

(2014) 11 MAD CK 0460**Madras High Court****Case No:** Writ Petition No. 1276 of 2010

T.T. Krishnamachari and Co.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Nov. 17, 2014**Acts Referred:**

- Central Excises and Salt Act, 1944 - Section 35G
- Constitution of India, 1950 - Article 226, 265
- Copyright Act, 1957 - Section 13, 14, 2(c), 45, 49
- Finance Act, 1994 - Section 65(105), 65(55a), 68
- Finance Act, 1995 - Section 65(55a)

Citation: (2015) 37 STR 679 : (2015) 83 VST 222**Hon'ble Judges:** T.S. Sivagnanam, J**Bench:** Single Bench**Judgement**

@JUDGMENTTAG-ORDER

T.S. Sivagnanam, J.

The petitioner seeks for issuance of a Writ of Prohibition to prohibit the respondents from levying and collecting service tax on the transfer of right to use copyright.

2. The petitioner is engaged in the business of marketing and distribution of various consumer and pharmaceutical products and it has registered its logo "ttk" as an "artistic work" under the Copy Rights Act, 1957, and has permitted the same to be used by its group companies. The petitioner has entered into agreements with its group companies, who have been permitted to use the artistic work in their packages, cartons, containers etc., and the petitioner received royalty in respect of the same. After the introduction of the service tax under the Finance Act, 1994, while the second respondent was inspecting the books of accounts of the petitioner, stated that the petitioner is liable to pay service tax on the transaction of transfer of

right to use copy right. The petitioner is said to have explained to the second respondent that the Copyright is goods and the transfer of right to use the copyright is taxable under the Sales Tax/VAT Act and there is no liability to pay service tax. The second respondent issued show cause notice to the petitioner demanding service tax on the royalty received. The petitioner contended that copyright is specifically excluded from the definition of intellectual property service under Section 65(55a) of the Finance Act. Therefore, it was contended that the respondents are not entitled to demand service tax and the petitioner has filed this Writ Petition for the aforementioned relief.

3. The learned Senior counsel appearing for the petitioner submitted that the levy of service tax on royalty received for transfer of right to use the registered copyright, is without authority of law and per se illegal. By referring to Section 65(55a) of the Finance Act as inserted by Finance Act, 2007, it is submitted that the same clearly excludes the copyright from intellectual property services, the demand and levy of service tax is against the provisions of Article 265 of the Constitution of India. In this regard, the learned counsel referred to the definition of Intellectual Property Rights contained in the Finance Act as well as Sections 13 and 49 of the Copy Rights Act, 1957. The learned counsel referred to the Registration Certificate given by the Registrar of Copyright and submitted that the logo ttk has been registered under the clause of description artistic and the registration under the Copy Right Act is sufficient to exclude the same from the purview of Service Tax. The learned counsel referred to Section 45 of the Copyrights Act and submitted that in terms of the proviso under sub-section (1) of Section 45, the certificate has been issued by the Registrar of copyright after a search was made in the Registrar of trade mark and the certificate is valid and binding. Further, it is submitted that as long as the petitioner's logo has been registered as a copyright, it falls outside the purview of the Finance Act, as amended in 2007 and no service tax can be demanded on the royalty received by the petitioner from its group companies, who have been permitted to use the logo. The learned counsel placed reliance on the decision of the Hon'ble Supreme court in the case of Isha Beevi on behalf of the Minor Umaiben Beevi and Others Vs. The Tax Recovery Officer and Addl. P.A. to Collector, Quilon and Others, for the proposition that a Writ of Prohibition is maintainable, when there is total absence of jurisdiction to proceed on the part of the Officer or the Authority.

4. The learned Standing counsel appearing for the respondents resisted the petitioner's contention broadly raising two grounds. Firstly by contending that the Writ Petition is not maintainable. It is submitted that after issuing show cause notice to the petitioner and affording opportunity, order-in-original No. 16 of 2009, dated 15.05.2009 was passed by the second respondent confirming the service tax liability of a sum of Rs. 1,82,19,236/- for the period from 10.09.2014 to 30.06.2007. As against the said order, the petitioner preferred appeal before the CESTAT and the appeal was pending. While so, the petitioner moved this Writ Petition and obtained

an interim order from this Court and thereafter, withdrew the appeal filed before the CESTAT. It is submitted that the issue raised by the petitioner is a classification issue and no Writ of Prohibition as sought for by the petitioner can be granted. In this regard, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of Union of India (UOI) and Another Vs. Guwahati Carbon Ltd.,, and the decision of this Court in the case of United Bleachers Ltd. Vs. The Customs, Excise and Gold (Control) Appellate Hon'ble Tribunal, The Commissioner of Central Excise and The Superintendent of Central Excise and the decision of the Allahabad High Court in the case of Royal Bank of Scotland N.V. Vs. Commissioner of Cus. and C. Ex.,. Secondly, on the merits of the case, it is contended that the definition of copyright as contained under the Copyrights Act cannot be merely incorporated while interpreting the provisions of the Finance Act and the object of the Finance Act has to be taken note of while interpreting the provisions. It is submitted that the artistic work goes along with the brand name and the logo "ttk" used in the goods has nexus in the goods and the registration obtained by the petitioner under the clause on description artistic does not fall under any of the categories mentioned in Section 14 of the Copyrights Act. Therefore, it is submitted that the issue whether the petitioner is liable to pay service tax or not has to be adjudicated by the authorities under the Act and the petitioner has to pursue their remedy before the Tribunal.

5. Further, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of Commissioner Central Excise, Delhi Vs. Ace Auto Comp. Ltd., to support his contention that when a brand name, which does not belong to a person is being used by such person, it is intended to indicate that the goods manufactured by them has connection with the owner of the brand name, which may lead to indicate the quality of the product. In the said case, the issue arose under the provision of the Central Excise Act regarding the grant of exemption, when the brand name used for the goods was TATA Ace.

6. Heard the learned counsels appearing on either side and perused the materials placed on record.

7. Two issues fall for consideration in this Writ Petition, the first issue is regarding the maintainability of the Writ Petition and the second issue is as to whether on facts could a Writ of Prohibition be issued as sought for by the petitioner. It is not in dispute that a show cause notice was issued to the petitioner on 13.10.2009 stating that on verification of the records, it was noticed that the petitioner entered into agreement with group companies permitting them to use the ttk logo on packages, cartons, containers etc., and in terms of the agreement, the petitioner collected royalty charges and the petitioner did not pay service tax on the royalty charges on the ground that the logo is registered as an artistic work under the Copyrights Act, 1957 and hence, the excluded from the scope of Immovable Property Right service under the Finance Act. After referring to the term artistic

work as defined under Section 2(c) of the Copy Right Act and the definition of the word "adaptation" as defined under 2(a)(ii) of the Copy Right Act, it is stated that the logo ttk has been approved under the Copy Right Act as "artistic work" and the said logo has not been used as an artistic work as the logo has not been re-produced in any material form; or to communicate the artistic work to the public; or to issue copies of the work to the public; or to include the work in any Cinematograph film; or adaptation of the work; or adaptation of the work; or conversion of the work into a dramatic work by way of performance in public. Therefore, the authority proposed that the logo has been mainly used by the group companies in order to create an impression among the public that the products marketed by the group companies have in fact some relationship with TTK & Co and the logo has got some inherent goodwill and the same has been permitted to be used by the group companies in products to get maximum mileage of the goodwill arising from such use.

8. Therefore, it was *prima facie* held that the logo has been used by the group companies as a trade mark and not as an artistic work. In the show cause notice, the agreement entered into between the petitioner and M/s.TTK Prestige Ltd and M/s. TTK LIG Limited were referred to. Further, after referring to the definition of intellectual property right as defined under Section 65(55a) of the Finance Act, it was proposed that the logo "ttk" is used as a trade mark rather than an artistic work as defined under the Copy Right Act and the logo "ttk" owned by the petitioner would fall under the category of intellectual property right and consideration received for temporary transfer of intellectual property right is liable to service tax w.e.f., 10.09.2014. Further, it was stated that for the earlier period, show cause notice was issued and the matter was adjudicated and order in original dated 15.05.2009, was passed and on enquiry, the petitioner by letter dated 03.08.2009, informed the Jurisdictional Divisional Officer that they collected an amount of Rs. 10,96,45,202/- towards copyright charges from the group companies during the period from April 2008 to March 2009 for which no service tax was paid. Therefore, it appears that the petitioner has contravened the provision of Section 68 of the Finance Act, 1994 read with Rule 6(1) of the Service Tax Rules, 1994 inasmuch as they failed to pay service tax on the taxable service. Accordingly, the petitioner was directed to show cause as to why service tax of Rs. 1,33,88,286/- should not be demanded at the applicable rate and why the penalty should not be imposed.

9. It is not in dispute that the notice demanding service tax for the period from 10.09.2004 to 30.06.2007, (earlier period), prior to the period for which notice dated 13.10.2009 was issued, culminated in an order-in-original No. 16 of 2009, dated 15.05.2009, by which the service tax payment of Rs. 1,82,19,236/- was confirmed. The petitioner preferred an appeal before the CESTAT as against the said order on 04.08.2009 and the appeal was taken on file as Appeal No. ST/440/2009. It is stated by the respondent that when the appeal was pending before the CESTAT, the petitioner without disclosing the same, filed this Writ Petition projecting as if the

cause of action to file the Writ Petition arose after the issuance of the show cause notice dated 13.10.2009, when infact the appeal for the earlier period was pending before the Tribunal. On a perusal of the affidavit filed in support of the Writ Petition, it appears that the petitioner has not disclosed the pendency of the appeal for the earlier period and proceeded to seek for issuance of a Writ of Prohibition alleging that the respondent has no jurisdiction to demand service tax. In all fairness, there should have been a disclosure of the fact that an appeal was pending as against the demand for the anterior period. After obtaining an interim order from this Court, the petitioner withdrew the appeal before the Tribunal during 2011 and the same was dismissed by order dated 27.06.2011.

10. The learned Senior counsel appearing for the petitioner submitted that the Tribunal was of the view that because the case was periodically adjourned by the Tribunal, they did not want the matter to be kept pending because the Writ Petition was pending before this Court and therefore, the appeal was withdrawn and liberty was granted to apply for restoration of the appeal subject to the outcome of the Writ Petition. On a reading of the order passed by the Tribunal dated 27.06.2011, it is seen that there is no record of any observation made by the Tribunal that the appeal was permitted to be withdrawn because the Tribunal did not want the appeal on its file as the Writ Petition was pending before this Court. In fact, the order stated that the consultant, who appeared for the petitioner sought permission to withdraw the appeal and he made a prayer to grant liberty to apply for the restoration of the appeal subject to the outcome of the Writ Petition. Therefore, the contention raised by the petitioner regarding the reason for withdrawing the appeal before the Tribunal is incorrect and not substantiated by the petitioner as the order passed by the Tribunal reads otherwise.

11. In the background of these facts, this Court is of the view that the petitioner having already agitated their rights before the Tribunal with regard to the earlier period was not entitled to maintain a Writ Petition before this Court, when show cause notice was issued for the subsequent period. That apart, the issue as to whether service tax is liable to be paid on the nature of transaction done by the petitioner with its group companies, whether the logo which is registered under the Copy Right Act was used as an artistic work or merely with the purpose to show that the products marketed by their group companies also belong to the TTK group and whether in that regard, it was in the nature of a trade mark are all issues which involve adjudication of disputed questions of fact. These issues cannot be permitted to be raised for being adjudicated in a Writ Petition.

12. In the case of United Bleachers Ltd., (supra), a similar issue arose as to whether a Writ Petition could be entertained without exhausting the alternate remedy, when the Writ Petition was admitted and pending for several years. The contention raised by the petitioner therein was rejected and it was held that the Writ Petition was not maintainable on the ground that under Section 35G of the Central Excise Act, there

is a specific embargo for this Court to entertain the appeal with regard to dispute relating to the determination of any question having a relation to the rate of duty of exercise or to the value of the goods for the purpose of assessment. The same principle would equally apply to the case on hand, the only difference being the present proceedings are under the Finance Act. The issue relating to rate of duty whether the transaction is amenable for taxation under the Finance Act are classification issues, which cannot be adjudicated by this Court by exercise of its power under Article 226 of the Constitution.

13. The Hon"ble Supreme Court in the case of Union of India Vs Guwahati Carbon Ltd., (supra), held that the High Court ought not to have entertained a Writ Petition questioning the correctness of the order passed by the Tribunal as the Excise Law is a complete code in order to seek redress in excise matters and it will not appropriate for the Writ Court to entertain a petition under Article 226 of the Constitution.

14. The Allahabad High Court in the case of Royal Bank of Scotland N (supra), also considered this issue after referring to several decision on the point and held that the classification as to whether the credit card facility provided by the Royal Bank of Scotland falls within the term banking and other financial services covered under clause (zm) of Section 65(105) of the Finance Act and whether such service is not liable to service tax or Nil rate of duty, can only be examined by the Apex Court in an appeal under Section 35L of the Finance Act.

15. In the light of the above decision, this Court is no hesitation to hold that the issue raised by the petitioner being an issue relating to classification, there is a clear bar of jurisdiction imposed under the statute if even entertaining an appeal as against the order passed by the Tribunal as the appeal shall lie only to the Supreme Court.

16. In such circumstances, the question of entertaining a Writ Petition under Article 226 to issue a Writ of Prohibition cannot be sustained, more so, taking note of conduct of the petitioner in having agitated the matter before the Tribunal, not disclosed the filing of the appeal for the anterior period, withdrawing the appeal before the Tribunal after obtaining stay from this Court. Therefore, the Writ Petition is held to be not maintainable and accordingly, the same deserves to be dismissed.

17. In the light of the above conclusion, it is held that a Writ or Prohibition cannot be issued as sought for by the petitioner. Accordingly, the Writ Petition is dismissed as not maintainable. No costs. Consequently, connected miscellaneous petition is closed.