Lulu International Shopping Malls Pvt Ltd Vs Joint Commissioner

Court: High Court Of Kerala

Date of Decision: Jan. 21, 2025

Acts Referred: Constitution of India, 1950 â€" Article 226
Central Goods and Services Tax Act, 2017 â€" Section 17, 17(5), 17(5)(d), 73, 73(1)

Hon'ble Judges: Bechu Kurian Thomas, J

Bench: Single Bench

Advocate: Rajesh Nair, Joseph Prabakar, Jasmin M.M.

Final Decision: Allowed

Judgement

Bechu Kurian Thomas, J.

1. The challenge raised in this writ petition is against the determination of tax and other liabilities relating to the petitioner as per the provisions of

section 73 of the Central Goods and Services Tax Act, 2017 (for short 'CGST Act').

2. Petitioner claims to be engaged in the business of retail trading, leasing and wholesale trading. In order to carry on its business, petitioner claims to

have constructed shopping malls. After filings its returns under the CGST Act for the year 2019-20, an audit was initiated by the respondent. After

scrutiny of the documents submitted, it was alleged that petitioner had availed input tax credit on works contract services for the construction of an

immovable property and that it was ineligible to avail input tax credit since the output supply was not works contract service. Thereafter a show cause

notice was issued on 29.05.2024 under section 73(1) of the CGST Act, requiring the petitioner to explain why the input tax credit should not be

disallowed. Though a detailed reply was submitted by the petitioner, the respondent has, after conducting a personal hearing, issued an order

confirming the demand in the show cause notice. Ext.P3 is the order issued by the respondent, which is assailed in this writ petition.

3. Sri. Joseph Prabakar, the learned counsel for the petitioner vehemently contended that the impugned order is ex facie erroneous, since it is contrary

to the decision in Chief Commissioner of Central Goods and Service Tax & Ors. v. M/s Safari Retreats Private Ltd. & Ors (2024 INSC 756). It was

also submitted that the finding in the impugned order that the taxpayer had never availed input tax credit in respect of 8 invoices which corresponded

to an input tax credit of Rs.52,66,89,389/- was also inconsistent with the returns filed. It was also submitted that the finding in the order that the

taxpayer had wrongly availed input tax credit declared in Table 4D(1) of Form GSTR-3B is contrary to the statute, and the specific instructions given

by the CBIC. The learned counsel submitted that the instructions in Form GSTR-9 indicate that any input tax credit reversed through Form ITC 03

should be declared in 7H of Form GSTR-9 and if the amount stated in Table 4D of Form GSTR-3B was not included in Table 4A of Form GSTR-3B,

then no entry should be made in Table 7E of Form GSTR-9. It was also submitted that if the amount mentioned in Table 4D of Form GSTR-3B was

included in Table 4A of Form GSTR-3B, then the entry must come in 7E of Form GSTR-9. The learned counsel submitted that these specific

instructions were not borne in mind by the State Tax Officer and on the contrary, in the impugned order, a finding was entered contrary to the

instructions to come to the conclusion that the petitioner had wrongly availed ITC. The learned counsel further submitted that the jurisdiction of this

Court ought to be exercised since the impugned order is perverse.

4. Smt. Jasmin M.M., the learned Government Pleader on the other hand, opposed the submissions and stated that the statutory remedy of an appeal

is available to the petitioner and it must be relegated to pursue such remedies. It was also submitted that all contentions now raised before this Court

are matters which can be considered by the Appellate Authority and therefore this is not a fit case where the jurisdiction under Article 226 of the

Constitution India must be exercised.

5. I have considered the rival submissions.

6. Petitioner is engaged in the business of trading, leasing apart from construction of shopping malls. In the decision in Chief Commissioner of Central

Goods and Service Tax & Ors. v. M/s Safari Retreats Private Ltd. & Ors (2024 INSC 756), the Supreme Court had considered the scope and purport

of section 17(5) of the CGST Act and held that the expression Ã¢â‚¬Ëœplant or machineryÃ¢â‚¬â„¢ used in section 17(5)(d) of the CGST Act cannot be given

the same meaning as the expression Ã¢â‚¬Ëœplant and machineryÃ¢â‚¬â„¢ as defined in the explanation to section 17. It was further observed that the question

whether a mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a plant within the meaning of the expression

'plant or machinery' used in section 17(5)(d) is a factual question which has to be determined keeping in mind the business of the registered person and

the role that building has in the said business. It was further observed that if the construction of a building was essential for carrying out the activity of

supplying services, renting or giving on lease or other transactions in respect of the building or a part thereof, which are carved out by clauses (2) and

(5) of Schedule II of the CGST Act, then such a building could be held to be a plant and will be taken out of the exception carved out by clause (d) of

section 17(5) and the functionality test will have to be applied to decide whether a building is a plant. The Court went on to hold that the question of

applying the functionality test depends on the facts of each case and the tax officer must decide whether the construction of immovable property is

plant for the purpose of clause (d) of sub section 17(5).

7. The above observations have great significance in the instant case since the petitionerÃ¢â‚¬â„¢s contention is that it is eligible to avail the input tax

credit in view of the nature of business being carried on. Though the decision in Safari RetreatÃ¢â‚¬â„¢s case (supra) was rendered subsequent to the

order of assessment, the said judgment is declaratory in nature. The impugned order having not considered the impact of the said proposition of law as

declared in Safari RetreatÃ¢â‚¬â„¢s case (supra), renders it perverse warranting an interference by this Court.

8. As the impugned order has not taken into consideration the impact of the principles of law laid down in Safari RetreatÃ¢â‚¬â„¢s case (supra), this Court

is of the view that the impugned order is liable to be set aside and a de novo reconsideration should be directed. The question relating to the 8 invoices

and the inconsistency in the ITC reported in Table 4D(1) of Form GSTR-3B and Table 7E of Form GSTR-9 and all other contentions raised by the

petitioner are left open for consideration again.

9. Hence Ext.P3 order dated 30.08.2024 is hereby set aside and the respondent is directed to reconsider the matter afresh, bearing in mind the

principles of law laid down in Safari RetreatÃ¢â‚¬â„¢s case (supra). It is clarified that all issues raised by the petitioner are left open and the respondents

shall reconsider the matter in its entirety. Sufficient opportunity of hearing shall also be granted to the petitioner before passing final orders. The

decision as directed above shall be taken as expeditiously as possible, at any rate, within an outer period of three months from the date of receipt of a

copy of this judgment.

Writ petition is allowed as above.