(2013) 11 GUJ CK 0081

In the Gujarat High Court

Case No : Special Civil Application No. 16725 of 2013

Inox Air Products Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 20-11-2013

Acts Referred:

Citation : (2014) 43 GST 189

Hon'ble Judges : R.P. Dholaria, J;M.R. Shah, J

Bench : Division Bench

Advocate : Jigar Shah and Anand Nainawati, for the Appellant; Jaimin Gandhi, for the Respondent

Judgement

M.R. Shah, J.—By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for appropriate writ, order and/or direction to quash and set aside the impugned show cause notice dated 23/4/2013 issued by the respondent No. 3 herein-Commissioner of Central Excise and Customs, Vadodara, by which, the petitioner is called upon to show cause as to why the service tax amounting to Rs. 2,32,87,465/- (Rs. 2,26,09,189 service tax + Rs. 4,52,184/- education cess) on the taxable value of Rs. 21,69,03,887/- received by them during the period from 16/5/2008 to 31/3/2012, should not be demanded and recovered from them under the proviso to section 73(1) of the Finance Act, 1994 and also to show cause why interest and penalty should not be demanded and recovered from them. Facts giving rise to file the present Special Civil Application, in nutshell, are as under:-

1.1 That the petitioner is having Service Tax Registration and is engaged in the business of manufacturing industrial gases such as oxygen, nitrogen, arogen, argon, speciality gas, medical oxygen dissolved acetylene, etc. That the petitioner also engaged in the business of leasing out equipments of Air Separation Plant to customers which produce the aforesaid gases. That the respondent No. 3 Commissioner of Central Excise and Customs, Vadodara, has issued show cause notice dated 23/4/2013 calling upon the petitioner to show cause as to why the service tax amounting to Rs. 2,32,87,465/- (Rs. 2,26,09,189 service tax + Rs. 4,52,184/- education cess) on the taxable value of Rs. 21,69,03,887/- received by them during the period from 16/5/2008 to 31/3/2012, should not be demanded and recovered from them under the proviso to section 73(1) of the Finance Act, 1994 and also to show cause why interest and penalty should not be demanded and recovered from them. According to the respondent No. 3, the petitioner is also engaged in providing services falling under the category of "Supply of Tangible Goods Services" for use. It is mentioned in the show cause notice that from the Agreements between the petitioner and M/s. Essar Steel Ltd. and M/s. DFL, it is clear that the petitioner has provided equipments to Ms. Essar Steel Ltd. and M/s. DFL without transferring right which satisfies the conditions to the provisions of sub-section (zzzzj) of section 65(105) of the Finance Act, 1994, wherein the service provided to any person, by any other person in relation to supply of tangible goods including machinery, equipment and appliances for use without transferring right of possession is liable to pay service tax. It is further observed in the show cause notice that therefore, service of leasing the plant, machinery and equipments to M/s. Essar Steel Ltd. and M/s. GFL is covered under the service category of "Supply of Tangible Goods Services.

1.2 Feeling aggrieved by and dissatisfied with the impugned show-cause notice, the petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India.

2. Mr. Jigar Shall, learned counsel appearing with Mr. Anand Nainawati, learned advocate appearing on behalf of the petitioner has vehemently submitted that the petitioner is paying Value Added Tax under the provisions of the Gujarat Value Added Tax Act, 2003 on the same transaction/eventuality and therefore, no service tax is leviable and therefore, the petitioner is not liable to pay service tax and hence, the impugned is wholly without jurisdiction. It is submitted that, as such, the transaction in question will be covered within the definition of "Sale" as provided u/s 2(23) of the Gujarat Value Added Tax Act, 2003 and accordingly, when the petitioner is paying VAT under the Gujarat Value Added Tax Act, the impugned show cause notice by which service tax is sought to be recovered deserves to be quashed and set aside.

2.1 Mr. Jigar Shah, learned counsel appearing with Mr. Anand Nainawati, learned advocate appearing on behalf of the petitioner has tried to make further submissions on merits by submitting that there is no question of applicability of aspect theory in the present case and therefore, the impugned show cause notice deserves to be quashed and set aside. However, for the reasons stated hereinbelow, we propose not to entertain the present petition, as the present petition is at the stage of show cause notice and dispute is yet to be adjudicated upon by the appropriate authority as to whether the petitioner is liable to pay service tax or not, we do not propose to consider the submissions on merits whether the petitioner is liable to pay service tax or not at this stage.

2.2 Mr. Jigar Shah, learned counsel appearing with Mr. Anand Nainawati, learned advocate appearing on behalf of the petitioner has heavily relied upon the decision of the Hon''ble Supreme Court in the case of Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, (more particularly para 7 at page 110) as well as another decision of the Hon''ble Supreme Court in the case of Filterco and Another Vs. Commissioner of Sales Tax, Madhya Pradesh and Another, in support of his prayer to entertain the petition under Article 226 of the Constitution of India and to quash and set aside the impugned show cause notice.

3. Heard Mr. Jigar Shah, learned counsel appearing with Mr. Anand Nainawati, learned advocate appearing on behalf of the petitioner at length.

3.1 At the outset, it is required to be noted that what is challenged in the present petition under Article 226 of the Constitution of India is the show cause notice issued by the respondent No. 3-Commissioner of Central Excise & Customs, calling upon the petitioner to show cause as to why the service tax amounting to Rs. 2,32,87,465/- (Rs. 2,26,09,189 service tax + Rs. 4,52,184/- education cess) on the taxable value of Rs. 21,69,03,887/- received by them during the period from 16/5/2008 to 31/3/2012, should not be demanded and recovered from them under the proviso to section 73(1) of the Finance Act, 1994 and also to show cause why interest and penalty should not be demanded and recovered from them.

3.2 In the case of Commissioner of Income Tax, Gujarat Vs. Vijaybhai N. Chandrani, it is observed and held by the Hon''ble Supreme Court that when an alternative remedy is available to the aggrieved party, it must exhaust the same before approaching the Writ Court. In the said decision, the Hon''ble Supreme Court has also observed its another decision in the case of Bellary Steels & Alloys Ltd. v. CCT [2009] 17 SCC 547 taking the view that High Court should not have interfered in the matter as the Writ Petition was filed without even reply to the show cause notice. In the said decision, the Hon''ble Supreme Court has also considered the decision in the case of In do Indo Asahi Glass Co. Ltd. and Another Vs. Income Tax Officer and Others, wherein the assessee had approached the Hon''ble Supreme Court against the judgment and order of the High Court which had dismissed the Writ Petition filed by the assessee wherein show cause notice, the respondent No. 3 may or may not hold that the petitioner is liable to pay service tax. However, merely because according to the petitioner the petitioner is not liable to pay service tax on the transaction, by itself, it cannot be said that the show cause notice issued by the authority under the Act lacks total jurisdiction.

3.3 Now, so far as the contention on behalf of the petitioner that the petitioner is paying VAT Tax under the Gujarat Value Added Tax Act on the transaction in question and therefore, the petitioner cannot be held liable to pay service tax on the same transaction/eventuality is concerned, it is required to be noted that as such while issuing show cause notice, the respondent No. 3 is conscious of the same. It is also required to be noted that as such there is no adjudication by any authority that the petitioner is liable to pay Value Added Tax and/or Service Tax. Nothing is on record to show that there is any adjudication by the authority under the VAT Act that the petitioner is liable to pay VAT. In a given case it may happen that on the same transaction, there may be levy of two different taxes under two different statutes. However, all the aforesaid questions are required to be adjudicated by the adjudicating authority. As stated hereinabove, whether the petitioner is liable to pay service tax on the same service/transaction in question is yet to be adjudicated upon by the appropriate authority and for which the impugned show cause notice has been issued by the respondent No. 3 to the petitioner.

3.4 In view of the above and for the reasons stated above, and when the present petition is against the show challenge was made to the show cause notice issued by the Assessing Authority on the ground that alternative remedy was available to the assessee. Considering the law laid down by the Hon''ble Supreme Court in the aforesaid decisions and as the present petition is against the show cause notice and the petitioner is yet to reply to the show cause notice and the show cause notice is yet to be adjudicated upon, present petition is not entertained.

3.5 Now so far as the reliance placed upon the decision of the Hon''ble Supreme Court Harbanslal Sahnia (supra) is concerned, considering the facts of the case on hand, we are of the opinion that the observations made by the Hon''ble Supreme Court in the said decision will not be of any assistance to the petitioner. In the present case, there is a serious dispute with respect to applicability of service tax by the petitioner which is yet to be adjudicated upon by the adjudicating authority. Similarly, decision of the Hon''ble Supreme Court in the case of Filterco (supra) will not be applicable to the facts of the present case.

3.6 Now, so far as the contention on behalf of the petitioner that the impugned show cause notice is wholly without jurisdiction and therefore, this Court may entertain the petition under Article 226 of the Constitution of India against the show cause notice is concerned, the same cannot be accepted. It cannot be said that the respondent No. 3-Commissioner of Central Excise & Customs who issued the impugned show cause notice, lacks total jurisdiction to issue the show cause notice with respect to service tax. It is different thing that after considering the reply of the petitioner to the cause notice and the petitioner has yet to respond to the same, present petition is not entertained and the same is dismissed. However, it is observed that all the defences which may be available to the petitioner under the law are kept open which the authority is bound to consider the same in accordance with law and on merits at the time of adjudication. We also make it clear that we have not expressed any opinion on merits in favour of either of the parties as to whether the petitioner is liable to pay service tax on the same transaction in question for which the show cause notice has been issued and it is ultimately for the adjudicating authority to pass appropriate order in accordance with law and on merits, after considering the reply that may be filed by the petitioner and/or submissions to be made by the petitioner.

With this, present Special Civil Application is dismissed.

