(2014) 05 KL CK 0066

In the High Court Of Kerala

Case No : W.P. (C). No. 30370 of 2013 (U)

Sony Rebeiro APPELLANT

Vs

Commr. of Service Tax (Appeals) RESPONDENT

Date of Decision : 28-05-2014

Acts Referred:
Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 76, 78

Citation : (2015) 38 STR 5 : (2015) 86 VST 84

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : R. Leela and P. Lakshmy, Advocates for the Appellant; Tojan J. Vathikulam, Thomas Mathew Nellimoottil, SCs, Santhosh Mathew, Sathish Ninan, Arun Thomas and Jennis Stephen, Advocates for the Respondent

Judgement

K. Vinod Chandran, J.—The petitioner is aggrieved by the Service Tax liability imposed on the petitioner by Ext. PI order and the order passed pursuant to Ext. P4 judgment of this Court. The petitioner contends that, the petitioner was not able to file an appeal within the time provided and that the petitioner had turn over below the limit as prescribed under the Finance Act, (for brevity, ''the Act'') 1994, in the respective years in which assessment was taken up. The petitioner also has a contention that the penalty imposed being under Sections 76 and 78 of the Act, cannot be sustained by virtue of the proviso introduced to Section 78 of the Act by an amendment brought to the Act on 10-5-2008. Immediately, it has to be noticed that, the contentions substantially raised herein, were also raised in another proceeding before this Court itself, in an another writ petition under Article 226 of the Constitution of India. This Court by Ext. P4 specifically found that, the penalty under Sections 76 and 78 of the Act has been held to be permissible by two Division Benches of this Court. It is also trite that when the statute provides for a specific period of filing an appeal and also confers the appellate authority with specific powers to condone the delay, the appeal if not filed within the specified period or the extended period, then, the assessee cannot invoke Article 226 to get over the statutory dictate Assistant Commissioner of Central Excise Vs. Krishna Poduval, .

2. Though this Court has in Ext. P4 found that, penalty under Sections 76 and 78 of the Act could be simultaneously imposed, the petitioner contends that, the amendment brought by introduction, of the proviso, on 10-5-2008, has not been brought to the notice of the learned Single Judge. That definitely seems to be correct. However, looking at Ext. P1 order, it is seen that the assessing authority has taken into account the amendment, brought in. In page 4, paragraph 4, the penalty imposed under Section 76 is only till 10-5-2008; i.e., till the date of amendment and the introduction of the proviso which bars imposition of penalty under Section 76 of the Act if penalty under Section 78 of the Act is imposed. In such circumstance, the contentions raised by the petitioner regarding the illegality in the levy of penalty cannot be sustained.

3. The next contentions are with respect to the computation and the amounts due from the additional 4th respondent. Towards computation, the petitioner would contend that, the amounts deposited has not been adjusted as is evidenced from Ext. P5, and in calculating the penalty under Sections 76 and 78 of the Act, the amounts already paid have also been taken into account. Ext. P5 is an order issued, pursuant to the directions of this Court directing credit to be given to all payments effected by the petitioner. Paragraph 6 of Ext. P5 takes in Rs. 3,44,304/- as the tax paid by the petitioner. The balance tax payable is computed at Rs. 2,54,194/-. Hence, the computation of amounts cannot be faulted and definitely credit has been given to the payments made by the petitioner.

4. Next contention is with respect to the imposition of penalty on the amounts deposited by the petitioner. It is very evident that, the penalty has been imposed for assessments for the years 2005-06 to 2009-10. The payment of Rs. 1,50,926/- referred to in Ext. P1 is only on 17-9-2012, long after the expiry of the periods assessed. It is pertinent that, Ext. P1 order, in paragraph 11 specifically refers to the petitioner having collected Service Tax without registration or payment to the department. The balance amounts, coming within the amount of Rs. 3,44,304/- deducted in Ext. P5, are amounts paid pursuant to interim orders issued by this Court. Such amounts cannot be adjusted, since, penalty under Section 78 of the Act has to be on the defaulted amounts subject to a maximum of double the actual amounts due. The petitioner having failed to remit any amounts as tax in the relevant years, no adjustments can be made in the penalty levied, on the basis of amounts paid subsequent to the relevant years.

5. The petitioner has an alternate contention with respect to the amounts payable by the additional 4th respondent. The petitioner''s contention is that, there are amounts due from the additional 4th respondent and the Service Tax liability should be kept in abeyance till the additional 4th respondent pays the amounts to the petitioner. The recovery of amounts from the additional 4th

respondent would have to be agitated by the petitioner, before the appropriate forum and no direction can be issued to keep in abeyance the demand of tax assessed and penalty levied, on that ground, under Article 226 of the Constitution of India.

6. In such circumstance, the contentions raised by the petitioner against Exts. P1 and P5 are to be negatived. However, considering the fervent plea made by the learned Counsel for the petitioner, the petitioner shall be permitted to pay the amounts due in installments. The petitioner shall pay the entire amounts due in installments starting from 28-6-2014 and on the 28th of the succeeding five months. On such installments being made as against the amounts due as per Ext. P5, the department shall issue a communication regarding any future interest payable, and the same shall be payable on the 28th of the succeeding month. With the above directions and observations, the writ petition stands disposed of. No cost.

