IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.4.2016

CORAM :

THE HONOURABLE MR.JUSTICE V.RAMASUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN

Writ Petition No.10515 of 2016
and
WMP.No.9214 of 2016

N.Bala Baskar ... Petitioner

Vs

1. Union of India, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, rep.by its Secretary, North Block, New Delhi-110001.

2. The Commissioner of Service Tax, Nandanam, Chennai-35.

3. The Chairman, Central Board of Excise & Customs, North Block, New Delhi-110001.

4. Tax Research Unit, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, North Block, New Delhi-110001.

5. M/s.LCS City Makers Pvt. Ltd., Chennai-18 rep.by its Director ... Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Declaration to declare that Circular No.151/2/2012-ST dated 10.2.2012 issued by the third respondent and the recommendation of the fourth respondent via Instruction F.No.354/311/2015-TRU dated 20.1.2016 are unconstitutional and ultra vires the powers of Parliament under Article 246(3) read with Entry 49 of List II of the Seventh Schedule and the Finance Act, 1994 (as amended from time to time) [prayer amended as per order dated 28.3.2016 by VRSJ and NKKJ in WMP.No.9878 of 2016 in W.P.No.10515 of 2016].

For Petitioner : Mr.B.N.Suchindran

For Respondents 1 to 4 : Mr.A.P.Srinivas

For Respondent-5 : Mr.G.Natarajan

Order of the Court was made by V.RAMASUBRAMANIAN,J

The petitioner, who entered into an agreement with the fifth respondent herein for the joint development of a property owned by him and his brother and sisters, has come up with the above writ petition seeking a declaration that circular No.151/2/2012 dated 10.2.2012 issued by the Central Board of Excise and Customs and the recommendations made by the Tax Research Unit of the Ministry of Finance on 20.1.2016 are unconstitutional and ultra vires the powers of the Parliament under Article 246(3) read with Entry 49 of List II of the Seventh Schedule and the Finance Act, 1994.

2. Heard Mr.B.N.Suchindran, learned counsel appearing for the petitioner. Mr.A.P.Srinivas, learned Senior Panel Counsel takes notice for the respondents 1 to 4. Mr.G.Natarajan, learned counsel appears for the fifth respondent.

3. As stated earlier, an agreement tiled 'agreement for development' was entered into on 20.2.2013 between the writ petitioner, his brothers and two sisters on the one hand and the fifth respondent herein on the other hand, for the purpose of developing the land owned by the petitioner and his siblings into a complex of residential houses. Under the said agreement, the fifth respondent was obliged to construct a super built up area of 15,600 sq.ft., and hand over 65% of such constructed super built up area to the petitioner and his siblings. The fifth respondent was entitled to the remaining 35% of the super built up area. In consideration of the fifth respondent putting up and handing over 65% of such constructed area to the petitioner and his siblings, they have agreed to convey to the fifth respondent or to his nominees 35% of the undivided share of the land.

4. Clause 23 of the said agreement reads as follows :

> "The parties of the first part are liable to pay all government taxes, statutory levies including service tax, VAT on construction to the extent of 7,600 sq.ft. of super built up area including common area being residential apartments

along with two covered car parks each as contemplated in Clause (5) in the total super built area to be constructed in Schedule A to be delivered by the party of the second part, prior to handing over of the apartments. All other taxes, duties, if any, etc., shall be borne according to the share of super built up area related to parties of first and second part."

5. In view of the terms and conditions of the agreement for development and in view of the provisions of Section 66B of the Finance Act, 1994, the fifth respondent appears to have sent an e-mail dated 4.2.2016 demanding service tax to the tune of Rs.12,85,077/- together with a VAT amount of Rs.96,000/-. The claim was so made by the fifth respondent on the basis of the provisions of the Finance Act, 1994, the scope of the circulars issued thereunder and also in terms of Clause 23 of the agreement for development.

6. However, contending that the agreement did not envisage the rendition of any services so as to attract payment of service tax and also contending that for the mere exchange of a property, there could not be a service tax, the petitioner came up with the above writ petition challenging the very provisions of Section 66B read with Section 66E(b). Thereafter, the got his prayer modified so as to challenge only the circular of the Central Board dated 10.2.2012 and the recommendations made by the fourth respondent dated 20.1.2016.

7. At the outset, we are afraid that the writ petition is not maintainable, in as much as the law makes the service provider namely the fifth respondent liable to pay service tax. It is always open to the service providers either to pass on the burden to the recipient of the services or not to pass it on. Under Clause 23 of the agreement for development, the petitioner and his siblings, who are the service recipients, agreed to take the burden to the extent they are liable. Therefore, the circulars, in our considered view, cannot be challenged by the petitioner.

8. However, relying upon two decisions of the Allahabad High Court, one in Indian Explosives Limited Vs. Commissioner of Sales Tax [(1978) 41 STC 315] and another in U.P. Solvent Extractors Association Vs. Union of India [1987 Law Suit (All.) 211], it is contended by Mr.B.N.Suchindran, learned counsel for the petitioner that the petitioner has locus standi to maintain the writ petition.

9. But, a careful look at the decision in Indian Explosives Limited would show that the challenge that was made in the said writ petition arose out of a particular assessment relating to the assessment year 1969-1970. The very liability of the petitioner before the Allahabad High Court was not in dispute. It was only the quantum relating to the turnover, etc., that were in dispute before the said Court. Where there is a private lis with respect to certain disputed facts, out of which, the liability arises, it may perhaps be open to the person, on whom, the burden is passed on, to question the assessment orders.

10. In U.P. Solvent Extractors Association, a Division Bench of the Allahabad High Court simply rejected the argument of locus standi by observing in one line that the concept of locus standi is getting widened. The said decision does not deal with the law on the point.

11. In Assistant General Manager, Central Bank of India Vs. Commissioner, Municipal Corporation [1995 (4) SCC 696], the tenant of a building challenged the enhancement of tax ordered by the Local Body. The Local Body contested the appeal filed by the tenant on the ground that the levy was on the landlord. The High Court sustained the objection of the Municipality. But, the Supreme Court held that despite a private arrangement between the landlord and the tenant, the right of the tenant to challenge the enhancement of tax, cannot be defeated.

12. But, as pointed out earlier, the said dispute was also between two private individuals. The landlord had an agreement with the tenant that in the event of the property tax being enhanced, the burden of payment of the same would be passed on to the tenant. Therefore, the tenant had a right individually to guard himself against the liability, to which, the owner was willing to submit himself to the detriment of the tenant.

13. The cases of the above nature are clearly distinguishable. But, in a case where a circular is challenged questioning the very liability, we do not think that the concept of locus standi could be widened. The petitioner, after having entered into an agreement for development with the fifth respondent and after having been a party to Clause 23 of the said agreement, cannot now turn around and say that the circulars imposing an obligation upon persons, who entered into such contracts, are invalid in the eye of law.

14. The contention that the person, to whom the burden of tax is ultimately passed on, is entitled to challenge a levy, if accepted, would lead to disastrous consequences. Any increase in

the incidence of sales tax affects all consumers of all products. Therefore, any person will be entitled to come and challenge the increase in the levy on the ground that the manufacturer or dealer will eventually pass on the burden only to the ultimate consumer. We can quote any number of examples of this nature. Every citizen is a consumer of any number of products. Every Finance Act imposes an additional burden upon many such products. Millions of consumers are entitled to come and challenge such levies, if such a contention is accepted. Therefore, we are of the considered view that the petitioner has no locus standi to challenge the above circulars.

15. Though the petitioner expresses the apprehension that the service tax is sought to be levied on both the components namely value of the land as well as value of construction, the learned counsel for the fifth respondent clarified that it is not so. The burden passed on, according to the learned counsel for the fifth respondent, related only to that component, which dealt with the value of construction.

16. Referring to the definition of the expression 'service' under Section 65B(44), it is contended by Mr.B.N.Suchindran, learned counsel for the petitioner that any activity, which constituted merely a transfer of title in goods or immovable property, by way of sale, gift or in any other manner, would not come within the definition of the expression 'service'.

17. Section 65B(44) reads as follows :

> " 'Service' means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—
>
> (a) an activity which constitutes merely,--
>
> (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
>
> (ii) a transaction in money or actionable claim;
>
> (b) a provision of service by an employee to the employer in the course of or in relation to his employment;
>
> (c) fees taken in any Court or tribunal established under any law for the time being in force."

18. According to the learned counsel for the petitioner, the agreement for development that he had entered into with the fifth respondent, merely enabled the fifth respondent to put up

a construction and exchange 35% of the constructed area with 35% of the undivided share of land. Therefore, his contention is that it was just an exchange of one immovable property for another. Hence, his case is that the service, if at all rendered by the fifth respondent, falls within the exempted category under Sub-Clause (i) of Clause (a) of Sub-Section (44) of Section 65B.

19. An alternative submission was made to the effect that if the above transaction is not considered to be an exchange, it could, at the best, be termed as a sale. The petitioner and his siblings have agreed to sell 35% of the undivided shares in the land to the nominees of the fifth respondent and the fifth respondent has agreed to pay a consideration not in cash, but in kind in the form of a constructed area. Therefore, the contention of the petitioner is that this service, which falls within the exempted category does not attract service tax.

20. In support of this contention, the learned counsel places reliance upon the decision of the Gauhati High Court in Magus Construction Pvt. Ltd. Vs. Union of India [(2008) 15 VST 17].

21. We have carefully considered the above submissions.

22. At the outset, we have to point out that the agreement for development entered into between the petitioner and his siblings with the fifth respondent, in whatever manner worded, is an agreement for the construction of about 15,600 sq.ft of super built up area in the land that belongs to the petitioner and his siblings. It may be true that after construction, the parties may exchange the constructed area for the undivided share of the land. But, the agreement can also be looked at from another angle.

23. It is also possible for the Department to contend that a person, who is the owner of the land, had engaged a contractor to put up a construction for themselves upto a particular limit. Since the cost of construction could not be paid by the owner in the form of cash, they agreed to exchange the undivided share of the land with the contractor. If viewed from that angle, what the developer had done is actually the service of construction. Therefore, it is not an easy proposition that it was a transfer of immovable property by way of sale or exchange.

24. In Magus Construction Pvt. Ltd., the dispute that the Gauhati High Court was concerned with was a dispute between the flat purchasers and the promoter. The case did not arise out of a dispute between the developer and the original land owner.

25. In the second last paragraph of its judgment, the Gauhati High Court indicated that as per the circular dated 1.8.2006, when a builder, promoter or developer undertook construction activity for its own self, the relationship of service provider and service recipient was absent and that therefore, the question of providing taxable service did not arise.

26. But, in the case on hand, the agreement that the petitioner had, cannot be separated into two portions. The agreement gave rise to a bouquet of rights for the fifth respondent builder. One was to put up a construction of an area, a part of which could be sold by them to third parties. They could be sold not only as such, but also along with the undivided share of land. Those parties had certainly availed the services of the fifth respondent as a service provider. The petitioner did not stand on a different footing than those persons. Therefore, the challenge of the petitioner to the circular, apart from the question of locus standi, does not merit acceptance.

27. Accordingly, the writ petition is dismissed. No costs. Consequently, the above WMP is also dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

RS Sub Assistant Registrar

To

1.The Secretary to Union of India,
Ministry of Finance,
Department of Revenue,
Central Board of Excise and Customs, North Block,
New Delhi-110001.

2.The Commissioner of Service Tax,
Nandanam, Chennai-35.

3.The Chairman,
Central Board of Excise & Customs,
North Block,
New Delhi-110001.

4.Tax Research Unit,
Ministry of Finance,
Department of Revenue,
Central Board of Excise and Customs,
North Block, New Delhi-110001.

+1cc to Mr.B.N.Suchindran, Advocate, S.R.No.22651
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.22410
+1cc to Mr.S.Jai Kumar, Advocate, S.R.No.22097

WP.No.10515 of 2016
&
WMP.No.9214 of 2016

SNS(CO)
CA(21/04/2016)