(2015) 03 P&H CK 0019

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 4408 of 2015 (O and M)

Delhi Airport Metro Pvt. Ltd. APPELLANT

Vs

Commissioner RESPONDENT

Date of Decision : 13-03-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A
Customs Act, 1962 — Section 28
Finance Act, 1994 — Section 65(105)(g), 65(105)(zzzza), 73, 73(1)

Citation : (2015) 50 GST 568 : (2015) 40 STR 662

Hon'ble Judges : S.J. Vazifdar, Acting C.J.;Gurmeet Singh Sandhawalia, J.

Bench : Division Bench

Advocate : Bishwajit Bhattacharyya, Senior Advocate, Sushil Verma and Lakhindar Bir Singh, for the Appellant

Judgement

S.J. Vazifdar, Actg. C.J.—The petitioner has challenged a show cause notice dated 20.7.2012 (Annexure P-10) and an order dated 12.12.2014 (Annexure P-13) passed by the Commissioner, Central Excise.

2. In the facts and circumstances of this case, we see no reason to interfere either with the show cause notice or with the order of the Commissioner in this writ petition. The petitioner has already rightly availed the alternate remedy under the Act by replying to the show cause notice on 22.08.2012 (Annexure P-11) before the Commissioner. The petitioner has an alternate remedy of filing an appeal against the order of the Commissioner under Section 35-B of the Finance Act, 1994 before the Tribunal. We would not have interfered even if the show cause notice had been challenged at the outset. Considering the facts of this case, we would, in any event, have left the petitioner to avail the alternate remedy of challenging the show cause notice before the Commissioner.

3. The petitioner is registered with the Service Tax Department for "Works Contract Service" falling under Section 65(105)(zzzza) of the Finance Act, 1994. Subsequently, it obtained the inclusion in its registration certificate of consulting

engineers services and transport of goods by road services under Section 65(105)(g) and (zzp), respectively, of the Finance Act.

4. The petitioner entered into a concession contract dated 28.08.2008 with "M/s. Delhi Metro Rail Corporation" (DMRC) for "design, installation, commissioning, operation and maintenance of Airport Metro Express Line, New Delhi-Indira Gandhi International Airport-Dwarka Sector 21". The design and construction of basic civil structure was to be done by DMRC and made available to the petitioner progressively for design, supply, installation, commissioning and operation of system and related works. Considering the nature and scope of the work, it is understandably a detailed, lengthy and an involved agreement. It is not necessary to refer to the agreement in detail. It is sufficient to note that the source of revenue for the petitioner consisted of fare revenue and non-fare revenue.

5. Correspondence ensued between the parties in the course of which the petitioner was informed that the accumulated CENVAT Credit of Rs. 28.61 crores as per its ST-3 returns for the period October, 2009 to March, 2010 was in contravention of CENVAT Credit Rules, 2004, as it was providing "Works Contract Service" for construction and operation of Metro Rail which was not a taxable service within the meaning of that expression in Section 65(105)(zzzza).

6. The petitioner, on the other hand, in the course of the correspondence contended that it was entitled to the credits. The petitioner was requested to provide copies of its ST-3 Returns for the period October, 2009 to March, 2010, April, 2010 to September, 2010 and October 2010 to March, 2011 and details of capital goods and inputs on which CENVAT credit had been availed. It was also requested to clarify as to how capital goods and inputs, on which it had availed CENVAT credit, were covered under the relevant CENVAT credit rules. The petitioner was also requested to submit input invoices/agreements with suppliers of goods on which CENVAT credit had been availed by it.

7. It is pertinent to note that the petitioner, in the course of the correspondence, stated that while finalizing the revised ST-3 Returns for the period October, 2009 to March, 2010, there was an inadvertent error on its part in not mentioning that it had claimed CENVAT credit in respect of capital goods to the tune of Rs. 18.27 crores. It contended that the error was inadvertently shown under the category of "input" in the said return.

8. The Commissioner of Service Tax served the said show cause notice dated 20.07.2012 upon the petitioner which inter alia, set out the above facts. The show cause notice further stated that on scrutiny of the revised ST returns for the said period, it was found that the petitioner had availed CENVAT credit amounting to over Rs. 65,01,43,929/- which included an amount of Rs. 63,12,07,705 as service tax and central excise duty and Rs. 1,26,24,150/- and Rs. 63,12,074/- as education cess and secondary and higher education cess, respectively. The show cause notice summarised the credits taken on capital

goods, inputs and input services derived from the ST-3 returns for the period 2009-10 and 2010-11 and stated that the petitioner had not provided any details in respect of the usage of certain goods and also did not supply sample copies of invoices of such goods. On the basis of the available record including ST-3 returns, the show cause notice listed the major items on which CENVAT credit had been availed. The show cause notice then referred to the inadmissible CENVAT credit in respect of capital goods, inputs and input services. It stated that it appeared that the said amount of about Rs. 65 crores along with interest was liable to be recovered under Section 73 of the Act read with rule 14. The show cause notice further stated that it appeared that the petitioner had intentionally and wilfully suppressed the fact of availing the allegedly inadmissible CENVAT credit and that the same were, therefore, liable to be denied and recovered within five years from the relevant date under Section 73 of the Act. The petitioner was, therefore, called upon to show cause to the Commissioner why the said amount of about Rs. 65 crores availed as CENVAT credit should not be denied and also as to why the said amount should not be recovered by invoking the provisions of Section 73(1) of the Act and rule 14 together with interest and penalty. The petitioner was directed to submit a written reply along with evidence.

9. The petitioner filed a detailed reply dated 22.08.2012 to the show cause notice. The reply is also on merits. The petitioner appeared before the Commissioner and argued the matter on merits. Detailed written submissions were furnished including on the issue as to whether there was suppression on the petitioner''s part or not. The petitioner also contended that there was no jurisdiction to issue the show cause notice as it was issued beyond the period prescribed under Section 73 of the Finance Act.

10. The only point argued before us is that the show cause notice was issued beyond the time prescribed in Section 73(1) and that the proviso thereto was inapplicable to the case. Section 73 of the Finance Act reads as under:-

73. Recovery of Service tax not levied or paid or short levied or short paid or erroneously refunded

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within eighteen months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid erroneously refunded by reason of--

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words eighteen months, the words "five years" had been substituted.

Explanation.--Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of eighteen months or five years, as the case may be.

....

(2A) Where any appellate authority or tribunal or court concludes that the notice issued under the proviso to sub-section(1) is not sustainable for the reason that the charge of,-

(a) fraud; or

(b) collusion; or

(c) willful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the rules made thereunder with intent to evade payment of service tax, has not been established against the person chargeable with the service tax, to whom the notice was issued, the Central Excise Officer shall determine the service tax payable by such person for the period of eighteen months, as if the notice was issued for the offences for which limitation of eighteen months applies under sub-section(1).

At the relevant time, the period prescribed in the main section was 12 months.

11. The Commissioner dealt with the entire matter in a detailed order which is now impugned before us. The order was forwarded under the cover of a letter dated 15.12.2014 which, inter alia, stated that an appeal may be filed against the same under the Central Excise Tax (Appeal) Rules, 2001, Regulation 35B(6) of the Central Excise Tax (Appeal) Regulations, 1944, Rule 6 of Customs Duty (Appeal) Rules, 1982, Regulation 129A of the Customs Regulations, 1962 and Rule 9 of the Service Tax Rules, 1994 whichever was applicable.

The impugned order deals in considerable detail with the facts of the case, the contentions of the parties and the record. It has analysed the legal provisions and the facts. It is necessary for the purpose of this judgment to note the following observations, aspects and findings in the order. The above facts were referred to. The nature of the work was referred to and also the reasons for inadmissible CENVAT credit. The Commissioner furnished detailed reasons for coming to the conclusion that CENVAT credit availed by the petitioner was inadmissible including in respect of the inputs, input services, etc.

The impugned order also dealt with the contention in the reply to the show cause notice that the show cause notice was time-barred and that the provisions of Section 73(1) were inapplicable in the facts and circumstances of the case to extend the period of limitation. The Commissioner held, relying upon legal dictionaries, that where there is an obligation to speak, a failure to speak will constitute suppression of fact. He held that the petitioner had an obligation to comply with the statutory provisions and to furnish the information/documents as required. He observed that the case had arisen out of the audit conducted by the officers of the Service Tax Commissionerate, New Delhi and that the petitioner had consciously availed of the huge amount of inadmissible CENVAT credit and suppressed the same with an intent to evade payment of duty. He observed that had the department not conducted the audit, the inadmissible availment of CENVAT credit would not have been unearthed.

12. As mentioned earlier, it is also important to note that the petitioner had admitted that it had allegedly inadvertently not mentioned that it had claimed CENVAT credit in respect of capital goods to the extent of Rs. 18.27 crores and that it had inadvertently shown the same under the category of "input" in its returns. Whether it was an inadvertent error or not is not a question of law. It is a question of fact and, in any event, at least a mixed question of law and of fact. Similarly, as we mentioned earlier, the ST-3 returns were provided pursuant to the request of the respondent for the said three periods. As we also mentioned earlier, the respondent had requested the assessee by its letters dated 26.08.2011 and 08.09.2011 to provide copies of ST-3 returns for the said three periods and to furnish details of capital goods and inputs on which CENVAT credit had been availed and to clarify as to how the capital goods and inputs, on which the petitioner had availed CENVAT credit, were covered under the relevant rules. Further, some of the observations in the show cause notice and the findings in the impugned order were based on the scrutiny of the revised ST returns for the said period. Moreover, no replies had been received to the respondent''s queries as to how the capital goods and inputs, in respect whereof the CENVAT credit was taken, fall within the definition of capital goods and inputs under the said Rules. Nor were details provided in respect of usage of said goods. The sample copies of the invoices of the said goods were also not supplied. Certain inferences were drawn on the basis of the available record.

Even assuming that the petitioner denies these aspects/observations, it would make no difference so far as this writ petition is concerned. Even these issues would more appropriately be dealt with in the appeal provided under the Act. There is no reason for entertaining this writ petition especially when the petitioner has already chosen to reply to the show cause notice in the first instance and had accepted the jurisdiction of the authorities at that point of time.

13. Mr. Bhattacharyya, the learned senior counsel appearing on behalf of the petitioner submitted that he would confine this petition only on the ground of jurisdiction and would not contest the merits of the matter.

14. We find, however, that even the issue as to whether the relevant material was suppressed or not is not a pure question of law. By the impugned order, the Commissioner has held that the petitioner has suppressed material with an intent to evade payment of duty. The petitioner contends that the fact of having availed of CENVAT duty was disclosed in the returns. It is necessary, however, to see whether the extent of disclosure in the returns was sufficient compliance. It would be necessary to ascertain whether the extent of disclosure would have enabled the assessing authority to determine whether in law the petitioner was entitled to CENVAT credit or not. There are various issues of fact which would be required to be considered. Even assuming that there was a disclosure of the fact of the petitioner having availed the credit, it would be necessary to ascertain whether there were other relevant facts which were necessary to be disclosed and whether the non-disclosure thereof constituted suppression. It is obviously for this reason that the petitioner rightly did not challenge the show cause notice itself at the outset. The petitioner rightly answered the show cause notice by filing a detailed reply therein. Even on merits, the petitioner thereafter appeared before the Commissioner and made detailed submissions. The petitioner filed detailed written submissions in this regard as well.

15. The judgment of the Supreme Court in C.C.E., Mangalore Vs. Pals Microsystems Ltd., Mangalore, is of no assistance to the petitioner. It must be noted firstly that the respondent therein had availed of all the alternate remedies including before the Tribunal. The Tribunal held in favour of the respondent. The Supreme Court upheld the decision of the Tribunal and found that the department could not establish that there was any suppression of fact or fraud on the part of the respondent-assessee.

16. The judgment of the Supreme Court in Commissioner, Central Excise, Meerut vs. M/s. Monsanto Manufacture Pvt. Ltd., (2011) 2 SCC 754 is also of no assistance to the petitioner. In that matter also, the assessee had availed of all the remedies including before the Tribunal which held in favour of the assessee. The Supreme Court found as a matter of fact that the department was not justified in invoking the extended period under Section 11A of the Central Excise Act which is pari materia with Section 73 of the Finance Act.

17. The judgment of the Supreme Court in Uniworth Textiles Ltd. Vs. Commissioner of Central Excise, Raipur, does not militate against our view either. The Commissioner of Customs and Central Excise (Appeals) rejected the appellant''s claim and affirmed the payment of duty and penalty. The Supreme Court held that the burden of proving mala fide under Section 28 of the Customs Act was on the revenue. We have not expressed any opinion on the question of

burden of proof. This is a matter for the Tribunal to decide in the event of an appeal being filed. As we noted earlier, the case before us is not a pure question of law. Questions of fact would also arise after an analysis of the material furnished with the returns.

18. We, therefore, see no reason to interfere at this stage in exercise of our extra-ordinary jurisdiction when the issue can be raised before the appellate Tribunal. It would be appropriate for the petitioner to challenge the order by filing an appeal before the Tribunal.

19. The writ petition is, therefore, dismissed. Needless to say that all the contentions are kept open. It is clear from our judgment that we have expressed no views on the merits of the matter including as to whether the provisions of Section 73 of the Finance Act can be availed of by the respondent or not. There shall be no order as to costs.