
(2018) 11 CAL CK 0059
In the Calcutta High Court
Case No : Writ Petition No. 12241 (W) of 2016

Emdee Digitronics Pvt. Ltd

APPELLANT

Vs

Union of India & Ors

RESPONDENT

Date of Decision : 29-11-2018

Acts Referred:

Finance Act, 1994 — Section 73, 82
Central Excise Act, 1944 — Section 14
Service Tax Act, 1994 — Section 174
Service Tax Rules, 1994 &mdash Rule 5A, 5A(1), 5A(2)
Constitution of India, 1950 — Article 12

Citation : (2018) 11 CAL CK 0059

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : J.K. Mittal, Sarmila Das, Kausik Chanda, Debashis Basu, Amitabrata Ray,

Final Decision : Dismissed

Judgement

The petitioner has challenged the vires of Rule 5A (1) of the Service Tax Rules, 1994. The petitioner has also challenged the action of the respondent

no. 2 in visiting the premises of the petitioner no. 1 on December 4, 2014. According to the petitioner such action is illegal, without authority of law and against the provisions of the Finance Act, 1994.

Learned Advocate appearing for the petitioner has referred to Rule 5A (1) of the Rules of 1994 and Section 82 of the Finance Act, 1994. He has

submitted that, the assessment for Service Tax for the petitioner was completed much prior to the impugned actions. The notice dated February 5,

2014 has no basis in the eye of law. The provisions of Section 14 of the Central Excise Act, 1944 have been sought to be invoked for the period from

2008-09 to 2013-14. The assessment for such period was over. Such assessment has attained finality. They cannot be reopened. Consequently, the

authorities could not have invoked Section 14 of the Central Excise Act, 1944.

According to him, the authorities are not sure of the provisions of law that have been invoked for the purpose of issuing the notice dated February 5,

2014 and the action of the authorities in visiting the premises of the petitioner. In this regard, learned Advocate for the petitioners has referred to the

stand taken in the affidavit-in-opposition by the respondents. He has submitted that, some of the respondents did not file any affidavit despite direction

to file affidavits. According to him, the provision of the Service Tax Act does not envisage a power of review.

There is no provision for reassessment. The assessment being complete, the action of the authorities in issuing the notices and visiting the premises are

incorrect. He has contended that, with the coming into force of the Central Goods and Services Tax Act, 2017 the provisions of Service Tax Act,

1994 have no manner of application. The provisions of the Act of 1994 do not survive the Act of 2017. Consequently, the Service Tax Rules framed

under the provisions of the Act of 1994 also do not survive. In support of such contentions, he has relied upon 2000 Volume 2 Supreme Court Cases

Page 536 (Kolhapur Canesugar Works Ltd. & Ors. v. Union of India & Ors.) and 1995 Volume 4 Supreme Court Cases Page 734 (Air India v.

Union of India & Ors.).

Referring to 2016 Volume 43 S.T.R. 67 (Del.) (Mega Cabs Pvt. Ltd. v. Union of India) learned Advocate for the petitioner has submitted that, Rule

5A (2) of the Rules of 1994 has been held to be ultra vires by the Delhi High Court. He has referred to 1990 Volume 4 Supreme Court Cases Page

113 (Dabur India Ltd. & Anr. v. State of Uttar Pradesh & Ors.) and submitted that, the authorities cannot coerce a litigant to make payment when a

litigant is not liable to pay. According to him, there is no tax due from the petitioner. In support of such contention, he has referred to 1998 Volume 5

Supreme Court Cases Page 1 (Harshad Shantilal Mehata v. Custodian & Ors.).

Learned Advocate for the petitioner has submitted that, a writ petition is maintainable notwithstanding the existence of statutory alternative remedy. In

support of such contention, he has relied upon 2011 Volume 268 Excise Law Times Page 64 (Cal.) (Avery India Ltd. v. Union of India). He has

referred to 2018(17) G.S.T.L. Page 598 (Cal.) (Srei Equipment Finance Ltd. v. Union of India) and submitted that when, the assessment is

concluded, the same issue cannot be revisited. Referring to 2016(44) S.T.R. Page 526 (Del.) (ebiz.com Pvt. Ltd. v. Union of India) he has submitted

that, the authorities did not have any reason to believe to undertake the impugned action. The impugned notices and actions of the respondents be quashed.

Learned Additional Solicitor General appearing for the respondent nos. 1 to 3 has submitted that, the authorities received credible intelligence in order

to undertake an investigation/enquiry by the intelligence wing. This was done under Section 14 of the Central Excise Act, 1944. Powers under Rule

5A (1) of the Rules of 1994 were exercised. The vires of Rule 5A (1) was upheld by the Court in the judgment and order dated September 1, 2017

rendered in W.P. No. 11773(W) of 2016 (Magma HDI General Insurance Company Ltd. v. Union of India & Ors.). Upon investigation, in the event,

any amount is found outstanding, recovery thereof would be made under Section 73 of the Act of 1994. There is no infirmity in the actions of the

authorities warranting interference by a Writ Court.

The petitioner is registered under the provisions of the Finance Act, 1994 and is assessed for Service Tax. The accounts of the petitioner was

scrutinised, verified and audited for the period from 2008 till 2012 under the provisions of Rule 5A (2) of the Service Tax Rules, 1994 in the year 2012.

On February 12, 2013, respondent no. 4 initiated proceedings pursuant to such audit for the period from 2007 till 2012 demanding Service Tax. Such

proceedings culminated into an Order dated February 12, 2013. In 2013 itself, the respondent no. 4 deputed its officers for scrutiny, verification and

audit for the period from 2008 till 2012 under Rule 5A (2) of the Rules of 1994. However, upon the petitioner pointing out that, the period till 2011 had

been audited, the new proceeding was limited for the period from 2012 till 2013. By two several summons dated February 5, 2014, the petitioner was

directed by the respondent no. 2 to produce documents and details for the last 5 years. The petitioner replied thereto by a writing dated February 13,

2014. By summons dated March 11, 2014, the respondent no. 2 directed the petitioner to produce documents relating to the last 5 years. The petitioner

responded thereto by a writing dated March 24, 2014. By a writing dated March

31, 2014, the respondent no. 3 directed the petitioner to produce records for the period from 2009 till 2013.

Â This request was responded by the petitioner through its writing dated April 4, 2014. The petitioner claimed that, it was causing hardship as two authorities were scrutinizing the documents for the same period. The representatives of the petitioner met the Deputy Director of the respondent no. 3 on April 7, 2014. It wrote a letter dated April 9, 2014. On December 4, 2014 officers of the respondent no. 2 visited the premises of the petitioner at Kolkata. A summons dated December 4, 2014 was issued to the Chief Executive Officer of the petitioner seeking evidence and documents to be produced on December 18, 2014.

The petitioner complied with such summons and on December 18, 2014, the Accounts Manager along with the Consultant appeared before the officer of the respondent no. 2. The petitioner acknowledged a sum of Rs. 1,34,05,129/- along with interest to be payable. The petitioner paid such sum and by a writing dated December 23, 2014 informed the authorities that such payment was made. The respondent no. 5 insisted on auditing the account for the period from 2009 till 2014 which was responded by the letter dated February 11, 2015 written by the petitioner. The respondent no. 5 sought the records for the period of 2013-14 by a writing dated April 17, 2015. The petitioner claims to have produced such records. On March 28, 2016, the respondent no. 2 issued summons seeking presence of the authorised signatory of the petitioner at Hyderabad. The officers of the petitioner appeared before such officer. Thereafter, the officers of the respondent no. 2 made several phone calls to the petitioner for payment.

Notwithstanding the availability of statutory alternative remedy, a writ petition is maintainable if, it is substantiated that, the action complained of breaches any fundamental right of the petitioner, or that the impugned action is without jurisdiction or is perverse. Such is the view of Avery India Ltd.

(supra) and Srei Equipment Finance Ltd. (supra) The writ petitioner has claimed that, Rule 5A (1) of the Service Tax Rules, 1994 as inserted by the notification dated December 28, 2007 was in conflict with the provisions of Section 82 of the Finance Act, 1994 and beyond the rule-making power of the first respondent is ultra vires the Finance Act, 1994 and should therefore be quashed. Such issue has been considered and decided against the writ

petitioner in Magma HDI General Insurance Company Ltd. (supra). No new material has been placed in this case to take a view contrary thereto.

Rule 5A (1) of the Rules of 1994 allows an officer authorized by the Commissioner to have access to a registered premises of an assessee. Rule 5A

(1) of the Rules of 1994 is as follows:-

Rule 5A. Access to a registered premises. (1) An officer authorised by the Commissioner in this behalf shall have access to any premises

registered under these rules for the purpose of carrying out any scrutiny, verification and checks as may be necessary to safeguard the interest of

revenue.

An officer envisaged under Rule 5A of the Rules of 1994, has in the facts of the present case access to the registered premises of the petitioner.

There is no infirmity in the actions of the respondents in doing so.

Kolhapur Canesugar Works Ltd. & Ors. (supra) and Air India (supra) have held that, where, the repealing Act, does not save the provisions of the

Act of repeal, then the actions taken under the previous Act will not survive. However, the Central Goods and Services Tax Act, 2017 provides in

Section 174 thereof that, proceedings initiated under the Service Tax Act, 1994 will continue irrespective of coming into effect of the Act of 2017.

Therefore, in my opinion the proceedings already initiated by the respondents under the Act of 1994 can continue.

Mega Cabs Pvt. Ltd. (supra) has held that, Rule 5A (2) of the Rules of 1994 to be ultra vires. Such Rule however has not been pressed in the present

proceedings by the respondents. The respondents however have said in their affidavit that they have acted in terms of Rule 5A (2) of the Rules of

1994. Quoting a wrong provision of law does not invalidate the action taken if the authorities are otherwise empowered to take such action in law. In

the present case, an officer authorised under Rule 5A (1) of the Rules of 1994 has sought to have access to the registered address of the assessee

being the petitioner. Such officer can do so under Rule 5A (1).

Dabur India Ltd. & Anr. (supra) has found in the facts of that case, that the measures taken by the Article 12 authority in seeking to coerce an

assessee to pay tax not due as unacceptable. In the facts of the present case, the petitioner acknowledged a sum to be payable and paid such sum.

The exact quantum of tax due is yet to be adjudicated as the proceedings are yet

to culminate into a final order. Therefore, such part payment cannot be construed to be an act of coercion on the part of the respondents, particularly in the facts of the present case.

The ratio laid down in *Harshad Shantilal Mehata (supra)* has no manner of application in the facts of the present case. In *ebiz.com Pvt. Ltd. (supra)*, it has been held that, there must be reasons to believe to undertake a scrutiny. A Writ Court is not concerned with the sufficiency of the reasons to believe. It must be satisfied that the reason to believe expressed by the authorities have reasonable nexus with the steps taken. In the facts of the present case, it cannot be said that there was no reason to believe for the authorities to invoke the provisions of law as sought to be done.

In such circumstances, there is no infirmity in the impugned actions of the respondents warranting any interference by the Writ Court.

W.P. No. 12241(W) of 2016 is dismissed. Interim order, if any, stand vacated. No order as to costs.

Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.