

(2013) 01 GUJ CK 0108
In the Gujarat High Court

Case No : Special Civil Application No. 6948 of 2008

Aarvee Denims and Exports Ltd. and Another

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 09-01-2013

Acts Referred:

Citation : (2013) 61 VST 313

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; Y.N. Ravani, for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—The petitioners have made the following substantive prayers in this petition: 17. (A) That your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction or order, striking down rule 2(1)(d)(iv) of the Service Tax Rules, 1994 as ultra vires the Finance Act, 1994, and ultra vires articles 14 and 19(1)(g) of the Constitution of India;

(B) That your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, direction or order, quashing and setting aside proceedings initiated vide show-cause notice F. No. STC/4207 O&A/2008 dated March 17, 2008 (annexure D).

In the instant case, the petitioners have challenged the show-cause notice proceedings dated March 17, 2008 annexed at annexure D to the petition. In such notice the respondents have called upon the petitioners to show cause why: (i) Services of foreign agents received by them should not be considered as taxable service under the category of business auxiliary service as defined under clause (105)(xxb) read with clause (19) of section 65 of the Finance Act, 1994, as amended, and why they should not be held as the "person liable for paying the service tax", as a person receiving taxable service in India, as defined under rule 2(1)(d)(iv) of the Service Tax Rules, 1994 as amended.

(ii) The total/gross amount of Rs. 5,59,45,812 paid towards brokerage/ commission to the foreign agents should not be considered as taxable value under the category of business auxiliary service for the period from July 1, 2003 to March 31, 2007 and service tax amounting to Rs. 56,93,236 should not be demanded and recovered from them u/s 73(1) of the Finance Act, 1994, invoking the larger period of five years, as discussed hereinabove.

(iii) Interest as applicable on the amount of service tax liability of Rs. 56,93,236 should not be paid by them for the delay in making the payment, u/s 75 of the Finance Act, 1994;

(iv) Penalty should not be imposed upon them u/s 76 of the Finance Act, 1994 for the failure to make the payment of service tax payable by them.

(v) Penalty should not be imposed upon them u/s 77 of the Finance Act, 1994 for the failure to file prescribed service tax return within the stipulated time.

(vi) Penalty should not be imposed upon them u/s 78 of the Finance Act, 1994 for suppressing the value of taxable services provided by them before the Department as discussed hereinabove with an intention to evade payment of service tax.

(vii) Penalty should not be imposed under the provisions of the erstwhile section 75A of the Finance Act, 2001 as much as they failed to make application for registration under the category of "business auxiliary service" within the stipulated time.

2. Such a demand is based on rule 2(1)(d)(iv) of the Service Tax Rules, 1994 and section 66A of the Finance Act, 1994 introduced with effect from April 18, 2006.

3. In short, controversy is with respect to the collection of service tax from the petitioners, who are recipients of taxable service from service provider situated outside India.

4. The case of the petitioners is that the authorities have no power to levy such service tax on the petitioners, who are service recipients as per rule 2(1)(d)(iv) of the Service Tax Rules and also as per subsequently introduced section 66A of the Finance Act, 1994 with effect from April 18, 2006.

5. We may record that a part of the demand raised in the show-cause notice relates to the period prior to April 18, 2006 and a part thereof relates to the later period.

6. Counsel for the petitioners drew our attention to the decision of the Bombay High Court in the case of Indian National Shipowners Association Vs. Union of India (UOI), wherein referring to and relying upon the decision of the apex court in the case of Indian National Shipowners Association Vs. Union of India (UOI), and the decision of the apex court in the case of Laghu Udyog Bharati and Another Vs. Union of India and Others, this court had upheld the decision of the

Tribunal quashing the service tax demand from service recipient, which arose prior to introduction of section 66A of the Finance Act, 1994 with effect from April 18, 2006.

7. In view of the above decision, counsel for the petitioners did not press prayer 17A of the petition and agreed to appear before the departmental authorities in the pending show-cause notice proceedings. He would, however, contend that any demand of service tax for the period prior to April 18, 2006 would not be sustainable. Whatever be the position after April 18, 2006, by virtue of introduction of section 66A of the Finance Act, 1994, for the earlier period, the demand would not be sustainable.

8. In view of the above developments, we allow the petitioners to appear before the adjudicating authority, who, we are sure, will grant a full hearing to the petitioners and take a final decision in accordance with law bearing in mind the observations made by this court in the case of *The Commissioner, Service Tax Vs. M/S Quintiles Data Processing Centre (I) Pvt. Ltd.*, and of the Bombay High Court in the case of *Indian National Shipowners Association Vs. Union of India (UOI)*, that may be applicable and brought to his notice.

9. All the contentions of the petitioners on all the issues in relation to the said show-cause notice, are kept open. With the above observations, this petition is disposed of.