(2013) 02 CAL CK 0005

Calcutta High Court

Case No: W.P. No. 1029 of 2010

Naresh Kumar and Co. Pvt. Ltd.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision: Feb. 12, 2013

Citation: (2014) 73 VST 409

Hon'ble Judges: Indira Banerjee, J

Bench: Single Bench

Judgement

Indira Banerjee, J.

This writ petition has been filed, inter alia, challenging a show-cause notice bearing DGCEI F. No. 152/KZU/KOL/ST/Gr.F/06-2207 dated April 23, 2010 issued to the petitioner, raising service tax demand of Rs. 27,09,293 on the petitioner for the period from April 1, 2004 to September 9, 2004 along with penalty under sections 76, 77 and 78 of Chapter V of the Finance Act, 1994 and interest u/s 75 of Chapter V of the said Act. The breakup of the aforesaid claim of Rs. 27,09,293 is as follows:

(i) Rs. 4,71,526 (as detailed in calculation-sheet enclosed as annexure C to the impugned notice) in respect of services rendered between April 2004 to August, 2004.

(ii) Rs. 21,35,766 (as detailed in the calculation-sheet enclosed as annexure C2 to the impugned notice) in respect of services rendered between April 1, 2004 to September 9, 2004 to various State Electricity Boards.

(iii) Rs. 1,02,001 (as detailed in the calculation-sheet enclosed as annexure C3 to the impugned notice) in respect of services of loading and supervision rendered from April 1, 2004 to September 9, 2004.

2. The petitioner, a partnership firm registered under the Indian Partnership Act, 1932, claims to have been engaged by purchasers of coal to coordinate, supervise and liaison supply of coal from various collieries to those purchasers of coal.

3. According to the petitioner on or about July 25, 2002, the petitioner got itself registered with the Commissioner of Service Tax as provider of the taxable service of clearing and forwarding and started paying service tax at the insistence of the respondent-authorities.

4. A show-cause notice bearing DGCEI F. No. 132/KZU/KOL/JSR/04/1872 dated September 13, 2004 was issued to the petitioner demanding Rs. 49,27,918 alleged to be the service tax dues of the petitioner for the period from September 1, 1999 to March 31, 2002, as detailed in annexure 2 enclosed thereto, for taxable service rendered by the petitioner to various clients as clearing and forwarding agent, Rs. 36,56,555 as detailed in annexure 8 for the period from September 1, 1999 to March 31, 2004, Rs. 3,71,610, as detailed in annexure 6 for the period from September 1, 1999 to March 31, 2004, Rs. 48,396 as detailed in annexure 5 towards taxable service provided by the petitioner to TATA Ryeson Ltd. during the period from September 29, 2002 to September 10, 2004 and Rs. 80,402 as detailed in annexure 7 claimed to be the service tax dues on account of the job of stock verification done by the petitioner during the period from September 1, 1999 to March 31, 2004 along with penalty under sections 75A, 76, 77 and 78 of Chapter V of the Finance Act, 1994 and interest u/s 75 of Chapter V of the Finance Act, 1994.

5. Another show-cause notice bearing DGCEI F. No. 217/KZU/JSR/ST/04/2368 dated October 18, 2004 was issued to the petitioner demanding service tax to the tune of Rs. 87,57,440 for service as forwarding and clearing agent allegedly rendered by the petitioner during the period from September, 1999 to March 2004.

6. By a letter dated April 19, 2005 written to the Superintendent of Service Tax (Audit) the petitioner categorically denied having rendered cargo handling services which include loading, unloading, packing and unpacking. The petitioner denied having rendered service of packing or unpacking.

7. Service tax is payable under the Finance Act, 1994 as amended from time to time. After service tax was first introduced in 1994, amendments have from time to time been made and different kinds of services have been brought under the net of service tax. The Finance Act, 1994 has last been amended by the Finance Act, 2012.

8. Section 73(1) of the Finance Act, 1994 as it stood at the time of issuance of the impugned notice provided as follows:

"73. (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has been erroneously made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of--

(a) fraud; or

(b) collusion; or

(c) willful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or the Rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words ''one year'', the words ''five years'' had been substituted.

Explanation.--Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or five years, as the case may be."

9. Under the provisions of the Finance Act, 1994, as it stood at the material time any service tax not levied or paid or short levied or short paid or erroneously refunded might be recovered by issuance of notice within one year from the relevant date.

10. Section 73(1) of the Finance Act, 1994 has been amended with effect from April 8, 2011 by the Finance Act, 2011 enhancing the period of limitation for issuance of notice to eighteen months from one year. The amendment is of no relevance, since the impugned notice was issued long before the amendment, and in any case the impugned notice was not even issued within eighteen months from the relevant date.

11. However, by reason of the proviso to section 73(1), as it stood at the time of issuance of the impugned notice, a show-cause notice could be issued within five years from the relevant date but only if service tax had not been levied or paid or had been short levied or short paid or erroneously refunded by reason of fraud, collusion, willful misstatement, suppression of facts or contravention of any Rules under Chapter V of the Finance Act, 1994, with intent to evade payment of service tax.

12. In view of the Explanation to section 73(1), where service of notice had been stayed by an order of court, the period of stay was to be excluded in computing the period of one year or five years, as the case might be. In the instant case, however, there was no order of stay of any court and as such the Explanation was not attracted.

13. The concerned authority had no power and/or authority and/or jurisdiction to issue any show-cause notice after expiry of the period of limitation prescribed u/s 73(1). A show-cause notice would necessarily have to be issued within one year from

the relevant date. Only in case of fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of Chapter V or any Rules made thereunder with intent to evade payment of service tax, a show-cause notice might have been issued within five years from the relevant date.

14. The condition precedent for exercise of jurisdiction to issue a show-cause notice after expiry of one year, but before expiry of five years, is the finding of fraud, collusion, willful misstatement, suppression of facts or contravention of any provisions of Chapter V or of the Rules made thereunder, with intent to evade payment of service tax, by the person chargeable with service tax or his agent.

15. In no circumstances could jurisdiction to issue a show-cause notice be exercised after expiry of five years from the relevant date. The entire demand in the impugned show-cause notice is ex facie barred by limitation as five years had elapsed from the relevant date, as pointed out by Mr. J.K. Mitral appearing on behalf of the petitioner.

16. Mr. Mitral submitted that, in any case the conditions precedent for invocation of the extended period of limitation as provided in the proviso to section 73(1) of the Finance Act, 1994 were wholly absent.

17. The petitioner has categorically asserted that the demand of Rs. 4,71,526 pertains to service rendered under an agreement with TISCO and TATA Ryeson which was the subject-matter of an earlier show-cause notice dated September 13, 2004.

18. The petitioner has further asserted that the demand of Rs. 21,35,766 raised by the impugned show-cause notice is the subject-matter of an earlier show-cause notice dated October 18, 2004. The petitioner has further contended that the demand of Rs. 1,02,001 raised in the impugned show-cause notice pertains to loading and unloading charges, which was clarified by the petitioner by a letter dated March 11, 2005 being annexure P6 at page 94 of the writ petition and a letter dated April 9, 2005 also annexed to the writ petition.

19. It is not in dispute that the petitioner is paying service tax under the head "business auxiliary services" with effect from September 10, 2004 for which the petitioner has been furnishing copies of challans, etc. The Department has thus accepted that the services in question constituted business auxiliary service with effect from September 10, 2004.

20. On behalf of the Revenue, Mr. Bharadwaj argued that the impugned notice was issued within the extended period of limitation of five years.

21. Reiterating the averments in the affidavit-in-opposition affirmed by one Madhab Chandra Mishra on September 30, 2010, it was contended that in course of search conducted at the premises of the petitioners on or about June 18, 2006, various documents including computer records in the form of compact discs (CDs) were seized.

22. According to the respondents, examination of one of the CDs revealed numerous entries of bills raised on various parties such as Maharashtra State Electricity Board, Rajasthan Rajya Vidyut Utpadan Nigam Ltd., etc. It is alleged that the compact discs revealed that payment of the bill No. STPS/SECL/KORBA/04-05/07/16 dated September 13, 2004, raised on M/s. Rajasthan Rajya Vidyut Utpadan Nigam Ltd. in connection with services rendered in July, 2004, had been received on October 28, 2004. In the affidavit it is further alleged that many other such instances were found during examination, but no particulars have been disclosed in the affidavit-in-opposition.

23. In the show-cause notice it is alleged that examination of the entries in the ledger as available in the seized CD, revealed numerous entries showing particulars of the bills raised on various parties like M/s. Maharashtra State Electricity Board, M/s. Rajasthan Rajya Vidyut Utpadan Nigam Ltd., etc., on various dates. The Bill No. STPS/SECL/KORBA/04-05/07/16 dated September 13, 2004 was found to have been raised on M/s. Rajasthan Rajya Vidyut Utpadan Nigam Ltd. in connection with services rendered in the month of July 2004, but the payment was found to have been received on October 28, 2004 by cheque No. 971421, dated October 27, 2004. Similarly examination of sample bills revealed that there were substantial gaps of time between the period during which the taxable services were rendered and the dates of receipt of payments against the bills. However only the figures of the bills were mentioned under the head, "income of the firm". It is alleged that, as most of the payments were received in the half-year ending March 2005, the last date of filing the return fell on April 25, 2005. The date was to be considered as the relevant date for invocation of the extended period of five years.

24. On the face of the impugned notice no payment was received after October 27, 2004 in respect of the taxable services allegedly rendered by the petitioner during the period in question. The respondent-authorities are contending that in respect of bills realized in the half year ending March, 2005 the last date of filing of return would fall on April 25, 2005. The respondent-authorities contend that the said date, April 25, 2005 is the relevant date from which limitation would start running.

25. The respondents have also taken a preliminary objection to the writ petition, inter alia, contending that the petitioner had an equally efficacious alternative remedy of adjudication before the adjudicating authority.

26. The power to issue prerogative writs under article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. The High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition.

27. The courts have however, by way of judicial discipline, themselves evolved certain principles for entertaining writ petitions. The High Courts normally refrain from exercising jurisdiction under article 226 of the Constitution of India when there

is an effective and efficacious remedy available.

28. Alternative remedy does not operate as an absolute bar to entertaining a writ petition. The Supreme Court and the High Courts have consistently held that notwithstanding the existence of an alternative remedy, a writ petition may be entertained in at least three contingencies, that is, where the writ petition has been filed for the enforcement of a fundamental right, where the actions and/or the proceedings impugned are in violation of the principles of natural justice, or where the order or proceedings impugned are without jurisdiction.

29. The High Court may entertain a writ petition under article 226 of the Constitution, in spite of existence of an alternative statutory remedy in a case where the authority against whom the writ petition is filed is shown to have had no jurisdiction to initiate the action impugned or to have purported to usurp jurisdiction without legal foundation.

30. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, the Supreme Court discussed its earlier judgments on the question of maintainability of a writ petition when there was an alternative remedy, and held that the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention of the writ petitioner that the show-cause notice was without jurisdiction.

31. In this case too, a challenge has been thrown to the jurisdiction of the concerned respondent to issue a show-cause notice, after expiry of the period of limitation stipulated in the proviso to section 73 of the Finance Act, 1994.

32. It is well-established that the question of limitation is a question of jurisdiction in the sense that an authority has no jurisdiction to issue a show-cause notice which is barred by limitation. In the State of Punjab and Others Vs. Bhatinda District Coop. Milk P. Union Ltd., the Supreme Court held that the question of limitation being a jurisdictional question, a writ petition challenging the validity of a notice of revision of an order of assessment of sales tax, on the ground of the same being barred by limitation, would be maintainable, notwithstanding an alternative statutory remedy.

33. It is well-established that where the jurisdiction of an authority depends upon a preliminary finding of fact, this court in exercise of its writ jurisdiction is entitled to examine whether the findings on jurisdictional facts are correct or not. This proposition finds support from the judgment of the Supreme Court in the State of Madhya Pradesh and Others Vs. Sardar D.K. Jadav,

34. In Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, the Supreme Court held that no authority, much less a quasi-judicial authority, could confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question of whether the jurisdictional fact had rightly been decided or not was a question open to examination by the High Court in an application under article 226 of the

Constitution of India.

35. Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, the Supreme Court held that, if in an application under article 226 of the Constitution of India, the income tax Officer had assumed jurisdiction by deciding a jurisdictional fact erroneously, the assessee would be entitled to a writ of certiorari as prayed for, since it was incomprehensible to think that a quasi-judicial authority could erroneously decide a jurisdictional fact and impose a levy.

36. In Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers, the Supreme Court followed its earlier judgment in Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, and reiterated the proposition that a court or Tribunal cannot confer jurisdiction to itself by deciding a jurisdictional fact wrongly. A statutory authority also cannot assume jurisdiction by wrongly deciding a jurisdictional fact.

37. In Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, a Constitution Bench of the Supreme Court held (pages 207, 210 and 211 in 41 ITR):

". . . The scheme of the law clearly is that where the income tax Officer has reason to believe that an under-assessment has resulted from non-disclosure he shall have jurisdiction to start proceedings for reassessment within a period of eight years; . . . The argument that the court ought not to investigate the existence of one of these conditions, viz., that the income tax Officer has reason to believe that under-assessment has resulted from non-disclosure of material facts, cannot therefore be accepted.

. . . It is well-settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

. . .

. . . The expression ''reason to believe'' postulates belief and the existence of reasons for that belief. The belief must be held in good faith: it cannot be merely a pretence. . . If it be asserted that the income tax Officer had reason to believe that income had been under-assessed by reason of failure to disclose fully and truly the facts material for assessment, the existence of the belief and the reasons for the belief, but not the sufficiency of the reasons, will be justiciable. The expression therefore predicates that the income tax Officer holds the belief induced by the existence of reasons for holding such belief. It contemplates existence of reasons on which the belief is founded, and not merely a belief in the existence of reasons inducing the

belief; in other words, the income tax Officer must on information at his disposal believe that income has been under-assessed by reason of failure fully and truly to disclose all material facts necessary for assessment. Such a belief, be it said, may not be based on mere suspicion: it must be founded upon information."

38. This court exercising jurisdiction under article 226 of the Constitution of India does not, ordinarily interfere with a show-cause notice. However, when the show-cause notice is without jurisdiction, or barred by law, or suffers from any patent illegality, this court is duty-bound to interfere. To ascertain whether the show-cause notice was within jurisdiction and/or within the parameters of law, this court may even examine jurisdictional facts.

39. Furthermore, this court, in exercise of jurisdiction under article 226, can also interfere with a show-cause notice that is vague, devoid of particulars and incapable of effective reply, for such a show cause would be in flagrant violation of principles of natural justice. This court might also interfere with a show-cause notice which does not fulfill the statutory conditions for issuance thereof and/or ex facie does not disclose any offence, misconduct or other cause of action for which action as contemplated in the show-cause notice can be initiated.

40. This court exercising jurisdiction under article 226 of the Constitution of India may be required to examine jurisdictional facts to ascertain whether jurisdiction to issue a show-cause notice has properly been exercised, or such jurisdiction has been usurped by a pretended invocation of a provision of statute.

41. This court is thus entitled to examine whether the extended period of limitation could have, at all been invoked, and if so, whether any cogent grounds have been made out in the impugned show-cause notice for invocation of the extended period of limitation, whether the grounds, if any, are supported by the materials on record.

42. On the material date on which the impugned show-cause notice was issued, the period of limitation for issuing a show-cause notice was one year from the relevant date.

43. Any show-cause notice would necessarily have to be restricted to demand for a period of one year preceding the date of the show-cause notice or at best within a period of five years preceding the date of the show-cause notice if extended period of limitation was invocable. In no circumstances could any show-cause notice have been issued in respect of a demand which arose more than five years prior to the date of the show-cause notice. This view finds support from the decision of the Supreme Court in Ilavia Enterprises v. Collector of Central Excise, Jaipur reported in [1997] 91 ELT 26 (SC).

44. As held by the Supreme Court in Commissioner of Central Excise, Ahmedabad-I v. M. Square Chemical reported in [2008] 231 ELT 194 (SC), five years is to be computed by back calculation from the date of the show-cause notice. The

show-cause notice having been issued on April 23, 2010 there could be no question of inclusion of any claim for any period prior to March 30, 2005.

45. Section 73(1) of the Finance Act, 1993 being substantially in pari materia with section 11A(1) of the Central Excise Act, 1944, the judgments of the Supreme Court interpreting section 11A(1) of the Central Excise Act, 1944 including Bajaj Auto Ltd. [2010] 5 GSTR 543 (SC) : [2010] 260 ELT 17 (SC), operate as a binding precedent for interpretation of identical provisions of section 73(1) of the Finance Act.

46. Under rule 6 of the Service Tax Rules, 1994 as they stood at the material time, service tax was to be paid to the credit of the Central Government by the 5th day of the month following the calendar month in which payment towards the value of the taxable service was received. In case of electronic transfer through internet banking, payment could be made within the 6th day of that month, that is one day later. Limitation would thus start running from the seventh day of the month following the calendar month in which payment for the taxable service had been received by the petitioner.

47. The onus is on the authority issuing the show-cause to disclose relevant facts in the show-cause notice or documents annexed therewith to show that the show-cause notice was within one year from the relevant date, or in case of invocation of the proviso to section 73(1) of the Finance Act, within five years from the relevant date.

48. Limitation gives rise to a valuable right to the assessee. Service tax cannot be recovered after one year from the relevant date except in circumstances stipulated in the proviso to section 73(1). In no circumstances could any show-cause notice have been issued beyond the maximum period of five years from the relevant date.

49. Even when the extended period of limitation is invoked in terms of the proviso to section 73(1) of the Finance Act, sufficient particulars of the alleged fraud, collusion or willful misstatement would have to be given in the show-cause notice to enable the assessee to give a meaningful and effective reply thereto. Similarly, for the same reason particulars have to be given of the facts allegedly suppressed.

50. The show-cause notice is the foundation on which the document has to build up its case. The allegations in the show-cause notice thus have to be specific. If the allegations in the show-cause notice are vague, unintelligible and lacking in material particulars the court would be obliged to hold that the noticee had not been given proper opportunity to meet the allegations indicated in the show-cause notice. The court would thus be obliged to set aside such a notice.

51. This proposition finds support from the judgment of the Supreme Court in Commissioner of Central Excise, Bangalore Vs. Brindavan Beverages (P) Ltd. and Others,

52. It is well-established that the Revenue cannot invoke the extended period of limitation where facts leading to the show-cause notices were already known to the Revenue as held by the Supreme Court in Commissioner of Central Excise, Baroda v. Sotex reported in [2007] 209 ELT 9 (SC). It is also well-established that subsequent change of opinion with regard to the taxability of any service does not justify a show-cause notice upon invocation of the extended period of limitation. Reference may in this context be made to the judgment of the Supreme Court in P & B Pharmaceutical (P) Ltd. v. Collector of Central Excise reported in [2003] 153 ELT 14 (SC).

53. Contravention simpliciter of the provisions of Chapter V of the Finance Act, 1994, as amended from time to time, does not in itself attract the proviso to section 73(1) of the said Act. For invocation of the extended period of limitation, the contravention must be coupled with intent to evade payment of service tax.

54. A show-cause notice issued upon invocation of the extended period of limitation as provided in the proviso to section 73(1) on the ground of contravention of Chapter V cannot be sustained in law, unless the authority issuing the show-cause notice is able to demonstrate intention to evade payment of service tax on the part of the assessee.

55. No case has been made out in the impugned show-cause notice of any fraud, collusion or misrepresentation. There is a vague assertion of suppression of facte and contravention of Chapter V with intent to evade payment of service tax.

56. In Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut, the Supreme Court held that mere failure to declare does not amount to willful suppression. There must be some positive act on the part of the assessee. The judgment in Commissioner of Central Excise Vs. Eswaran and Sons Engineers Ltd., has been followed by the Supreme Court in The Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials) and Others, cited by Mr. J.K. Mittal appearing for the petitioner.

57. The extended period of limitation can be invoked when there is a conscious act to evade tax, for example deliberate non-disclosure of some bills pertaining to any particular taxable service rendered by the assessee. Similarly, if an assessee withholds information in spite of requisition to provide the same, with intention to evade tax, the assessee would be guilty of willful suppression.

58. It is not the case of the respondents as made out in the show-cause notice that the petitioner has withheld any information in spite of requisition or has refrained from filing returns in spite of any specific direction to do so.

59. This court is, in view of the judgment of the Supreme Court in Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut, and The Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice

President (Materials) and Others, constrained to hold that the conditions precedent for exercise of jurisdiction to issue a show-cause notice by invoking the proviso to section 73(1) of the Finance Act, 1994 were absent.

60. As held in The Commissioner of Central Excise, Aurangabad Vs. Bajaj Auto Ltd., Waluj, Aurangabad, through its Vice President (Materials) and Others, once the service tax authorities discharge their initial onus of producing materials to show that the assessee is guilty of any of the acts specified in the proviso to section 73(1), the burden would shift on the assessee. In this case, the respondents have failed to discharge their initial onus.

61. In any case, it is reiterated, at the cost of repetition, that as observed above, in no circumstances could any show-cause notice have been issued in respect of a demand which arose over five years ago. The impugned notice is thus patently barred by limitation.

62. Even assuming that the extended period of limitation was invocable the show-cause notice in the instant case is not even within the extended period of five years from the date on which service tax became payable.

63. Moreover, the petitioners have not even been able to give particulars of any bills which were realized in the half year ending on March 31, 2005 except for one bill allegedly realized on October 27, 2004.

64. The impugned show-cause notice is barred by limitation.

65. The show-cause notice is thus set aside. The writ application is disposed of accordingly.