

(2015) 02 BOM CK 0139
In the Bombay High Court
Case No : Writ Petition No. 6342 of 2012

Maharaja Developers

APPELLANT

Vs

Assistant Commissioner, Service Tax Cell and Others

RESPONDENT

Date of Decision : 11-02-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 65, 73, 78, 85

Citation : (2015) 33 GSTR 159 : (2016) 41 STR 381 : (2015) 81 VST 271

Hon'ble Judges : A.P. Bhangale, J.;B.P. Dharmadhikari, J.

Bench : Division Bench

Advocate : A.J. Bhoot, for the Appellant; Firdos Mirza, Advocates for the Respondent

Judgement

B.P. Dharmadhikari, J.—Heard Shri A.J. Bhoot, learned Advocate for the petitioner and Shri Firdos Mirza, learned Advocate for the respondents. By their consent, writ petition is taken up for final disposal by issuing rule making the same returnable forthwith.

2. The petitioner, an assessee under Service Tax provisions added by Chapter V of Finance Act, 1994, is before this Court for setting aside assessment order of Assessment Commissioner dated 23/24 October, 2008.

3. Learned Advocate Shri Bhoot submits that liability is fastened because of definitions contained in Section 65 clause 105(zzq) and (zzzh). He points out that the services rendered by builder was made taxable partly in 2004 and thereafter in 2005. However, later circulars issued by CBEC to clear the confusion show that such demand could not have been made. He submits that the petitioner could not then respond to show cause notices as its partner looking after the affairs had undergone a bye-pass surgery. The demand in terms of said assessment was made for the first time on 24-8-2012 and then petition has been filed. Our attention has been drawn to the provisions of Section 85 to urge that appeal needed to be filed within three months and appellate authority can condone

delay upto further three months. Thus, it has no powers to condone delay in excess of three months. Judgment of Hon"ble Apex Court in the case of Commissioner of Customs and Central Excise Vs. Hongo India (P) Ltd. and Another, is relied upon to show absence of jurisdiction.

4. Learned Advocate Shri Mirza appearing for respondents pointed out that circulars which clarified the position have come in year 2009 or thereafter. He submits that these circulars/clarifications cannot have retrospective operation. The assessment order has attained finality and this Court should not interfere. He further submits that finality to assessment because of peculiar arrangement about limitation and scheme in Section 85 will be frustrated if this Court intervenes in Articles 226 of the Constitution of India.

5. Perusal of the impugned order dated 23/24 October, 2008 shows that petitioner has been found liable to pay service tax for providing services in both categories i.e. residential and commercial. It takes note of the fact that the petitioner received amount of Rs. 69,40,000/-during the period April, 2006 to December, 2006 on account of "constructions of residential complex" services. The petitioner received amount of Rs. 42,33,700/- during the period 10-6-2004 to 15-6-2005 on account of "commercial and industrial construction" services. On the basis of these findings, the demand of Rs. 4,22,827/-has been worked out against petitioner and the penalty of Rs. 8,45,000/-has been imposed upon it. Demand is under Section 73 of the Finance Act while penalty is under Section 78 of the thereof.

6. Perusal of Circular No. 108/02/2009-ST issued by CBEC, New Delhi shows that it is on the subject of imposition of service tax on builders. It is dated 29-1-2009. Paragraph no. 3 therein is important for present purposes, which reads thus:

3. The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of "agreement to sell". Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of "self-service" and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter/builder/developers, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of "residential complex". However, in both these situations, if services of any person like contractor, designer or a similar

service provider are received, then such a person would be liable to pay service tax.

[Emphasis added]

7. Thus, the CBEC has found that services rendered or jobs performed till execution of sale deed will be in the nature of "self service" and consequently would not attract service tax.

8. Learned Advocate Shri Bhoot as also learned Advocate Shri Mirza have their respective contention on paragraph no. 3. However, impugned order does not consider the fact whether the petitioner had during relevant period executed any sale deed or not. If concept of "self service" is attracted in case of petitioner, the petitioner may not be liable to pay any tax under the head service tax. Similarly other factors taken note of in paragraph 3 of circular need to be looked into by the assessing authority.

9. Advocate Shri Mirza submitted that this circular issued in 2009 cannot be correlated with facts looked into the impugned order. We find that the circular only recognizes legal position and does not lay down any new law. It explains and interprets an existing provision. The contention that it cannot operate retrospectively is erroneous. It is interpretation of legal position and it can always be applied to the facts and events at hand.

10. The impugned order does not show any consideration of any sale deed executed by petitioner in favour of its customers or clients. There is no application of mind as required in paragraph no. 3 of CBEC circular (supra). As such, it can be seen that said order of assessment is incomplete.

11. Petitioner had also not taken any definite stand or facts as he did not reply to show cause notice.

12. In this situation, as we find that impugned order of assessment is incomplete and if the law as explained in CBEC circular dated 29-1-2009 is found applicable in case of petitioner, it may not be liable to pay any tax, we set aside the demand as also assessment order dated 23/24 October, 2008.

13. We direct petitioner to appear before the respondent no. 4 on 2-3-2015. Said authority shall place the matter before competent officer authorized to deal with assessment proceedings. Such competent officer shall attempt to finalize the same within next two months in accordance with law.

14. While appearing on 2-3-2015, the petitioner shall be free to file reply to the show cause notice.

15. The petitioner is at liberty to produce such material on record as is deemed necessary for the purpose of assessment.

16. With these directions and keeping all rival contentions open, writ petition is partly allowed and disposed of. Rule is made absolute in aforesaid terms. No

costs.