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(2010) 02 CAL CK 0071

In the Calcutta High Court

Case No : APO No. 332 of 2009 and Writ Petition No. 1518 of 2006

Naresh Kumar and Company — APPELLANT

Vs

Union Of India(UOI) and Others — RESPONDENT

Date of Decision : 08-02-2010

Acts Referred:
Finance Act, 1994 — Section 66

Citation : (2011) 241 CTR 194 : (2011) 38 VST 332

Hon'ble Judges : Kalyan Jyoti Sengupta, J;Kalidas Mukherjee, J

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This appeal is against a judgment and order of the learned Single Judge by which no relief had been granted as prayed for.

2. The above writ petition was filed for the following reliefs:

(A) Issue a writ of certiorari/mandamus or any other appropriate writ/order/ direction against the Respondents to refund the sum of Rs. 15,00,000 and to return the records seized during the search operation.

(B) A writ in the nature of prohibition prohibiting the Respondents from taking any coercive action during the pendency of the present writ petition.

(C) A writ in the nature of certiorari commanding the Respondents to produce the records and to certify the same so as to render conscionable justice to the Petitioner.

(D) Rule Nisi in terms of prayers (A) to (C) above.

(E) An ad interim order of injunction restraining the Respondents from taking any coercive action against the Petitioner during the pendency of the rule.

(F) Issue such other writ/order/direction and further orders as the Hon''ble Court may deem just and proper in the facts and circumstances of the case.

(G) Ad interim order directing the Respondents.

3. The facts for which the writ petition was filed are shortly stated hereunder:

The Petitioner is carrying on business activities and coordinating supervisions and liasioning in the process of supply of coal from collieries to its customers under various agreements. Therefore, the Petitioner is a service provider within the meaning of Finance Act, 1994, a statute relating to service-tax.

On 18th April, 2006, the officers from DGCIE, Kolkata Zonal Unit, conducted a search and seizure operation and seized various records and documents relating to the business of the Petitioner. According to the Petitioner, such conduct of search and seizure is illegal. The Petitioner has never defaulted in paying due and legitimate service-tax as and when it is levied or leviable.

4. On the date of the search and seizure operation, the Petitioner was compelled to handover a cheque amounting to Rs. 15 lakhs drawn on the State Bank of India, Kolkata Main Branch, and this was forcibly collected by the raiding officers and the said cheque was also encashed later on. The Petitioner immediately thereafter, by letter, protested against collection of this amount without informing the tax liability or failure to discharge the obligation in terms of the said Act and the rules framed thereunder. Repeated demands were made for return of the said cheque collected illegally and also the documents and records seized.

5. The petition was contested by the Respondent by filing affidavits saying that there has been no filing of returns as required under the law and also payment of service-tax. It is also alleged that upon examining all these documents collected, and examining the statements recorded by the raiding officers, it was prima facie found that there had been a tax liability. It is further alleged that necessary steps were taken for issuing show-cause notice.

6. The Petitioner contends that till now, the Petitioner has not received any show-cause notice in connection with the search and seizure. The learned Trial Judge, after observing all the facts as above and having noted the relevant authorities on the proposition of law relating to refund of the amount paid by mistake on account of tax, ultimately did not grant any relief and held that the writ petition was premature.

7. Mr. Mittal, appearing for the Appellant, submits that the judgment and order appealed against is patently erroneous as after observing everything in favour of the Appellant, the same did not provide any relief which ought to have been granted. He further argued that the learned Trial Judge made out a case which was not the issue and decided accordingly. He has drawn our attention to the authorities cited before the learned Trial Judge on this issue.

8. Mr. Bhardwaj, appearing for the Revenue Department, contends that the raiding officers did not extract the aforesaid amount, rather it was the voluntary payment on account of tax liability and the same has been duly encashed. Necessary adjudication will be done for fixing up of the tax liability and if it is

found that there has been any excess deposit, then the balance amount would be refunded.

9. After hearing the learned Counsel for the parties and reading the impugned judgment and the pleadings before us, we are of the view that the learned Trial Judge has not decided the matter in a right direction. To put it differently, the learned Trial Judge did not put the right question to render the decision. In this case, according to us, the issue involved is whether the payment made by the Petitioner, even if for argument''s sake voluntarily, can be realised by the Department or not ? However, it is contended that the payment was not made voluntarily, rather it was under threat and coercion. We find two letters placed by Mr. Bhardwaj, written by the Petitioner to the Department contemporaneously, and on reading both of them, one of 18th April, 2006 and another of 4th Aug., 2006, it appears that the payment was not made voluntarily but of course with the intention to meet the tax liability, if found to be due. Sometime, the payment is made to mitigate adverse and harsh situation which befalls consequent upon raid, search and seizure.

10. Therefore, the whole point is that whether the Department can retain this amount under the provisions of law or not. Mr. Bhardwaj says that under Rule 6 of the relevant rules framed under the aforesaid Act, the service provider is obliged to pay tax at a particular interval. Therefore, it is his duty to pay tax. We are of the view that this rule has to be read in consonance with the charging Section 66 of the said Act. The service provider has to file a return. We do not find any provision that one has to pay compulsorily the tax in advance. According to us, this payment in this case is not required to be paid under the law compulsorily. When the Petitioner alleges that it is not a voluntary payment, we feel that the payment is not according to law and liability to make payment will arise only when the tax liability is ascertained and not before that. Here, there is no ascertainment of tax liability and it is the case of the Respondent that show-cause notice is to be issued for determination of tax liability. The authority concerned has no jurisdiction or authority to collect any amount at the time of raid as simply it is not empowered legally to do so. At the stage of recovery proceedings, all sorts of legitimate coercive measures can be taken, namely attachment of property etc.

11. We find from the judgment of the learned Trial Judge that the aforesaid proposition of law more or less has been summarised with the strength of a large number of decisions of High Courts and the Supreme Court. We therefore need not repeat those and we accept those observations recorded by the learned Trial Judge. Based on the aforesaid observations, we hold that the Revenue Department has no right to withhold the said amount and it is bound to return the same.

12. Accordingly, we direct the Revenue Department to return the principal amount of Rs. 15 lakhs to the Appellant within a period of one month from the date of receipt of the signed copy of this order and on receipt of Rs. 1 5 lakhs,

the Appellant shall keep the same in a short-term fixed deposit account with any nationalised bank and shall not encash the same for a period of three months from the date of receipt of the amount. In the meantime, it will be open for the Revenue Department to take steps in accordance with law as may be advised and in the event any lawful tax liability is ascertained upon giving hearing to the Appellant, then it would be open for both the parties to take steps in accordance with law as may be advised.

13. We make it clear that if no action is taken within three months from the date of making payment to the Appellant, then the Appellant would be free to appropriate the aforesaid amount and in that case, the Revenue shall pay interest @ 9 per cent per annum from the date of encashment of the said cheque upto the date of making payment in terms of this order.

14. However, in course; of taking action by the Respondents, if the Appellant does not cooperate, then it will be open for the Respondents to proceed in accordance with law.

15. The original books of accounts and records which have been seized shall be returned after making photocopies thereof and this shall be done within a period of 15 days from the date of receipt of the signed copy of this order. However, it is made clear that in the event such original books of accounts are required for production at the time of enquiry or adjudication, the Appellant shall produce the same.

16. In view of the aforesaid, the appeal accordingly stands disposed of. There will be no order as to costs.

Parties shall act on signed copy of the operative portion of the order on the usual undertakings.