(2014) 09 BOM CK 0023

In the Bombay High Court

Case No : Writ Petition No. 8954 of 2014

GTL Infrastructure Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 29-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 310 ELT 44 : (2015) 49 GST 24

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : Riyaz Chagla i/b. Prompt Legal, Advocate for the Appellant; Pradeep S. Jetly and Anamika Malhotra, Advocate for the Respondent

Judgement

1. By this writ petition under Article 226 of the Constitution of India, the petitioner is seeking a direction to respondent No. 2 to permit it to credit their Cenvat credit account to the extent of Rs. 79,92,56,619/- earlier paid by the petitioner. The petitioner does the business of providing telecommunication network. The petitioner is engaged in providing business auxiliary services and infrastructural facilities to various telecom companies. The petitioner is having a centralized Service Tax registration and is filing its returns regularly. One M/s. Chennai Network Infrastructure Limited, a company situated at Navi Mumbai, Dist. Thane is also in the same business. The petitioner and said M/s. Networks Infrastructure Limited (''M/s. CNIL'' for short) agreed to merge their activities. It filed a scheme of merger before this Court and the Madras High Court. Learned Single Judge of this Court exercising company jurisdiction allowed the Company Scheme Petition No. 295 of 2011 filed by the petitioner on 22nd July, 2011 and the scheme of merger was sanctioned. Similar Company Petition No. 77 of 2011 in Madras High Court had been filed by M/s. CNIL and that is pending. In the light of the order passed by this Court, a consolidated return of Service Tax liability was filed and a sum of Rs. 79,92,56,619/- being the liability of Service Tax dues of M/s. CNIL from October, 2010 to March, 2012 was paid.

2. Later on, the petitioner was advised that though this Court has sanctioned the scheme of merger, the Madras High Court is yet to sanction it. Therefore, the petitioner made an application and details of the same are disclosed in the writ petition. The petitioner then sought virtual refund of the said amount of Rs. 79,92,56,619/- or relief in the form of credit of their Cenvat credit amount to this extent. A representation was made in that behalf to the authorities and which instead of considering it, kept the same pending. In view thereof, this Court was moved by the petitioner by an earlier writ petition. That earlier writ petition came to be disposed of by this Court with directions to the authorities to consider its representation after hearing the petitioner and pass a speaking order. It is this speaking order, a copy of which is to be found at Annexure-A, which is now challenged by this further writ petition.

3. At the outset, Mr. Jetly, learned counsel appearing on behalf of the respondents raised objection to the maintainability of this writ petition. Firstly, on the ground that what the petitioner had filed was only a representation and not a refund application. All that the authorities had advised the petitioner is to file an appropriate and proper application for refund or credit of Service Tax paid and to the competent authority. Alternatively, it is admitted that the Commissioner of Service Tax-II, Mumbai had denied the request of the petitioner, yet, that should be construed as an order and it can be impugned by way of appropriate proceedings under the Act, namely, Central Excise Act, 1944 which applies the procedure even in relation to Service Tax refund claim as set out therein.

4. For all these reasons, Mr. Jetly submits that the present petition should be dismissed.

5. Mr. Chagla, learned counsel appearing on behalf of petitioner pointed out a communication at Annexure-N. An appeal was indeed filed before the Customs, Excise and Service Tax Tribunal but on 7th August, 2014, it passed order Annexure-N holding the same is not maintainable. What is termed by the Tribunal in its order about Annexure-A is that it is a communication and not a order under the Act. Therefore, his writ petition is maintainable. We have considered these contentions and what we find is that once this Court has directed that the representation made by the petitioner to the authorities praying for refund or credit in the Cenvat credit account be considered and a speaking order be passed thereon after hearing the petitioner, then, the Tribunal has taken a hyper technical view. Annexure-A is nothing but an order passed by the authorities under the Act. Customs, Excise & Service Tax Appellate Tribunal is a Appellate Authority and it has been approached because of the rejection of the petitioner''s plea claiming the refund or credit of Cenvat credit. In such circumstances, and according to the tenor of this Court''s order in the earlier writ petition passed on 27th January, 2014, we are of the view that this writ petition can be disposed of with the following order:--

"(a) The order passed on the representation/application of the petitioner and in terms of the Division Bench direction dated 27th January, 2014 in Writ Petition

No. 621 of 2014 is nothing but a speaking order on the Refund Application.

(b) It is appealable to Customs, Excise & Service Tax Appellate Tribunal, who shall now allow the petitioner to proceed with the appeal filed before it in accordance with law. In the event the appeal is not existing on its file, the petitioner may be permitted to file a fresh appeal challenging the communication/ order dated 7th March, 2014 by treating it as a order on the application seeking refund or credit of their Cenvat credit account.

(c) The appeal, then, shall be decided on its own merits and in accordance with law.

(d) All contentions of both sides on merits of the petitioner''s claim are kept open.

(e) The writ petition is disposed of in these terms. No costs."

