In the High Court of Judicature at Madras

Dated: 12.06.2015

Coram:

The Honourable Mr.Justice T.RAJA

Writ Petition No.12546 of 2015
and
M.P.No.1 of 2015

Fifth Avenue Sourcing (P) Ltd.,
represented by Mr.J.Balakrishnan
Director-Finance, Chennai-40. ... Petitioner

Versus

Commissioner of Service Tax
Office of the Commissioner of Service Tax-I
Newry Towers, No.2054-1,
II Avenue, Anna Nagar,
Chennai-40. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records relating to Order-in-Original No.C.No.IV/9/26/2013-STCAdj dated 27.02.2015 passed by the respondent and quash the same as arbitrary and illegal.

For Petitioner .. Mr.Joseph Prabakar

For Respondent .. Mr.V.Sundareswaran

ORDER

This Writ Petition has been directed against the impugned Order-in-Original No.C.No.IV/9/26/2013-STCAdj dated 27.02.2015 passed by the Commissioner of Service Taxes - I, Chennai, on various grounds.

2. Mr.Joseph Prabakar, learned counsel appearing for the petitioner would submit that the petitioner being engaged in the business of sourcing for Foreign Buyers to procure Indian Garments, obtained Service Tax Registration under the category of ''Business Auxiliary Service''. After receiving orders from the buyers from abroad, the petitioner placed orders on different vendors/manufacturers in India and raised proforma invoice on the

overseas buyer for the total order and again open Letter of Credit (LC) in their name. Similarly, on receipt of proforma invoice from the Indian vendors/manufacturers, the Letter of Credit would be transferred to the respective vendors/manufacturers, after retaining the margin of the petitioner. Once the shipment of the goods was effected, the documents from the vendors would reach the petitioner bank through the vendor's bank and only thereafter, the petitioner would substitute their invoice and bills of exchange permissible as per UCP and then the documents were sent to the buyers situated abroad. Upon receipt of the payment, the petitioner's bankers would credit the petitioner with the margin in convertible foreign currency and the rest of the amount would be sent to the vendors in convertible foreign currency. In this background, the issue raised in the Writ Petition is whether the receipt of Letter of Credit Margin/Trade margin by the petitioner in convertible foreign exchange for rendering service to various overseas buyers are liable to service tax under the category of ''Business Auxiliary Services'' as per Section 65(19) of the Finance Act.

3. The learned counsel appearing for the petitioner would further submit that the petitioner received a notice for Statement of Demand No.193/2013 dated 05.06.2013 for the period October 2011 to September 2012 to show cause as to why service tax of Rs.1,74,04,550/- for the period commencing from October 2011 to September 2012 should not be demanded along with interest and penalty. In response to the said notice, the petitioner submitted a detailed reply in July 2012 and finally he has also appeared for personal hearing on 16.02.2015. However, the respondent has passed the impugned Order-in-Original dated 27.02.2015 without following the ratio already decided in Order-in-Original Nos.6 and 7 of 2014 (ST) dated 31.01.2014. Therefore, the petitioner is constrained to come this Court.

4. The learned counsel appearing for the petitioner would further submit that the Order-in-Original is not only non-speaking, but also has been passed without jurisdiction, inasmuch as it goes beyond the scope of show cause notice. Adding further, he would submit that although the petitioner has got merits in the matter, he is prepared to go back to the appellate authority to file the appeal against the impugned order, however, in the mean while, various High Courts have decided the filing of the appeal without making pre-deposit as the amendment has come into effect from 06.08.2014 with reference to Section 35(F) of the Act.

5. The learned counsel for the petitioner would also submit that the Kerala High Court while dealing with almost in a similar and identical issue under Section 35(F) of the Act has come to the conclusion that the appellant would not be required to make the pre-deposit amount of 7.5% pursuant to 2014 Amendment. The

same ratio has been once again reiterated by the Hon'ble Andhra Pradesh High Court stating that at the time of filing the appeal, the appellant is not required to make the payment as pre-condition for the hearing of the waiver application by the Tribunal. In support of his submission, he has relied upon the following judgments of Kerala High Court (i) M/s.Muthoot Finance Ltd., ..vs.. Union of India and another reported in 2015-TIOL-632-HC-Kerala-ST. (ii) Secretary to Government Department of Agriculture, Government of Kerala and another ..vs.. Union of India and another reported in 2015 - TIOL - 895 - HC - Kerala - ST. and on this basis, he sought for a direction to enable the petitioner to file appeal without making payment of 7.5% of the tax amount confirmed against the petitioner as a pre-condition for making the appeal before the CESTAT.

6. Per contra, Mr.V.Sundareswaran, learned counsel appearing for the respondent, heavily opposing the above prayer would submit that the contentions made by the petitioner that he should be allowed to file his appeal before the CESTAT without making the payment of 7.5% of the tax amount confirmed against the petitioner as pre-condition for maintaining the appeal cannot be accepted since neither the Hon'ble High Court of Kerala nor the Andhra Pradesh High Court has dealt with the second proviso to Section 35(F) of the Act. In support of his submission, after referring to the entire proviso including second proviso to Section 35(F), he has also placed on record the judgment of the Kerala High Court in K.V.Raghunathan Pillai ..vs.. The Commissioner of Central Excise, Customs and Service Tax, Thiruvananthapuram to impress upon this Court that reading of second proviso to Section 35(F) as contained in the Finance Act itself shows that the provision relied on by the learned counsel appearing for the petitioner shall not apply to stay applications and appeals pending before any appellate authority prior to the commencement of the amendment, viz., 06.08.2014, hence, the petitioner should be directed to file his appeal along with pre-deposit as per Law. I do not find any merits in his submissions.

7. In this context, to answer the contentions raised by the learned counsel appearing for the respondent, it is necessary to extract Section 35(F) of the Finance Act, 2014, which is as follows:-

> "35F. The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal-
>
> (i) under sub-section (1) of Section 35, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute or penalty, where such penalty is in dispute, in pursuance

of a decision or an order passed by an officer of Central Excise lower in rank than the Commissioner of Central Excise;

(ii) against the decision or order referred to in clause (a) of sub-section (1) of Section 35B, unless the appellant has deposited seven and a half per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) against the decision or order referred to in clause (b) of sub-section (1) of Section 35B, unless the appellant has deposited ten per cent of the duty, in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of the decision or order appealed against;

Provided that the amount required to be deposited under this section shall not exceed rupees ten crores;

Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

Explanation - For the purposes of this section ''duty demanded'' shall include,-

i) amount determined under Section 11D;

ii) amount of erroneous Cenvat credit taken;

iii) amount payable under rule 6 of the Cenvat Credit Rules, 2001 or the Cenvat Credit Rules, 2002, or the Cenvat Credit Rules, 2004.''

8. A close reading of second proviso to Section 35F of the Act makes it abundantly clear that the proviso to this Section shall not apply to stay applications and appeals pending before the appellate authority prior to the commencement of the Finance Act (2 of 2014). In the present case, as contended by the learned counsel appearing for the respondent to apply the second proviso in order to deny the benefit of filing the appeal without making the payment of

7.5% before the CESTAT, it should be mentioned that the petitioner as against the Order-in-Original passed by the respondent on 27.02.2015, till date has not filed any appeal nor moved any stay application. Therefore, the petitioner, as rightly contended, is entitled to have the benefit of the ratio laid down by both the Kerala High Court and Andhra Pradesh High Court in the afore-mentioned judgments.

9. In this regard, it is necessary to extract the view taken by the Hon'ble High Court of Kerala at Ernakulam in WP(C). No.6173/15 (V) dated 02.03.2015 in M/s.Muthoot Finance Limited .. vs.. Union of India and another, which reads as follows:-

> "4. .... The only point that arises for consideration is whether the petitioner would have to deposit the amount of 7.5% of the tax confirmed against him, as a condition for pursuing the appellate remedy before the Tribunal. I note in this connection that recently, a Division Bench of the High Court of Telengana & Andhra Pradesh has taken a prima facie view that, inasmuch as the lis in question had commenced prior to the introduction of the amendment to the Finance Act, 1994, with effect from August 2014, the petitioner's right of appeal as per the erstwhile provisions of law would not be affected by the provisions introduced by the amendment of 2014. Although not expressly referred to in the interim order dated 19.02.2015 passed by the High Court of Telengana & Andhra Pradesh in W.P.No.3393/2015, the view seems to be consistent with the settled law that the institution of a suit carries with it an implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit and, further, that the right of appeal that is vested is to be governed by the law prevailing at the date of institution of the suit or proceeding, and not by the law that prevails at the date of its decision or at the date of filing of the appeal. (See: Garikapati Veeraya v. N.Subbiah Choudhry and other (AIR 1957 SC 540); Messrs Hoosein Kasam Dada (India) Ltd., v. The State of Madhya Pradesh and others, (AIR 1953 SC 221; Vitthalbhai Naranbhai Patel v. Commissioner of Sales Tax M

P Nagpur (AIR 1967 SC 344) and Ramesh Singh and Another v. Cinta Devi and others (1996 (3) SCC 142). In that view of the matter, I find that the petitioner, in whose case also the lis commenced in 2012, would not be required to deposit the amount of 7.5%, as required pursuant to the 2014 amendment, and in that respect, he would have an efficacious alternate remedy before the Tribunal where he can file an appeal, together with an application for waiver of pre-deposit and stay or recovery of the amounts confirmed against him by Ext.P8 order. At the time of filing the appeal, he will not be required to make any payment as a pre-condition for the hearing of the waiver application by the Tribunal. I, therefore, relegate the petitioner to the alternate remedy available under the Finance Act, 1994, as amended, of approaching the Appellate Tribunal by way of an appeal against Ext.P8 order. It is made clear that the appeal to be filed by the petitioner would be governed by the statutory provisions, as they stood prior to the amendment introduced with effect from 16.08.2014. Thus, without making any observations on the merits of the case, and without prejudice to all the contentions that the petitioner can take against Ext.P8 order of the 2nd respondent, I dismiss the writ petition in its challenge against Ext.P8 order. I make it clear that, if the petitioner prefers a duly constituted appeal under the provisions of the Finance Act, 1994, as they stood prior to 16.08.2014, then the Appellate Tribunal shall number the Appeal, and consider the application filed by the petitioner for waiver of pre-deposit and stay of recovery of the amounts confirmed against him by Ext.P8 order, on merits and thereafter, proceed to hear the appeal itself in due course. The petitioner shall file the appeal, together with the application for waiver of pre-deposit and stay, before the Appellate Tribunal on or before 31.03.2015."

10. The above view has been followed in a subsequent case reported in 2015 - TIOL - 895 - HC - Kerala - ST (Secretary to Government, Department of Agriculture, Government of Kerala and another ..vs.. Union of India represented by the Secretary, Ministry

of Finance (Department of Revenue), New Delhi and another) , which reads as under:-

> " 5. Counsel for the petitioner would point out that as per the amendment dated 16.08.2014, effected in the Finance Act, 1994, there is a requirement of payment of 7.5% of the tax amounts confirmed against the petitioner, as a pre-condition for maintaining the appeal before the CESTAT. I note, in this connection, that this Court has taken a view that, in cases where the commencement of the lis is prior to the coming into force of the amendment dated 16.08.2014, the appeal to be filed by the assessee would be governed by the provisions of the Finance Act, 1994, as is stood prior to its amendment by the amendment dated 16.08.2014. Following the said view in the instant case, I make it clear that, if the petitioner prefers an appeal against Ex.P7 order, before the CESTAT, together with an application for waiver of pre-deposit and stay on or before 30.04.2015, then the Appellate Tribunal shall consider the same as an appeal filed by the petitioner in accordance with the provisions of the Finance Act, 1994, as it stood prior to its amendment on 16.08.2014, and the Appellate Tribunal shall number the appeal, and proceed to consider the application for waiver of pre-deposit and stay, and thereafter, proceed to hear the appeal itself on merits. To enable the petitioner to do so, I stay further proceedings for recovery of the amounts confirmed against the petitioner by Ext.P7 order, for a period of one month, making it clear that on expiry of the period of one month, the stay granted by this judgment will cease to operate. "

11. After that, the Hon'ble High Court of Andhra Pradesh also in M/s.K.Rama Mohana Rao & Co. ..vs.. Union of India, Ministry of Finance, New Delhi and 4 others reported in 2015-TIOL-511-HC-AP-CX, while dealing with the very same amendment, has held that on the date of initiation of proceedings, the aforesaid amendment was not in force however, during the pendency of the matter, the above said amendment is made. Hence, on the date of initiation of proceedings, the right to appeal also accrues on that date, in view thereof, as the appeal is in continuation of the original proceedings. The

aforesaid amendment may not be applicable for the simple reason that the proceedings were initiated with the issuance of show cause notice prior to the amendment.

12. In yet another reported decision in 2006 (147) STC 218 (Mad) (Deputy Commercial Tax Officer, Tirupur Central I Assessment Circle, Tirupur and others ..vs.. Cameo Exports and others), the Hon'ble Division Bench of this High Court, while answering the question as to when such a pre-existing right of appeal becomes vested in a party- Is it on the date of filing of the returns ? Or is it on the date when a pre-assessment notice is issued ? Or it is on the date when proceedings are initiated for reopening an assessment ?, this Court has answered categorically that the assessee's right to file an appeal and a further appeal under the earlier Act is a vested right and such a right becomes vested in the assessee, the moment he filed his return which commenced the assessment proceedings.

13. To appreciate with clarity, it is pertinent to mention few facts involved in the case of Deputy Commercial Tax Officer, Tirupur Central I Assessment Circle, Tirupur and others .. vs.. Cameo Exports and others mentioned supra. The assessees therein filed Appeals before the Assistant Commissioner under Section 31 of the Tamil Nadu General Sales Tax Act, 1959, against the orders of assessment, but the Appeals were rejected by the appellate authority on the ground that they were not accompanied by the proof of payment of 25% of the disputed tax as per proviso 2 to Section 31 of the Act as amended by Act 19 of 2002 with effect from June 3, 2002. The assessees filed Writ Petitions challenging that order. A single Judge allowed certain Writ Petitions without insisting upon the pre-deposit of 25% of the disputed tax, while the writ petitions in the other batch were dismissed. Hence, Writ Appeals were filed at the instance of the Revenue as well as the assessees. The case of the assessees was that their right of appeal was governed by provisions as on the dates they filed their monthly returns which were prior to June 10, 1999, when there was no mandatory condition for pre-deposit of disputed tax before the appeal was lodged. On the other hand the Revenue contended that although the right of appeal was substantive, it vested in an assessee on the date when the order of final assessment was made under Section 12(2) of the Act or the order of reassessment was made under Section 16 of the Act, and, in any case, on the date when a notice of final assessment was issued under Section 12(2) or a show cause notice for reassessment was made under Section 16 of the Act. In that background, this Court has held that for the purpose of accrual of the right of appeal, the crucial and the relevant date is the date of initiation of assessment proceedings and not the decision itself. The right of appeal becomes vested in the assessee the moment he files his return, which commences the

assessment proceedings. In the case of assessees, the returns were filed long before the provisions of Section 31 of the Act was amended by Act 14 of 1999. Further, it is not disputed that the aforesaid amendments to the Act have not been given retrospective effect but are prospective. Therefore, the appeals are deserved to be entertained without insisting on pre-deposit of 25% of the disputed tax as per the amended provisions of the Act.

14. In the light of the above decision, as the amended provisions of the Act are not given retrospective effect as of from an anterior date, it has been construed that the amended provisions are prospective.

15. Therefore, this Court without entertaining the Writ Petition, directs the petitioner to file an Appeal before the CESTAT along with stay application, without making pre-deposit of 7.5% of the tax amount confirmed against the petitioner, within a period of two weeks from the date of receipt of a copy of this order.

16. With the above direction, the Writ Petition is disposed of . No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

mra

To

Commissioner of Service Tax
Office of the Commissioner of Service Tax-I
Newry Towers, No.2054-1,
II Avenue, Anna Nagar,
Chennai-40.

1 cc to Mr.V. Sundareswaran, Advocate, Sr. 29163
1 cc to Mr. Joseph Prabhakaran, Advocate, sr. 28834

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GGK (CO)
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