(2005) 08 AP CK 0084

In the Andhra Pradesh High Court

Case No : Writ Petition No. 3677 of 2005

Karvy Consultants Limited APPELLANT

Vs

Government of India RESPONDENT

Date of Decision : 09-08-2005

Acts Referred:

Central Excises and Salt Act, 1944 — Section 2
Constitution of India, 1950 — Article 226
Finance (Amendment) Act, 2003 — Section 65(19)
Finance (Amendment) Act, 2004 — Section 65(19)
Finance Act, 1994 — Section 65(19), 66, 73(1), 75, 76

Citation : (2006) 4 STR 75

Hon'ble Judges : Ramesh Ranganathan, J;B. Sudershan Reddy, J

Bench : Division Bench

Advocate : S. Chakrapani, for the Appellant; A. Rajashekar Reddy, A.S.G. and S.R. Ashok, S.C.C.T., for the Respondent

Judgement

1. In this writ petition, the petitioner seeks a declaration that Section 65(19) of the Finance Act, 1994, as amended by the Finance Act of 2003, has no application to the petitioner''s service namely "Registrar and Transfer Agency" and consequently interdict the 2nd respondent from proceeding in furtherance of the show cause notice dated 3-1-2005.

2. Facts, to the extent necessary for the purpose of this writ petition, are that the 2nd respondent issued show cause notice dated 3-1-2005 calling upon the petitioner to show cause as to why :-

I. An amount of Rs. 1,38,95,128/- should not be paid by them towards service tax on the amounts received by them during the period from 1-7-2003 to 31-1-2004, on account of providing taxable services under proviso to Section 73(1) of the Finance Act, 1994.

II. Interest should not be paid by them on the amount demanded at (I) above u/s 75 of the Finance Act, 1994.

III. A penalty should not be imposed on them u/s 76 of the Finance Act, 1994.

IV. A penalty should not be imposed on them u/s 78 of the Finance Act, 1994.

3. The petitioner was asked to produce all the evidence upon which they intended to rely in their defence and to indicate in their written reply whether they wished to be heard in person before the case was adjudicated.

4. The petitioner, a company registered under the Companies Act, provides various financial services and, among several activities, it earlier functioned as the Registrar and Transfer Agent for various corporate bodies. It is their case that the service rendered by them as Registrar and Transfer Agents of Corporate bodies, did not fall within the definition of "Business Auxiliary Service" and they were therefore not liable for payment of service tax.

5. Service Tax was introduced in the Finance Act of 1994. "Business Auxiliary Service" was brought within the purview of the service tax in the Finance Act of 2003 with effect from 1-7-2003. Section 65(19) of the Finance Act of 2003 read thus :-

Section 65(19):

Business Auxiliary Service" means any service in relation to :-

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) any incidental or auxiliary support service such as billing, collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services,

and includes services as a commission agent, but does not include any information technology service.

Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this clause, "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems.

Section 65(19), as amended by Finance Act, 2004 with effect from 10-9-2004, reads thus :-

business auxiliary service" means any service in relation to :-

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

(v) production of goods on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in Sub-clauses (i) to (iv), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" within the meaning of Clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 1944)

Explanation.- For the removal of doubts, it is hereby declared that for the purposes of this clause, "information technology service" means any service in relation to designing, developing or maintaining of computer software, or computerized data processing or system networking, or any other service primarily in relation to operation of computer systems;

6. The services covered, under Sub-clauses (iv), (v) and (vi) above, were added to the pre-existing definition of "Business Auxiliary Service", prescribed by Finance Act of 2003, with effect from 10-9-2004. Petitioner admits that its activity falls within the purview of Sub-clause (vi) of Section 65(19) of the Finance Act of 2004. They, however, contend that the activity of "Registrar and Transfer Agency Service" carried on by them earlier, which was hived of and transferred for valid consideration in favour of M/s. Karvy Computer Shares Private Limited with effect from 1-2-2004, did not come within the definition of "Business Auxiliary Service" prior to 10-9-2004. It is their case that the show cause notice dated 3-1-2005, issued by the 2nd respondent, was under the erroneous supposition that Section 65(19) of Finance Act, 2003 encompassed the nature of activity carried on by the petitioner, even prior to 10-9-2004. Petitioner also relies on the Notification No. 25/2004, dated 10-9-2004, issued by the Central Government, u/s 93(1) of the Finance Act exempting that portion of the value of certain taxable services from the whole of service tax leviable thereon, u/s 66 of the Finance Act, which was received by the service provider prior to the 10-9-2004. The services exempted, under the said notification, include, in Claused(iii), the service provided to a client by a commercial concern in relation to business auxiliary services namely provision of service on behalf of the client. Petitioner contends that since the aforesaid service hitherto being provided by the petitioner on behalf of its clients, is exempted from service tax under the Govt. of India Notification dated 10-9-2004, the show cause notice dated

3-1-2005 is liable to be set aside. It is further contended that the expression "Business Auxiliary Service" in Section 65(19) of the Finance Act, 2003 did not include provision of service on behalf of the clients and therefore the petitioner ought not to have been called upon by the 2nd respondent to show cause as to why service tax should not be levied on it.

7. A counter-affidavit is filed on behalf of the respondents, wherein it is stated that the activity carried on by the petitioner, during the relevant period, as Share Transfer Agent, is in the nature of incidental or auxiliary support service in the sale of goods (securities) belonging to the client and falls within the purview of Section 65(19)(iv) of the Finance Act, 2003, that the impugned show cause notice merely demanded service tax on service charges collected by the petitioner towards such services rendered from 1-7-2003 to 31-1-2004, that the show cause notice was issued after strictly construing Section 65(19) of the Finance Act, 2003, that the functions of the Registrar and Share Transfer Agent is a service rendered which is in the nature of incidental or auxiliary support service rendered in the contract of sale of goods (securities) belonging to the client and therefore the petitioner''s contention, that none of the clauses in the definition encompass the activity rendered by it and that it could not be brought within the purview of business auxiliary service, was not correct.

8. Section 65(19)(iv) of the Finance Act, 2003 defines "Business Auxiliary service" to mean any service in relation to any incidental or auxiliary support service, such as, billing collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services and includes services as a commission agent, but does not include any information technology service. While the petitioner contends that it was not carrying on any activity relating to billing collection or recovery of cheques, accounts and remittance, evaluation of prospective customer and public relation services or service as a commission agent and therefore did not fall within the purview of Section 65(19)(iv), it is the case of the respondents that the services referred to in Sub-clause (iv) of Section 65(19) of the Finance Act, 2003 are merely illustrative and not exhaustive of all "incidental or auxiliary support services".

Sub-clause (iv) of Section 65(19) of Finance Act, 2003 relates to any incidental or auxiliary support service. Learned Assistant Solicitor General, appearing on behalf of the respondents, submits that the six services referred to in Section 65(19)(iv) of Finance Act, 2003 i.e., (1) Billing collection, (2) Recovery of cheques, (3) Accounts and remittance, (4) Evaluation of prospective customer, (5) Public relation service and (6) Services as a commission agent are only illustrative of "any incidental or auxiliary support service" and are not exhaustive. According to the Learned Assistant Solicitor General the expression "Business Auxiliary Service" has been defined in Section 65(19)(iv) to mean any incidental or auxiliary services and would therefore include all kinds of incidental or auxiliary services. Learned Counsel contends that the six services mentioned therein are preceded by the words "such as" which makes it clear that the expression "any incidental or auxiliary support service" would bring within its fold services other than the aforementioned six services also. Learned counsel submits that since the activity carried on by the petitioner of "Registrar and Transfer Agency" falls within the purview of "any incidental or auxiliary support service" u/s 65(19) of the Finance Act, 2003, the said business auxiliary services rendered by the petitioner during the period 1-7-2003 to 31-1-2004 would bring them within the service tax net. Learned counsel further submits that Section 65(19) of the Finance Act, 2004, which includes in Sub-clause (vi) any service in relation to provision of service on behalf of the client, is much wider and while undoubtedly the activity carried on by the petitioner comes within the purview of Section 65(19)(vi) of the Finance Act, 2004, it nonetheless comes within the purview of Section 65(19)(iv) of Finance Act, 2003 also.

9. It is not necessary for this court to examine this aspect since the applicability or otherwise of Clause (iv) of Section 65(19) of Finance Act, 2003 has to be first examined by the 2nd respondent. Whether or not the services rendered by the petitioner, as a Registrar and Transfer Agent for corporate bodies, is an incidental or auxiliary support service falling within the scope of "Business Auxiliary Service" u/s 65(19), is a mixed question of fact and law, required to be first examined by the 2nd respondent and not straightaway adjudicated in proceedings under Article 226 of the Constitution of India.

10. The Government of India Notification dated 10-9-2004 exempts a portion of the value of certain taxable services, including services provided to a client by a commercial concern in relation to the business auxiliary services of provision of service on behalf of the client, from the whole of the service tax leviable thereon, u/s 66 of the Finance Act, which is received by the service provided prior to 10-9-2004. This notification has neither been referred to in the show cause notice issued by the 2nd respondent on 3-1-2005 nor in the counter-affidavit filed before this Court. Whether or not the petitioner is entitled for exemption under the Central Government Notification No. 25/2004, dated 10-9-2004 is for the 2nd respondent to examine and decide in accordance with law. The petitioner is said to have submitted an explanation on 14-2-2004 setting out in detail its reply to the show cause notice dated 3-1-2005. In the said explanation, the petitioner, among other issues, has also taken the plea of limitation.

11. Interference under Article 226 of the Constitution of India, where the validity of a show cause notice is under challenge, is normally, limited to cases where the show cause notice as issued, is without jurisdiction or is tainted with malice, as these are matters which are required to be examined by the competent statutory authorities. It cannot be said that the show cause notice issued by the 2nd respondent on 3-1-2005 is without jurisdiction. No mala fides are attributed to the 2nd respondent. Since the applicability or otherwise of Section 65(19)(iv) of Finance Act, 2003 to the services rendered by the petitioner as Registrar and Transfer Agent during the period 1-7-2003 to 31-1-2004 is a mixed question of fact and law, this issue and the question whether the petitioner is entitled for

exemption under Central Government Notification No. 25/2004-Service Tax, dated 10-9-2004, are all matters for 2nd respondent to decide after taking into consideration the explanation furnished by the petitioner in this regard.

12. The show cause notice issued by the 2nd respondent on 3-1-2005 does not call for interference by this Court under Article 226 of the Constitution of India. Since the time prescribed in the show cause dated 3-1-2005, of 15 days, has already expired, we deem it appropriate to permit the petitioner to submit an additional reply, if it so desires, to the show cause notice dated 3-1-2005 bringing to the notice of the 2nd respondent the Central Government Notification No. 25/2004-Service Tax, dated 10-9-2004 and raise such other grounds as it considers necessary, within a period of 15 days from the date of receipt of a copy of this order. If any such additional reply is filed by the petitioner within the aforesaid said period, the 2nd respondent shall consider the same along with the reply furnished by the petitioner earlier and pass appropriate orders thereon, in accordance with law, uninfluenced by any observations made in this order.

13. The writ petition is accordingly disposed of. No orders as to costs.