(2015) 09 MP CK 0013

In the Madhya Pradesh High Court

Case No : W.P. No. 2868 of 2015

M.P. Audhyogik Kendra Vikas Nigam — APPELLANT

Vs

Chief C.C., C.E. & Service Tax — RESPONDENT

Date of Decision : 16-09-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 65, 65(64), 66, 93, 97(1)

Citation : (2015) 40 STR 875

Hon'ble Judges : Rajendra Menon and S.K. Seth, JJ.

Bench : Division Bench

Advocate : Abhishek Oswal, for the Appellant; Sushrut Dharmadhikari, for the Respondent

Judgement

1. The petitioner has filed this writ petition under Article 226 of the Constitution of India challenging the assessment order dated 13-5-2014 Annexure-P/1 and the consequential demand raised vide Annexure-P/14 and Annexure-P/18 by the Commissioner, Customs, Central Excise and Service Tax, Bhopal in the matter of demanding Service Tax from the petitioner for the service of Management, Maintenance or repairs of roads provided by the petitioner. It is the case of the petitioner that as the service rendered by the petitioner are totally exempted from payment of the service tax. The impugned action of the Revenue in demanding the tax in question is unsustainable. Facts in nutshell go to show that the petitioner is a wholly owned State Government Company and has been established for the purpose of enhancing, maintenance, development and various infrastructural facilities. The petitioner M.P. Audhyogik Kendra Vikas Nigam was granted a contract for the purpose of construction and maintenance of various roads and in the process of carrying out their business activities they were paid the amount as per the agreement towards the maintenance and repairs of roads undertaken pertaining to various contracts. Assessment process were conducted against the petitioner by the Revenue in accordance to the Provision of the Service Tax and the Revenue issued notice to the petitioner, inter alia contending

that the service of Management, Maintenance or repairs of roads falls within the definition of service provided as contained under Section 65(64) of the Finance Act and the Notification No. 7/2003-S.T. , dated 26-6-2003 which came into force on 1st of July 2003, demand for tax was made. Accordingly, holding that the service provided by the petitioner for Management, Maintenance and repairs of roads comes within the aforesaid service liable for payment of service tax, the impugned action is taken. However, it is the case of the petitioner that after the service provided by the petitioner was defined in the manner as indicated herein above, this service was exempted from payment of tax, a notification was issued by the competent authority and vide amendment to the Finance Act, 2012 inserted w.e.f. 28-5-2012. Section 97(1) was incorporated in the Finance Act, which reads as under:-

97. (1) Notwithstanding anything contained in Section 66, no service tax shall be levied or collected in respect of management, maintenance or repair of roads, during the period on and from the 16th day of June, 2005 to the 26th day of July, 2009 (both days inclusive).

(2) Refund shall be made of all such service tax which has been collected but which would not have been so collected had sub-section (1) been in force at all material times.

(3) Notwithstanding anything contained in this Chapter, an application for the claim of refund of service tax shall be made within a period of six months from the date on which the Finance Bill, 2012 receives the assent of the President.

(emphasis supplied)

2. According to learned counsel for the petitioner by virtue of this notification an amendment to the statue the service as provided by the petitioner i.e. Management, Maintenance or repairs of roads was totally exempted from payment of Service Tax between 16-6-2005 to 25-7-2009 and thereafter another notification bearing Notification No. 24/2009, dated 27-7-2009 was issued wherein in exercise of powers conferred under sub-section (1) of Section 93 of the Finance Act. The entire sub-clause (zzg) of Clause (105) of Section 65 was amended and it was notified that any person by himself or by any other person carries out the activities of Management, Maintenance or repairs of roads, the entire service so provided is exempted from payment of service tax. The aforesaid notification and the relevant Clause reads as under:-

G.S.R. (E) - In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do hereby exempts the taxable service, referred to in sub-clause (zzg) clause (105) of section 65 of the Finance Act, 1994, provided to any person by any other person in relation to management, maintenance or repair of roads, from the whole of the service tax leviable thereon under Section 66 of the said Finance Act.

(emphasis supplied)

3. Based on the aforesaid, a case is canvassed before us to say that the entire service rendered by the petitioner pertaining to Management, Maintenance or repairs of roads is totally exempted from payment of service tax duty. It is accordingly submitted that the action of the Revenue in imposing the duty is unsustainable. Respondents have filed the reply and have raised a preliminary objection with regard to maintainability of this writ petition on the ground that against the order impugned passed by the Assessing Officer and the demand made as statutory remedy by way appeal to the appellate authority and further to the appellate Tribunal is available, this petition is not maintainable. However, on merit the respondents again refer to the definition of Management, Maintenance or repairs of roads as contained in Section 65(64) of the Finance Act, 2006 and says that as the service in question is taxable in accordance with the aforesaid provision, no error has been committed by the department.

4. However, respondents in the return do not deny the notification and amendment to the statute as indicated and reproduced herein above. That being so, based on the contention advanced, we propose to deal with the matter.

5. Normally, when imposition of tax or duty is challenged and when order of assessment are impugned in a petition under Article 226 of the Constitution of India, this Court is reluctant to interfere into the matter on account of availability of the remedies of appeals before various Forum. However, there are exemption to this normal rule and this Court can interfere, if the imposition of duty is per se unsustainable and illegal. That being so, we propose to examine the merit of the matter and considered the objection with regard to maintainability of the petition thereafter. Admittedly as per the provision of Section 65(64) the work of Management, Maintenance or repairs of roads is a service which was initially held liable for payment of service tax, however, after having so notified the Central Government amended the statue as indicated herein above vide amending Act incorporated on 28-5-2012 in the Finance Act, 2012, exempted payment of Service Tax with respect to Management, Maintenance or repairs of roads for the period 16-6-2005 to 26-7-2009 (both days inclusive). Admittedly, period for which the impugned assessment was passed is within the aforesaid period thereafter, further another notification was issued as is evident from the notification No. 24/2009 as reproduced herein above and by this notification the entire service in question i.e. Management, Maintenance or repairs of road was exempted from payment of Service Tax. It is, therefore, clear from a conjoint reading of this notification and the amendment brought into force in the Finance Act, 2012, that initially on 27-7-2009 the competent authority granted exemption from payment of duties between 6-6-2005 to 26-7-2009 after this notification was issued granting exemption from payment of duties upto 26-7-2009 it was thought appropriate that grant complete exemption and therefore the statutory provision has been amended retrospectively and total exemption granted by amending the provision under Section 97(1) in the Finance

Act, 2012. That being so, infact what has been done in the second notification, is to give retrospective effect to the exemption, which was initially for the period 27-6-2009 w.e.f. 16-6-2009, that being so it is clear that the service in question is totally exempted from payment of duty as claimed by the petitioner and by ignoring the notification and the amended provision, tax is being compounded as the same is contrary to the provision of law is clearly unsustainable.

6. Once we find that the imposition of tax is not permissible as indicated herein above, is wholly unsustainable and impermissible under law. It is not necessary to relegate the petitioner to take recourse to the remedy available of filing the appeal. It is a case where, apparent from the face of the record the imposition of duty is per se found to be illegal and therefore there is no reason why jurisdiction in a petition under Article 226 of the Constitution of India should not be exercised. Accordingly, we allow this petition, overrule the objection raised by the respondents and quash the impugned assessment order Annexure-P/1, dated 13-5-2014 and the consequent demand notice Annexure-P/14, dated 11-6-2010 and Annexure-P/18, dated 7-10-2014. The petition stands allowed and disposed of. Certified copy as per rules.

