
(2015) 09 BOM CK 0231
In the Bombay High Court
Case No : Writ Petition (L) No. 1110 of 2015

Damco India Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 01-09-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 65(105)(zzb)

Citation : (2015) 40 STR 216

Hon'ble Judges : S.C. Dharmadhikari and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : Vikram Nankani, Sr. Counsel, Anupam Dighe and Ajinkya Patil i/b. India Law Alliance, for the Appellant; Pradeep S. Jetly and Jitendra B. Mishra, for the Respondent

Final Decision : Dismissed

Judgement

1. By this petition under Article 226 of the Constitution of India, what the Petitioner essentially prays is to quash and set aside the show cause notice dated 24th April, 2015. The prayer is that this show cause notice has been issued without the authority satisfying itself about the jurisdictional facts. In other words an Authority, much less a quasi-judicial Authority, cannot confer jurisdiction upon itself by deciding jurisdictional facts erroneously or wrongly. The Authority issuing the show cause notice cannot take a stand and simply state that having issued the show cause notice, it would be open for the petitioner noticee to raise all contentions at the time of adjudication and the Adjudicating Authority will take note of the same and deal with them while passing the order in furtherance of the show cause notice. That according to the learned counsel for the Petitioner, is an erroneous premise on which the Authority has proceeded. Reliance is placed on the judgment of the Hon'ble Supreme Court in the case of Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, . Our attention is invited to pages 94-95 of the paper-book wherein the sample invoice issued to certain parties depict the nature of the services rendered and item-wise description of

the parties including service charges. It is submitted that the registration under the Finance Act, 1994 was obtained in relation to such services which answer the definition of the term "Business Auxiliary services" under the Finance Act, 1994 and amended from time to time. However, an explanation is called for from the Petitioner on the basis that the intelligence gathered indicated that some freight forwarders, shipping/airline agents, consolidation agents, customs house agents etc. are not paying service tax on the profit earned in selling of space for import/export to the importers/exporters on behalf of the Shipping lines/Airlines. The excess amount of freight as charged i.e. the difference between freight charged to the shippers and paid to the shipping companies is nothing but additional consideration received for the services provided to the shippers as an agent for the Shipping Lines/Airlines and are covered under the category "Business Auxiliary Services" as defined under Section 65(105)(zzb) of Finance Act, 1994 and the same are chargeable to Service Tax with effect from 1st July 2012.

2. Mr. Nankani, learned Senior Counsel appearing on behalf of the Petitioner submits that there is a complete shift in the stand taken and in the show cause notice, copy of which is at page 107A of the paper-book. It is alleged that the Petitioner is providing "Business Auxiliary Services", "Business Support Services". The Petitioner is registered with Service Tax Department and that is why it is further alleged that the petitioner-assessee was approaching the shipping lines/airlines only after getting inquiry from the client and therefore they were acting on behalf of the clients when they book the space or make available slots in the shipping lines/airlines. Mr. Nankani submits that the position is quite to the contrary and irrespective of any bookings received from the customer as alleged, the Petitioner and parties like them, book the space in the shipping lines/airlines and it is that arrangement which has been erroneously assumed to create a relationship of service provider and service recipient. He therefore submits that there being no opportunity given to the petitioner to first satisfy the authority about its jurisdiction and invite a ruling on this point, that this Court should admit this petition, direct the adjudicating authority to render a finding on jurisdiction and then allow the Petitioner, if need be, to challenge it in this very writ petition.

3. It is not possible to agree with Mr. Nankani for more than one reason. The Supreme Court in the case of Raza Textiles Ltd. (supra) was considering a case where the Income-tax Officer directed the appellant - Raza Textiles Ltd. to pay a certain sum as tax on the sum of Rs. 2,00,000/- remitted by it as selling commission to an Indonesian party. The ITO rejected the contention of the appellant that the payee was not a non-resident firm. The Appellate Authority viz. the Assistant Commissioner, rejected the Appeal on the ground that it was not maintainable. He took the view that the appeal can be entertained only if the precondition was satisfied viz. deduction of tax at source and payment to the credit of the Government. A Writ Petition was filed in the Allahabad High Court which was heard by a Single Judge and who arrived at the conclusion that the payee was not a non-resident firm and there was no liability on the Appellant to

deduct tax at source. A Division Bench, in Letters Patent Appeal, held that there was material before the ITO to hold that the Jakarta party were non-residents. The Division Bench held that the ITO has jurisdiction to decide the question either way and that is why it cannot be concluded that he assumed jurisdiction by a wrong decision on the question of residence.

4. In *Raza Textiles Ltd.* (supra), learned Single Judge of the High Court came to the conclusion that the ITO had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the Assessee was entitled for a writ of certiorari. Such a conclusion of the learned Single Judge could not have been reversed in the Letters Patent Appeal by the Division Bench, on the basis of assumptions, is the conclusion reached by the Supreme Court. The ratio of the Supreme Court must be seen in the backdrop of the facts and circumstances brought before it. Therefore, we do not dispute the legal proposition but its application will depend on the facts and circumstances of each case.

5. In the present case, we are concerned with the show cause notice and demand notice and which has or contains certain allegations. These allegations may not be correct and that can be pointed out by the petitioner by appearing before the Adjudicating Authority. The Petitioner will have to demonstrate that it is not rendering any services within the meaning of Finance Act, 1994, much less the "business support services". It is the allegation in the show cause notice that the shipping lines/airlines are approached by the petitioner-assessee after getting inquiry from the clients and that is how the space or the slot is booked. That there is no such client who had approached the petitioner but the space is booked irrespective of any such inquiry from the client is a version of the Petitioner which the petitioner will have to establish and prove. That there is no customer of the Petitioner and therefore the Petitioner is not an agent of such customer and hence whatever amounts are collected are not in the nature of service charge, are all matters which raise essentially disputed questions of fact. In the garb of Mr. Nankani's submissions we cannot decide them. The Petitioner will have ample opportunity before the Adjudicating Authority to urge that the jurisdictional facts have been wrongly assumed and that is why the show cause notice could not have been issued at all and that the services for which registration was obtained are not the same but distinct. All such contentions can be raised and we cannot proceed on the basis that the Adjudicating Authority will not deal with them. We cannot assume that the petitioner will necessarily be served with an adverse order. In such a situation, we cannot entertain this Petition. In the given facts and circumstances, this is nothing but scuttling the inquiry and delaying the adjudication. For the above reasons, we do not find any merit in this Petition. The Petition is dismissed. Needless to clarify that all contentions including the one based on the view taken by the Commissioner of Service Tax, Chennai can be placed before the Adjudicating Authority and the Adjudicating Authority shall decide them in accordance with law.