# Thomas John vs the Commissioner of Central Excise

Thomas John vs the Commissioner of Central Excise

**SooperKanoon Citation** : sooperkanoon.com/1390670

**Court** : Kerala

**Decided On :** Jan-24-2023

**Judge** : Honourable Mr. Justice Amit Rawal

**Appeal No.** : WP(C)/19968/2016

**Appellant** : Thomas John

**Respondent** : The Commissioner of Central Excise

**Judgement** :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE AMIT RAWAL TUESDAY, THE 24TH DAY OF JANUARY 2023 / 4TH MAGHA, 1944 WP(C) NO. 19968 OF 2016 PETITIONER: THOMAS JOHN, AGED 54 YEARS, PROPRIETOR, MELTECH ENTERPRISES, SHALON, KALLARA ROAD, EROOR NORTH P O, THIRUPUNITHURA, PIN 682306. BY ADVS.SRI.K.SASIKUMAR SRI.S.ARAVIND SRI.P.S.RAGHUKUMAR RESPONDENTS: 1 THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX(AUDIT) C R BUILDNG, I S PRESS ROAD, KOCHI 682018 2 THE COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX C R BUILDING, I S PRESS ROAD, KOCHI PIN 682018. 3 ASSISTANT

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX, MUVATTUPUZHA DIVISION, T B JUNCTION, P B NO 44 , MUVATTUPUZHA - 1 4 ASSISTANT COMMISSIONER OF CENTRAL EXCISE, AUDIT CR-III, OFFICE OF THE COMMISSIONER , C R BUILDING, I S PRESS ROAD, KOCHI 682018 5 SUPERINTENDENT OF CENTRAL EXCISE, TRINPUNITHURA RANGE, TRIPUNITHURA 6 SUPERINTENDENT OF CENTRAL EXCISE, AUDIT PARTY NO 22 OFFICE OF THE ASSISTANT COMMISSIONER OF CENTRAL EXCISE (AUDIT)CENTRAL EXCISE BHAVAN, KATHRIKADAVU, KOCHI 682017

7 DIVISIONAL RAILWAY MANAGER, SOUTHERN RAILWAY , THIRUVANANTHAPURAM DIVISION, THIRUVANANTHAPURAM-14 WP(C) NO. 19968 OF 2016 -2- 8 DIVISIONAL RAILWAY MANAGER (WORKS) SOUTHERN RAILWAY , TRIVANDRUM DIVISION, TRIVANDRUM -14 BY ADV. SRI.SREELAL N WARRIER, SC, CENTRAL EXCISE SRI.THOMAS MATHEW NELLIMOOTTIL,SC,CB EX THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 24.01.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: WP(C) NO. 19968 OF 2016 -3-

## JUDGMENT

Present writ petition is directed against the communication of Assistant Commissioner of Central Excise and Service Tax dated 02.05.2016 Ext.P5 making petitioner liable for payment of service tax of an amount of Rs.71,89,140/- (Rupees Seventy one lakh eighty nine thousand one hundred and forty only) for the period 01.10.2010 to 20.12.2010 and 01.07.2012 to 31.03.2015.

2. Petitioner is the proprietor of Meltech

Enterprises (hereinafter called the assessee), an approved Railway Contractors engaged in providing various construction/erection works for Indian Railways on the basis of works contract awarded by respondent Nos.7 and 8, i.e., Divisional Railway Manager and Divisional Railway Manager (Works), Southern Railway, Trivandrum Division. Petitioner is also registered with the Commercial Taxes

Department, Government of Kerala as works contractor with Registration No.32072092975. The contract work undertaken for construction/erection of WP(C) NO. 19968 OF 2016 -4- railway siding yards with the Bharat Petroleum Corporation Ltd. was exempted, however the petitioner registered under Section 69 of the Finance Act, 1994 and was allotted a registration No.ACNPJ 8541 QSD002 dated 05.06.2015 and thereafter, have been paying service tax for the works carried out within the yard of Bharat Petroleum Corporation Ltd. On 09.11.2015, Superintendent of Central Excise, Audit Party No.22, inspected the premises of the assessee and verified the records. Said verification continued till 11.11.2015. On the basis of the aforementioned verification a communication dated 04.12.2015 Ext.P1 was received wherein it was pointed out that for the period 01.04.2010 to 30.04.2015, petitioner undertook the work but not paid the service tax including the service tax on labour charges. The aforementioned letter, was duly replied by the petitioner vide communication dated 08.12.2015 Ext.P2, by giving a reference of Clause 14 of notification No.25/2012 dated 20.06.2012 Ext.P3, whereby various works for certain institutions were brought under the WP(C) NO. 19968 OF 2016 -5- exemption clause. Despite having given detailed reasons respondent No.6 again sent a communication dated 09.12.2015 Ext.P4 directing the assessee to pay a sum of Rs.71,89,140/- (Rupees Seventy one lakh eighty nine thousand one hundred and forty only) along with the interest and penalty for the works undertaken for Railways. Communication Ext.P4 dated 09.12.2015 was followed by another communication dated 02.05.2016, audit report of the records of the petitioner assigning the reasons for charging the amount of Rs.71,89,140/- towards the service tax.

3. Learned counsel appearing on behalf of the

petitioner submitted that Section 65(105)(zzzza) of Finance Act, 1994 excluded the service of work contract provided to Indian Railways. The aforementioned section was in pursuance to clause 14 of the notification dated 20.06.2012 Ext.P3.

4. As per Section 2(31) of the Railways Act, 1989

Railways means a railway or any portion of a railway for WP(C) NO. 19968 OF 2016 -6- the public carriage of passengers or goods, and includes all lands within the fences or other boundary marks; all lines of rails, sidings or yards or branches; all electric traction equipments, power supply and distribution installation; all rolling stock, stations, offices, warehouses, wharves, workshops, etc., In view of the definition of original works under Rule 2A of Service Tax (Determination of Value) Rules, 2006 as well as the definition of Railways under Section 2(31) of the Railways Act, 1989, the construction activities of the assessee under works contract for Railways, stood excluded from the purview of Service Tax upto 30.06.2012 and after 01.07.2012 completely exempted from Service Tax under Ext.P3 notification.

5. On the other hand, Mr.Sreelal Warriar, learned

Counsel appearing on behalf of the respondents countered the argument on the ground that assessee also undertook works contract for the construction/erection of Railway siding with Bharat Petroleum Corporation Ltd., yards. The said activity fell outside the Indian Railway WP(C) NO. 19968 OF 2016 -7- property and on that ground, was registered under Section 69 of the Finance Act 1994. Based on the detailed audit verification of the records carried out under Rule 5A of Service Tax Rule, 1994 and Chapter 8 of the Central Excise and Service Tax Audit Manual, 2015 Ext.P1 the communication for initiation of Audit Verification was issued by respondent No.4 to the assessee. Exts.P1, P4 and P5 clearly disclose the basis of the conclusion as to how and why the stand taken by the petitioner was unsustainable and without any legal basis. Contention of the petitioner having undertaken original work and not maintenance and repair, was not acceptable on the basis of contract between the petitioner and the railway, which was extensively examined by the audit party and urged this Court for upholding the order challenged by dismissing the writ petition.

6. I have heard learned counsel for the parties and appraised the paper book.

7. Section 65(105)(zzzza) of the Finance Act, 1995 WP(C) NO. 19968 OF 2016 -8- as it was in vouge in 30.06.2012 reads as under:

6.It is submitted that the petitioner clearly stated in the Ext.P2 reply that the works contract service provided to Indian Railways by the assessee stands excluded from the purview of the service tax by the specific exclusion provided in Section 65(105)(zzzza) of Finance Act 1994, which reads as follows:- (zzzza) to any person by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. Explanation. -For the purposes of this sub-clause, works contract means a contract wherein,-

(I) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out, -

(a) erection, commissioning or installation of

plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning WP(C) NO. 19968 OF 2016 -9- including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape stair cases or elevators; or (b)construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or (d)completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning

(EPC) projects;

8. Thereafter, exclusion clause also regarding the

construction work provided for Indian Railways became applicable after 01.07.2012 as per the clause 14 of the notification dated 20.06.2012 Ext.P3. Same reads as under: Ministry of Finance (Department of Revenue) WP(C) NO. 19968

OF 2016 -10- Notification No.25/2012-Service Tax New Delhi, the 20th June, 2012

> G.S.R..(E).-In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994)(hereinafter referred to as the said Act) and in supersession of notification number 12/2012-Service Tax, dated the 17th March, 2012, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (I) vide number G.S.R.210(E), dated the 17th March, 2012, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the following taxable services leviable thereon under section 66B of the said Act.

..14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-

(a) an airport, port or railways, including monorail or metro;

(b) a single residential unit otherwise than as a part of a residential complex;

(c) law-cost houses up to a carpet area of 60

square metres per house in a housing project approved by competent authority empowered under the Scheme of Affordable Housing in Partnership framed by the Ministry of Housing and Urban Poverty Alleviation, Government of WP(C) NO. 19968 OF 2016 -11- India;

(d) post-harvest storage infrastructure for agricultural produce including a cold storages for such purposes; or

(e) mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages;

9. Section 2(31) of the Railways Act, 1989 and Rule 2A of Service Tax (Determination of Value) Rules, 2006 reads as under: Section 2(31) of the Railways Act, 1989 Railway means a railway, or any portion of a railway, for the public carriage of passengers or goods, and includes-

(a) all lands within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;

(b) all lines of rails, sidings, or yards, or branches used for the purposes of, or in connection with, a railway;

(c) all electric traction equipments, power supply and distribution installations used for the WP(C) NO. 19968 OF 2016 -12- purpose of, or in connection with, a railway;

(d) all rolling stock, stations, offices, warehouses,

wharves, workshops, manufactories, fixed plant and machinery, roads and streets, running rooms, rest houses, institute, hospitals, waterworks and water supply installations, staff dwelling and any other works constructed or the purpose of, or in connection with, railway;

(e) all vehicles which are used or any road for the purposes of traffic of a railway and owned, hired or worked by a railway; and

(f) all ferries, ships, boats and rafts which are

used any canal, river, lake, or other navigable inland waters for the purposes of the traffic of a railway and owned, hired or worked by a railway administration, but does not include -

(i) a tramway wholly within a municipal area; and

(ii) lines of rails built in an exhibition ground, fair, park or any other place solely for the purpose of recreation;

In view of the definition of original works under Rule 2A of Service Tax (Determination of Value) Rules, 2006 as well as the definition of Railways under Section 2(31) of the Railways Act, 1989, WP(C) NO. 19968 OF 2016 -13- the construction activities of the assessee under works contract for Railways, stand excluded from the purview of Service Tax upto to 30-6-2012 under Section 65(105)(zzzza) of Finance Act, 1994 and after 1-7-2012, completely exempted from Service Tax under Ext. P3 notification. Rule 2A of Service Tax (Determination of Value) Rules, 2006 Original Works means -

(i) All new constructions;

(ii) All types of additions and alterations to abandoned or damaged structures on land that are required to make them workable.

(iii) Erection, commissioning or installation of plant, machinery or equipment or structures, whether prefabricated or otherwise;

10. Though the respondents attempted to draw a

different meaning by taking into consideration the definition of Original Works in Rule 2A to connote all new constructions, additions and alterations to be abandoned or damage structures to be outside the preview of the Section 65(zzzza) or of Clause 14 of the notification dated 30.06.2012, but I am afraid the said attempt is wholly WP(C) NO. 19968 OF 2016 -14- erroneous and unsustainable. Plain reading of the provisions of Section 65 and the Clause 14 of the notification unambiguously provided that the work contract would mean transfer of the property in goods involved in execution of the contract erection, commissioning and installation of plant and machinery, construction of new building of civil structure, construction of new residential complex, completion of finishing services, term key projects. Erection and commission in installation cannot be strictly construed to be read as not including the repair and maintenance. Any commission and erection of the building also include maintenance and repair. It is not the case of the respondents that petitioner deviated from the work contract allotted to them and undertaken extra work of maintenance and repair of old construction.

11. For the reason aforementioned, the audit report

Ext.P5 dated 02.05.2016 and the demand raised is wholly preposterous, aberrative and fallacious, accordingly set aside. Writ petition is allowed. WP(C) NO. 19968 OF 2016 -15-

12. Petitioner is stated to have deposited an

amount of Rs.59,405/- (Rupees Fifty nine thousand four hundred and five only) and Rs.56,318/- (Rupees Fifty six thousand three hundred and eighteen only) as noticed in Ext.P1 letter, the same is ordered to be either refunded or adjusted in future assessments. Sd/- AMIT RAWAL JUDGE vv WP(C) NO. 19968 OF 2016 -16- APPENDIX OF WP(C) 19968/2016 PETITIONER EXHIBITS EXHIBIT P1 A TRUE COPY OF THE LETTER NO APR NO 149/ST/22/2015-16 DTD 4/12/2015 OF THE 6TH RESPONDENT EXHIBIT P2 A TRUE COPY OF THE REPLY DTD 8/12/2015 FURNISHED THE 6TH RESPONDENT BY THE PETITIONER EXHIBIT P3 A TRUE COPY OF THE NOTIFICATION NO OF FINANCE ACT, 1994 EXHIBIT P4 A TRUE COPY OF THE LETTER NO APR 149/ST/22/2015-16 DTD 9/12/2015 OF THE 6TH RESPONDENT EXHIBIT P5 A TRUE COPY OF TEH COMMUNICATION ISSUED BY THE 3RD RESPONDENT UNDER REFERENCE AR NO 149/ST/22/2015-16 DTD EXHIBIT P6 A TRUE COPY OF THE SUBMISSION MADE BY

THE ASSISTANT COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX, KOLLAM, BEFORE THE CENTRAL INFORMATION COMMISSION, NEW DELHI THROUGH LETTER C NO. IV/16/35/2014 RTI DATED 24.1.2017. EXHIBIT P7 A TRUE COPY OF THE ORDER NO. 06/2015-16(AA) DATED 05.02.2016 ISSUED BY THE ADDITIONAL COMMISSIONER OF CENTRAL EXCISE, CUSTOMA AND SERVICE TAX, THIRUVANANTHAPURAM FROM FILE C. NO. IV/16/68/2015-RTI.