(2007) 09 GAU CK 0009

In the Gauhati High Court

Case No : Writ Petition (C) No. 2146 of 2007

Videocon Industries Limited — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 10-09-2007

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14, 14(3)
Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 83
Penal Code, 1860 (IPC) — Section 174, 175, 193, 228

Citation : (2008) GLT 780 Supp

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : R.D. Soni, S. Sarma, J. Deka and T.K. Bhuyan, for the Appellant; D. Das, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—Heard Mr. R.D. Soni, learned Counsel along with Mr. S. Sarma, learned Counsel for the Petitioner. Also heard Mr. D. Das, learned Central Government Standing Counsel representing the Respondents. Perused the materials on record.

2. The Petitioner, a Public Limited Company incorporated under the Companies Act, 1956, has invoked the writ jurisdiction of this Court assailing the legality and validity of the investigation initiated against it by the Directorate General of Central Excise Intelligence (in short ''DGCEF) u/s 83 of Chapter V and VA of the Finance Act, 1994 read with Section 14 of the Central Excise Act, 1944. The Petitioner has also assailed the legality and validity ofAnnexures-4, 5, 7 and 11 summons dated 14.12.2006, 2.1.2007, 17.1.2007 and 2.3.2007 respectively asking the Petitioner to produce the documents indicated in the summons and to depose verbally as well as in writing in the matter in respect of an enquiry being conducted for evasion of service tax/contravention of Chapter V and VA of the Finance Act, 1994 and the Rules framed there under.

3. The Petitioner has also challenged the Annexures-8,10 and 13 letters issued by the authority to it as replies to the queries and questions raised by the Petitioner upon receipt of the summons.

4. For a ready reference, one of the summons dated 14.12.2006 (Annexure-4 to the writ petition) and one of the letters dated 2.3.2007 issued by way of clarification (Annexure-10 to the writ petition) are reproduced below:

F. No. DGCEI/SH/RU/INV/ST/11/2006/1499

Dated 14.12.2006

Summons (Under Section 83 of Chapter V & VA of the Finance Act, 1994 read with Section 14 of the Central Excise Act, 1944)

To M/s Videocon Industries Ltd., Auto Car Compound, Adalat Road, Aurangabad-431005

Whereas a case against M/s Videocon International Ltd. (at present M/s Videocon Industries Ltd, Auto Car Compound, Adalat Road, Aurangabad-431005) about evasion of Service Tax/contravention of Chapter-V & VA the Finance Act, 1994 and rules made there under is being inquired by me/under my orders.

And whereas I have reasons to believe that you are in possession of facts and/or documents and things, which are relevant to the above inquiry.

You are hereby summoned U/s 83 of Chapter V & VA of the Finance Act, 1994 read with Section 14 of the Central Excise Act, 1944 to appear before me in person/by an authorized agent on 29.12.06 at 11.30 Hrs. in the office situated at ''House No. 19, ''Janardanam Complex'', 1st Floor, Rajgarh Main Road, Chandmari, Guwahati, Assam Pin 781003, to give evidence or to make statement truthfully on such matters concerning the inquiry as you may be asked and to produce the documents and things mentioned in the schedule below for my examination.

If you fail to obey with this summons and intentionally omit to attend to give evidence or to make statements and/or to produce the documents and things, you will be liable to be punished under the provisions of Sections 174-175 of the IPC, 1860.

Schedule

1) Copy of Court''s order regarding Amalgamation of M/s Videocon Industries Ltd. and Videocon International Ltd.

2) Copy of agreement entered with the Govt. of Tripura for conduct of Tripura Govt. Online Lottery.

3) Books of Accounts of M/s Videocon International Ltd. & M/s. Videocon Industries Ltd. including Balance Sheet, Trial Balance & Profit and loss Accounts for the period from December, 2004 to November, 2006.

4) Details of Tripura Online Lottery organized for the period from December, 2004 to November, 2006.

5) Statement showing total amount of sale, total amount of prize money disbursed and the total amount of guarantee money paid to the Govt. of Tripura in respect of each draw of ''Tripura Govt. Online Lottery'' organized for the period from December, 2004 to November, 2006.

6) Details of down-line agents, sub-agents, stockiest or sub-distributors appointed for the purpose of running ''the Tripura Govt. Online Lottery'' including the accounts, addresses and agreements or terms and conditions of such appointments.

7) To depose verbally as well as in writing. Office Seal Given under my hand & Seal of Office dated this, 14th day of December, 2006.

Sd/- (S. Mukherjee) Superintendent D.G.C.E.I., Guwahati.

E No. DGCEI/SH/RU/INV/ST/11/2006/145,

Dated 2nd March, 2007

To

M/s Videocon Industries Ltd., 171, Mittal Court, "C" Wing, 17th Floor, Nariman Point, Mumbai-400021.

Subject: Summons u/s 83 of Chapter V & VA of the Finance Act, 1944 read with Section 14 of the Central Excise Act, 1944--regarding.

Dear Sir,

This has reference to letter dated 19.2.2007 of your consultant Ram & Co. vide which certain clarifications were sought about the nature of enquiry as well as particulars of alleged evasion to be investigated from this end for proper representation of the facts.

The inquiry initiated is about alleged evasion of service tax by you for providing taxable Business Auxiliary Service to Government of Tripura in conducting their online lottery business and for this purpose the Summon Notices dated 2.1.07 and 17.1.07 were issued to you to gather the actual facts and information on the matter investigated upon.

In the aforesaid letter dated 19.2.07, your consultant raised doubt about applicability of Service Tax relating to promotion and marketing of On-line lottery business. In this regard, it is to be noted that the Investigating Officer is not the appropriate authority to take any decision on the point raised by you. The matter is still at investigation stage, therefore, it would be premature to presume anything on applicability of Service tax on promotion and marketing of On-line lottery business.

On investigation, if any case is registered against you on evasion of Service Tax, adequate opportunity are available with you to represent your case before the adjudicating and for appellate authorities.

Therefore, in anticipation of your cooperation with the investigating agency relating to the ongoing investigation, another Summon Notice dated 2.3.07 is enclosed herewith for submission of the desired documents/information as mentioned in the schedule to the Summon and also to depose verbally as well as in writing. Encl. As stated above.

Sd/-(S. Mukherjee) Superintendent

5. Writ petition was filed at the time when Annexure-13 letter dated 28.3.2007 was issued to the Petitioner in response to the legal notice dated 23.3.2007 (Annexure-12 to the writ petition). In the letter, it was indicated that the investigation being conducted against the Petitioner has been approved by the competent authority and that the summons were issued as per the provisions of Section 83 of the Finance Act read with Section 14 of the Central Excise Act, 1944. It was pointed out in the letter that the summons were issued not only for personal appearance, but also for submission of records and documents for the period in question and the failure on the part of the Petitioner to produce the same. The purported admission on the part of the Petitioner through its consultant about its engagement as Marketing Agent for Sale of Tripura Online Lottery Tickets was also indicated. By the letter, the Petitioner was once again requested to submit the following documents with the further request to cooperate in the investigation so that the facts are brought out. The documents sought for are as follows:

i) Copy of Court''s order regarding Amalgamation of M/s Videocon Industries Ltd. and Videocon International Ltd. ii) Copy of Agreement entered with the Govt. of Tripura for conduct of Tripura Govt. Online Lottery, iii) Copies of Balance Sheet, Trial Balance and Profit and Loss Accounts of M/s Videocon International Ltd., for the financial year 2004-05, 2005-06 and 2006-07 (up to November, 2006).

ii) Statement showing total amount of sale, total amount of Prize Money disbursed and the total amount of guarantee money paid to the Govt. of Tripura in respect of each draw of ''Tripura Govt. Online Lottery'' organized for the period from December, 2004 to November, 2006.

iii) Details of down-line agents, sub-agents, stockist or sub-distributors appointed for the purpose of running the ''Tripura Govt. Online Lottery'' including the accounts, addresses and agreements or terms and conditions of such appointments.

6. By the said letter, while making the request to the Petitioner to co-operate in the investigation, the authority stated as follows:

You are requested to co-operate in the investigation so that the facts are brought out. This is not the stage to conclude either by you or the investigating authority that the activities/services rendered by you in relation to Tripura Govt. Online Lottery are taxable or not taxable. The objective of investigation is to collect all the relevant facts and documents so as to enable to reach a conclusion either to drop the case or go further. Your non-cooperation in the investigation is not conducive to the proper conduct of the investigation.

Therefore, it is requested that the documents listed in this letter be sent without further delay and also to comply with the summons.

7. The Petitioner has questioned the jurisdiction of the authority to issue the summons and to proceed with the matter. According to the Petitioner, the authority which has issued the summons having himself stated vide the above quoted letter dated 2.3.2007 that the investigating officer is not the appropriate authority to take any decision on the point raised by the Petitioner and that the matter is still at the investigating stage and, therefore, it would be premature to presume anything on applicability of the Service Tax on promotion and marketing of online lottery business, the impugned proceeding is not sustainable in law. The Petitioner has also placed reliance on decision of the Apex Court reported in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, The further case of the Petitioner is that since in respect of another region, similar summons have been withdrawn by the Respondents with liberty to issue fresh summons according to law, the impugned summons are also required to be withdrawn by the Respondents.

8. As against the aforesaid pleas of the Petitioner, the Respondents in their counter affidavit have questioned the very maintainability of the writ petition on ground of being premature. It is the stand of the Respondents that the present enquiry/investigation is being carried out as empowered u/s 14 of the Central Excise Act, 1944, which has also been made applicable to Service Tax vide Section 83 of the Finance Act, 1994. It has further been stated that the Central Government by its notification dated 10.2.1999 has empowered all the Central Excise Officers not below the rank of Superintendent of Central Excise to summon persons and hold enquiries, to give evidence, to record statement relating to any proceeding.

9. The decision in Whirlpool Corporation (supra) has been pressed into service so as to contend that the jurisdiction of the High Court in entertaining the writ petition under Article 226 of the Constitution of India in spite of there being alternative statutory remedy is not affected, specially, in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. There is no quarrel in respect of the jurisdiction of the High Court under Article 226 of the Constitution of India.

10. The question is as to whether in the instant case the authority which has issued the summons and the impugned letters, has no jurisdiction to do so or has assumed the jurisdiction without any legal foundation. If it is found that the

authority has exercised the jurisdiction properly, there is no question of falling back on the proposition relating to jurisdiction of the High Court under Article 226 of the Constitution of India.

11. According to the Petitioner, some of the documents mentioned in the impugned summons and the letters dated 28.3.2007 (Annexure-13 to the writ petition) are not available with the Petitioner. Learned Counsel for the Petitioner has submitted that the documents No. 1, 2 and 3 are available with the Petitioner and the remaining documents are not in the hands of the Petitioner. The further stand of the Petitioner is that since the nature of the enquiry proposed to be made and the foundation thereof, has not been disclosed, the impugned summons and the letters could not have been issued to the Petitioner.

12. I have considered the aforesaid submissions of the learned Counsel for the Petitioner, which has been resisted by Mr. Das, learned Central Government Standing Counsel appearing for the Respondents. From the materials on record, what has appeared is that the authorities want to carry out the enquiry relating to evasion of Service Tax/Contravention of Chapter V & VA of the Finance Act, 1994 and the Rules framed there under. It has been indicated in the summons that the Petitioner is in possession of facts and or documents and/or things which are relevant for the purpose of enquiry. Being empowered by the provisions of the Act, the Petitioner has been summoned to appear before the authority along with the documents and to depose.

13. If the Petitioner is not in possession of all the documents mentioned in the summons and the letters dated 28.3.2007 (Annexure-13 to the writ petition), it can very well say so before the authority. According to the Petitioner, some of the documents are with the Government of Tripura. There is nothing to prevent the Petitioner from saying so before the authority which has issued the summons and the impugned letters. In fact, by Annexure-14 letter dated 11.4.2007 the Petitioner requested the authority at least 15 days time to arrange the required documents. After assuring the authority in that matter, the Petitioner invoked the writ jurisdiction of this Court assailing the very authority of the officer who has issued the summons.

14. It is an admitted position that the present enquiry initiated by the D.G.C.E.I. has been approved by the Governmental authority. The Petitioner has been given opportunity to represent its case before the departmental authority. The matter is still at the investigation stage. As has been rightly contended by the Respondents in their affidavit, the Petitioner will be at liberty to raise any pertinent contention which may have a bearing on the issue before the investigating authority at any point of time.

15. Apart from the above, the provisions of the Act itself provide exhaustive legal remedy to the aggrieved party. On completion of the investigation, if the Petitioner is found to be liable for payment of Service Tax on account of services rendered by it to the Government of Tripura in running the online lottery

business, show cause notice will be issue to it, in which eventually, the Petitioner will get opportunity to substantiate its claim before the adjudicating authority. Even thereafter, if the Petitioner is aggrieved by any decision, it will be open for it to prefer appeal before the appellate authority.

16. Although the Petitioner has raised technical pleas, but it has also urged the ground of its non-liability to pay any Service Tax. According to it, it has not provided any service either to the Government of Tripura or to any Marketing Agent. However, according to it, the authority without applying its mind to decide the issue in question and without even coming to prima facie view about the applicability of Service Tax has invoked the power u/s 83 of the Finance Act, 1994 read with Section 14 of the Central Excise Act, 1944. According to the Petitioner, the enquiry resorted to by the authority is a fishing enquiry without even formation of prima facie opinion.

17. The impugned summons and the letters have been issued for carrying out the enquiry/investigation relating to evasion of Service Tax/ Contravention of Chapter V&VA of the Finance Act, 1994. The matter is only at the investigation stage and to facilitate the same, if the Petitioner has been asked to produce the documents and to depose in respect of any relevant aspect of the matter, it cannot be said that the Respondents have acted arbitrarily and without any jurisdiction. As the Respondents themselves contended in their affidavit, the Petitioner will be at liberty to raise any contention which may have a bearing on the issue before the investigating authority.

18. The grounds which have been raised in the writ petition can very well be agitated before the investigating agency. Since it cannot be said that the impugned summons and the letters have been issued without jurisdiction, the Petitioner is bound to respond to the same by making appearance and produce documents which will advance the investigation so as to come to a prima facie finding as to whether there is any evasion of Service Tax/Contravention of Chapter V & VA of the Finance Act, 1994. Thereafter, the matter will be adjudicated by issuing show cause notice to the Petitioner in which eventuality the Petitioner will also get ample opportunity to have its say in the matter. Thereafter also, if aggrieved, the Petitioner will have the remedy by way of appeal.

19. Mr. Soni, learned Counsel for the Petitioner has argued that the investigating authority has also to adjudicate the matter as the proceeding u/s 14 of the Act is a ''judicial proceeding''. Section 14(3) of the Act says that every enquiry u/s 14 of the Act shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code. Section 1931.P.C. relates to punishment for false evidence and Section 2281.P.C. relates to intentional insult or interruption to public servant sitting injudicial proceeding. The emphasis on the ''judicial proceeding'' u/s 14(3) of the Act will have to be understood in that context and not in the context of adjudicating the matter finally, as has been contended by the learned Counsel for the Petitioner.

20. The Petitioner instead of thwarting the investigation which the authority has initiated should respond the same by extending helping hand. As regards the plea of the Petitioner that under similar circumstances, the summons issued in respect of another region have been withdrawn, in the instant case also, the Respondents should withdraw the impugned summons, there is no material on record to support this contention of the Petitioner. It is not know as to why the summons in respect of another case/region have been withdrawn. On being asked, Mr. Das, learned Counsel appearing for the Respondents, submits that there is no instruction to him regarding withdrawal of the impugned summons. Thus, the plea of the Petitioner and that too, in absence of any finding of this Court that the impugned summons are wholly without any jurisdiction and/or has been issued malafide and/or arbitrary exercise of power and/or in violation of any statutory provisions, cannot be interfered with.

21. For all the aforesaid reasons, I am of the considered opinion that it is not a fit case for exercising writ jurisdiction so as to thwart the very process of investigation sought to be carried out by the Respondents as per the provisions of the aforesaid Act for which the impugned summons and the letters have been issued.

22. Writ petition is dismissed. Interim order stands vacated. There shall be no order as to costs.

