

(2018) 07 CAL CK 0109
In the Calcutta High Court

Case No : W. P. No. 9270 (W) of 2018, W. P. No. 9267 (W) of 2017

M/s. Intelsys Technologies Pvt. Ltd. & Anr.

APPELLANT

Vs

Union of India & Ors.

RESPONDENT

Date of Decision : 16-07-2018

Acts Referred:

Finance Act, 1994 — Section 65B(51), 73, 73(1), 73(6), 73(6)(b), 78A
Central Excise Act, 1994 — Section 35
Service Tax Rules, 1994 — Section 6, 7
Constitution of India, 1950 — Article 226

Citation : (2018) 07 CAL CK 0109

Hon'ble Judges : DEBANGSU BASAK, J

Bench : Single Bench

Advocate : N. K. Chowdhury, Indranil Banerjee, Uday Sankar Bhattacharya,
Sanjukta Gupta

Final Decision : Disposed Off

Judgement

DEBANGSU BASAK, J

Two writ petitions are taken up for analogous hearing, as they involve similar issues.

Both the writ petitions assail orders in original.Â There are two different orders in original.Â There are two different show-cause notices in the two proceedings.

Learned advocate for the petitioners submits that, both the impugned showcause notices were issued beyond the period of limitation prescribed.Â He

submits that, in W.P. 9267(W) of 2018 (for the sake of convenience hereinafter referred to as the first writ petition), the revenue has a claim in

respect of a period from October 2010 to March, 2011. Â For the subsequent period of time shown in the show-cause notice the revenue has no

claim.Â So far as the other writ petition being W.P. 9270(W) of 2018 (hereinafter referred to as the second writ petition for the sake of convenience)

he submits that, the period involved is 2010 to 2013. However, he submits that, the major claims in the second writ petition are for the period 2010 to

2011.Â According to him, in any view of the matter, the claims made in the impugned show-cause notices are barred by limitation.Â He submits that,

both the show-cause notices are dated April 22, 2016.Â Under Section 73 of the Finance Act, 1994, as existing at that point of time, the revenue may

raise a claim within one year from the relevant day, or within extended period of five years from the relevant date, upon the criteria laid down therein

being satisfied.Â In the instant case, the petitioners are not liable to file any returns under Service Tax Act. Therefore, in terms of the Service Tax

Rules, particularly Rule 6 read with Rule 7 of the Rules of 1994, the last date for the financial year 2010-2011 is March 31, 2011.Â A period in

excess of five years had elapsed from March 31, 2011 for the revenue to invoke the provisions of Section 73 to recover tax through the impugned

show-cause notice dated April 22, 2016.Â Consequently, the impugned order in original stands vitiated.Â Moreover, in the first writ petition, the

adjudicating authority has invoked the provisions of Section 78A for the purpose of imposing a penalty.Â Such provisions were introduced to the

statute with effect from May 10, 2013.Â The period in dispute is upto March 31, 2011.Â Therefore, the provisions of Section 78A of the Act of 1994

cannot be invoked for the purpose to imposing a penalty as sought to be done in the impugned order in original of the first writ petition.

Learned advocate for the petitioner relies upon 2015 (326) E.L.T. 532 (Guj.) (Panoli Intermediate (India) Pvt. Ltd. Vs. Union of India) and submits

that, although an appeal may be barred by the laws of limitation, still then the writ petition is maintainable to assail an order in original.Â Moreover,

Writ Court is not denuded of the power to direct the appeal to be accepted by the Appellate Authority, in spite of the period of limitation prescribed by

statute having expired. He relies upon AIR 1958 SC 86 (State of U.P. Vs. Mohammad Nooh) and submits that, a writ of certiorari was available to

challenge an order in original.

Relying upon 2008 (231) E.L.T. 194 (S.C.) (Commissioner of Central Excise, Ahmedabad-I Vs. M. Square Chemicals) he submits that, where a

period of limitation has set in, the impugned show-cause notice has to be quashed.

Learned advocate for the Revenue draws the attention of the Court to Section 73 of the Act of 1994.Â He submits that, the recovery of Service Tax

not levied or paid or short levied or short paid can be recovered within the initial period of one year from the date of the relevant date and thereafter

for a period of five years on the happening of a fraud or collusion.Â He relies upon Section 73(1) and Section 73(6)(b) of the Act of 1994 read with

Rule 7 of the Service Tax Rules, 1994 and submits that, the relevant date in the present case will be March 31, 2011 and twenty-five days from such

date will be April 25, 2011.Â The impugned showcause notice was issued on April 22, 2016.Â Therefore, both the impugned showcause notices are

within the period of limitation.Â He submits that, Section 78A of the Finance Act, 1994 was introduced with effect from May 10, 2013 and, therefore,

at the time when the show-cause notice was issued, the provisions of such statute was available to the Adjudicating Authority for considering

imposition of penalty.Â The penalty imposed in the impugned order of the first writ petition, therefore, is correct.Â He submits that, the petitioners

are not entitled to any relief in the present writ petition.

Having heard the rival contentions of the parties, in my view, the following issues arise for consideration:

a)Â Are the two impugned show-cause notices dated April 22, 2016 are barred by limitation ?

(b) Is the penalty imposed in the impugned order in original of the first writ petition stands vitiated ?

(c) To what relief or reliefs are the parties entitled to ?

If, a demand is raised beyond the prescribed period of limitation, then, the same cannot be recovered.Â That is the view in M. Square Chemicals

(supra).Â Such view was expressed upon considering the fact scenario obtaining therein.Â The fact scenario in the present case has to be looked

into for considering, whether, the impugned show-cause notices are barred by limitation or not.Â In the present case, the first petitioner was found to

have rendered services defined as taxable service under Section 65B (51) of the Finance Act, 1994.Â It was found to have contravened various

provisions of the Act of 1994 as also the Rules of 1994.Â It was issued a show-

cause notice dated April 22, 2016 for the period 2010 to 2014 in respect of the first writ petition and another show-cause notice dated April 22, 2016 for the period 2010 to 2012 for the second writ petition. In the adjudicating proceedings the petitioner was found to be liable to pay service tax for the business carried on by it. Such finding has not been substantiated to be perverse by the petitioner.Â In fact, the petitioner did not contend in this writ petition that, such a finding of the adjudicating authorities is perverse.Â Therefore, the first petitioner has to be considered as an assessee, who has not paid service tax.Â Recovery of service tax not levied or paid or short levied or short paid or erroneously refunded is governed by Section 73 of the Act of 1994.Â Section 73(1) of the Act of 1994 allows a period of five years from the relevant date to recover tax from the person responsible where is fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of Chapter V of the Act of 1994 or the rules made thereunder. Section 73(6) defines the relevant date. Rule 7 of the Rules of 1997 requires returns to be filed on half yearly basis. Such return is to be filed within 25th of the month following the particular half year.

In the facts of the present case, the first petitioner being an assessee was required to submit half-yearly return by the 25th of the month following the particular half year.Â Therefore, in the facts of the present case, the petitioner ought to have filed the return by April 25, 2011.Â The show-cause notice was issued on April 22, 2016.Â It was within a period of five years contemplated under Section 73 (6)(b) of the Act of 1994.Â The show-cause notice being within the period of limitation, therefore, no error, at least any jurisdictional error in the Adjudicating Authority assuming jurisdiction and passing the impugned order is substantiated.

The first issue is answered by holding that, the two impugned orders are not barred by the laws of limitation. So far as the impugned order in the first writ petition is concerned, it proceeds to impose a penalty by invoking the provisions of Section 78A of the Act of 1994.Â Section 78A of the Act of 1994 has come into operation with effect from May 10, 2013.Â In my view, such a provision cannot be invoked for the purpose of imposing a penalty for an offence happening prior to such provision coming into effect.Â Consequently, the penalty imposed in the impugned order of the first writ

petition by invoking Section 78A of the Act of 1994 is quashed.Â It is clarified that, all other portions of the impugned order remains unaffected.

Panoli Intermediate (India) Pvt. Ltd. (supra) poses three questions to itself and answers them in the fact scenario of that case.Â One of the questions

was whether, if a statutory remedy or appeal under Section 35 of the Central Excise Act, 1994 is barred by Law of Limitation, then, whether in a writ

petition, the Writ Court can direct, the delay in filing the appeal should be condoned and whether such a writ petition is maintainable. It answers both

the questions in the affirmative by holding that notwithstanding the expiry of the period imposed for the purpose of preferring an appeal a writ petition

is maintainable.Â However, it goes on to qualify that, such writ petition can be maintained only if it is substantiated that, the impugned order suffers

from gross error of jurisdiction or, the authority has assumed jurisdiction where there existed none or had exercised power in exercise of jurisdiction or

has acted in flagrant violation of the rules of procedure or acted in violation of principles of natural justice.Â It also holds that, notwithstanding the

expiry of the period of limitation, a Court exercising jurisdiction under Article 226 of the Constitution of India can direct the Appellate Authority to

consider an appeal filed beyond the prescribed period of limitation.

In the present case, none of the two writ petitions contain any prayer for allowing the petitioners to prefer an appeal by condoning the delay in

preferring such appeals.Â Therefore, the question of directing the petitioners to prefer an appeal by condoning the delay therefore does not arise.

Mohammad Nooh (supra) is of the view that, a writ of certiorari can be issued, where there are gross illegalities in the impugned order.Â It holds that

where, an Adjudicating Authority has acted without jurisdiction, a provision for appeal will not cure the first defect.Â In the present case, I have not

found the Adjudicating Authority to be without jurisdiction or its assumption of jurisdiction to be defective.

In view of the discussions above, the second issue is answered by holding that, the imposition of penalty under Section 78A stands vitiated.Â The

third issue is answered by holding that, the imposition of penalty by invoking Section 78A of the Act of 1994 in the impugned order in original of the

first writ petition stands quashed.Â No other relief can be granted to the petitioner in the two writ petitions.

W.P. 9270(W) of 2018 and W.P. 9267(W) of 2018 are disposed of without any order as to costs.

Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance of the requisite formalities.