

(2015) 01 JH CK 0096

In the Jharkhand High Court

Case No : Writ Petition(T) No. 5520 of 2014

Exman Security Services Pvt. Ltd.

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 15-01-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14

Finance Act, 1994 — Section 73, 73(1), 73A, 73-A (3), 73-A(1)

Citation : (2015) 2 JLJR 86 : (2015) 3 AJR 209 : (2015) 50 GST 300 : (2015) 40 STR 463 : (2015) 81 VST 251

Hon'ble Judges : Pramath Patnaik, J.;Dhirubhai Naranbhai Patel, J.

Bench : Division Bench

Advocate : Mahendra Choudhary, Amrita Sinha and Anupam Anand, for the Appellant; Amit Kumar, Advocates for the Respondent

Judgement

Dhirubhai Naranbhai Patel, J.—This writ petition has been preferred challenging the order dated 11.08.2014, which is at Annexure 5, mainly for the reason that the amount demanded under Section 87 of the Finance Act, 1994 is not based upon any adjudication, on the contrary now at a later stage demand-cum-show cause notice dated 17.10.2014 has been issued, which is at Annexure 8 to the supplementary affidavit filed by the petitioner, which includes the amount of Rs. 4,45,97,399/- towards the Service Tax. It is further submitted by the counsel for the petitioner that in the letter dated 11.08.2014, which is at Annexure 5, which is under challenge, it has been stated that the amount of Rs. 4,45,97,399/- towards Service Tax, which is payable by the petitioner, is undisputed and unpaid. This is factually wrong statement. In fact, the said amount is highly disputed and the petitioner has already written a letter dated 13.11.2014, which is at Annexure 9 to the 2nd supplementary affidavit, admitting his liability, upon exact calculation approximately at Rs. 3.05 crores. Moreover, the demand-cum-show cause notice issued by the respondents has also been replied by this petitioner, but, for any reason whatsoever the respondents have not decided the demand-cum-show cause notice dated 17.10.2014. It is also submitted by the

counsel for the petitioner that the demand-cum-show cause notice dated 17.10.2014 includes the disputed amount of Rs. 4,45,97,399/-. The petitioner has also deposited amount approximately at Rs. 3.21 crores. Thus, more than admitted amount by this petitioner has been deposited and, therefore, notice under Section 87 of the Finance Act, 1994 is not tenable at law and hence, it deserves to be quashed and set aside. It is further submitted by counsel for the petitioner that notice under Section 87 of the Finance Act, 1994 (hereinafter referred to as the Act, 1944 for the sake of brevity) dated 11.08.2014 cannot be issued unless notice under Section 73-A (3) of the Act, 1994 is given, and hence also Annexure 5, notice under Section 87 of the Act, 1994 deserves to be quashed and set aside.

2. Counsel appearing for the petitioner has also relied upon the decision rendered by Hon"ble High Court of Gujrat in the case of Technomaint Contactors Ltd. Vs. Union of India, equivalent citation (2014) 44 GST 545 (Gujrat) and specially upon paragraph 6 thereof. Similarly counsel for the petitioner has also relied upon the decision rendered by the Hon"ble High Court of Uttarakhand in the case of R.V. Man Power Solution Vs. Commr. of Cus. and Central Excise, equivalent citation (2014) 45 GST 567 (Uttarakhand). Counsel has specially relied upon paragraph 9 of the said decision. On the basis of the aforesaid decisions, it is submitted by counsel for the petitioner that unless the proceeding under Section 73 of the Act is completed recovery notice under Section 87 issued by the respondents, dated 11.08.2014 (Annexure 5) could not have been issued by the respondents and hence, also the said notice under Section 87 of the Act dated 11.08.2014 deserves to be quashed and set aside.

3. Counsel for the respondents submitted that the liability towards service tax at Rs. 4,45,97,399/- has been admitted by this petitioner when statement under Section 14 f the Excise Act was recorded. Moreover, he has also given detailed calculation vide its letter dated 23.04.2014 and, therefore, straightway notice under Section 87 of the Finance Act has been issued, which is at Annexure 5 of the memo of this petition, and, hence, this petition may not be entertained by this Court. Even otherwise also the respondents has also issued demand-cum-show cause notice dated 17.10.2014 under Section 73 of the Act of 1994, which will be adjudicated upon by the respondents and the order passed by the respondents is always appealable order and, therefore, also this petition may not be entertained by this Court.

4. Having heard learned counsels for the parties and looking to the facts and circumstances of the case, we hereby quash and set aside the notice dated 11.08.2014, issued by the respondents under Section 87 of the Finance Act, 1994, which is for the recovery of service tax, mainly for the following facts, reasons and judicial pronouncements:

"(i) Looking to the facts of the present case, it appears that raid under Section 82 of the Finance Act, 1994 was carried out in the premises of the petitioner on 25.03.2014. Statement under Section 14 of the Excise Act was recorded of the

Managing Director of the petitioner's company, which is at Annexure 10 to the 3rd supplementary affidavit filed by the petitioner. Looking to this statement recorded under Section 14, it does not appear that petitioner had admitted the liability towards service tax at Rs. 4,45,97,399/-. For ready reference the said questions and answers reads as under:

"Question No. 11. Why you have not paid the Service Tax?

Answer. Due to financial crunch, we have not paid the Service Tax.

Question No. 12. It is observed that you have not paid Service Tax amounting to Rs. 7,30,81,479/- only during the period 2009-10 to 2013-14. What you have to say?

Answer. Prima facie, it is true. But detail calculation will be provided on 26.03.2014."

(ii) A letter has been written by this petitioner on 23rd April, 2014, in which, he has given calculation for his liability at Rs. 4,45,97,399/-, which has been further disputed vide information letter dated 13.11.2014, which is at Annexure 9 of the 2nd supplementary affidavit filed by the petitioner. Meanwhile, the petitioner has deposited approximately Rs. 3.21 crores. It appears from the facts of the case that during the raid carried out by the respondents, at the premises of the petitioner, on 25.3.2014, several records were also seized and, therefore, accurate calculation could not have been made by the petitioner and therefore, on 13.11.2014 fresh calculation has been given by the petitioner. Moreover, looking to the question and answer format statement recorded under Section 14 also, it was never admitted by the petitioner that he is liable to make a payment of Rs. 4,45,97,399/- towards service tax.

(iii) Now the question before this Court is whether merely because a letter dated 23.04.2014 is written, whereby calculation is given by the petitioner of his letter at Rs. 4,45,97,399/- whether straightway notice under Section 87 of the Act, 1994 can be issued by the respondents. The answer is in negative mainly for the reason that:

(a) It ought to be kept in mind by tax imposing and levying authority that a small error committed by the assessee in writing in letter cannot be encashed by the mighty State specially when the assessee is handicapped because during the raid several registers, which is having details of the accounts, have been seized.

(b) Tax imposing and levying authority should prove the liability of the assessee to make the payment of the tax. This authority should rely upon the proof of the liability to pay the tax rather than the admission being made by the assessee, hurriedly.

(c) When the assessee is writing a detailed letter within few days that now the calculation of the service tax amount comes to Rs. 3.05 crores instead of Rs. 4.46 crores approximately and when during his statement recorded under

Section 14 of the Central Excise Act, 1944, as stated herein above, while replying the question No. 12 categorically has stated that he shall give detail calculation later on, upon conjoint reading of answer of question No. 12 and letter dated 13.11.2014 of this petitioner makes it abundantly clearer that the amount of service tax is a disputed amount and in absence of documents at hand mistakenly the calculation was given at Rs. 4,45,97,399/-. It ought to be kept in mind by tax imposing and levying authority that such detailed calculation for the assessment years 2009-10, 2010-11, 2011-12 and 2012-13 cannot be expected from this petitioner without availability of data at its hands. There might be some mistaken calculation on the part of the assessee. One letter written by the assessee, hurriedly, after the raid is carried out at his premises, in absence of documents is not shifting, the burden of proof. If this mistaken calculation, is corrected by him, later on 13.11.2014 that does not give power to the respondents-authorities to straightway issue notice under Section 87 of the Act, 1994.

(d) Moreover, this petitioner has also deposited amount approximately at Rs. 3.21 Crores. Thus, he is not running away from whatever he has admitted in its letter dated 13.11.2014.

(e) Moreover, this petitioner has also been given demand-cum-show cause notice under Section 73 of the Finance Act, 1994 for the assessment years 2009-10 to 2012-13 for Rs. 6,58,90,037/-. Paragraph 6.02 of the said demand-cum-show cause notice issued by the respondents under Section 73-A(1) of the Act, dated 17.10.2014 (Annexure 8 to the supplementary affidavit filed by the petitioner) reads as under:

"6.0 Quantification

xx xx xx

6.02 The computation chart of service tax short paid or not paid, along with Education Cess and secondary and Higher Education Cess, for the financial years 2009-10 to 2013-14 is enclosed and marked as Annexure-L. Accordingly, it appears that ESSPL is liable to pay Service Tax, Education Cess and Secondary and Higher Education Cess of Rs. 6,39,70,909/-, Rs. 12,79,418/- and Rs. 6,39,709/- respectively, aggregating to Rs. 6,58,90,037/- during the period 2009-10 to 2013-14."

In view of the aforesaid demand-cum-show cause notice it appears that the disputed amount of Rs. 4,45,97,399/- is also inter-woven.

(f) Thus, it appears that on one hand the respondents have also issued a notice under Section 73(1) of the Act of 1994 for recovery of Rs. 6,58,90,037/- which includes Rs. 4,45,97,399/-. A composite notice has been issued, which is stamped as demand-cum-show cause notice dated 17.10.2014. Meaning thereby the amount of Rs. 4,45,97,399/- is absolutely a disputed amount, which is yet to be adjudicated upon by the respondents-authorities. Whereas, for Rs.

4,45,97,399/- a recovery notice under Section 87 of the Finance Act, 1994 has also been issued. Both things cannot go together and, therefore, also the notice issued under Section 87 of the Act, which is at Annexure 5 dated 11.08.2014 deserves to be quashed and set aside.

(iv) It further appears that notice under Section 87 of the Act cannot be given by the respondents unless, there is determination of the amount, after issuance of the notice under Section 73(1) or under Section 73-A(1) of the Act, 1994, as held by Hon"ble High Court of Gujarat in the case of Technomaint Contactors Ltd. Vs. Union of India, whereof reads as under:

"6. The petitioners having already deposited a sum of Rs. 1.16 crores (rounded off) with the department by now, at best, they may be called upon to deposit difference amount of Rs. 8 lakhs. The remaining recovery is highly disputed. The petitioners have raised several disputes including the dispute that some of the services having been provided in the special economic zone areas, serving tax is not applicable. We are not judging the validity of such contentions. All that we are suggesting is that when the show cause notice was issued by the department to which the petitioners have raised their objections, recoveries without adjudication of such disputed taxes was simply not permissible in law. We notice that section 73C of the Finance Act, 1994 allows the department to make provisional attachment of the properties of the assessee during the pendency of the proceedings under section 73 or 73A of the Act for the purpose of protecting the interest of the Revenue. Such provision cannot be activated for seeking recovery even before adjudication. Recovery of unpaid tax is to be made as per section 87 of the said Act which provides for the power and procedure for such recoveries."

(Emphasis supplied)

(v) It has also been held by Hon"ble High Court of Uttarakhand in paragraph 9 of the judgment rendered in the case of R.V. Man Power Solution Vs. Commr. of Cus. and Central Excise, as under:

"9. According to me, going by the language of Section 87 of the Finance Act that any amount payable means that amount adjudged after hearing the show cause notice and this provision of Section 87 is one of the methods of recovery of the amount due and payable after adjudication is done. Moreover, I find from the language of clause (b), there is no power to freeze the Bank accounts. At the most, if it is applied, the money can be claimed from the Bank itself. Such claim can be made only when the final adjudication has been done after quantifying the amount due and payable by the assessee."

(Emphasis supplied)

5. In view of the aforesaid facts, reasons and judicial pronouncements, this writ petition is allowed. Orders at Annexure 5 dated 11.08.2014 as well as order at Annexure 6 dated 01.09.2014 are hereby quashed and set aside as the

respondents have already issued demand-cum-show cause notice under Section 73(1) dated 17.10.2014, covering the disputed amount at Rs. 4,45,97,399/- is directed to be adjudicated upon as early as possible and practicable. This writ petition is allowed and disposed of.