(2014) 02 CHH CK 0009

In the Chhattisgarh High Court

Case No : Writ Petition No. 6054 of 2006

Naresh Kumar and Co. Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Finance Act, 1994 — Section 69, 73, 73(1), 75, 75A

Citation : (2014) 304 ELT 481

Hon'ble Judges : Manindra Mohan Shrivastava, J

Bench : Single Bench

Advocate : J.K. Mittal and A.S. Gaharwar, Counsel, Advocate for the Appellant; Vivek Shrivastava and Smiti Dubey, Counsels, Advocate for the Respondent

Judgement

Manindra Mohan Shrivastava, J.

1. This petition under Article 226 of the Constitution of India has been filed by the petitioner assailing the correctness and validity of the show cause notice dated 23-5-2006 (Annexure P-2) issued by respondent No. 2/Commissioner Customs and Central Excise, Raipur in the matter of recovery of service tax in respect of taxable service of "Clearing and Forwarding Agent". The petitioner is a company registered under the Companies Act, 1956 having its registered office at 9B, Wood Street, 5th Floor, Kolkata. The petitioner is engaged in business activities of supervision, liaison and coordination in the process of supplying coal from South Eastern Coalfields Limited (S.E.C.L.), collieries of Coal India to its customers as per various agreements entered with its customers namely M/s. Larsen and Toubro Ltd., M/s. Ultra Tech Chemco Ltd. and M/s. Lafarge India Pvt. Ltd. The petitioner carries out activities of supervision and coordination from its branch offices at Bilaspur and Raipur. According to the petitioner, it has got itself registered under Centralized Registration at Kolkata on 5th November, 2004 in the name and style of M/s. Naresh Kumar & Co. Pvt. Ltd. with registered address as that of the company under the service head "Business Auxiliary Services".

2. The petitioner is aggrieved by show cause notice dated 23-5-2006 issued by respondent No. 2, calling upon the petitioner to show cause as to why service tax demand of Rs. 1,46,55,861/-, should not be recovered from the petitioner u/s 73 Chapter V of the Finance Act, 1994 (hereinafter referred to as "the Act of 1994") along with interest payable u/s 75 and further penalty be not imposed on the petitioner under the provision of Sections 75A, 76, 77 and 78 of Chapter-V of the Act of 1994 for non-payment of service tax, under the category of "Clearing and Forwarding Agent Services" on taxable value of Rs. 22,79,05,690/- in respect of period starting from 1st April, 2001 up to October, 2004 in respect of the business activity undertaken by the petitioner.

3. The petitioner taking serious objection to the initiation of recovery proceedings under the impugned show cause notice, assailing the very maintainability of the proceedings, filed a reply on 21-8-2006 and, thereafter, filed this petition seeking quashing of the entire proceedings of recovery.

4. Learned counsel for the petitioner contended that the notice is barred by limitation as provided u/s 73(1) of the Act of 1994 because present is a not a case of any fraud or misrepresentation or suppression of any fact towards evasion of tax. It is next contended that as the petitioner has been registered under Centralized Registration at Kolkata, in view of the provision contained in Rule 4(2) of the Service Tax Rules, 1994 (hereinafter referred to as "the Rules of 1994"), the petitioner could be assessed only by the competent authority of the Excise Department at Kolkata and the respondent No. 2 at Raipur has no territorial jurisdiction to initiate the proceedings of recovery of tax. It has been urged that as a matter of fact, the petitioner has already been assessed to service tax in respect of "Clearing and Forwarding Agent Services" in respect of the period from 1-9-1999 to 31-3-2004 under notice dated 18-10-2004 issued by the office of Central Excise Intelligence, Kolkata, which has also passed order of assessment on 25-4-2006 and the matter is now pending before the Tribunal. Therefore, the petitioner could not be proceeded against by respondent No. 2 in respect of the same transaction attracting liability towards payment of service tax. In addition, it has also been submitted that the computation and determination of tax is illegal, arbitrary and contrary to the provisions of the Act of 1994 for the reasons stated in para-5.13 and 5.14 of the writ petition.

5. On the other hand, learned counsel for the respondents submitted that the writ petition is not maintainable. It is submitted that the petitioner has only been given a show cause notice to which reply has also been filed. Having filed reply on 21st/22nd August, 2006, the petitioner ought to have waited for the consideration and decision of the authorities, but the petitioner, without awaiting the decision, has rushed to this Court. The officer/respondent No. 2 shall verify the liability, if any, of the petitioner after due consideration of his reply. He further submits that in so far as registration at Kolkata is concerned, it is only in relation to taxable service under the Head "Business Auxiliary Service" and not under the head "Clearing and Forwarding Agent Services". Therefore,

notwithstanding such registration, the respondent-authority has territorial jurisdiction to initiate recovery proceedings as the transactions inviting tax liability have taken place within the territorial jurisdiction of the State of Chhattisgarh. Learned counsel for the Revenue submits that the petitioner was not registered u/s 69 of the Act of 1994 with the respondent-authority nor furnished any return before the authority. It was only when the enquiry was made from the service consumers of the petitioner that it was revealed that the petitioner had provided services as "Clearing and Forwarding Agent" to its consumers in Chhattisgarh. After making necessary enquiry, collecting material, show cause notice has been issued. Therefore, in view of the provision contained in the proviso to sub-section (1) of Section 73 of the Act of 1994, the notice is within the limitation as in place of one year, it has to be treated as 5 years. It is also submitted that respondent-authority had no notice and knowledge of petitioner being assessed to service tax under the head "Clearing and Forwarding Agent" by the Kolkata office of the Excise Department in respect of the period from 1-9-1999 to 31-3-2004. Now, when the petitioner has submitted his reply and these facts have been detailed in his reply, it shall be duly verified and appropriate orders shall be passed.

6. I have considered the rival submissions made by learned counsel for the parties and perused the records.

7. Though number of issues have been raised by the petitioner in the present case, taking into consideration overwhelming material on record which shows that in respect of the period from 1-9-1999 to 31-3-2004, a show cause notice was issued to the petitioner by the Central Excise Intelligence, Kolkata on 18-10-2004, copy of which has also been placed on record as Annexure P-3, it is not necessary for this Court to decide all the issues at present except the aspect of overlapping.

8. The petitioner has made emphatic pleadings in paras 5.8, 5.9, 5.10, 5.13 and 5.17 of the writ petition regarding issuance of a notice dated 18-10-2004 by the Central Excise Authority at Kolkata. A copy of the said notice has been placed on record as Annexure P-3. A comparison of this notice i.e. notice dated 18-10-2004 with the notice which has been issued to the petitioner on 23-5-2006 by the Commissioner, Customs & Central Excise, Raipur reveals that there is considerable overlapping of the petitioner''s liability towards payment of service tax under the head "Clearing and Forwarding Agent". The notice issued by the Excise Authority at Kolkata, covered the period from 1-9-1999 to 31-3-2004, which is included in the period of notice under notice dated 23-5-2006 issued by the Central Excise Authority at Raipur. The transactions mentioned in the notice dated 23-5-2006 and notice dated 18-10-2004 are also overlapping and most of the transactions, on bare perusal, appear to be the same. It is also not in dispute by the respondents that on 25-4-2006, the Commissioner, Service Tax, Kolkata has passed an order of assessment and that order has also been challenged and the matter is presently pending before the Tribunal.

9. The respondents have not seriously disputed the overlapping of the transactions and the period covering those transactions under two assessment proceedings. This aspect, therefore, requires consideration by the respondent authorities. The petitioner has already submitted a reply highlighting these issues. Therefore, Respondent No. 2/Commissioner Customs and Central Excise, before proceeding further in the matter, shall minutely scrutinize and if necessary, obtain information from the Kolkata office with regard to the petitioner''s liability of payment of service tax under the head of "Clearing and Forwarding Agent" relating to the transactions covered under notice dated 23-5-2006. As a result of scrutiny, if it is found that the transaction between the period from 1-9-1999 to 31-3-2004 are those which have already been assessed by the Kolkata office, in respect of which, matter is pending before the Tribunal, respondent No. 2 shall pass appropriate orders in that regard, to the extent of overlapping, and further proceedings pursuant to show cause notice shall not be taken against the petitioner. In respect of the period subsequent to 31-3-2004, it would be open for the respondent to proceed further against the petitioner by considering petitioner''s reply to show cause notice in that regard, if at all found necessary in the changed circumstances after excluding the period of transaction from 1-9-1999 to 31-3-2004. A clear order of exclusion of transactions in respect of overlapping period shall be passed by respondent No. 2 before proceeding further with the matter. Thereafter, if the respondent No. 2 further requires, it may proceed against the petitioner in respect of the period and transactions which have not been covered by the order of assessment passed by the Commissioner Service Tax, Kolkata. It would be open for the petitioner to raise all the grounds to assail correctness and validity of the proceedings, if continued, in respect of the period subsequent to 31-3-2004 including grounds which have been urged before this Court. The Assessing Authority shall minutely scrutinize and take appropriate decision thereon in accordance with law. With the aforesaid direction, the petition is finally disposed off.