(2014) 02 KL CK 0043

In the High Court Of Kerala

Case No : Writ Petition (Civil) No. 30612 of 2013 (B)

Kothamangalam Municipality APPELLANT

Vs

Addl. C.C.E., C. and S.T. RESPONDENT

Date of Decision : 03-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 65, 65(104c), 65(105)(zzzm), 65(105)(zzzz), 69

Citation : (2014) 36 STR 11 : (2015) 80 VST 451

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : V.M. Kurian, Mathew B. Kurian, K.T. Thomas, N. Sunil and Isac T. Paul, Advocate for the Appellant; Thomas Mathew Nellimoottil, SC, Advocate for the Respondent

Judgement

P.R. Ramachandra Menon, J.—Exts. P3 and P4 orders, to the extent they make the petitioner liable for ''Service Tax'' under the heads of: (a) Renting of Immovable Property,

(b) Collection of bus stand fee, and

(c) Collection of Advertisement Tax

are under challenge in this writ petition, contending that they are per se wrong and unsustainable in all respects, and without any authority of law, being contrary to the relevant provisions of the Finance Act, 1994.

The petitioner is a Local Authority, who has established and is maintaining a bus stand; also regulating advertisements, which according to them, is part of the statutory obligation, being done in public interest. It is contended that the petitioner is not carrying out any instance of trade and that the activity does not come within the purview of the Service Tax net. It is without any regard to the factual position as above and in total disregard to the contents of Circular No. 89/7/2006-S.T., dated 18-12-2006 (which stipulates that statutory functions do not fall within the purview of service tax net), that the petitioner has been required to satisfy the liability by way of Exts. P3 and P4 and hence the challenge. 2. It is seen from the pleadings and proceedings that the petitioner was served with Ext. P1 show cause notice dated 20-9-2011 issued by the 1st respondent, with regard to the proposed fixation of liability asking the petitioner to submit explanation, if any, within 30 days from the date of receipt of the notice. On receipt of Ext. P1 notice, detailed explanation was submitted by way of Ext. P2 dated 10-10-2011, which was served to the 1st respondent on 19-10-2011. However, the 1st respondent turned down the claim of the petitioner and passed Ext. P3 order dated 24-5-2012, the operative portion of which reads as follows:

"(i) I hereby classify services rendered by the noticee under (i) Renting of Immovable Property Services as per Clause (90a) of Section 65 of Finance Act, 1994, (ii) Business Support Services under Section 65(104c) of Finance Act, 1994, and (iii) Sale of Space or Time for Advertisement Services under Section 65(105)(zzzm) of Finance Act, 1994.

(ii) I confirm the demand of Rs. 7,05,280/- (Rupees seven lakhs five thousand two hundred and eighty only) (Service Tax Rs. 6,87,095/-, Education Cess Rs. 12,125/- and Secondary and Higher Education Cess Rs. 6,060/-) being the short paid amount during the period 2007-08 under the category of Renting of Immovable Property Services under Section 73(2) of Finance Act, 1994 read with Rule 6 of Finance Rules, 1994.

(iii) I confirm the demand of Rs. 4,28,454/- (Rupees four lakhs twenty eight thousand four hundred and fifty four only) (ST Rs. 4,16,746/-, Education Cess Rs. 8,336/- and Secondary and Higher Education Cess Rs. 3372/-) being the non-paid Tax and Cess under "Business Support Services" during the period 2007-08 to 2010-11 under Section 73(2) of Finance Act, 1994 read with Rule 6 of Finance Rules, 1994.

(iv) In confirm the demand of Rs. 49,605/- (Rupees forty nine thousand six hundred and five only) (ST Rs. 48,229/-, Education Cess Rs. 964/-and Secondary and Higher Education Cess Rs. 412/-) being the non-paid tax and Cess under "Sale of Space or Time for Advertisement Services" during the period 2007-08 to 2010-11 under Section 73(2) of Finance Act, 1994 read with Rule 6 of Service Tax Rules, 1994.

(v) I impose a penalty on the noticee under Section 76 of Finance Act calculated @ Rs. 100/- per day starting the due date till 17-4-2006 and thereafter i.e., from 18-4-2006 to 10-5-2008 calculated @ Rs. 200/- for every day or 2% of Service Tax per month whichever is higher, subject to ceiling that the total amount of penalty payable under Section 76 shall not exceed the Service Tax, Education Cess and Secondary and Higher Education Cess payable for the period.

(vi) I impose a penalty of Rs. 5,000/- (Rupees five thousand only) on the noticee under Section 77 of the Finance Act, 1994 for contravention of Section 69 of

Finance Act, 1994.

(vii) I impose a penalty of Rs. 11,83,339/- (Rupees eleven lakhs eighty three thousand three hundred and thirty-nine only) under Section 78 of the Finance Act, 1994 for wilful suppression of the value of taxable services and material facts from the Department with an intent to evade payment of service Tax, Education cess and Secondary and Higher Education Cess. However I give the noticee an option to avail the facility under proviso (1) and (2) of Section 78 of the Finance, 1994.

(viii) with the above orders, Show Cause Notice No. 125/2011-S.T., dated 20-9-2011 stands disposed off."

3. Subsequently, it was noted that, some error, as apparent on the face of the record, had occurred in fixing the liability vide Ext. P3. In the said circumstance, the matter was re-examined, invoking the power and procedure under Section 74(1) of the Finance Act, 1994, leading to Ext. P4 order dated 23-8-2012, enhancing the liability also by including ''interest'' payable under Section 75 of the Finance Act, 1994 in respect of the amount confirmed at Serial Nos. (ii), (iii) and (iv) of Ext. P3 order. The said order was passed after serving notice dated 25-6-2012 and it has become final, as no appeal was preferred by the petitioner against Exts. P3 and P4 orders invoking the power and procedure under Section 85 of the Finance Act, 1994 within the prescribed time. The writ petition has been filed challenging Exts. P3 and P4, virtually about 1 year after passing the said orders, contending that the petitioner actually is not supposed to bear any liability, for the reason that the petitioner is discharging statutory functions under the Municipality Act, 1994 and hence outside the purview of the Service Tax net.

4. A counter affidavit has been filed on behalf of the respondents, mainly raising a question of maintainability of the writ petition and without prejudice to the right to file detailed counter affidavit on merits, if found necessary on a later occasion. The specific case of the respondents is that the petitioner was having an effective alternate remedy by way of appeal as provided under Section 85 of the Finance Act, 1994 before the Commissioner of Central Excise (Appeals) and that the petitioner admittedly did not avail any such statutory remedy within the specified time, or even within the extended time, offering any satisfactory explanation for the delay. By virtue of the law declared by the Apex Court in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, and reiterated in Amchong Tea Estate v. Union of India [2010 (257) E.L.T. 3 (S.C.)] and also several other decisions rendered by this Court on the point, it is contended that, once the statutory period to file appeal is over, the party cannot be permitted to resurrect the cause by invoking the discretionary remedy under Article 226 of the Constitution of India.

5. Heard Sri. V.M. Kurian, the learned counsel for the petitioner and Sri Thomas Mathew Nellimoottil, the learned standing counsel for the respondents at length. The learned counsel for the petitioner submits that the first relief sought for, is

for a declaration, that the petitioner is not liable for payment of Service Tax on Bus stand fee, Advertisement tax, and fee collected on letting out of immovable property. The decision rendered by a Division Bench of this Court, reported in Panopharam and Narayaneeyam Vs. Union of India (UOI), is sought to be relied on to contend that the writ petition is maintainable, despite the fact that the statutory period for filing appeal is over.

6. The learned standing counsel for the respondents, submits on the other hand, that the said decision does not support the case of the petitioner in any manner and that, it only reiterates the legal position made clear already, also with reference to the decision rendered by the Apex Court on the point.

7. It is seen from the materials on record, that the petitioner is a registered service provider under the category of "Renting of Immovable Property Service" from 3-11-2008, under the second respondent. As a matter of fact, Service Tax was imposed on renting of immovable property services with effect from 1-6-2007 vide Notification No. 23/2007-S.T., dated 22-5-2007 as per Section 65(105)(zzzz) of the Finance Act, 1994. Taxable services means, any service provided or to be provided to a person by any other person, in relation to renting of immovable property for use in the course of furtherance of business or commerce. There is no dispute for the petitioner that the petitioner had applied for and obtained Service Tax registration under the category ''Renting of immovable property service'' on 3-11-2008 and started payment of Service Tax by filing ST-3 return from November, 2008. In other words, there is no case that the petitioner has paid any Service Tax on the taxable income received during the period from June, 2007 to October, 2008. It was pointing out this aspect, also with reference to the short payment of service tax on the taxable income received during the period from 2007-08 to 2009-10 and such other relevant aspects, that Ext. P1 show cause notice was issued to the petitioner.

8. The only objection raised by the petitioner as per Ext. P2 reply, in response to Ext. P1 show cause notice, is that, the petitioner is not in a position to demand or realise the differential tax from the parties to whom the service was rendered, as the right to collect the Bus stand fee, Advertisement tax, etc., was being allotted to the successful bidder/concerned parties on yearly basis, by way of public auction. It is also pointed out that the liability to satisfy Service Tax was not incorporated in the tender conditions/contract earlier and as such, there is much hardship (technical and legal) in recovering the arrears from the parties concerned. It was accordingly, that the petitioner sought for exemption from the liability till 2011-12, also with reference to the probable audit objections. The petitioner has given the particulars of remittance already made, in the opening paragraph of Ext. P2, referring to the total payment of Rs. 5,97,030/-; simultaneously adding that steps are being taken to deposit the balance amount in connection with the instance of letting out of the shop rooms in different buildings belonging to the petitioner.

9. As mentioned above and as discernible from the materials on record, Ext. P2

reply submitted by the petitioner was considered and the assessment was finalised as per Ext. P3 order dated 24-5-2012; followed by Ext. P4 order dated 23-8-2012 passed in rectification of the error apparent on the face of the records; whereby the liability to satisfy ''interest'' under Section 75 of the Finance Act, 1994 was also added on. The rights and liberties of the petitioner to file an appeal under Section 85 of the Finance Act, 1994 before the Commissioner of Central Excise (Appeals), also referring to the time span stand clearly incorporated in paragraphs 1 and 2 of the Ext. P3 order. Admittedly, the petitioner did not choose to contest the matter by filing any appeal, but has made a belated attempt by way of this writ petition filed after 1 year. By virtue of the law declared by the Apex Court in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, and in Amchong Tea Estate v. Union of India [2010 (257) E.L.T. 3 (S.C.)], the appellate authority is having no power to allow the appeal presented beyond the stipulated time and as such, it is not liable to be resurrected by way of a writ petition filed under Article 226 of the Constitution of India.

10. Coming to the scope of the observations made by a Division Bench of this Court in Paragraphs 23 and 24 of the verdict reported in Panopharam and Narayaneeyam Vs. Union of India (UOI), , it is to be noted that nothing new or anything contrary to the law already declared by this Court, is brought about. After making a reference to the various judgments rendered by the Apex Court and also by this Court, it has been asserted by the Bench in Paragraph 18, that in the case of a person whose remedy provided under the Statute stands expired, invoking of the extraordinary jurisdiction under Article 226 of the Constitution of India would amount to resurrection of a cause of action. The view of the Bench is clearly discernible from the observations in Paragraph 19 which is extracted below:

"We may even say that even if writ petition was filed under Article 226 of the Constitution of India at a time when an appellate remedy is not barred, this Court could certainly say it would not entertain a writ petition, if the reliefs sought for in the writ petition are available to be granted by invoking the statutory remedy provided under the Statute. If that be so, the case of a person who failed to invoke statutory remedy cannot be better placed so as to invoke the extraordinary jurisdiction."

From the above, it is clear that the Bench specifically observed that the case of a person who did not choose to avail the statutory remedy within the specified time, is never seated on a better position than a person who approached this Court directly by filing a writ petition instead of availing a statutory remedy before expiry of the time and driven out relegating to avail the statutory remedy declining interference under Article 226. Undisputedly, the petitioner was simply sleeping over the issue.

11. The only observation made by the Division Bench of this Court in Panopharam and Narayaneeyam Vs. Union of India (UOI), is that, writ petition

can be entertained even if the alternate statutory remedy had become time-barred, provided the petitioner is able to establish a justifiable right. If the writ petition raises issues on which ordinary relief could not be given by the statutory authority, then, the fact that writ petition has been filed beyond the period prescribed under the Statute, cannot be a ground for dismissal of the writ petition. Referring to the facts of the case, as disclosed from Paragraph 3 of the judgment (non-filing of the statutory appeal under Section 85 of the Finance Act, 1994 within the prescribed time), the Bench observed in Paragraph 24 of the above verdict, that the reliefs sought for in the said writ petition were reliefs which ordinarily could be granted by the appellate authority and therefore, there was no extraordinary situation for invoking the power under Article 226 of the Constitution of India, even if the writ petition was filed within the period of limitation. It was accordingly, that interference was declined and the writ petition was dismissed. This Court finds that the above decision cited on behalf of the petitioner does not come to the rescue of the petitioner at all.

12. With regard to the contention of the petitioner referring to Circular No. 89/7/2006-S.T., dated 18-12-2006 (as referred to in Paragraph 8 of the writ petition), it is doubtful that the petitioner''s activity does come within the purview of the Circular. There is specific observation in the said Circular that the fee being charged is ultimately deposited in the Government treasury. In the case of petitioner herein, being an institution of Local Self Government, it is not deposited in the Government treasury, but goes to the funds of the petitioner Municipality. Anyhow, since the said Circular has not been produced to have an exhaustive analysis, this Court does not propose to go into the said aspect.

13. The remaining point to be considered is, whether the petitioner has approached this Court at least within ''reasonable time'', after expiry of the statutory period for filing the appeal. In other words, even if it is presumed that, no statutory remedy is available, could the matter be agitated before this Court (in respect of the challenge against Exts. P3 and P4) at this distance of time; is the point to be considered. Obviously, the impugned orders (Exts. P3 and P4) are dated 24-5-2012 and 23-8-2012 respectively, whereas the writ petition has been filed only about 1 year after passing the said orders. This being the position, it cannot but be held, that the petitioner has not approached this Court within a reasonable time, so as to call for interference by this Court in exercise of the discretionary jurisdiction under Article 226 of the Constitution of India. In the above facts and circumstances this Court finds that there is absolutely no merit or bona fides in the writ petition. Interference is declined. The writ petition is dismissed accordingly.