
(2013) 01 CAL CK 0054

Calcutta High Court

Case No: Writ Petition No. 10940 (W) of 2011

Vogue

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision: Jan. 3, 2013

Citation: (2013) 3 CHN 684 : (2014) 33 STR 139

Hon'ble Judges: Indira Banerjee, J

Bench: Single Bench

Advocate: Pranab Kumar Dutta and Shovendu Banerjee, for the Appellant; Abhratosh Majumdar and Soumitra Mukherjee, for the Respondent

Judgement

Indira Banerjee, J.

This writ application is directed against an Order No. 96/HAL/2011 dated 7th June, 2011 passed by the Commissioner of Central Excise (Appeal-I) directing the writ petitioners to pre-deposit Rs. 15 lakhs as a condition precedent for proceeding with the appeal of the writ petitioners u/s 35F of the Central Excise Act, 1944, read with section 83 of the Finance Act, 1994 and to report compliance by 5th July, 2011, failing which the appeal would be liable to be dismissed without any further notice. The petitioner No. 1 is apparently engaged in the execution of works contracts for industrial organizations, which includes supply of materials and service of construction, erection, commissioning installation, interior decoration etc.

2. According to the petitioners, the design or the drawings as needed for execution of works contracts are Supplied, by the customers or their nominated architects to the petitioner No. 1. The petitioner No. 1 supplies the materials for the execution of the works contract.

3. According to the petitioners, the nature of jobs of, the petitioner No. 1 are inter alia fabrication and fixing of false ceiling inside the office premises including supply of materials; electrical wiring inside the office premises including supply of materials; painting of walls, false ceiling and wooden partitions including supply of

materials; flooring and polishing of tiles with supply of goods; supply of wooden materials, fabrication and polishing of wooden furniture and partitions; sanitary works including fixing and supply of materials; and the beautification of the office floors.

4. According to the petitioners, the petitioner No. 1 has, since 1985, been executing works contracts that are composite and indivisible. The petitioner No. 1 was apparently assessed to sales tax under the Bengal Finance Act and later the W. Ben. Sales Tax Act, 1994 and is now being taxed under the W. Ben. Value Added Tax Act, 2003 as a works contractor.

5. On or about 21st November, 2006, the petitioner No. 1 was registered under the Finance Act as a provider of the service of interior decoration. It is stated that the petitioner paid service tax amounting to Rs. 2,48,133/- during the period from 21st November, 2006 to 3rd March 2007.

6. In or about February, 2007 the Directorate General of Central Excise Information (hereinafter referred to as DGCEI), Kolkata Zonal Unit, started an investigation alleging that the petitioners had not paid service tax during the period from 16th June, 2005 to 31st March, 2007.

7. According to the petitioners, the petitioner No. 1 paid Rs. 7 lakhs by the cheques specified in paragraph 7 of the writ application. Whether the cheques towards service taxes allegedly due and payable by the petitioner No. 1 were paid voluntarily or in the circumstances alleged in paragraph 7 of the writ petition is not for this Court to decide, in exercise of jurisdiction under Article 226 of the Constitution of India.

8. While the aforesaid investigation was going on, a notice dated 20th September, 2007 was issued alleging that the services rendered by the petitioner was liable to service tax with effect from 1st June, 2007 u/s 65(105)(zzzza) of the Finance Act, 1994 as amended, that is, for the service of execution of works contracts.

9. The petitioner No. 1, was directed to get registered for the aforesaid service, u/s 69 of the Finance Act, 1994 read with Rule 4 of the Service Tax Rule, 1994, as amended a"4d; o pay service tax.

10. According to the petitioners, the petitioner No. 1 thereafter changed its registration and started paying service tax on the entire value of the works contract.

11. On 2nd February, 2008 a show-cause notice being No. DGCEI F No. 45/KZU/KOL/ST/O7/1449- dated 27 February, 2008 was issued directing the petitioner No. 1 show cause why service tax amounting to Rs. 26,33,691/- and educational cess amounting to Rs. 52,674/- should not be paid by the writ petitioners under the first proviso to the sub-section (1) of section 73 of the Finance Act, 1994 as amended. The petitioner No. 1 was also asked to show cause why interest at an appropriate rate u/s 75 of Chapter V of the Finance Act, 1994 and

penalty in terms of sections 76 and 78 of the Finance Act, 1994 should not be imposed and why amount of Rs. 9,48,133/- paid by the petitioners by cheque should not be appropriated against service tax payable along with educational cess, interest and other dues.

12. The petitioner No. 1 gave its reply to the show cause by a letter dated 2nd April, 2008, after which the Adjudicating Authority dated 23.02.2009 for personal hearing. According to the petitioners they duly appeared on 23.02.2009, but no hearing took place, as the Adjudicating Authority was not available. The petitioners and/or their representatives were informed that they would be intimated of the next date of hearing. The petitioners have alleged that they were not intimated of the next date of hearing.

13. By an ex parte order bearing No. 14/Addl.Commr/ST/Kol/2009-2010 dated 22nd July, 2009 the Adjudicating Authority confirmed demand of service, tax amounting to Rs. 26,86,365/- and imposed penalty of Rs. 26,86,365/- u/s 78 and penalty of Rs. 1000/- u/s 77 of the Finance Act, 1994 allegedly behind the back of the petitioners. A sum of Rs. 9,48,133/- was appropriated.

14. Being aggrieved the petitioners preferred an appeal before the Appellate Authority and made an application for stay of pre-deposit which gave rise to the order impugned in this writ application.

15. Mr. Pranab Kr. Dutta, learned counsel appearing with Mr. Shovendu Banerjee submitted that the Adjudicating Authority as also the Appellate Commissioner did not at all consider the Notification 1/2006-S.T. dated 1st March, 2006 of the Central Government exempting commercial or industrial service of execution of works contracts from 33% of the service tax.

16. Mr. K.K. Maiti, learned counsel appearing on behalf of the respondent authorities submits that this Court in exercise of jurisdiction under Article 226 of the Constitution of India ought not to interfere with a discretionary order for direction of pre-deposit. Mr. Maiti submits that the appeal might be directed to be heard, subject to the condition that the petitioner No. 1 makes pre-deposit as directed by the impugned order.

17. Section 85 of the Finance Act, 1994 as amended provides that any person aggrieved by any decision or order passed by an Adjudicating Authority subordinate to the Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals) within three months from the date of receipt of the decision, section 85(5) of the Finance Act, 1994 provides that subject to the provisions of Chapter V of the said Act the Commissioner of Central Excise (Appeals) shall exercise the same powers and follow the same procedure as he exercises and follows in hearing the appeals and making orders under the Central Excise Act. Moreover section 83 of the Finance Act, 1994 has expressly made the provision of inter alia section 35F of the Central Excise Act applicable to service tax, as it applies to Central

Excise.

18. u/s 35F pre-deposit is a condition precedent for filing of an appeal. However, the requirement of pre-deposit might be dispensed on the application of an assessee.

19. Financial hardship is undoubtedly a land of hardship, in deciding application for dispensation of pre-deposit, the Appellate Authority is thus required to consider the financial capacity of the assessee to make the pre-deposit. In the absence of any pleadings relating to financial position of the assessee or in the absence of documents that show financial weakness, as in this case, the Appellate Authority is legitimately entitled to arrive at the conclusion that the assessee has the financial capacity to make the pre-deposit. However, it is well-settled that payment under compulsion of any amount which is not due and payable would also constitute hardship so far as the assessee is concerned, even though the assessee may be in a financial position to pay the same.

20. In the instant case, Mr. Dutta has drawn the attention of this Court to the notification dated 1st March, 2006 which has not at all been considered. This Court does not express any opinion on the applicability of the said notification in the facts and circumstances of the instant case. However, it was for the Appellate Authority to consider the prima facie case in the light of Notification I/2006-S.T. dated 1st March, 2006 on which reliance has now been placed.

21. The impugned order is thus set aside.

22. It is submitted that the appeal has been dismissed for non-compliance of the direction for pre-deposit. The appeal is restored.

23. The Appellate Authority shall dispose of the within four weeks from the date of communication of this order deciding the question of dispensation of pre-deposit afresh in the light of the observation made above. It will be open to the Appellate Authority to dispose of the appeal itself if the Appellate Authority so deems it appropriate.

24. The writ application is disposed of accordingly. Urgent certified photostat copy of this order, if applied for, be supplied to the learned Advocates appearing for the parties, subject to compliance with all requisite formalities.