

(2010) 02 CAL CK 0055

Calcutta High Court

Case No: Writ Petition No. 79 of 2007

ABP Private Limited and Another

APPELLANT

Vs

Commissioner of Service Tax and
Others

RESPONDENT

Date of Decision: Feb. 18, 2010

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 14
- Civil Procedure Code, 1908 (CPC) - Section 132, 133
- Companies Act, 1956 - Section 237
- Finance Act, 1994 - Section 64, 96I
- Penal Code, 1860 (IPC) - Section 193, 228

Citation: (2010) 2 CALLT 50 : (2010) 31 VST 535

Hon'ble Judges: Soumitra Pal, J

Bench: Single Bench

Advocate: S. Mitra and S. Dutta, for the Appellant; R. Bharadwaj, for the Respondent

Final Decision: Dismissed

Judgement

Soumitra Pal, J.

In the writ petition petitioner No. 1, stated to be a leading public house in the country and, inter alia, engaged in the business of printing and publishing a wide range of newspapers and periodicals and petitioner No. 2, a citizen of India and shareholder of petitioner No. 1, have challenged the notice dated 1st/4th December, 2006 (for short, "the notice") issued by the Assistant Commissioner (S.I.V.), Service Tax, Kolkata, respondent No. 2, requesting petitioner No. 1 to furnish certain documents mentioned therein with regard to the information regarding taxability of its activity under the category of business auxiliary service (for short, "the BAS") under the Finance Act, 1994. It may be noted that provisions for service tax have been made in Sections 64 to 96-I (Chapters V and VA) of the Finance Act, 1994. In the

writ petition it has been stated that petitioner No. 1, registered under the service tax with regard to eight activities, have been regularly filing service tax returns and paying tax thereto. According to the petitioner, in view of several exemptions granted by notifications and circulars, the commercial activity of printing, publishing and selling newspapers and periodicals and selling of advertisement space in print media does not fall under the category of BAS. It has been stated that the impugned notice is based on suspicion as it has been mentioned that the commercial activities may fall under category of BAS. Since the entire nature of commercial activities is known to the service tax authorities as apparent from the notice itself and from the returns filed, and since such commercial activities do not fall under the category of BAS, the documents sought for are not relevant. Moreover, the notice impugned is vague and thus the inquiry is fishing and roving in nature.

2. The learned senior advocate appearing on behalf of the petitioner relying on the statements in the writ petition submitted that since in the affidavit-in-opposition it has been stated that the authorities have reasons to believe that the petitioner is carrying on BAS activities, the respondents ought to have disclosed what had prompted them to issue such notice. Submission is that the letter dated 20th December, 2006 sent on behalf of petitioner No. 1 in reply to the notice does not preclude the petitioner from challenging the same. The learned senior advocate for the petitioner had relied on several judgements which shall be dealt with in appropriate stage.

3. The learned advocate for the respondents justifying the action has submitted that Section 83 of the Finance Act, 1994 read with Section 14 of the Central Excise Act, 1944 (for short, "the Central Excise Act") authorise the respondent to issue such notice. Since the Finance Act, 1994 is a special Act and the Section 14 of the Central Excise Act does not contain the words "reason to believe", the judgments relied on by the petitioner are not applicable to the facts of the case. Moreover, the instant writ petition is not maintainable since it is evident from the reply dated December 20, 2006 that petitioner No. 1 had submitted to the jurisdiction of the authority as it had understood the purport of the notice and request was made to grant time for compliance.

4. In order to appreciate the issue it is necessary to refer to the impugned notice dated 1st/4th December, 2006, the relevant portion of which is as under:

It is suspected that your commercial activity may fall under the category of "business auxiliary service (BAS)", the definition of which provided u/s 65(19) of the Finance Act, 1994 as "business auxiliary service means any service in relation to-(i) promotion or marketing or sale of goods produced for provided by or belonging to the client ; or (ii) promotion or marketing of service provided by the client ; or (iii) any customer care service provide on behalf of the client ; or (iv) procurement of goods or services, which are inputs for the client ; (v) production of goods on behalf of the client ; or provision of service on behalf of the client ; or a service incidental or

auxiliary to any activity specified in Sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customers or vendor, public relation service, management or supervision, and includes services as commission agent".

In this regard, an inquiry has been initiated, for which you are requested to furnish the following documents related to the last three financial years, within five days of receipt of this letter.

1. Brief declaration of all your commercial activities, nature of relationship with the present group, and mode of reimbursements/ payments of any kind received by you.
2. Month wise figures of all considerations (cash or kind) received by you for the services provided.
3. Balance sheet and audited books of accounts of your concern and your present group.
4. Copy of service tax registration certificate and returns submitted.
5. Copy of IT returns.
6. List of your agents, distributors in Kolkata and payments made on them.

Sd/-

ssistant Commissioner (SIV)

Service Tax, Kolkata

(Emphasis supplied)

5. In order to appreciate the issue it is necessary to refer to Section 83 of the Finance Act, 1994 and Section 14 of the Central Excise Act. Section 83 of the Finance Act, 1994 is as under:

Section 83. Application of certain provisions of Act 1 of 1994.-The provisions of the following sections of the (Central Excise Act, 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:

9C, 9D(xxx), 11B, 11BB, 11C, (xxx), 12, 12A, 12B, 12C, 12D, 12E, 14, 14AA, 15, 33A, 35F to 35O (both inclusive), 35Q, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40.

6. Section 14 of Central Excise Act is as follows:

14. Power to summon persons to give evidence and produce documents in inquiries under this Act.-(1) Any Central Excise Officer duly empowered by the Central Government in this behalf, shall have power to summon any person whose

attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of certain description in the possession or under the control of the person summoned.

(2) All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

Provided that the exemptions under Sections 132 and 133 of the Code of Civil Procedure, 1908 (5 of 1908) shall be applicable to requisitions for attendance under this section.

(3) Every such inquiry as aforesaid shall be deemed to be a "judicial proceeding" within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860 (45 of 1860).

(emphasis supplied)

7. It is evident that admittedly the petitioner is carrying on commercial activity of printing, publishing and selling of newspapers and periodicals and selling of advertisement space in the print media. The authorities had issued the notice dated 1st/4th December, 2006 requesting petitioner No. 1 to furnish documents as mentioned therein as an "inquiry" had been initiated since it was "suspected" that the commercial activity of the petitioner "may fall" under BAS. The question is whether the authorities are competent and were justified in issuing such notice. As seen by Section 83 of the Finance Act, 1994, Section 14 of the Central Excise Act, 1944 has been made applicable in relation to service tax. Section 14 of the Central Excise Act empowers "any Central Excise Officer" "to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which the officer is making for any of the purposes of the Act". Inquiry, in the instant case, is for the purpose whether petitioner No. 1 is carrying on business of BAS. Evidently, for that purpose, authorities have issued the notice for the production of certain specified documents mentioned therein which is under the control of the person to whom notice has been issued. Such notice cannot have been issued without any apprehension or reason. That apprehension or reason is suspicion. "Suspicion" means "a feeling that something is possible or likely"-Oxford. In The New Collins Dictionary and Thesaurus "suspicion" means "the act or an instance of suspecting ; belief without sure proof, esp. that something is wrong". . . "Conjecture, guess . . hunch, idea, impression, notion, supposition, surmise". Now it is to be noted it is in that context and with

regard to such inquiry, information has been sought by the authorities for apprising itself regarding the correct state of affairs before a conclusion is drawn. As documents sought for are identifiable, it cannot be termed to be a fishing or an omnibus inquiry. Rather it has to be kept in mind that the authorities are conducting the inquiry-a statutory duty-as to whether the petitioner comes under purview of the BAS, which has been termed in the notice as reason to suspect. Suspicion is the ground for making an inquiry. As there is suspicion, petitioner No. 1 has been requested to furnish documents. Since it is a statutory notice, the petitioners are bound to comply as unless documents are produced it cannot be decided whether petitioner No. 1 falls within the ambit of BAS. This is the pre show-cause notice stage. It is to be borne in mind that the notice does not inflict any civil liability as it cannot be converted into a notice of demand. Besides, the extent of inquiry is to be judged by the authorities and not by the petitioner. After facts are gathered supported by materials, suspicion or impression is converted into reason to believe. Then the stage is set for issuance of show-cause notice which can be displaced by materials furnished by the petitioner. Therefore, for the reasons as aforesaid, the notice dated 1st December,/4th December, 2006 is just, proper and valid. That apart, the petitioners cannot turn back and challenge the notice as the petitioners had submitted to the jurisdiction as they have understood its purport as evident from the letter dated December 20, 2006 and had sought extension of time to submit the documents. So far as the judgments relied on by the petitioners are concerned, since the words "reason to believe" do not occur in Section 14 of the Central Excise Act, the judgments of the apex court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, and in Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, are not applicable to facts of the case. Similarly the judgments in The Barium Chemicals Ltd. and Another Vs. The Company Law Board and Others,; Rohtas Industries Ltd. v. S.D. Agarwal (1966) 39 Comp Cas 781 (SC); New Central Jute Mills Co. Ltd. v. Deputy Secretary, Ministry of Finance, Department of Revenue & Company Law (1970) 40 Comp Cas 102 (Cal); Modi Industries Ltd. v. Union of India (1982) 52 Comp Cas 589 (Delhi) and Harianga Cement Ltd. Vs. Company Law Board and another, are also not applicable as therein the Supreme Court and the High Courts were dealing with the provisions contained in Section 237(b) of the Companies Act, 1956. The principles of law laid down in the judgment of the apex court in B.D. Gupta Vs. State of Haryana, where the Supreme Court was dealing with the show-cause notice, are not applicable as in the instant case the notice under challenge is not a notice to show cause.

8. Hence, the writ petition is dismissed. Interim order stands vacated.

9. No order as to costs.

10. Later:

11. After the judgment and order is delivered, learned senior advocate appearing for the petitioner prays for stay of its operation. Prayer is considered and allowed. Let there be a stay of operation of this order till March 5, 2010.

12. All parties concerned are to act on a signed copy of the minutes of the operative part of this order on the usual undertakings.