

(2017) 04 BOM CK 0117
In the Bombay High Court
Case No : 1636 of 2016

PACE SETTER BUSINESS SOLUTIONS PVT LTD

APPELLANT

Vs

UNION OF INDIA & ORS

RESPONDENT

Date of Decision : 03-04-2017

Acts Referred:

[Constitution of India](#), [Article 226](#) -
Power of High Courts to Issue certain writs
[Finance Act, 1994](#), [Section 65\(19\)](#), [Section 72](#), [Section 73](#)

Citation : (2017) 04 BOM CK 0117

Hon'ble Judges : S C Dharmadhikari, Prakash D Naik

Bench : DIVISION BENCH

Advocate : Bharat Raichandani, Mahesh Raichandan, B J Raichandani, Swapnil Bangur, Shalaka Gujar

Final Decision : Allowed

Judgement

1.] This petition under Article 226 of the Constitution of India challenges the order dated 21st July, 2015 passed by the third respondent.
2.] Since the writ petition is pending in this Court from 14th August, 2015 and appeared on our Board on several occasions, we have found that the Revenue has not filed any affidavit controverting the factual and the legal position.
3.] The facts lie in a very narrow compass. Since there are no contrary submissions made on affidavit, we dispose of this writ petition at this stage itself by a short order.
4.] The respondents waives service.
5.] The petitioners are inter-alia engaged in the business of providing "Auxiliary services". These are defined under Section 65(19) of Chapter V of the Finance Act, 1994.

6.] The petitioners claim that they have been rendering these services in terms of the agreement. An illustrative agreement is annexed at Exhibit "B" to the petition. The call center services provided to various clients located in India resulting in the petitioners raising invoices for their service charges alongwith service tax thereon in terms of Rule 4A of the Service Tax Rules, 1994. Annexure "C" is the copy of this invoice. The petitioners claim that certain expenditure is incurred by them for their clients which is reimbursed by the clients. The petitioners claim is that they did not recover service tax and that was not paid on the reimbursement of their expenses. The petitioners were of the view that such reimbursement is not subject to service tax. 6. Upon an audit conducted in the premises of the petitioners in December 2008 and January 2009 by the office of the service tax department for the period 2005-2006 to 2007- 2008, the petitioners were called upon to pay service tax.

The petitioners submitted that they paid an amount of Rs.13,33,972/- along with interest. This was to neutralize the revenue impact. Their case is that the monitoring committee constituted by the Revenue accepted this position and closed the matter. They rely upon Annexure D in that behalf.

7.] Since the petitioners throughout held the view that they are not liable to pay service tax but noticing that there was a Voluntary Compliance Encouragement Scheme of 2013 traceable to paragraph 104 to 114 of the Finance Act, 2013 with effect from 10th May, 2013 and the Service Tax Voluntary Compliance Encouragement Rules, 2013 were also introduced, they filed an application in the prescribed form. They filed this application on 21st October, 2013 for the period from April 2008 to December 2012. In terms of the Scheme, the petitioner voluntarily paid the entire sum of Rs.47,33,476/-.

8.] The petitioners still received a show-cause notice copy of which is annexed at Annexure E. They filed a reply to the show-cause notice and raised several grounds. However, they contended that the application under the Scheme was made and in the light of the fact that such an application was made, they be allowed to proceed further and rely on it.

9.] The petitioners also appeared for personal hearing on 1 st September, 2015, before the third respondent and reiterated their submissions.

10.] However, without taking any note of the same, the impugned order has been passed.

11.] Apart from the fact that the order is challenged on the ground that it violates the principles of natural justice, it is non speaking, what is essentially relied upon is a scheme styled as Service Tax Voluntary Compliance Encouragement Scheme, 2013 (for short VCES 2013). Certain sections of the Finance Act are relied upon to submit that the term "tax due" as defined in para 105(e) denotes service tax due or payable under the Chapter or any other amount due or payable under Section 73(a) thereof for the period beginning from 1st October, 2007 and ending on 31st December, 2012 including a cess

leviable thereon under any other Act for the time being in force, but not paid as on the 1st March, 2015.

12.] The argument is that the application is not rejected on the ground of non-compliance with paragraph 106(2). It is stated that by Paragraph 106(1) any person may declare his tax dues in respect of which no notice or an order of determination under Sections 72 or 73 or Section 73A of Chapter VI of the Finance Act, 2013 has been issued or made before the first day of March 2013. The proviso thereto has not been invoked and we need not therefore refer it.

13.] The procedure for making a declaration and payment of tax dues is set out in paragraph 107 of the Scheme. In the present case, there was no show-cause notice issued to the petitioners. The petitioners submit that the show-cause dated 21st October, 2013 cannot be said to be a show-cause and applicable in law. An audit objection cannot be a show-cause nor an order.

14.] The petitioners also rely upon the paragraphs in the Scheme which according to them further clarify that it is not just a notice but an order of determination under Sections 72, 73 or 73A of Chapter which is a pre requisite. In the instant case, there is no determination. The argument then is that if such determination is not there, then, no reliance could have been placed upon an observation during the course of a audit.

15.] It is submitted by Mr. Raichandani appearing on behalf of the petitioners that at page 23 of the paper book in the impugned order, the first finding is that there is an application filed by the petitioners. Second finding is that there is an audit observation/objection for non-payment of service tax on reimbursement expenses. That was accepted by the declarant and he has paid the dues up to March, 2008. Thereafter, an audit was carried out during 2013-14. Mr. Raichandani would submit that relying upon the past audit, and the payment made in respect thereof cannot be relied upon so as to reject the application which is for a distinct period. It is an admitted position that the past audit is for the period 20th May, 2006 to 20th July, 2008, the application that is filed is for the period of April 2008 to December 2012. The reason that during the current audit declarant i.e. the petitioner has again failed to pay service tax on the same issue therefore cannot be legally sound for rejecting the application.

16.] The only argument to counter this and raised by Mr. Bangur is that at page 84 of the paper book when the summary of the audit result was brought to the notice of the petitioner, he has accepted the liability and has made the payment. The matter was treated as closed.

17.] Upon hearing both sides and perusing the impugned order, we are of the view that the payment which has been made and for a past audit objection, for an earlier period cannot be utilized to reject the application as is now made by the present writ petitioner. The application invoking VCES has to be considered and if at all rejected, it must be on the touchstone of the paragraphs of the VCES, 2013 and the wording thereof. The scheme itself cannot be defeated by

holding that on the earlier occasion parties like the petitioners have accepted their liability.

18.] Reliance by the petitioner's advocate on the judgment of this Court in the case of Indokem Limited Vs. Union of India¹ and S2 Infotech Pvt. Ltd. Vs. Union of India² which rely on these very paragraphs in the Scheme is thus opposite. Once we have found that in the present case, the conclusion reached and particularly at page 23 paragraphs (c) and (d) cannot be sustained on the touchstone of the wording of the paragraphs, then, the impugned order must be set aside. 19 The authorities need not be so anxious to protect the government revenue and reject the applications, as are made in the present case by closing the files instantaneously. They have to apply their mind. They must consider the application in accordance with the paragraphs of the scheme. They must pass an order in accordance therewith. In the circumstances, finding that the conclusions reached are unsustainable in law, we quash and set aside the impugned order. We direct that the application shall be considered in accordance with law, as expeditiously as possible. While considering the application, the authorities shall not be influenced by the earlier conclusions. By keeping open all 1 2015(38) S.T.R. 464 (Bom.) 2 2015(40) S.T.R. 10 (Bom.) the contentions of the parties for being raised during the course of consideration of the application, we allow the writ petition. No order as to costs.