(2011) 08 AHC CK 0319

In the Allahabad High Court

Case No : Writ Tax No. 1228 of 2011

N.K.G. Infrastructure Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 25-08-2011

Acts Referred:

Citation : (2017) 346 ELT 109

Hon'ble Judges : Sunil Ambwani and Pankaj Mithal, JJ.

Bench : Division Bench

Advocate : S/Shri Chandra Kumar Rai and J.K. Mittal, Counsels, for the Petitioner; Shri S.P. Kesarwani, SSC, for the Respondent

Final Decision : Dismissed

Judgement

1. We have heard Shri J.K. Mittal and Shri Chandra Kumar Rai, learned counsel for the petitioner. Shri S.P. Kesarwani appears for the respondents.

2. This writ petition is directed against the show cause notice dated 5-5-2011 issued by the Addl. Director General, Directorate General of Central Excise Intelligence, Delhi Zonal Unit, R.K. Puram, New Delhi, answerable to the Commissioner, Customs & Central Excise, CGO Complex-II, Kamla Nehru Nagar, Ghaziabad. The petitioner has also prayed for declaration that the notice has been issued arbitrarily, without jurisdiction, and time-barred, against the provisions of law and illegal. The petitioner has also prayed for writ of mandamus or any other appropriate writ declaring that activity ''levelling of soil including filling of gorges/nallah, removing of shrubs, grass and rubbish from the area'' are not liable to service tax under the provisions of Chapter V of the Finance Act, 1994.

3. The notice alleges, on the basis of specific intelligence gathered by the Revenue that the petitioner is engaged in providing various services to M/s. Sahara India Commercial Corporation Ltd., relating to land development for their real estate project at Sahara City Homes, Amritsar and that they have received

huge amount as consideration, in lieu of providing these services, but have not paid service tax. The officers of the Kanpur Regional Unit of Directorate General of Central Excise Intelligence, Kanpur commenced investigations against the petitioner. It was found that the work order has been awarded to the petitioner by M/s. Sahara India Commercial Corporation Ltd., in connection with development of land at Sahara City Homes, Amritsar. A letter was written on 2-2-2010 to the petitioner calling upon the balance sheets for the financial years 2006-07, 2007-08 and 2008-09; attested copies of the work order between the petitioner and M/s. Sahara India, Lucknow; payment details, date-wise, bank account statement, etc. In response the petitioner informed that they are already assessed with Range-II, Central Excise & Service Tax, Division-V, Ghaziabad with which they are registered. The department, thereafter, sent letters on 24-2-2010 and 25-2-2010, to the petitioner asking for same information. The petitioner informed on 9-3-2010 that they have not provided any service for maintenance or repair of roads during the period 16-6-2005 to 26-7-2009, and that they were awarded order for constructions, widening and strengthening of roads. They also enclosed copy of summons received from Ghaziabad Commissionerate. The respondents thereafter contacted M/s. Sahara India Commercial Corporation Ltd., who provided to them vide letter dated 17-2-2010, the copy of the work order dated 17-6-2006 given to the petitioner for their project "Sahara City Homes, Amritsar", the cost of which was Rs. 6,08,49,000/-. They also supplied copies of the bill raised by the petitioner to the same amount and payment details. On this information which the department found to have been suppressed by the petitioners, summons were issued to the petitioner on which one Shri Jitendra Kumar appeared on 9-3-2011 and recorded his statement under Section 14 of the Central Excise Act, 1944. He introduced himself as Senior Manager of the petitioner and claimed exemption from service tax under Section 65(97a) of the Finance Act, 1994 for agricultural land development. He expressed his inability to comment on work order dated 17-6-2006.

4. On the basis of the aforesaid information which the department treats to have been suppressed by the petitioner, the show cause notice has been issued. The notice also refers to the work order and relevant provisions for recovery of service tax, and the expansion of the period of limitation of one year under proviso to Section 73(1) to 5 years, where service tax has not been levied or paid or has been short paid or erroneously refunded by reason of fraud, or collusion, or wilful misstatement or suppression of facts or contravention of any provisions of this chapter or rules made thereunder with intent to evade payment of service tax.

5. In the show cause notice explanation has been given for invocation of extended period to the effect that the petitioner had wilfully suppressed the facts of rendering taxable services during the period 1-6-2006 onwards, to their clients from the jurisdictional service tax authorities with intent to evade payment of service tax. They never filed the service tax returns in Form ST-3 as prescribed in the Service Tax Rules, 1994 in respect of the work order. By an act of omission or

failure on the part of the petitioner to disclose wholly and truly all the material facts, the gross amount received by them for rendering the taxable service, necessary for their assessment for the said period, the value of taxable service had escaped assessment.

6. Learned counsel for the petitioner submits that the petitioner registered under the Act is truthfully disclosing all the relevant facts. The balance sheet, profit and loss account as well as the ledger were produced for the relevant period from which the department could have easily discovered the amount which according to them have escaped the assessment of tax. Shri Mittal states that the extension of limitation is permissible only when there is deliberate suppression with intention to evade payment of tax. He relies on the judgment in Commissioner of C. Ex., Aurangabad v. Bajaj Auto Ltd., 2010 (260) E.L.T. 17 (S.C.) in which the Supreme Court held in Paragraphs 12 and 16 after examining the judgments in Collector of Central Excise, Hyderabad v. Chemphar Drugs and Liniments, Hyderabad, (1989) 2 SCC 127 : 1989 (40) E.L.T. 276 (S.C.); Cosmic Dye Chemical v. Collector of Central Excise, Bombay, (1995) 6 SCC 117 : 1995 (75) E.L.T. 721 (S.C.) and Anand Nishikawa Co. Ltd. v. Commissioner of Central Excise, Meerut, (2005) 7 SCC 749 : 2005 (188) E.L.T. 149 (S.C.) as follows :-

"12. Section 11A of the Act empowers the central excise officer to initiate proceedings where duty has not been levied or short levied within six months from the relevant date. But the proviso to Section 11A(1), provides an extended period of limitation provided the duty is not levied or paid or which has been short-levied or short-paid or erroneously refunded, if there is fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty. The extended period so provided is of five years instead of six months. Since the proviso extends the period of limitation from six months to five years, it needs to be construed strictly. The initial burden is on the department to prove that the situation visualized by the proviso existed. But the burden shifts on the assessee once the department is able to produce material to show that the appellant is guilty of any of those situations visualized in the Section.

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16. 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 misstatement, 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 extended period of limitation. It only observes in its order 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."

7. Shri Mittal submits that the activity undertaken by the petitioner is clearly an activity, which is connected with agriculture and relied upon certificate of Patwari (revenue officer) of revenue area in Amritsar that the work was carried out on agricultural land. He submits that the ''taxable service'', which are defined in Section 65(105)(zzza) to mean any service provided or to be provided, to any person, by any other person in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities but does not include, as provided in Section 65(97a), such services in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies.

8. Prima facie we do not find that the filing of returns including balance sheet, profit and loss account and the ledgers would amount to declaration and will not fall within the meaning of suppression of information, if the particular contract covering the taxable service was not specifically disclosed. The calculation of the total profits in the balance sheet made by the Chartered Accountant, may include all the contracts but if the particular contract has not disclosed, even if the stand of the petitioner is that activity was not taxable, it cannot be said that the petitioner had disclosed all the relevant information and that such an act will not fall within the purview of the word ''suppression'' used in proviso to Section 11A. Further we prima facie find that the activity undertaken by the petitioner for M/s. Sahara India Commercial Corporation Ltd. was not exempt under Section 65(97a), as working on the land recorded as agricultural land by itself cannot be treated to be service provided in relation to agriculture. There is no averment in the pleading nor there is any such stand taken by the petitioner that M/s. Sahara India Commercial Corporation Ltd. was engaged in any agricultural operation or that the work performed by the petitioner was in furtherance to the activity for the purpose of agriculture.

9. Be that as it may, we are not recording any positive findings and have considered the arguments only for the purposes to find out whether a case has been made out by the petitioner to interfere with the show cause notice. It will be open to the petitioner to take all the grounds, which have been taken in this writ petition and any other grounds, which they may like to take in reply to the show cause notice. Any observations made by us in this order shall not influence the competent authority to take a decision.

10. The writ petition is accordingly dismissed.

