(2015) 09 MAD CK 0085

In the Madras High Court

Case No : Writ Petition No. 27176 of 2015 and M.P. No. 1 of 2015

Ganga Foundations Pvt. Ltd. APPELLANT

Vs

The Commissioner Large Taxpayer Unit (LTU) RESPONDENT

Date of Decision : 02-09-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35(F), 35F

Citation : (2015) 09 MAD CK 0085

Hon'ble Judges : R. Mahadevan, J.

Bench : Single Bench

Advocate : K. Jayachandran, for the Appellant; A.P. Srinivas, Standing Counsel, for the Respondent

Judgement

R. Mahadevan, J.—Heard the learned counsel for the petitioner and Mr. A.P. Srinivas, learned Standing Counsel, who took notice for the respondent and with their consent, the main writ petition itself is taken up for disposal.

2. This writ petition has been filed challenging the order dated 26.06.2015 passed by the respondent in C. No. IV/09/478/2012-13 No. 2/2015.

3. The petitioner, which is a Company incorporated under the provisions of the Companies Act, engaged in the construction service in respect of residential and commercial or industrial buildings and civil structures, in the capacity of "Promoter, Builder or Developer". On the reasonable belief that the activities carried out by the petitioner Company does not attract levy of Service tax, the petitioner had not obtained the Service Tax Registration prior to February 2011 and not collected service tax from any of their customers during the period 2007-2011, as they have not raised any invoice and only given them the details of receipts to them. It is the submission of the learned counsel for the petitioner that when the petitioner planned to undertake a project "Anandam" in Chitlapakkam, they applied for registration under Service Tax in 2011 and the same was granted on 08.02.2011, for construction of Industrial and Commercial Buildings, and on 21.10.2011, the registration was amended for "Transport of

Goods by road, construction of residential complex, renting of immovable property services and works contract services". Pursuant to the grant of registration, the officials attached to the Service Tax, issued a letter dated 09.02.2011, requiring the petitioner to submit the audited balance sheet, profit and loss accounts for the years 2007-2011 and summons were also issued to the Managing Director for appearance. In response to the same, all the documents on various dates ending were submitted. On 22.10.2012, the Commissioner of Service Tax issued a show cause notice proposing to levy service tax on the activities carried out by the petitioner, for which, a detailed reply dated 19.12.2012 was filed by the petitioner. Written submissions were also filed at the time of personal hearing given to the petitioner on 17.12.2014. When the adjudication of notice was transferred to the respondent, the petitioner filed written submissions before the respondent on 07.04.2015, denying the allegations contained in the show cause notice. However, rejecting the reply filed by the petitioner, the respondent, passed the impugned order, confirming the proposals made in the show cause notice dated 22.10.2012. Aggrieved against the same, the petitioner is before this Court.

4.1 The learned counsel appearing for the petitioner submitted that the respondent, in the impugned order, while referring to the Board Circular dated 29.01.2009 has stated that the Circular was issued under a different service viz., "Construction of residential complex service" and hence not applicable to the present case. He would further submit that the respondent has further held that the insertion of Explanation on 01.07.2010 had retrospective effect as the same cannot be termed as an amendment. According to the learned counsel for the petitioner, the conclusion so arrived at by the respondent is contrary to the settled position of law as per the decisions of the Hon''ble Apex Court and the Courts in general that any amendment by way of Explanation to a Section is only prospective and cannot be applied retrospectively. It is pointed out by the learned counsel for the petitioner that the explanation inserted was specifically made effective from 01.07.2010 through the Finance Act, 2010, as clarified in Board''s Circular dated 10.02.2012.

4.2 That apart, according to the learned counsel for the petitioner, the respondent confirmed the demand invoking larger period of limitation i.e., demanding tax for five years on the allegation of suppression etc., whereas, as per the provisions applicable during the relevant period, they are under the bonafide belief that no service tax is leviable and therefore, not applied for registration itself.

4.3 Further, according to the learned counsel for the petitioner, the reasoning of the respondent is contrary to the provisions and the decisions of the Hon''ble Apex Court that any amendment by way of insertion to a provision can be applied only prospectively and the Circulars issued by the Board clearly confirm that the Explanation is effective from 01.07.2010, which are binding on its officers.

4.4 The learned counsel for the petitioner would further submit that the period of dispute is 2007-2011, the show cause notice was issued on 22.10.2012. If the petitioner is relegated to file appeal against the impugned order before the Tribunal, because of substitution of Section 35F of Central Excise Act, effective from 6.8.2014, as applicable to Service Tax matters, the petitioner will be compelled to file an appeal only after depositing 7 1/2% of the amount of tax demanded, even though the substitution of Section 35F of the Act can be applied prospectively, i.e., for the cases where the lis arises after 6.8.2014.

4.5 Besides, according to the learned counsel for the petitioner, the question of applicability of substituted Section 35-F of the Finance Act, to the orders passed after 06.08.2014 or to the appeals filed on or after 06.08.2014, is still pending consideration before the Division Bench of this Court, irrespective of the final orders by Kerala High Court reported in 2015 TIOL 895 Kerala and the interim orders of the Andhra Pradesh High Court reported in 2015 TIOL 511. In the circumstances, according to the learned counsel, filing appeal against the impugned order by mandatorily depositing 7.5% of the amount demanded will not only make hardship to the petitioner but also will lead to depriving right of appeal without pre-deposit of 7.5% of the said amount.

Based on these, the learned counsel for the petitioner has prayed for allowing of the writ petition.

5. Mr. A.P. Srinivas, learned Standing Counsel for the respondent, on the other hand, would submit that neither the Court of Kerala nor the Andhra Pradesh High Court has dealt with the second proviso to Section 35(F) of the Act. In support of his submission, after referring to the entire proviso including second proviso to Section 35(F), he has also placed on record the judgment of the Kerala High Court in K.V. Raghunathan Pillai vs. The Commissioner of Central Excise, Customs and Service Tax, Thiruvananthapuram to impress upon this Court that reading of second proviso to Section 35(F) as contained in the Finance Act itself shows that the provision relied on by the learned counsel appearing for the petitioner shall not apply to stay applications and appeals pending before any appellate authority prior to the commencement of the amendment, viz., 06.08.2014, hence, the petitioner should be directed to file his appeal along with pre-deposit as per Law. That apart, according to him, the applicability of Section 35F of the Finance Act is pending consideration before the Hon''ble Division Bench of this Court.

6. Considering the submissions made by the learned counsel on either side and in view of the fact that the applicability of Section 35F of the Finance Act is pending consideration before the Hon''ble Division Bench of this Court, this Court permits the petitioner to file an appeal along with waiver application, within a period of two weeks from the date of receipt of a copy of this order. Since the matter is pending before the Division Bench of this Court, testifying the validity of Section 35F of the Finance Act, relating to pre-deposit, the appellate authority is directed to receive the appeal along with waiver application filed by the

petitioner, which would be subject to the result of the issue pending before the Division Bench.

With the above direction, the writ petitioner is disposed of. No costs. Connected miscellaneous petition is closed.

