

(2021) 04 DEL CK 0099

In the Delhi High Court

Case No : Civil Writ Petition No. 5766 Of 2019, Civil Miscellaneous Application
No. 25101 Of 2019

Back Office It Solutions Private Limited

APPELLANT

Vs

Union Of India & Ors

RESPONDENT

Date of Decision : 05-04-2021

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(f), 19(1)(g)
Place Of Provisions Of Service Rules, 2012 — Rule 9(b)
Service Tax Rules, 1994 — Rule 6A, 6A(1)(d), 6A(1)(f)
Central Goods and Services Tax Act, 2017 — Section 67(2), 70, 174
Central Excise Act, 1944 — Section 12F, 37B
Finance Act, 1994 — Section 65B(44), 82, 83
Income Tax Act, 1922 — Section 2(6A)(e), 5(8), 12(1B)
Income-tax Act, 1961 — Section 119

Citation : (2021) 04 DEL CK 0099

Hon'ble Judges : Rajiv Shakdher, J; Talwant Singh, J

Bench : Division Bench

Advocate : Puneet Agrawal, Deepak Anand, Purvi Sinha, Hemlata Rawat, Apoorv Kurup, Abhishek Khanna, Satish Aggarwala, Gagan Vaswani, Jasneet Jolly, Sonu Bhatnagar, Venus Mehrotra, Anushree Narain, Mallika Joshi, Vaibhav Joshi

Final Decision : Disposed Of

Judgement

Rajiv Shakdher, J

1. Mr. Puneet Agrawal, who appears on behalf of the petitioner-company, says that, although several grievances and resultant reliefs have been sought, in the instant writ petition, for the moment, the grievance and consequent relief sought, is confined to the failure on the part of the contesting respondents [i.e., respondent nos. 2, 4 and 5] to scrupulously adhere to the provisions of the instruction dated 21.12.2015 bearing F. No. 1080/09DLA/MISC/15/757 [in short "2015 instruction"] and the Master Circular dated 10.03.2017 [in short "2017 Master Circular"], issued by Central Board of Excise & Customs, Department of Revenue, Ministry of Finance, Government of India [presently, known as "Central

Board of Indirect Taxes & Customs"]

1.1. According to Mr. Puneet Agrawal, the impugned show cause notice cannot survive given the provision contained in paragraph 5 of the 2017 Master Circular [and the pari materia provision made in the 2015 instruction] for mandatory consultation with the assessee before issuance of a show cause notice.

2. It is, thus, Mr. Puneet Agrawal's submission that in terms of paragraph 5 of the 2017 Master Circular, the contesting respondents were mandatorily required to have a pre-show cause notice consultation with the petitioner-company.

2.1 It is submitted that since a pre-show cause notice consultation was not held, in terms of the judgment of the coordinate bench of this court, rendered in *Amadeus India Pvt. Ltd. vs. Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate*, 2019 SCC Online Del 8437, the impugned show cause notice dated 23.04.2019 deserves to be quashed.

2.2 It is also Mr. Puneet Agrawal's submission that the only exception to the pre-show cause notice consultation is that either the case set up is one concerning preventive action or should be relatable to an offence committed by the noticee.

2.3. Mr. Puneet Agrawal contends that the petitioner company's case falls in neither category.

3. Mr. Satish Aggarwala, who appears on behalf of respondent nos. 2, 4 and 5, i.e., the contesting respondents, contends that the petitioner's case falls in the first exception, which relates to preventive action and therefore, the 2017 Master Circular has no applicability in the instant case.

3.1 In this context, Mr. Satish Aggarwala has drawn our attention to paragraph 3 of the counter-affidavit, which is, extracted hereafter:

"3. At the outset, it is submitted that reliance on the case of *M/s Amadeus India Pvt. Ltd. Vs. Principal Commissioner* by this Hon'ble Court in W.P. (C) No.914/2019 is not correct. In this regard, attention is invited to Instruction No. 1080/09/DLA/MISC/15/75 dated 21.12.2015 (Annexure-B) issued by Member & Spl. Secretary to GOI (L & J/IT) CBEC (now CBIC), where in para '5' under the heading 'Preventive Action', the following was provided "Pre show cause notice consultation with the Principal Commissioners and Commissioners is being made mandatory prior to issue of SCN (Show Cause Notice) in the case of demands of duty above Rs. 50 lakhs (except for preventive/offence related SCN's).

(emphasis added)

Furthermore, Master Circular No. 1053/02/2017-CX dated 10.03.2017 (Annexure-C) vide its Para 5.0 provided "Consultation with the notice before issue of Show Cause Notice: Board has made pre show cause notice consultation by the Principal Commissioner/Commissioner prior to issue of Show Cause Notice in cases involving demands of duty above Rs. 50 lakhs (except for preventive/offence related SCN's) mandatory vide instruction issued from F.No. 1080/09/

DLA/MISC/15 dated December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice".

In the instant case, intelligence was gathered and developed by the officers of DGGI, JZU, Jaipur that M/s. Back Office IT Solutions

Private Limited, F-220-225, EPIP IT PARK Sitapura, Jaipur - 302022 ('M/s. BOISPL' in short) has indulged in non-payment of Service Tax on services provided to their associated concerns, in relation to online information and database access or retrieval in electronic form delivered through computer network over the internet from taxable territory to non-taxable territory, by considering their service as export, whereas the place of provision of said service is the place of service provider i.e. Jaipur (in taxable territory) in terms of provisions of clause (b) of Rule 9 of the Place of Provisions of Service Rules, 2012 read with clauses (d) & (f) of sub-rule (1) of Rule 6A of the Service Tax Rules, 1994 and they were required to pay Service Tax. M/s BOISPL had neither filed any Service Tax Returns nor paid applicable Service Tax thereon. Subsequently, search operations were carried out at various office premises of M/s BOISPL situated in Jaipur on 05.06.2018 under section 67(2) of the CGST Act, 2017 read with section 12F of the Central Excise Act, 1944 read with section 82 of the Finance Act, 1994 also read with Section 174 of the CGST Act, 2017. During the course of search, certain incriminating documents were seized in respect of evasion of Service Tax. Further, the Managing Director and Sr. Vice President of the company were summoned under Sections 70 and 174 of the CGST Act, 2017 read with Section 83 of the Finance Act, 1994 and accordingly statements of the said persons were recorded. Further, after completion of the investigation. Show Cause Notice dated 23.04.2019 was issued to M/s BOISPL for non-payment of Service Tax amounting to Rs. 18,80,00,266/- (including of Cesses) DGGI, JZU, Jaipur which is a Preventive Formation.

It is amply clear that Show Cause Notices where duty/tax exceeds Rs.50 lakhs, issued by and related to Preventive Formation, which undisputedly includes DGGI [(Directorate General of Goods and Services Tax Intelligence) earlier it used to be called as Directorate General of Central Excise Intelligence (DGCEI)], would fall under the exclusion category of the said Instruction dated 21.12.2015 and Master Circular dated 10.03.2017 of the Board. Therefore, placing reliance on the case of M/s Amadeus India Pvt. Ltd. to the facts of the instant case is not relevant."

3.2. A similar stand has been taken by the contesting respondents in paragraph 2 of their sur-rejoinder.

3.3. Pertinently, no other submission has been advanced on behalf of Mr. Satish Aggarwala.

4. In rejoinder, Mr. Puneet Agrawal contends that the petitioner-company is in

the business of providing accounting services to its clients which includes services such as software development, system analysis, Fund Accounting, NAV computation and reporting etcetera [hereafter referred to as "services"]. These services, according to him, are provided by the petitioner-company with the help of information technology tools. Mr. Agrawal also emphasizes that the petitioner-company, thus, exports the aforementioned services to two separate legal entities located outside India i.e. NAV Consulting Inc. USA [in short "NAV Consulting"] and NAV Fund Services (Cayman) Ltd. [in short "NAV Fund"].

4.1. Mr. Puneet Agrawal says, contrary to the claim of Mr. Satish Aggarwala that there is an attempt to evade service tax; the petitioner-company is not exigible to service tax. For this purpose, reliance is placed by him on Rule 6A of the Service Tax Rules, 1994 [in short "Service Tax Rules"] which concerns "Export of Services".

4.2. According to Mr. Puneet Agrawal, the reliance placed by the contesting respondents, on the provisions of Section 65B (44) Explanation-3(b) of Chapter V, Finance Act, 1994 [in short "Finance Act"] is misplaced as that provision applies where the services are provided by a person who has one establishment in the taxable territory and another establishment in a non-taxable territory.

4.3. Mr. Puneet Agrawal goes on to contend that the petitioner-company has been providing services, as indicated above, to two separate legal entities, i.e., NAV Consulting and NAV Fund, which are not the establishments of the petitioner-company. It is also Mr. Puneet Agrawal's submission that these two entities cannot be treated as "associate concerns" of the petitioner-company merely because the two persons who are directors in the petitioner-company, i.e., Shri Navratan Gupta and Mrs. Sudha Gupta are also the president/founder and the vice-president/co-founder, respectively, of NAV Consulting and NAV Fund.

4.4. Likewise, according to Mr. Puneet Agrawal, the relationship between the managing director of the petitioner-company one, Mr. Anil Agarwal and Shri Navratan Gupta and Mrs. Sudha Gupta can have no bearing on whether or not the petitioner-company is exigible to service tax.

4.5. In sum, Mr. Puneet Agrawal contends that the petitioner-company is exporting accounting services to two separate legal entities which are located outside the territory of the country. Thus, as per Mr. Puneet Agrawal, Rule 6A of the Service Tax Rules and Section 65B (44) Explanation-3(b) of the Finance Act can have no applicability in the instant case.

5. Having heard the learned counsel for the parties, we are of the view that what requires to be noticed, in the first instance, is the relevant paragraph contained in the 2017 Master Circular, which is, extracted hereafter:

"5.0 Consultation with the noticee before issue of Show Cause Notice : Board has made pre show cause notice consultation by the Principal Commissioner/Commissioner prior to issue of show cause notice in cases involving demands of

duty above Rs. 50 lakhs (except for preventive/offence related SCN's) mandatory vide instruction issued from F. No. 1080/09/DLA/MISC/15, dated 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice."

[Emphasis is ours]

5.1. A perusal of the aforesaid extract, taken from the 2017 Master Circular, would show that respondent no. 3 has made pre-show cause notice consultation by the Principal Commissioner/Commissioner before issuance of a show cause notice [in cases involving demands concerning duty above Rs.50,00,000/-] mandatory in line with the provisions of the 2015 instruction.

5.2. As noticed above, there are two exceptions to the pre-show cause notice consultation. First, where the matter concerns prevention and second, where the show cause notice relates to an offence said to have committed by the assessee.

5.3. Insofar as Mr. Satish Aggarwala's submission is concerned, which is, that this is a case in which preventive action is sought to be taken - in our view, this contention cannot be sustained for the reasons set forth hereafter. Firstly, the period qua which the instant show cause notice has been issued spans between 01.10.2013 and 30.06.2017. Secondly, a perusal of the impugned show cause notice would show that its import and scope is to bring the services rendered by the petitioner-company within the ambit of the Finance Act. By its very construct, the impugned show cause notice is not preventive; it seeks to progress the case set up by the contesting respondents that the services rendered by the petitioner-company to NAV Fund and NAV Consulting are exigible to tax.

6. The moot point over which the petitioner-company and the contesting respondents are at cross purposes is: as to whether the services offered by the petitioner-company to two entities located outside India fall within the ambit of Section 65B (44) Explanation-3(b) of the Finance Act. According to the contesting respondents, the recipients of the services are associate concerns and the aforementioned services are provided through a computer network, i.e., the internet from a taxable territory to a non-taxable territory.

6.1 The contesting respondents contend that the service provider is located in a taxable territory, i.e., Jaipur and, the recipients of service are its associate concerns, therefore, it is liable to pay service tax. In this context, the contesting respondents seek to place reliance on Rule 9(b) of the Place of Provisioning of Services Rules, 2012 [in short "POP Rules"] read with Rule 6A (1) (d) and (f) of the Service Tax Rules along with Section 65B (44) Explanation-3(b) of the Finance Act.

6.2. Therefore, whether or not the services rendered by the petitioner-company to two separate juridical entities outside India will be exigible to tax will fall

within the realm of adjudication, and certainly, would not bring the matter within the excepted category, i.e., preventive action in terms of paragraph 5 of the 2017 Master Circular. The allegation that the petitioner-company did not deliberately register itself with the concerned authority for the purposes of service tax and consequently, evaded payment of service tax are matters which will get sorted out if the contesting respondents seek and are able to inter alia obtain necessary information as to the true nature of the services rendered by the petitioner-company, as to the real relationship between the petitioner-company and NAV Consulting and NAV Fund and whether the transaction is at arm's length, and as to the structure of the recipients.

6.3. As noticed hereinabove, the impugned show cause notice is dated 23.04.2019. Therefore, merely emphasizing, in the counter-affidavit and the sur-rejoinder, that this is a case that falls in the first exception, i.e., "prevention", would not take it out of the purview of the 2017 Master Circular. The 2017 Master circular has been framed with the object of facilitating trade, cutting out, wherever possible, disputes, by exhorting assessees to voluntarily comply with the extant tax regime. In this context, tax administrators have to bear in mind the well-established dicta that circulars issued by the statutory authorities are binding on them, although, they cannot dictate the manner in which assessment has to be carried out in a particular case. A Circular cannot be side-stepped causing prejudice to the assessee by bringing to naught the object for which it is issued. [See: K.P. Varghese vs. Income-tax Officer, [1981] 7 Taxman 13 (SC); Also see: UCO Bank, Calcutta vs. Commissioner of Income Tax, W.B., (1999) 4 SCC 599].

"12. But the construction which is commending itself to us does not rest merely on the principle of contemporanea expositio. The two circulars of the CBDT to which we have just referred are legally binding on the revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of sub-section (2) and they depart or deviate from such construction. It is now well-settled as a result of two decisions of this Court, one in Navnit Lal C. Jhaveri v. K.K. Sen, AAC [1965] 56 ITR 198 and the other in Ellerman Lines Ltd. v. CIT [1971] 82 ITR 913, that circulars issued by the CBDT under section 119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act. The question which arose in Navnit Lal C Jhaveri's case (supra) was in regard to the constitutional validity of sections 2(6A)(e) and 12(1B) which were introduced in the Indian Income-tax Act, 1922 (hereinafter referred to as "the 1922 Act") by the Finance Act, 1955 with effect from 1-4-1955. These two sections provided that any payment made by a closely-held company to its shareholder by way of advance or loan to the extent to which the company possesses accumulated profit shall be treated as dividend taxable under the Act and this would include any loan or advance made in any previous year relevant to any assessment year prior to the assessment year 1955-56, if such loan or advance remained outstanding on the first day of the previous year relevant to the assessment year

1955-56. The constitutional validity of these two sections was assailed on the ground that they imposed unreasonable restrictions on the fundamental right of the assessee under article 19(1)(f) and (g) of the Constitution by taxing outstanding loans or advances of past years as dividend. The revenue, however, relied on a circular issued by the CBR under section 5(8) of the 1922 Act which corresponded to section 119 of the 1961 Act and this circular provided that if any such outstanding loans or advances of past years were repaid on or before 30-6-1955, they would not be taken into account in determining the tax liability of the shareholders to whom such loans or advances were given. This circular was clearly contrary to the plain language of section 2(6A)(e) and section 12(1B) of the 1922 Act, but even so this Court held that it was binding on the revenue and since "past transactions which would normally have attracted the stringent provisions of section 12(1B) as it was introduced in 1955, were substantially granted exemption from the operation" of the said provisions by making it clear to all the companies and their shareholders that if the past loans were genuinely refunded to the companies they would not be taken into account under section 12(1B)", sections 2(6A)(e) and 12(1B) of the 1922 Act did not suffer from the vice of unconstitutionality. This decision was followed in *Ellerman Lines' case* (supra) where referring to another circular issued by the CBR under section 5(8) of the 1922 Act on which reliance was placed on behalf of the assessee, this Court observed:

"Now, coming to the question as to the effect of instructions issued under section 5(8) of the Act, this Court observed in *Navnit Lal C. Jhaveri v. K.K. Sen*, AAC [1965] 66 ITR 198, 203:

'It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act under section 5(8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans, and the idea was not to affect such transactions and not to bring them within the mischief of the new provision.'

The directions given in that circular clearly deviated from the provisions of the Act, yet this Court held that the circular was binding on the Income-tax Officer." (p. 921)

The two circulars of the CBDT referred to above must, therefore, be held to be binding on the revenue in the administration or implementation of sub-section (2) and this sub-section must be read as applicable only to cases where there is understatement of the consideration in respect of the transfer."

6.4 The coordinate bench of this Court in *Amadeus India Pvt. Ltd.* dealt with a somewhat similar issue. The observations made by the Court in paragraph 12 to 16, being apposite, are extracted hereafter:

"12. It will be immediately noticed that there are two exceptions carved out for

the Respondent to engage in a pre-SCN consultation. The first is that the SCN is preventive and the second is that it is related to an offence in terms of the Finance Act, 1994.

13. In the present case, as is evident from the impugned SCN, the alleged non-payment of service tax pertains to period between 2012-2013 to 2016-2017. Consequently, there is no "preventive" aspect involved in the SCN and this is not even disputed by learned counsel for the Respondent. However, what is urged before the Court by the Respondent is that since the SCN was preceded by a search that was conducted in the business premises of the Petitioner, and the Petitioner also rendered itself liable for penal action "for suppression of facts and contravention of various statutory provisions with intent to evade payment of due service tax" and other incidental levies, the SCN partakes of the character of an "offence related" SCN and therefore falls within the exceptions carved out under para 5.0 of the Master Circular.

14. The above submission runs contrary to the very object of para 5.0 which is to narrow down the scope of the dispute by engaging the Assessee on specific areas where the Respondent may require information/clarification from the Assessee regarding alleged evasion of service tax. In the context of the present case, in relation to documents recovered during the search and statements recorded of representatives to the Petitioner in that process, several questions may have arisen for consideration by the Respondent which may require a clarification from the Petitioner as to its conduct. It is to facilitate this very exercise that para 5.0 finds place in the Master Circular. The mere possibility that at the end of the adjudication process, the Petitioner may have to face consequences for having committed an 'offence' under Finance Act, 1994 need not per se render the SCN itself as an 'offence related' SCN. If that were to be the logic, then in every case para 5.0 can be dispensed with on the ground that the adjudication of the SCN is likely to lead to the notice facing proceedings for having committed an offence. The exception would then become the rule and not vice versa, and the need for any pre-notice consultation being rendered redundant. Further, without the conclusion of the adjudication on the SCN, the Respondent would not be in a position to decide whether an offence is made out.

15. In any event, as far as the present case is concerned the officers of the Respondent do not appear to have taken any conscious decision in regard to the requirement of the Master Circular. A pointed question was posed by the Court to Mr. Harpreet Singh whether prior to issuing the impugned SCN, a decision was taken by the Respondent in the light of para 5.0 of the Master Circular not to undertake the pre-notice consultation. After going through the notes in file, Mr. Harpreet Singh stated that there was nothing in the file to that effect. In other words, it appears that the Respondent completely ignored the Master Circular before proceeding to issue the impugned SCN.

16. The mandatory character of the Master Circular can be traced to Section 83 of the Finance Act, 1994 which makes Section 37 B of the Central Excise Act,

1944 applicable in relation to service tax. In terms Section 37 B of the Central Excise Act, 1944 instructions issued by the CBEC would be binding on the officers of the Department."

[Emphasis is ours]

6.5. Thus, having regard to the aforesaid observations of the coordinate bench of this Court in Amadeus India Pvt. Ltd., and for the reasons given hereinabove the stand taken by the contesting respondents cannot be accepted.

6.6 We may note that the contesting respondents have preferred an appeal against the judgment of the coordinate bench of this Court rendered in Amadeus India Pvt. Ltd.

6.7. The Supreme Court, via order dated 04.11.2019, passed in S.L.P (Civil) Diary No. 35886/2019, has issued a limited notice in the matter. For the sake of convenience, the order passed by the Supreme Court is extracted hereafter:

"Delay condoned.

Learned Additional Solicitor General submits that if a fresh show cause notice is to be issued as directed by the High Court after pre-consultation, the Department may be given liberty to revive the earlier show cause notice to obviate any objection in regard to limitation.

Issue notice confined to the above issue, returnable in eight weeks."

[Emphasis is ours]

7. Thus, having regard to the foregoing, we are of the view that the contesting respondents were mandatorily required to have a pre-show cause notice consultation with the petitioner-company and that having not being done in the instant matter, the proceedings initiated by the contesting respondents via the impugned show cause notice are non-est in law. That being said, the only issue, which remains to be addressed, is concerning limitation. This aspect is pending consideration before the Supreme Court i.e. as to the date when the limitation will commence. [See: Direction contained in paragraph 7.1 (iv) hereinbelow].

7.1. Thus, having regard to the foregoing, the matter is remanded to the contesting respondents with the following directions:

(i) The contesting respondents will serve an appropriate communication on the petitioner-company indicating therein, the date, time and venue at which they intend to convene a meeting for holding the pre-show cause notice consultation.

(ii) The concerned officer will accord a personal hearing to the authorized representative of the petitioner-company.

(iii) The concerned officer would allow the authorized representative of the petitioner-company to make submissions on the merits of the matter including the aspect concerning jurisdiction. The concerned officer will, after hearing the

authorized representative of the petitioner-company, pass an order as to whether or not it is a fit case for continuing with the proceedings in accordance with the mandate of the law including the Finance Act.

(iv) If the concerned officer concludes that it is a fit case in which proceedings should continue against the petitioner-company, then, he/she would decide as to whether or not the impugned show cause notice should be revived or a fresh show cause notice should be issued in consonance with the decision that would be rendered by the Supreme Court in SLP (Civil) Diary No. 35886/2019.

8. The writ petition is disposed of in the aforesaid terms. Pending application(s) shall also stand closed.