(2014) 04 CAL CK 0054

In the Calcutta High Court

Case No : W.P. No. 32716 (W) of 2013

Naresh Kumar and Co. Pvt. Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:
Finance Act, 1994 — Section 40, 66, 67, 67(1), 73

Citation : (2015) 49 GST 402 : (2014) 35 STR 506

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : J.K. Mittal, Paritosh Sinha, Abra Majumdar, Dolon Dasgupta and Shiladitya Barma, Advocate for the Appellant; Nizamuddin, R. Bhardwaj and K.K. Maiti, Advocate for the Respondent

Judgement

Harish Tandon, J.—The challenge is made to a show cause notice dated 21st March, 2013 issued by the Additional Commissioner, Service Tax Commissioner-ate, Kolkata primarily on the ground that invocation of Rule 5(1) of the Service Tax (Determination of Value) Rules 2006 is wrongly made when the said provision has been declared ultra vires by the Division Bench of the Delhi High Court in case of Intercontinental Consultants & Technocrats Put. Ltd. v. Union of India reported in 2013 (29) S.T.R. 9 (Del.). Since the facts adumbrated in the writ petitions are not disputed, the respective counsels addressed the Court on the pure question of law. Shorn of unnecessary details, the petitioner was awarded a contract on 1st March, 2006 by M/s. Prism Cement Ltd. for carrying out loading, shifting and feeding of coal and gypsum by roads. The said agreement provides that M/s. Prism Cement Ltd. shall provide High Speed Diesel (HSD) free of cost for transportation of the aforesaid goods by road. It is undisputed that the petitioner have been paying service tax on the amount charged from the said Company over the services taxable with the service tax which admittedly does not include the cost of the HSD. The Service Tax Authority and Comptroller and Auditor General of India (CERA) initiated audit of the petitioner''s account and issued spot memo as well as show cause notices for the period 2002-2003 to 2008-2009. In course of such audit, a show cause notice dated 30th March, 2010 was issued raising a demand of Rs. 1,10,08,867/- for the period from 2004-2005 to 2008-2009 for rendering the services to M/s. TISCO for conversion of the coal to the coke, intra-port transportation of ores and processing of pyroxenite. The said show cause notice was challenged before this Court in W.P. No. 124 of 2011 on other grounds including the ground of limitation. The Court quashed the said show cause notice as the service tax authority could not satisfy the requirement of proviso to Section 73(1) of the Finance Act, 1994. The said order is assailed in an intra-court appeal which is still pending. Subsequently the impugned show cause notice dated 21-3-2013 is issued solely on the ground that consumption of HSD provided by the service provider free of cost having used for providing taxable services, such cost have to be included in the taxable value. The demand sought to be raised pertain to the period 2007-2008 to 2010-2011 and part of the period of 2011-2012 (April 2011 to September 2011).

2. The learned Advocate appearing for the petitioner submits that Section 73 sub-section (1) of the Finance Act, 1994 provides a limitation of eighteen months from the relevant date for issuance of the notice where any service tax has not been levied or paid or has been sought levied or sought paid or erroneously refunded to be served with the notice on a person chargeable with service tax requiring him to show cause why such amount should not be paid by him. It is submitted that proviso to Section 73(1) of the said Act extends the period of eighteen months to five years in case of fraud, collusion, willful mis-statement, suppression of fact or contravention of any provision of that Chapter or the Rules made therein. He thus submits that the show cause notice, which covers 2007-2008, is ex facie had being beyond the period of five years. It is further submitted that none of the ingredients incorporated in the proviso to Section 73(1) of the said Act is spelt out in the said show cause notice for invocation of the extended period.

3. In support of the aforesaid contentions, he relies upon a judgment rendered by the Co-ordinate Bench of this Court on the earlier show cause notice. If is strenuously submitted that once the notice is held to be invalid for the extended period under the proviso, it cannot be treated as valid for a shorter period and placed reliance upon a judgment of the Supreme Court in case of Collector of Central Excise, Jaipur Vs. Alcobex Metals,

4. He audaciously submits that it is an uniform view that the value of HSD supplied free of cost by the service recipient for providing the taxable services does not form part of the gross value and placed reliance upon a judgment of the Tribunal and Delhi in case of 2013 (32) S.T.R. 740 On the proposition that the revenue cannot take a different stand in not following the order of the Higher Authority or the Tribunal, even if, it is prejudicial to the interest of the revenue and relies upon a judgment of the Supreme Court in case of Union of India and others Vs. Kamlakshi Finance Corporation Ltd.,

5. Lastly it is submitted that the show cause notice is based on Rule 5(1) of the Service Tax (Determination of Value) Rules, 2006 which is repugnant to Sections 66 and 67 of the Finance Act, 1994 and is held ultra vires to that extent in case of Intercontinental Consultants & Technocrats Pvt. Ltd. v. Union of India reported in 2013 (29) S.T.R. 9 (Del.). The respondent at the very outset submits that the writ court should not interfere against the issuance of the show cause notice. He further submits that the petitioner shall get an opportunity to take all pleas available to him before the authority issuing show cause notice which shall be aptly dealt with in accordance with law. He further submits that the value of the HSD, even if, supplied free of cost by the service recipient is an ascertainable sum and if it is used in the process of providing services, it attracts service tax on the transaction value.

6. It emerges from the respective submissions that the service tax authority sought to raise demand of the service tax on the value of the HSD supplied by the service recipient within the purview of the transaction value. The further point evolved from the respective submissions is as to whether the show cause notice is liable to be declared invalid having issued for the extended period in absence of any recording relating to the incidents provided in proviso to Section 73(1) of the said Act. For clear exposition and convenience, it would be profitable to quote Section 73(1) of the Finance Act, 1994 which reads thus:

"73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. - (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within eighteen months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) fraud; or

(b) collusion; or

(c) willful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words eighteen months, the words "five years" had been substituted."

7. Prior to the amendment brought with effect from 28th May, 2012 by the

Finance Act, 2012, the normal period of limitation invoking the provisions contained u/s 73(1) of the said Act was one year. The proviso inserted to the aforesaid provisions extends the period of five years by the reason of fraud, collusion, willful misstatement, suppression of fact or contravention of any provision of the said Chapter. Under sub-section (6) of Section 73, the relevant date is defined to mean the date on which the periodical return relating to the period for which the service tax is paid or where no periodical return is filed, the last date on which such periodical return is to be filed. The extended period is applied in the impugned show cause notice on the ground of willful suppression of fact as the cost of USD supplied free by the service recipient is not shown in the taxable value in contravention to Section 67 of the said Act. The willful suppression cannot be assumed and/or presumed merely on failure to declare certain facts unless it is preceded by deliberate non-disclosure to evade the payment of tax. In this regard, the reliance can be conveniently placed upon Paragraphs 26 & 27 of the judgment rendered by the Apex Court in case of Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut, held:

26. In Tata Iron & Steel Co. Ltd. v. Union of India this Court held that when the classification list continued to have been approved regularly by the Department, it could not be said that the manufacturer was guilty of "suppression of facts". As noted herein earlier, we have also concluded that the classification lists supplied by the appellant were duly approved from time to time regularly by the Excise Authorities and only in the year 1995, the Department found that there was "suppression of facts" in the matter of post-forming manufacturing process of the products in question. Furthermore, in view of our discussion made herein earlier, that the Department has had the opportunities to inspect the products of the appellant from time to time and, in fact, had inspected the products of the appellant. Classification lists supplied by the appellant were duly approved and in view of the admitted fact that the flow-chart of manufacturing process submitted to the Superintendent of Central Excise on 17-5-1990 clearly mentioned the fact of post-forming process on the rubber, the finding on "suppression of facts" of CEGAT cannot be approved by us. This Court in the case of Pushpam Pharmaceuticals Co. v. CCL while dealing with the meaning of the expression "suppression of facts" in the proviso to Section 11A of the Act held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and wilful to evade payment of duty. The Court further held: (SCC pp. 463-64, para 4)

"In taxation, it [''suppression of facts''] can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(emphasis supplied)

27. Relying on the aforesaid observations of this Court in the case of Pushpam

Pharmaceuticals Co. v. CCL we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts". In Densons Pultretaknik v. CCE this Court held that mere classification under a different sub-heading by the manufacturer cannot be said to be wilful mis-statement or "suppression of facts". This view was also reiterated by this Court in CCE v. L.M.P. Precision Engg. Co. Ltd."

8. The aforesaid proposition is further reiterated in a recent judgment rendered by the Supreme Court in case of The Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials) and Others, in these words:

"19. In our view, on a reading of the relevant provision the extended period of limitation as provided by the proviso to Section 11A(1) of the Act can only be invoked when there is a conscious act of either fraud, collusion, wilful mis-statement, suppression of fact, or contravention of the provisions of the Act or any of the Rules made thereunder on the part of the person chargeable with duty or his agent, with the intent to evade payment of duty. In the present case, the Tribunal while considering this issue has not stated whether or not there were any such circumstances which would not allow the Revenue to invoke the extended period of limitation. It only observes in its order that since both the assessees are situated under the jurisdiction of the same division and as such it cannot be reasonable to conclude that the Revenue was not aware of the transactions. Since this is not what is envisaged under the proviso to Section 11A(1) of the Act, we cannot agree with the reasoning and the conclusion reached by the Tribunal."

9. The ratio which could be culled out from the aforesaid reports is that the extended period of limitation can be invoked on clear exposition that there has been a conscious act on the part of the petitioner to evade the tax by non-disclosing the fact which, if disclosed, would attract the service tax under Sections 66 & 67 of the Finance Act. The non-disclosure of the fact which, even if, disclosed would not have brought within the charging section cannot be brought within the ambit of suppression of fact for the purpose of extension of period of time. The department has to adhere to the decisions of the Tribunals or

Court and cannot take a stand contrary thereto. The Supreme Court in case of Union of India and others Vs. Kamlakshi Finance Corporation Ltd., held that the Revenue Officers are bound by the decisions of the Appellate Tribunal by observing the judicial discipline, even if, the order of the Tribunal or the Court harshly effect the interest of the revenue in these words:

"6. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual mala fides but with the fact that the officers, in reaching their conclusion, by-passed two appellate orders in regard to the same issue when were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The Principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."

10. In case of Intercontinental Consultants (supra), the Division Bench of the Delhi High Court declares Rule 5(1) of the said Rules to be ultra vires to Section 67 of the Finance Act in the following words:

"18. Section 66 levies service tax at a particular rate on the value of taxable service. Section 67(1) makes the provisions of the section subject to the provisions of Chapter V, which includes Section 66. This is a clear mandate that the value of taxable services for charging service tax has to be in consonance with Section 66 which levies a tax only on the taxable service and nothing else. There is thus inbuilt mechanism to ensure that only the taxable service shall be evaluated under the provisions of 67. Clause (1) of subsection (1) of Section 67 provides that the value of the taxable service shall be the gross amount charged by the service provider "for such service". Reading Section 66 and Section 67(1) together and harmoniously, it seems clear to us that in the valuation of the taxable service, nothing more and nothing less than the consideration paid as quit pro quo for the service can be brought to charge, Sub-section (4) of Section 67 which enables the determination of the value of the taxable service "in such manner as may be prescribed" is expressly made subject to the provisions of sub-section (1). The thread which runs through Sections 66, 67 and Section 94, which empowers the Central Government to make rules for carrying out the provisions of Chapter V of the Act is manifest, in the sense that only the service actually provided by the service provider can be valued and assessed to service tax. We are, therefore, undoubtedly of the opinion that Rule 5(1) of the Rules runs counter and is repugnant to Sections 66 & 67 of the Act and to that extent it is ultra vires. It purports to tax not what is due from the service provider under the charging section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service". What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes for beyond the charging provisions and cannot be upheld. It is no answer to say that under sub-section (4) of Section 94 of the Act, every rule framed by the Central Government shall be laid before each House of Parliament and that the House has the power to modify the rule. As pointed out by the Supreme Court in Hukam Chand etc. Vs. Union of India (UOI) and Others,

"The fact that the rules framed under the Act have to be laid before each House of Parliament would not confer validity on a rule if it is made not in conformity with Section 40 of the Act."

Thus Section 94(4) does not add any greater force to the Rules than what the ordinarily have as species of subordinate legislation."

11. The Tribunal at Delhi in case of Karamjeet Singh & Co. Ltd. (supra) upon placing reliance upon the above decisions rendered by the Delhi High Court held that non-disclosure of the value of the HSD supplied free of cost by the service recipient does not constitute the willful suppression of the material fact or contravention of any provisions of the Act in these words:

"8. In the light of the aforesaid clear ratio delineated in Intercontinental Consultants Technocrats Pvt. Ltd. v. Union of India (supra), the conclusion is irresistible that the value of diesel supplied free of cost by the service recipient to the assessee service provider for providing the taxable "site formation and clearance, excavation and earthmoving and demolition" service would not be a component of the gross value charged for the service provided, for computation of tax u/s 67 of the Act and the failure to so include, would not constitute either suppression of material facts nor a wilful contravention of the provisions of the Act with a view to evade tax, justifying invocation of the extended period of limitation under the proviso to Section 73(1) of the Act either. The several adjudication orders impugned in these appeals are unsustainable on the aforesaid analysis and are accordingly quashed. The Appeals are allowed but in the circumstances without costs."

12. In view of the clear exposition of law that the value of the diesel supplied free of cost by the service recipient cannot constitute taxable event, the authorities cannot take a contrary stand by placing reliance upon the provision which has been declared ultra vires. This Court, therefore, has no hesitation to hold that the extended period invoked by the authority on the plea of suppression of fact is illegal and renders the same to be invalid. It is in dispute that one of the period covered in the impugned show cause notice is apparently within the normal period of limitation provided u/s 73(1) of the said Act, even if, this Court accept that such period can be segregated from the rest of the periods for which the extended period is invoked, the impugned show cause notice cannot be validated having based upon the inclusion of the value of HSD supplied free of cost by the service recipient. Furthermore, the foundation of the impugned notice is laid on Rule 5(1) of the said rules, which is declared ultra vires by the Delhi High Court in the above noted decisions, In case of Collector of Central Excise, Jaipur Vs. Alcobex Metals, one of the plea agitated before the Supreme Court was whether the show cause notices can still be treated as invalid for the period which is within the normal period of limitation. The Apex Court did not lay down the law on the above subject but proceeded to declare the show cause notice as invalid on the ground that the same was issued by an authority not competent under the relevant statute. The aforesaid judgment, in my view, is not pointer to an issue whether the show cause notice can still be validated for a period which is within the normal period enshrined under the statute. In the present case, it is found that the value of HSD provided free of cost by the service recipient cannot be brought within the value of the transaction exposed to the charging section and, therefore, the impugned show cause is liable to be quashed and set aside.

13. Accordingly this Court hereby quashed and set aside the impugned show cause notice.

14. The writ petition succeeds.

15. However, there shall be no order as to costs. Urgent photostat certified copy of the judgment, if applied for, be given to the parties on priority basis.

