

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.07.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition No.7483 of 2015

And M.P.No.1 of 2015

Reserved on 31.03.2015

M/s.G.Ramamoorthi Constructions (I) Pvt.Ltd.,
81, Vinayagar Koil Street, Tatabad,
Coimbatore-641 012.

..Petitioner

Versus

- 1.The Commissioner (Adjudication),
O/o the Commissioner of Central Excise, Customs
And Service Taxes,
6/7, A.T.D.Street, Race Course,
Coimbatore-641 018.
- 2.The Union of India, rep. by the
Secretary to the Government of India
Department of Revenue,
New Delhi.
- 3.The Government of Tamil Nadu,
Rep. by the Secretary to the Government,
Commercial Taxes Department,
Secretariat, Chennai.

.. Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorari, to call for the records relating to the proceedings of the first respondent in order No.C.No.V/WCS/15/35/2014-ST Adj.Order Sl.No.19/2014-Commr, dated 28.11.2014 and quash the same.

For Petitioner : Mr.S.Raveekumar

For Respondents : Mr. A.P.Srinivas

ORDER

Questioning the impugned proceedings, dated 28.11.2014 of the first respondent, in and by which, the petitioner has been directed to pay a sum of Rs.2,27,24,001/- towards the service tax under the Work Contract Service in terms of Section 66B of the Finance Act, 1994 apart from interest and penalty, the petitioner has come forward with the present writ petition.

2. Brief facts of the case are as under:

3. The petitioner is providing taxable service under Construction Services both to residential complex and other than residential complex including commercial/industrial buildings and civil structures to their various clients. It appears that during the course of audit of the accounts of the petitioner, it was noticed that the petitioner provided construction services to various educational institutions, viz., Sri Krishna College, SRM Institutions, etc., and also to hospitals, viz., Ganga Medical Centre of Ganga Hospital, but they have not discharged service tax liability on the said services. According to the respondents, the above services provided by the petitioner are taxable and accordingly, the quantification of duty liability was worked out in terms of provisions of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 for the period from October, 2008 to October 2013 and arrived at Rs.2,27,24,001/- towards service tax payable by the petitioner. Accordingly, a show cause notice, dated 21.4.2014 was issued to the petitioner. Pursuant to the same, the petitioner submitted their reply on 5.6.2014, inter alia, stating that for the construction of educational institutions, service tax is exempted as per Circular No.80/10/2004 ST, dated 17.9.2004 upto 30.6.2012 and they have been paying service tax on construction services provided to educational institutions from 1.7.2012. It is also stated that the total construction of education institutions was only Rs.19,54,93,374/- and not Rs.22,16,55,493/- as mentioned in show cause notice. Since the petitioner has been paying service tax regularly without any suppression of any turnover, no penalty is liable to be imposed. On receipt of reply, the respondents provided personal hearing to the petitioner, wherein, the various submissions along with relevant citations were made on behalf of the petitioner. Having considered the same, on a detailed discussion, the first respondent came to the conclusion that the construction activities undertaken by the petitioner would be squarely covered under the definition of Clause 2(b) of the definition under Section 65(105) (zzzza) of the Finance Act, 1994 as a civil construction primarily for commerce or industry and hence, the petitioner is liable to pay the service tax. The first respondent also concluded that the petitioner has suppressed relevant facts relating to assessment of tax and accordingly, imposed interest and penalty. Accordingly, the first respondent has passed the impugned order.

4. Challenging the impugned proceedings, the learned counsel appearing for the petitioner would contend that by virtue of the Circular No.80/10/2004-ST, dated 17.9.2004, the service tax on the construction of educational institutions and hospitals is exempted since said construction is non-commercial and as such, the petitioner had continuously filed ST-3 Returns for the period October 2008 to October, 2013 which were also accepted by the respondents. He pointed out that in terms of Section 65 (105)(ii)(b) of the Finance Act, service tax is liable to be levied only in respect of the construction made for the purpose of commerce or industry and the petitioner has admittedly provided construction for the educational institutions, which would not fall within the above said definition in order to attract levy of service tax. However, the first respondent has erroneously without considering the objections made by the petitioner properly, has passed the impugned order, which are liable to be quashed.

5. On the other hand, the learned counsel appearing for the respondents would contend that the Circular, dated 17.9.2004 based on which, the petitioner claimed exemption, clarifies that only those institutions which are run solely for educational purposes and not for profit oriented, only are eligible for exemption and in the present case, the petitioner failed to provide evidence that the educational institutions to whom the petitioner provided the construction service, have been providing educational services and not making systematic profits and thereby, the first respondent has rightly construed that the educational institutions to whom the petitioner provided the construction service, are commercial and hence, the above said Circular does not apply to the case of the petitioner and accordingly, imposed the service tax. Hence, the learned counsel sought for dismissal of the writ petition.

6. Heard the learned counsel appearing for the petitioner and the respondents and perused the entire records.

7. A perusal of the impugned order, it appears that the first respondent has taken laborious efforts in order to make the petitioner ineligible to claim exemption of service tax in respect of constructions provided by them to the educational institutions by virtue of the Circular, dated 17.9.2004. It is not in dispute that the said Circular, dated 17.9.2004 provides exemption of service tax in respect of constructions which are for the use of organization or institutions being established solely for educational, religious, charitable, etc., However, according to the first respondent, the exemption of service tax can be claimed only in respect of construction services provided to the institutions which should solely impart education without any profit and if the institutions are earning profits, they cannot be construed as non-commercial, but only as industries. In such case, the exemption Circular cannot be made applicable. In the present case, after following the decision of the Hon'ble Apex Court in "Bangalore Water Supply & Sewerage Board versus R.Rajappa & others" reported in 1978 AIR 548 for the

proposition of law that "educational institution, viz., a university, a college, a school or research institute is, an industry and not charitable and also following other relevant decisions, the first respondent has categorically held as under in para 20 and 21:

"20. The above decisions of various judicial for a clearly points to the fact that the educational institutions per se cannot be held as 'non-commercial' or 'non-profit industries. In this regard, I would like to emphasize on the fact that the quantum of fees collected by the private institutions alone (as compared to similar Government Institutions) is not a factor alone in determining a institution as commercial or profit oriented. The collection of higher fees could be for the reasons that they may be providing better infrastructural support and they may not be supported by any educational subsidy from the Government, which the Government institutions enjoy. The question to be answered is whether the private educational institutions irrespective of the fact whether they collect higher fees or not, are run on profit motive or doing philanthropic services. The moot question is the motive/purpose and not the field in which they are functioning. Any claim on non-profit and non-commercial nature of institutions has to be substantiated only by way of establishing the credentials of such an institutions and not by merely stating that they are in the field of education."

21. Therefore, I reject GRCIPL's claim that any educational institution automatically would mean that their activities would be beyond the pale of commerce or industry.... Coming back to the case on hand, GRCIPL have failed to provide any evidence that the educational institutions to whom they provided the services of constructions had not been making systematic profits and that their sole aim is to serve the poor section of the public. Hence, I reject the claim that the educational services provided by GSET would be 'non-commercial' even when it is provided by charging fees from the beneficiaries."

8. It is pertinent to note that the petitioner has been claiming exemption from service tax towards the constructions provided for educational institutions and hospitals from October 2008 to October 2013 by filing ST-3 returns, which were also accepted by the department. However, in the year 2014, during the audit inspection, it was noticed that the petitioner provided construction services to various educational institutions, which according to the first respondent, had been making profits and that would be construed as commercial and thereby, the exemption claimed by the petitioner under Circular No.80, dated 17.9.2004 cannot be extended. Accordingly, a

notice, dated 21.04.2014 has been issued to the petitioner and thereafter, ultimately, the impugned proceedings were issued. It is to be noted that the first respondent, by relying upon the ratio laid down by the Apex Court in "Bangalore Water Supply case, he came to the conclusion that the educational institution is an industry and the petitioner provided construction services to the educational institutions are making systematic profits and as such, they are commercial in nature and thereby the exemption under the said Circular, dated 17.9.2004 cannot be availed by the petitioner. Though the first respondent has categorically mentioned in para 20 that "any claim on non-profit and non-commercial nature of institutions has to be substantiated only by way of establishing the credentials of such institutions and not by merely stating that they are in the field of education", however, considering the fact that the petitioner failed to provide any such evidence, the first respondent came to the conclusion that the educational institutions to whom the petitioner provided construction services, are making systematic profits and their sole aim is not to serve the poor section of the public and accordingly he rejected the claim of the petitioner.

9. Admittedly, as on the date of passing the impugned proceedings, there was no evidence available before the first respondent to hold that whether the educational institutions to whom the petitioner provided construction services, are profit oriented or whether they are established solely for educational purpose without any profit, etc., While that being so, in the absence of any evidence, there is no justification on the part of the first respondent to hold contrary that too on mere non-production of such evidence by the petitioner. In fact, till the impugned proceedings were passed by the first respondent, it was not known or expected by the petitioner that the first respondent would come to such a contrary conclusion. If at all the first respondent was of such view, he could have very well directed the petitioner by providing an opportunity to produce the relevant documentary evidence regarding the educational institutions to whom, the petitioner provided construction service and thereafter, he could have decided the issue. It is curious enough to note that the first respondent has gone to the extent of applying the definition of 'industry' under the Industrial Disputes Act and also followed the Apex Court decision in Bangalore Water Supply case, which in my opinion, is unnecessary and the first respondent has shown excess enthusiasm while dealing with the issue, inasmuch as the issue involved in the present writ petition is altogether different and ratio decided in the above said decision by the Hon'ble Apex Court regarding the definition 'industry' for the purpose of settling the industrial disputes, cannot be applied to the case on hand as the present subject matter relates to Finance Act, under which, the Circular dated 17.9.2004 has been issued pertaining to the exemption of Service Tax in respect of construction services. Even assuming that the educational institution is an industry, it does not take away the benefit of exemption

provided under the said Circular, if it is established that the constructions provided by the petitioner are used or to be used either not for commerce or not for industry. Therefore, the analysis given by the first respondent that the educational institutions to whom the petitioner provided are profit earning concerns and cannot be construed as non-commercial and thereby, they would be fallen within the ambit of "construction of new building primarily for the purpose of commerce or industry under Section 65(105)(ii)(b) of the Finance Act which defined , in my opinion, is fallacious and cannot be tenable.

10. In fact, the consistent version of the petitioner is that they were under bona fide impression that the service tax on the constructions provided to the educational institutions is exempted as per Circular No.80, dated 17.9.2004 and that they only constructed classrooms, hostels, etc., which are primarily used for imparting education and not used either for commerce or industry and without deciding the issue that whether the construction provided by the petitioner to the educational institutions are used or to be used for commerce or industry in order to extend the benefit of exemption under the above said Circular, the first respondent has erroneously dealt with the issue holding that the educational institution to which the petitioner provided constructions, itself is an industry and running for profit. I find considerable force in the said contention made on behalf of the petitioner. It is also stated by the petitioner that if at all the first respondent suspected the usage of the buildings or civil structures provided by the petitioner were meant to use or to be used for the purpose of commerce or industry, he could have very well called for records from the Income tax Department for verification and that the petitioner had already given the complete details of the educational institutions for whom they provided constructions.

11. For the foregoing reasons, I am of the considered view that the impugned proceedings, dated 28.11.2014 of the first respondent are liable to be set aside and since the issue has not been dealt with the properly in terms of the exemption Circular No.80, dated 17.9.2004, the matter is required to be remitted back for fresh consideration.

12. Accordingly, the impugned proceedings, dated 28.11.2014 of the first respondent are hereby set aside and the matter is remitted back to the first respondent to deal with the issue in terms of the exemption Circular No.80, dated 17.9.2004, as to whether the constructions provided by the petitioner to the educational institutions were meant to use or to be used for academic purpose or for commercial purpose, on consideration of the relevant evidence thereof and whether the petitioner is entitled to exemption. The

first respondent shall pass fresh orders within a period of four weeks from the date of receipt of copy of this order, after providing an opportunity to the petitioner. The petitioner is permitted to produce all relevant documents and also raise further objections if any, which shall be considered by the first respondent while passing the orders.

With the above observation, the Writ Petition is disposed of. No costs. Consequently, connected MP is closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

To

1. The Commissioner (Adjudication),
O/o The Commissioner of the Central Excise, Customs
And Service Taxes,
6/7, A.T.D.Street, Race Course,
Coimbatore-641 018.
2. The Secretary to the Government of India,
Department of Revenue,
New Delhi.
3. The Secretary to the Government of Tamilnadu,
Commercial Taxes Department,
Secretariat, Chennai.

+1cc to Mr. S.Raveekumar Sr.38974

W.P.NO.7483 OF 2015

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Rs 07/08/2015