(2006) 09 GAU CK 0091

In the Gauhati High Court

M.S. Associates and Another — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 28-09-2006

Acts Referred:
Constitution of India, 1950 — Article 301, 302, 303
Finance Act, 1994 — Section 5, 73, 75, 76, 77

Citation : (2007) 4 GLT 176

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—This writ petition is directed against the Annexure-21 show cause notice dated 22.8.2006 issued by the Government of India in the Directorate General of Central Excise Intelligence, Kolkata Zonal Unit, Kolkata to the petitioner No. 1 represented by the petitioner No. 2 directing it to show cause as to why:

(i) Amount of Rs. 20,78,23,780.00 being the amount of service tax payable as Business Auxiliary service provider on the value of taxable services realized by them from the Govt. of Meghalaya during the period from 1.7.2003 to 30.11.2005, and Education Cess on service tax amounting to Rs. 16,25,573.00 should not be demanded and realized from them under Sub-section 1(a) of Section 73 of Chapter-V of the Finance Act, 1994 as amended;

(ii) Penalty should not be imposed upon them in terms of Section 76, 77 and 78 of Chapter-V of the Finance Act, 1994 as amended;

(iii) Interest at the prescribed rate u/s 75 of Chapter-V of the Finance Act, 1994 as amended should not be demanded and realized from them.

2. Along with the show cause notice a list of documents relied upon has also been enclosed and the petitioner has been granted liberty to inspect and/or to take extract of the same. Liberty has also been granted for personal hearing. It

has also been indicated that on failure to show cause within 30 days from the date of receipt of the show cause notice or the failure of the petitioner to appear before the adjudicating authority, the matter would be decided exparte on the basis of the available records. The notice has been issued without prejudice to any other action, which might be initiated against the petitioner under the provisions of the Act and the Rules framed thereunder.

3. The writ petition is founded on the premises that the service rendered by the petitioner does not come within the purview of providing business of Auxiliary services to the Government of Meghalaya. Be it stated here that the petitioner is doing/conducting the Government of Meghalaya online lottery and it is the case of the respondents that they are doing so on behalf of the Government of Meghalaya and in turn they are earning commission from the Government of Meghalaya. On the other hand, it is the case of the petitioners that they are only selling online tickets by appointing sub-distributors/agents wherever lottery sale is permissible and that they are not conducting the Meghalaya online lottery and that they are also not providing, directly or indirectly any service at all to any persons or Government of Meghalaya.

4. Mr. N. Dutta, learned Sr. Counsel assisted by Mr. P. Upadhaya, learned Counsel for the petitioners elaborating his arguments on the above plea of the petitioners submits that there being already finding as indicated in the show cause notice that the petitioners are rendering business of Auxiliary services to the Government of Meghalaya and the demands made in the notice being based on such a finding, no useful purpose will be served by responding to the show cause notice. Mr. Dutta has also placed reliance on the decisions of the Apex Court as reported in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhwani and Another, and M/s. B.R. Enterprises Vs. State of U.P. and Others,

5. On the other hand, Mr. H. Rahman, learned Assistant Solicitor General of India submits that the writ petition is pre-mature and that the petitioners ought not have rushed to the writ court without first responding to the show cause notice.

6. In the aforesaid two decisions on which Mr. Dutta, learned Counsel for the petitioners has placed reliance, in the given fact situation of those cases, it was held that the High Courts have power to issue, in a fit case, an order prohibiting an executive authority from acting without jurisdiction and that the existence of an alternative remedy is not always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action. There cannot be any second opinion regarding this proposition. However, as has been observed in A.V. Vengkateswaran (supra), the broadlines of the general principles on which the writ court should act, their application to the facts of each particular case must necessary be depended on a variety of individual facts which must govern the proper exercise of the discretion of the court, and that in a matter which is thus permanently one of discretion, it

is not possible or even if it were, it would not be desirable to lay down inflexible Rules which should be applied with viscidity in every case which comes up before the court.

7. In B.R. Enterprises (supra), the issue raised was interse between two distinct sets of State, one challenging and the other upholding certain provisions of the Lotteries (Regulation) Ordinance 1997, which later on became the Lotteries (Regulation) Act, 1998. The issue was confined to the State lotteries under Entry 40, List (I) of the Seventh Schedule of the Constitution of India. As a consequence of the order passed by the State of U.P. banning State lotteries of other States by virtue of power entrusted u/s 5 of the Act, various affected States, challenged the provisions in different High Courts. One of the fundamental questions raised was, what is the character of State lotteries and even if it is legalized, would it qualify to be or can it be held to be a trace within the meaning of Chapter XXIII of the Constitution of India.

8. It is in the above context, it was held that the State lotteries cannot be construed to be a "trade and business" within the meaning of Article 301 to 303 of the Constitution of India. However, in the instant case, the whole basis of the impugned action on the part of the authorities is on the above question as to whether the petitioners are providing. Business Auxiliary Services (BAS) on the basis of the terms and conditions incorporated in the agreement executed with the State. Thus, the whole basis is altogether on a different connotation.

9. In the instant case the plea of the petitioners visa-visa the respondents has been noted above. In the impugned show cause notice a prima facie satisfaction of the authority about the liability of the petitioners for the aforementioned amounts and penalty has been recorded. It has been recorded in the notice on the basis of the various materials on record that it appears to the authority that the petitioners are rendering the taxable services viz. Business Auxiliary Services (BAS) to their customer without taking service tax registration from the proper officer of Central Excise and without paying service tax thereon. It has also been alleged there has been suppression of material fact on the part of the petitioners. In this connection, the authority has also referred to the agreement by and between the parties i.e. the petitioners and the State of Meghalaya. This prima facie satisfaction of the authority cannot be said to be the finality to the matter and it will be always open for the petitioners to persuade the said authority to take a different view of the matter, by responding to the show cause notice. They are also entitled to personal hearing towards adjudication of the matter.

10. If the impugned show cause notice has been issued on the grounds specified therein, no fault could be attributed to the authority, which has issued the same. Whether the show cause notice is founded on any legal premises is a jurisdictional issue, which can even be urged by the petitioners in response to the same and the authority also can adjudicate such issues, which has issued the notice. Similarly, the plea of limitation, which has been raised by the learned Counsel for the petitioners in reference to Section 73 of the Act, although, the

plea is further subject to the proviso to said Section and in the impugned show cause notice, there is indication of the factors likely to be covered by the said proviso, it will also be open for the petitioners to urge the said plea by responding to the show cause notice.

11. The authority, which has issued the show because notice is a statutory functionary constituted under the Act and he must be allowed to decide the matter in accordance with law. It will be sound and wise discretion not to entertain the writ petition and to grant the interim relief prayed for, which may or may not be finally granted in the writ petition. If any authority is required to such a proposition, one may refer to the decisions of the Apex Court as reported in T.N. Godavarman Thirumulpad Vs. Union of India (UOI) and Others, and AIR 2004 SCW 416 (Special Director v. Mohd. Ghulam Ghouse). In the case of Md. Ghulam Ghouse, the Apex Court has observed thus:

This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. Unless, the High Court is satisfied that the show cause notice was totally nonest in the eye of law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition. Whether the show cause notice was founded on any legal premises is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specifically and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is accorded to the writ petitioner even at the threshold by the interim protection, granted.

12. In view of the above, I am of the considered opinion that the writ petition merits dismissal, which I accordingly do. However, I hasten to add that, it will be open for the petitioner to urge all the grounds as have been urged in the instant writ petition and/or any other grounds by responding to the show cause notice and the authority, which has issued the show cause notice shall deal with all the grounds within the parameters and yard sticks applicable to such cases. Subject to the above observations, the writ petition is dismissed.