuation of taxable service. For valuation of

taxable service, provision is made in Section 67 of the Act which enumerates that it would be 'the gross amount charged by the service provider for such service provided or to be provided by him'. Whether the value of materials/goods supplied free of cost by the service recipient to the service provider/assessee is to be included to arrive at the 'gross amount', or not is the poser. On this aspect, there is no difference in amended Section 67 from unamended Section 67 of the Act and the parties were at ad idem to this extent.

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18) In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the learned counsel for the Revenue as it says '33% of the gross amount 'charged' from any person by such commercial concern for providing the said taxable service'. According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient. Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'. Thirdly, even when the explanation was added vide notification dated March 01, 2005, it only explained that the gross amount charged shall include the value of goods

and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'.

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20) It is to be borne in mind that the notifications in questions are exemption notifications which have been issued under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any 'taxable service' defined in any of sub-clauses of clause (105) of Section 65. Thus, exemption under Section 93 can only be granted in respect of those activities which the Parliament is competent to levy service tax and covered by sub-clause (zzq) of clause (105) and sub-clause (zzzh) of clause (105) of Section 65 of Chapter V of the Act under which such notifications were issued.

21) For the aforesaid reasons, we find ourselves in agreement with the view taken by the Full Bench of CESTAT in the impugned judgment dated September 6, 2013 and dismiss these appeals of the Revenue.

7. After the decision of the Supreme Court on 19th February, 2018, the Adjudicating Authority proceeded in the SCN and passed the Order-in-Original dated 4th October, 2018, by which the SCN was quashed and the proceedings were dropped. This order reads as under:-

"6 The Department filed a Special Leave Petition

SLP (C) No. 026491/2017. In the Hon'ble Supreme Court of India against the above Order of the Hon'ble High Court of Delhi. The Supreme Court of India disposed of the said SLP (C) on 19 02.2018 by dismissing the same.

7. I find that in view of the above Order of the Hon'ble Supreme Court of India, the matter has reached its finality and therefore, the proceedings initiated vide issuance of the impugned Show Cause Notice are liable to be dropped.

8. I therefore pass the following order:-

ORDER

The Show Cause Notice C No. DL/ST/AE/lnquiry/247/Gr. IV/08/4080 dated 12.02.2009
issued to M/s Alkarma, registered at 57, Najafgarh Road (Rama Road), New Delhi - 110015 is hereby dropped."

8. The said order was challenged by the Department before the CESTAT, which vide the impugned order dated 4th June, 2024, also agreed that the quashing of the SCN would in fact mean that the entire SCN is quashed. Relevant portion of the order has been extracted below:

"6. The Commissioner, after noticing the judgment of the Delhi High Court and the fact that the Civil Appeal filed by the department to assail the aforesaid judgment was dismissed, proceeded to discharge the show cause notice issued to the respondent for the reason that the show cause notice itself had been quashed.

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9. lt is not possible to accept the contention advanced by the learned authorized representative appearing for the department. Once the show cause notice had been quashed by the Delhi High Court, nothing remained to be ,adjudicated upon by the Commissioner, The Commissioner, therefore, committed no illegality in discharging the show cause notice.

10. The appeal is, accordingly, dismissed."

9. Ld. Counsel for the Appellant submits that the High Court had given liberty to the Department to proceed strictly in accordance with the direction in ***Era Infra Engineering Ltd. vs. Union of India (Supra)***. It is the submission of Ms. Narain, ld. Counsel that the SCN had various issues, and demands for which were raised on different counts. Only the issue relating to free supply of materials was discussed in these judgments and none of the other issues were ever considered. Accordingly, the adjudicating authority committed an error in holding that the proceedings cannot continue against the Respondent.

10. On the other hand, ld. Counsel for the Respondent/Assessee submits that if the SCN is quashed, no proceedings can go on in respect of the SCN.

11. Heard. A perusal of the order dated 8th December, 2016, passed by the Coordinate Bench of this Court would show that the SCN was quashed, but the Department was permitted to proceed in accordance with the decision in ***Era Infra Engineering Ltd. vs. Union of India (Supra)*** and exclude the value of free materials used by the Assessee.

12. The liberty which was given to the Department in effect meant that the Court was conscious of the fact that there were various other components of demands which were raised by the Department and it is the admitted position that these components for eg., - in respect of short payment of Service Tax, education cess, treatment of secondary and higher education cess etc. have all not been adjudicated at all till date.

13. Both the adjudicating authority and the CESTAT were incorrect in holding that the SCN having been quashed, none of the other demands would also be liable to be adjudicated. Clearly, the decision of the Division Bench

of this Court is not to the said effect. In fact, it permitted the Department to proceed further strictly in accordance with the judgment and exclude the value of free materials. All the other demands which are raised, accordingly, deserve to be adjudicated on facts and in accordance with law.

14. The Respondent shall be given an opportunity, if required for responding to all the other demands raised in the SCN and if a personal hearing is sought, the same shall also be granted. It is made clear that this Court has not opined on any of the other issues or the demands raised in the said SCN in Paragraph 30. The adjudication of the other demands in Paragraph 30(ii) to 30(x) shall now be on merits.

15. Accordingly, the present appeal is disposed of. Pending applications, if any, are also disposed of.

PRATHIBA M. SINGH
JUDGE

DHARMESH SHARMA
JUDGE

FEBRUARY 12, 2025/*gunn/ks*