

(2015) 10 GUJ CK 0036

In the Gujarat High Court

Case No : Special Civil Application No. 8704 of 2015

Gopala Builders

APPELLANT

Vs

Directorate General of C. Ex. Intelligence

RESPONDENT

Date of Decision : 01-10-2015

Acts Referred:

Finance Act, 1994 — Section 73, 73A, 73C, 87

Citation : (2015) 40 STR 888 : (2016) 88 VST 16

Hon'ble Judges : Harsha Devani and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : Jaimin R. Dave and Rohan H. Mathew, Advocates, for the Appellant;
Hriday Buck, Advocate, for the Respondent

Judgement

Harsha Devani, J.—Rule. Mr. Hriday Buch, learned senior standing counsel waives service of notice of rule on behalf of the respondents. Having regard to the controversy involved in the present case which lies in a very narrow compass, the matter was taken up for final hearing.

2. The petitioner, a partnership firm is engaged in providing services of industrial and civil work to various clients and is registered with the Service Tax Department under "Works Contract Service and Construction of Industrial Building and Civil Structure Service". The petitioner is a reputed firm providing services of industrial construction and is engaged in the business since 19 years and has got considerable goodwill in the market amongst clients. The petitioner carried out construction works for its clients on the basis of the works contract executed between them.

3. During the period October, 2009 to December, 2013, the petitioner paid service tax of Rs. 96,22,650/-. On 5-2-2014, search operations came to be carried out at the petitioner's registered office at Dahej and corporate office situated at Delhi. According to the first respondent, there were several irregularities in the payment of service tax on the part of the petitioner firm and it was alleged that the total service tax liability of the petitioner firm for the

period from October, 2009 to December, 2013 was Rs. 4,25,74,611/-. However, such figure was arrived at unilaterally, without affording any opportunity of hearing to the petitioner and it was directly alleged in the show cause notice that the petitioner was liable to pay the aforesaid amount. No demand notice was issued in respect of the aforesaid liability computed by the first respondent. The petitioner was thereafter called to the office of the first respondent from time to time and it had cooperated in the assessment proceedings and also paid an additional amount of Rs. 83,00,000/- during the course of investigation.

4. Subsequently, to the utter shock and surprise of the petitioner, on or about 6-4-2015, the first respondent issued notices under Section 87 of the Finance Act, 1994 (hereinafter referred to as "the Act") to the debtors of the petitioner, with a direction that monies payable by the clients of the petitioner, instead of being paid to the petitioner, be deposited in the treasury of the Central Government. Thereafter, on 17-4-2015 (i.e. after issuance of the garnishee orders), the petitioner was served with a show cause notice.

5. Having regard to the fact that the notice under Section 87 of the Act was issued unilaterally treating an amount of Rs. 4,25,74,611/- leviable on services rendered by the petitioner to all its clients for the above period, without issuance of any show cause notice or determination of tax or adjudication by the Department, the petitioner has approached this court seeking the following substantive relief:

"8. The petitioner therefore prays that:

[A] This Hon"ble Court be pleased to issue a writ of mandamus or a writ, order or direction in the nature of mandamus and quash and set aside the impugned Notice dated 6-4-2015, at Annexure-A issued by the respondent No. 1 and other notice as may be issued by the respondent No. 1 from time to time, including the notices marked and annexed at Annexure-E Colly, to this petition which at the relevant time was not available to us as all these notices were produced by the respondents."

6. Mr. Jaimin Dave, learned advocate for the petitioner submitted that there is no final assessment in the case of the petitioner. That the petitioner had, for the period in question, that is, October, 2009 to December, 2013, admittedly paid service tax to the tune of Rs. 96,22,650/- and had subsequently paid Rs. 83,00,000/- during the course of investigation. That in all, the petitioner has already paid an amount of Rs. 1,79,00,000/- towards service tax. It was submitted that under the circumstances, without any assessment order being made and without any demand notice being issued to the petitioner, the action of the respondent in issuing garnishee orders to the clients of the petitioner, is a drastic, highhanded and arbitrary measure which could be resorted to only in exceptional and extraordinary circumstances. In the facts and circumstances of the case, when no demand has been raised from the petitioner, there was no warrant for resorting to such a drastic measure. Mr. Dave, learned advocate,

however, submitted that over and above the amount already deposited, the petitioner is ready and willing to deposit an additional amount of Rs. 22,00,000/- within a period of six to eight weeks from today. It was, accordingly, urged that under the circumstances, the impugned notices under Section 87 of the Act issued to the clients of the petitioner be quashed and set aside.

6.1 In support of his submissions, the learned counsel placed reliance upon a decision of this court in the case of Technomaint Contactors Ltd. Vs. Union of India, , wherein the court, in similar set of facts and circumstances, had observed 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. The court noticed 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. The court held that 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. In the facts of the said case, the court observed that within two days of issuance of show cause notice, the respondents issued recovery orders against the customers of the petitioners, which in its opinion, was not simply permissible. Mr. Dave submitted that the above decision would be squarely applicable to the facts of the present case and as such, the petition deserves to be allowed.

7. Mr. Hriday Buch, learned senior standing counsel for the respondents, on the other hand, has reiterated the contents of the affidavit-in-reply filed on behalf of the respondents.

8. This court has considered the submissions advanced by the learned counsel for the respective parties and has perused the record and proceedings of the case.

9. From the facts noted hereinabove, it is evident that the proceedings initiated against the petitioner, post the search operations, are still at the stage of show cause notice. Therefore, there is no final adjudication in respect of the service tax liability of the petitioner. The respondents, however, have unilaterally worked out such liability for the period in question at Rs. 4,25,74,611/-. Thereafter, no demand for such amount has been made from the petitioner by issuing any demand notice in this regard. However, the respondents have resorted to the drastic measure of issuing notices under Section 87 of the Act to the debtors of the petitioner. Section 87 of the Finance Act, 1994 provides for recovery of any amount due to Central Government and lays down that where any amount payable by a person to the credit of the Central Government under any of the provisions of that Chapter or the rules made thereunder is not paid, the Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned therein. Section 87 of the Finance Act, 1994 came up for

consideration before the Jharkhand High Court in the case of Exman Security Services Pvt. Ltd. Vs. The Union of India and Others , wherein the court reiterated the view expressed by the Uttarakhand High Court in the case of R.V. Man Power Solution Vs. Commr. of Cus. and Central Excise, , wherein it has been observed that going by the language of Section 87 of the Finance Act, any amount payable means the 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. Such claim can be made only when the final adjudication has been done after quantifying the amount due and payable by the assessee.

10. This court is in agreement with the aforesaid view expressed by the Uttarakhand High Court, namely, that recovery under Section 87 of the Finance Act can be resorted to only after an amount is adjudicated to be due to the Central Government. Under the circumstances, at the stage of show cause notice when the liability of the petitioner is yet to be crystallized, it was not permissible for the respondents to resort to the drastic provisions of Section 87 of the Act.

11. Besides, as the facts reveal, no demand notice in respect of the aforesaid amount had been issued to the petitioner and directly garnishee orders had been issued to the clients of the petitioner. Such course of action adopted by the respondents, evidently, would bring the petitioner to disrepute and spoil its reputation in the business. Therefore, the action of the respondents of resorting to the provisions of Section 87 of the Act was not warranted in the facts and circumstances of the case. The impugned notices, Annexure "E" collectively to the petition, being contrary to the provisions of Section 87 of the Act, therefore, cannot be sustained. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 6-4-2015 (Annexure "A" to the petition) as well as the impugned notices (Annexure "E" collectively to the petition), are hereby quashed and set aside. The petitioner shall, however, deposit the additional sum of Rs. 22,00,000/- as per the statement made by the learned counsel for the petitioner with the respondent authorities within a period of six weeks from the date of receipt of a copy of this order. Rule is made absolute accordingly with no orders as to costs.