IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.06.2016

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.14736 of 2016
and
W.M.P.No.12874 of 2016

M/s.Sree Daksha Property Developers Pvt Ltd.,
No.1, Gandhi Layout
1st Floor, Sree Veeras Towers
Maruthamalai Road, Vadavalli
Coimbatore - 641 046.
Rep by R.Mohan,
Managing Director and
Authorised Signatory .. Petitioner

..Vs..

The Commissioner of Central Exercise
6/7, ATD Street, Race Course
Coimbatore - 641 018. .. Respondent

Prayer:
Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records comprised in Order C.No:V/WCS/15/117/2014-ST Adj date 14.3.2016 on the file of the respondent and quash the same.

For Petitioner : Ms.Naveena.D

For Respondent : Mr.A.P.Srinivas, Standing Counsel

ORDER

Heard Ms.Naveena.D, learned counsel appearing for the petitioner, and Mr.A.P.Srinivas, learned counsel appearing for the respondents and with their consent, the writ petition itself is taken up for final hearing.

2.In this writ petition, the petitioner has challenged the order passed by the respondent rejecting the application filed by the petitioner for rectification of the mistake which is apparent on the face of the order. The petitioner was issued a show cause notice on 16.10.2014 calling upon the petitioner to explain as to why, the services provided by them should not be classified under "Works Contract Service" in terms of Section 66E(h) of the Act read with Section 65B (54) ibid; the benefit of 75% exemption under Notification No.26/2012-ST dated 20.06.2012 should not be denied to them; the service portion value should not be determined in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 as 40% of the total amount charged for the works contract and assessed to Service Tax; consequently, an amount of Rs.2,60,72,592/- (Service Tax: Rs.2,53,13,196/-; Ed.Cess: Rs.5,06,264/-; SHEC: Rs.2,53,132/-) should not be demanded from them as differential tax relating to the period from July 2012 to September 2013 under Section 73 of the Act; Appropriate Interest under Section 75 of the Act should not be demanded from them on the above differential tax; A penalty should not be imposed on them under Section 76 of the Act for non-payment of appropriate Service Tax; and A penalty should not be imposed on them under Section 77 of the Act for failure to self-assess the Service Tax correctly and declare it in the ST-3 returns.

3.The petitioner submitted their reply on 29.09.2015. Apart from raising legal issues, the petitioner stated that the Department has quantified the demand without reducing the value of the land which was included in the amount charged. It was stated that the land value of the transactions for the period July 2012 to September 2014 works out to Rs.28,17,39,233/-. Therefore, they have stated that they are eligible for the exemption under notification 26/2012-ST. Along with the reply, the petitioner is said to have given undivided land share, sales summary, sales accounts for various periods and other records. Though, these particulars were furnished, the assessing authority while considering the case of the petitioner held that no corroborating and convincing evidence was given in support of the petitioner's claim that the land value has to be excluded. Accordingly, the authority proceeded to confirm the demand. It is thereafter, the petitioner submitted an application on 29.02.2016 for rectification in the quantification and pointed out that they have submitted the records and those records has not been considered while passing the impugned order.

4.The respondent by the impugned proceedings held that no action under Section 74 of the Act is required and such power could be exercised for rectification only if there is an error apparent from the records of the case and it cannot be a long drawn process of reasoning on the points where there may conceivably be two opinions. The respondent in the impugned order referred to the decision of the Hon'ble Supreme Court in the case of Sant Lal Gupta vs. Modern Co-op. Group Housing Society [2010 (262) ELT 6 SC].

5.After hearing the learned counsel appearing for the parties and perusing the materials placed on record, in my view, the power under Section 74 of Finance Act to rectify a mistake cannot be put under a straight jacket formula and each case has to be tested on its own facts. What is a mistake apparent from the record will have to be decided based on the facts which are placed before the concerned authority. The specific case of the petitioner in the reply to the show cause notice was that the value of the land has been included in the amount charged. Along with the reply to the show cause notice, the petitioner has furnished details of the undivided land sale transactions.

6.The learned counsel for the petitioner submitted that several box files containing particulars and documents were furnished to the authority along with the reply to the show cause notice. However, while considering the reply, the respondent merely averred that there is no corroborating or convincing evidence given in support of their claim. There is no averment in the impugned order as to the relevance or irrelevance of the records produced by the petitioner.

7.Therefore, if the records produced by the petitioner prima facie show that there was sale of undivided share of the land, then the authority ought to have taken into consideration of the same and examined as to whether those could have been included in the total value. This undoubtedly is an error apparent on the face of the record. Therefore, the respondent could not have rejected the application for rectification for the reasons assigned in the impugned order. Furthermore, in their application under Section 74, the petitioner has specifically sought for a personal hearing which was also not been offered.

8.Accordingly, the writ petition is allowed and the impugned order is quashed. The matter is remanded to the respondent to consider the application filed by the petitioner under Section 74 of the Finance Act, after granting an opportunity of personal hearing. Consequently, connected miscellaneous petition is closed. No costs.

-s/d-
Assistant Registrar(CSVI)

True Copy

Sub-Assistant Registrar

To

The Commissioner of Central Exercise
6/7, ATD Street, Race Course
Coimbatore - 641 018.

+1 cc to Mr.A.P.Srinivas Advocate vide sr.30753

W.P.No.14736 of 2016
and
W.M.P.No.12874 of 2016

aa20/06/2016