(2015) 03 MAD CK 0329

In the Madras High Court

Case No : Writ Petition No. 8443 of 2015, M.P. Nos. 1 and 2 of 2015

Dream Castle APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 25-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 68, 73 (1), 73(1), 77, 78

Citation : (2015) 03 MAD CK 0329

Hon'ble Judges : S. Vaidyanathan, J

Bench : Single Bench

Advocate : M.V. Swaroop, for the Appellant

Judgement

S. Vaidyanathan, J.—Petitioner has come forward with the aforesaid prayer.

2. The case of the petitioner is that it is a proprietary concern engaged in the business of real estate consultancy and agency and it is registered under the relevant service tax regulations and pays service tax on the services rendered by it. Its proprietor is a partner in M/s.RJK Investments, a firm, which entered into an agreement with M/s.DLF Home Development Ltd., a company for arranging the purchase of a large tract of land in Tamilnadu. The petitioner was authorised as partner of the firm to collect the monies from DLF to disburse the same to the land owners, the agents or RJK Investments itself. According to the petitioner, the respondent has held that the entire amount received by the petitioner, even though it was disbursed to third parties and the petitioner has acted as a mere conduit for payment of funds to the identified parties, is liable to service tax without considering any of the agreements or the bank account statements or other evidence produced by the petitioner.

3. The petitioner submitted that the petitioner has been foisted with a demand of over 36 crores whereas the consideration received by the petitioner is far less than the amount determined by the authority. According to the petitioner, the impugned order, which has been subsequently issued with an errata, is

completely vitiated by non- application of mind and the commissioner has not gone into details of bank statements produced by the petitioner and that there is no service provided by the petitioner and the act of the respondent in passing the impugned order has got to be interfered with under Article 226 of the Constitution of India. The petitioner submitted that imposing of service tax when there is no service rendered is a jurisdictional aspect which can be decided by this court without relegating the petitioner to the alternative remedy. The petitioner further submitted that the petitioner needs to have paid 7.5% of the amount determined by the original authority which is a condition precedent and there is no provision for waiver in the amended provisions of the Finance Act. The petitioner drew the attention of this court to the decision reported in Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, AIR 1973 SC 1362 : (1973) 87 ITR 539 : (1973) 1 SCC 633 and the relevant portion is extracted below:-

"The Appellate Bench appears to have been under the impression that the Income TAx Officer was the sole judge of the fact whether the firm in question was resident or non- resident. This conclusion, in our opinion, is wholly wrong. No authority, much less a quasi- judicial authority, can confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in an application for a writ of certiorari. If the High Court comes to the conclusion, as the learned single Judge has done in this case, that the Income Tax Officer had concluded at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for the writ of certiorari prayed for by him. It is incomprehensible to think that a quasi-judicial authority like the Income Tax Officer can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen. In our opinion, the Appellate Bench is wholly wrong in opining that the Income Tax Officer can "decide either way"."

4. Similarly, he also drew the attention of this court to the decision of the Honourable Apex Court in Tata Engineering and Locomotive Company Ltd. Vs. Assistant Commissioner of Commercial Taxes and Another, AIR 1967 SC 1401 : (1967) 2 SCR 751 : (1967) 19 STC 520 and the relevant portion is extracted below:-

"5. The appellant Company filed a petition under Article 226 of the Constitution of India in the Patna High Court for directions or orders or writs, including a writ in nature of certiorari calling for the records and quashing the order of the Assistant Commissioner. By the petition the jurisdiction of the Assistant Commissioner to make the assessment and the demand of tax in respect of stockyard sales were questioned....

6. The learned Additional Solicitor-General, who appeared for the Assistant Commissioner, raised a preliminary objection that the appellant Company could not be heard as it had not exhausted the remedies available under the taxing statutes which gave right of appeal and revision and finally for invoking the advisory jurisdiction of the High Court. He also called upon Thansingh Nathmal

and Others Vs. A. Mazid, Superintendent of Taxes, AIR 1964 SC 1419 : (1964) 6 SCR 654 : (1964) 15 STC 468 in support of the order of the High Court.

7. The preliminary objection really does no more than try to check in advance the points which the appellant Company is seeking to raise in this appeal. Whether one looks at the matter from the point of view of the appeal proper or from the point of view of the preliminary objection raised before us, the question is the same, namely, whether the High Court ought in this case to have exercised jurisdiction and if it took jurisdiction whether any settled principle governing Article 226 would have been departed from.

8. The power and jurisdiction of the High Court under Article 226 of the Constitution has been the subject of exposition from this Court. That it is extraordinary and to be used sparingly goes without saying. In spite of the very wide terms in which this jurisdiction is conferred, the High Courts have rightly recognised certain limitations on this power. The jurisdiction is not appellate and it is obvious that it cannot be a substitute for the ordinary remedies at law. Nor is its exercise desirable if facts have to be found on evidence. The High Court, therefore, leaves the party aggrieved to take recourse to the remedies available under the ordinary law if they are equally efficacious and declines to assume jurisdiction to enable such remedies to be bypassed. To these there are certain exceptions. One such exception is where action is being taken under an invalid law or arbitrarily without the sanction of law. In such a case, the High Court may interfere to avoid hardship to a party which will be unavoidable if the quick and more efficacious remedy envisaged by Article 226 were not allowed to be invoked. In our judgment the present is an example of the exceptional situation above contemplated just as Himmatlal Harilal Mehta Vs. The State of Madhya Pradesh and Others, AIR 1954 SC 403 : (1954) 1 SCR 1122 was another instance which came before this Court."

5. The learned counsel for the petitioner further contended that when there is jurisdictional question involved and there is infirmity in the order, this court is empowered to extend the powers of extra- ordinary jurisdiction under Article 226 of the Constitution of India and set aside the impugned order. The petitioner further submitted that he has already paid a sum of Rs. 77,00,000/= towards service tax and if the impugned order, which is legally not sustainable, has got to be challenged before the appellate authority, the petitioner will have to pay 7.5% amount in terms of provisions of the Act.

6. Heard the learned counsel for the petitioner.

7. The authority, after taking note of the submissions of the petitioner, and taking into account the commission received, in para 25 of the order and after verifying the invoices, came to the conclusion that DLF is the customer and the invoices raised by the noticee also confirm that the noticee received commission from the nominees of DLF and thereafter, the authority has observed as follows:-

" 30. I find from the records of the case that though the noticee is registered with the Service Tax Department, deliberately failed to disclose the full facts and di not inform about the receipt of commission towards rendering real estate agent services to the Department nor disclosed the same in the returns filed with the department with an intent to evade payment of Service Tax. The department would not have known the facts but for the verification of records and documents during investigation conducted by the officers of Service Tax Commissionerate. The various judgments relied upon by the noticee with regard to invoking extended period as provided in Proviso to Section 73 (1) of Finance Act, 1994, in the notice has no relevance in the instant case since the case laws are with regard to bona fide belief that they are not rendering certain services, non suppression, malafide intention etc., and are with regard to suppressions and not wilful suppressions. In the instant case, the noticee had adopted double set of invoice system to mis-lead the government, not clarified M/s. Dream Castle - M/s.RJK Investments - DLF relationship indicates clearly that there exist suppression of fact which would have gone unnoticed but for the verification of records and documents during timely investigation conducted by the officers of Service Tax Commissionerate. The Hon''ble Supreme Court in the case of CCE Vs Mehta and Co, (2011(264) ELT 481 (SC)) held that cause of action arises on the date on which the relevant facts came to the knowledge of the department. In this case, only after initiation of investigation by the Department, in the year 2010, the relevant facts have come to the knowledge of the department. Therefore, it is evident that the assessee wilfully suppressed the facts with an intention to evade payment of service tax. In view of the fact that the noticee had not disclosed the facts to the department with the intent to evade payment of Service Tax, suppression clause is rightly invoked. Hence, the extended proviso is rightly invoked in the instant case and the demand of Rs. 36,59,82,194/= are confirmed under proviso to Section 73(1) of the Finance Act, 1994.

31. As regards the impression of penalty, the noticee contended that since there is no question of payment of service tax, there is no question of demand of interest and imposition of penalty and since there is no suppression of value of taxable service from their end, penalty under Sec.78 cannot be imposed. As discussed in the preceding paragraphs, the failure and contraventions on the part of the assessee is established beyond any doubt. I find that the assessee contravened the provisions of Section 68 of the Finance Act, 1994 read with Rule 6 of the Service Tax Rules, 1994 since they failed to discharge their appropriate service tax liability. The noticee''s intention for tax evasion is elaborated in the preceding paras and imposition of Penalty under Section 78 of the Finance Act, 1994 is inevitable. Accordingly I hold that the assessee is liable for imposition of penalty under Section 77 and Section 78 of the Finance Act, 1994. I also hold that the noticee have rendered themselves liable for payment of interest on the service tax not paid."

8. Since a finding rendered by the authority cannot be stated that it is a jurisdictional aspect to be interfered by this court and it is based on the facts of

the case, the authority has rendered a finding, merely because the petitioner will have to shell out more than 7.5 lakhs, it cannot be a ground to exercise to interfere with under Article 226 of the Constitution of India. Only in rarest of the rare cases, the court will have to interfere with the decision quoted by the petitioner which has been extracted supra and the relevant portion is reflected in para 8 of the decision of the Apex Court. Since in this case, the decision taken by the respondent cannot be said to be against the provision of law and there is an arbitrary action without sanction of law, I find no merit in the contention of the petitioner. Hence, the writ petition is liable to be dismissed.

9. In the result, the writ petition is dismissed. No costs. The connected miscellaneous petitions are also dismissed. It is open to the petitioner to agitate the appeal remedy within time frame under the provisions of the Act excluding the period during which the writ petition was pending.