(2016) 01 DEL CK 0165

In the Delhi High Court

Case No : W.P. (C) No. 756 of 2016 and C.M. Nos. 3281, 3280 of 2016

Ebiz.com Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:
Finance Act, 1994 — Section 73(1), Section 89(1)(d), Section 89(1)(ii), Section 90(1)

Citation : (2016) 41 STR 785

Hon'ble Judges : Dr. S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : J.K. Mittal and Rajveer Singh, Advocates, for the Appellant; Jasmeet Singh, CGSC, Astha Sharma, Pooja Bhaskar, Advocates, Atul Singh, Deputy Director and Sunil Joshi, SI-6 DGCEI, for the Respondent

Final Decision : Disposed Off

Judgement

1. C.M. 3281/2016 (Exemption): Allowed, subject to all just exceptions. Application stands disposed of.

W.P. (C) 756/2016 & C.M. 3280/2016 (stay)

2. Notice. Mr. Jasmeet Singh, Advocate accepts notice on behalf of respondent No. 1 Union of India and Ms. Pooja Bhaskar, Advocate accepts notice on behalf of respondent No. 2, the Director General of Central Excise Intelligence (''DGCEI'').

3. This is a writ petition by EBIZ.Com. Private Limited seeking a declaration that the search conducted by the DGCEI, respondent No. 2, on the business premises of the petitioner on 19th January, 2016 apprehending evasion of payment of service tax by the petitioner, as well as the summons issued to the petitioner on 19th & 21st January, 2016 by the DGCEI to be illegal and ultra vires to the provisions of the Finance Act, 1994.

4. It is stated by Mr. J.K. Mittal, learned counsel appearing for the petitioner, that Mr. Pawan Malhan, the Managing Director (MD) of the petitioner was arrested by

the Senior Intelligence Officer, DGCEI (Headquarters) on 20th January, 2016 and continues to be in custody. He has drawn the attention of the Court to the remand application filed before the Magistrate by the DGCEI in which it is stated that in the course of the search undertaken in the business premises of the petitioner, the statements of two accountants, Mr. Sulabh Jain and Mr. Narendra Kumar, and two business associates, Mr. Pawan Mishra and Mr. Shubham Chaudhary, were recorded. The statement of the MD was also recorded. Copies of some of the invoices were seized from which it was concluded that from the years 2011-12 till 2015-16 (till 6th January, 2016) the petitioner had wrongly availed of exemption (under Notification No. 26/2012-S.T. , dated 20th June, 2012) from payment of service tax on some of the services provided by claiming to be a "tour operator" and had avoided payment of service tax to the extent of Rs. 17 crores. The DGCEI stated in the remand application that the petitioner had not remitted service tax collected from the customers to the extent of Rs. 17 crores and had thereby committed an offence punishable under Section 89(1)(ii) of the Finance Act, 1994.

5. Mr. Mittal informs the Court that the bail application of the MD of the petitioner is coming up for hearing before the learned additional sessions judge on 29th January, 2016. He points out that the accounts of the petitioner''s accounts have been periodically audited by the Commissioner of Service Tax (CST) since 2009. Further, the premises of the petitioner was searched on two earlier occasions. He states that the petitioner has been filing the service tax returns on a regular basis availing the exemption under the aforementioned notification by claiming to be a tour operator. The petitioner was issued a notice under Section 73(1) of the Finance Act, 1994 on 17th November, 2014 by the CST demanding a service tax of Rs. 34,00,425/- which demand was confirmed by an order dated 21st December, 2015. This order is being challenged by the petitioner. Another show cause notice dated 2nd November, 2015 demanding a service tax of Rs. 5,33,541/- issued by the CST is yet to be adjudicated. It is further stated that a refund claim by the petitioner to the extent of Rs. 35 lakhs is still pending with the CST. In the above circumstances, it is prayed that no further coercive steps be taken against the petitioner.

6. Ms. Pooja Bhaskar, learned counsel appearing for the DGCEI first submitted that since Mr. Satish Aggarwala, Standing Counsel for the DGCEI is not available in Delhi today, the further hearing of the case should be deferred. However, Mr. Atul Singh, Deputy Director, DGCEI and Mr. Sunil Joshi, SI-6, DGCEI were present in the Court along with the relevant records, which were perused by the Court. This includes a note prepared proposing the search of the premises and a separate note prepared proposing the arrest of the MD of the petitioner.

7. It is not clear from these notes that prior to going in for the extreme measure of arresting the MD of the petitioner, the DGCEI examined the entire previous records of the petitioner and in particular the assessments in relation to the years 2011-12 onwards. In particular, it is not clear whether the DGCEI was

conscious of the pending proceedings and show cause notices issued by the CST under Section 73(1) of the Finance Act, 1994 and the proceedings consequent thereto. This aspect is significant since the invocation of the powers of arrest without warrant under Section 90(1) read with Section 89(1)(ii) of the Finance Act, 1994 presupposes the arrival of a satisfaction regarding the assessee having collected service tax but failing to pay to the Department as envisaged in Section 89(1)(d) thereof. The question that would arise is whether there can be a predetermination regarding the offence under Section 89(1)(d) of the Finance Act, 1994 without issuance of a notice under Section 73(1) regarding the alleged evasion of payment of service tax in the sum of Rs. 17 crores, followed by an adjudication.

8. In the circumstances, the Court is satisfied that the petitioner has made out a prima facie case and accordingly an interim direction is hereby issued restraining the DGCEI from taking any further coercive action against the petitioner or any of its officers or employees till the next date of hearing.

9. It is clarified that as far as the proceedings consequent upon the arrest of the MD of the petitioner pending in the Court of the learned ASJ is concerned, it will proceed in accordance with law and this Court expresses no opinion in that regard. Further, it is made clear that the petitioner will continue to cooperate with the DGCEI, answer the queries and provide whatever documents are available in its possession as and when required by the DGCEI.

10. Mr. Mittal states that only last night a notice dated 21st/22nd January, 2016 has been received by the petitioner from the CST asking for documents relating to FYs 2013-14 and 2014-15 which he states have already been seized by the DGCEI pursuant to the search conducted on 19th January, 2016.

11. On the oral request of Mr. Mittal, the Commissioner Audit-II, Ghaziabad Commissionerate, CGO Complex-II, Kamla Nehru Nagar, Ghaziabad, U.P. is impleaded as respondent No. 3. The amended memo of parties be filed within one week.

12. Notice is issued to respondent No. 3. It is further directed that proceedings consequent upon the notice dated 21st/22nd January, 2016 issued to the petitioner by respondent No. 3 shall remain stayed till the next date of hearing.

13. On the next date of hearing one officer each from the respondent Nos. 2 and 3 who is conversant with the facts of the case will remain present with all the relevant records of the case.

14. Counter affidavits of the respondents be filed two weeks prior to the next date of hearing. Rejoinder thereto if any be filed by the next date.

15. List on 21st March, 2016. Order dasti under the signature of Court Master.