IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:21.10.2016

Coram

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P. No.23864 of 2016 &
W.M.P.No.20482 of 2016

M/s.Arvinth Hospitals
Represented b its Managing Partner
Dr.K.Mani
No.17, Rangar Sannathi Street
Namakkal - 1. .. Petitioner

Vs

1.The Additional Commissioner
Office of the Commissioner of Central Excise
No.1, Foulks compound, Anai Road
Salem - 636 001.

2.The Joint Commissioner
Office of the Commissioner of Central Excise
No.1,Foulks Compound,Anai Road
Salem - 636 001. .. Respondents

Prayer :-Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari, calling for the records comprised Impugned Order-In-Original No.18/2016, dated 29.04.2016 on the file of the First respondent and to quash the same.

For petitioner .. Mr.Mohammed Shaffiq

For Respondents .. Mr.V.Sundareswaran
Sr. Standing Counsel

O R D E R

Heard Mr.Mohammed Shaffiq, learned counsel for the petitioner and Mr.V.Sundareswaran, learned Senior Standing Counsel appearing for Revenue and perused the materials placed on record including the counter affidavit filed by the respondents.

2.The order impugned in this Writ Petition is an Order-in-Original dated 29.04.2016, by which, the first respondent confirmed the demand for Service Tax, by classifying the nature of service rendered by the petitioner under the 'Health Checkup and Treatment Services' as defined under section 65(105)(zzzzo) of the Finance Act, 1994, apart from demanding interest and levying penalty.

3.Under normal circumstances, the Writ Petition will not be maintainable because the Order-in-Original was passed by the first respondent, and as against the same, the petitioner has an effective alternate remedy of filing an Appeal before the Commissioner (Appeals), under the provisions of the Finance Act, 1994. However, in the light of the pure question of law, which is raised by the petitioner, this Court is inclined to entertain the Writ Petition.

4.The petitioner is a Hospital specialized in Orthopaedic and Trauma care. The Government of Tamil Nadu vide G.O.Ms.No.49 dated 04.02.2009, framed a Scheme 'Kalaignar Kaapittu Thittam' (KKT), with a view to afford good medical treatment for the people in the lower income group, who were suffering from serious ailments, by providing treatment in Government as well as in private notified Hospitals. The Operative Guidelines of the Scheme was provided by a State Empowered Committee with the Chief Secretary as its Chairman and Heads of various Government Departments as its Members. The State Health Society was designated as the Implementing Agency of the Scheme. The Scheme was to be managed by M/s Star Health and Allied Insurance Company Limited, (STAR), who were selected by the Government, as their bid was for the lowest amount of premium. As per the Scheme evolved by the Government of Tamil Nadu, the entire premium has to be paid by the Government of Tamil Nadu to the STAR and the beneficiary family will be entitled to avail free medical treatment upto Rs.1 lakh in a block period of four years. The Scheme contains various other aspects to it, which may not be necessary for deciding the controversy raised in this Writ Petition.

5.The first respondent issued a show cause notice dated 08.04.2015, alleging that the petitioner has contravened the provisions of the Finance Act, 1994, and the Rules framed therein and called upon the petitioner to show cause as to why the proviso to section 73(1) of the Finance Act should not be invoked to demand service tax beyond the normal period and as to why service tax amount cannot be demanded from the petitioner payable for the service rendered under "Health Check up and Treatment Services" for the period from 01.07.2010 to 30.04.2011, apart from proposing to demand interests and levy penalty.

6.The petitioner submitted a detailed objection dated 5.7.2015. The first and foremost objection raised by the petitioner is that the KKT is a Welfare Scheme introduced by the Government of Tamil Nadu for the benefit of those who cannot afford costly medical treatment and that will not construed as an Insurance Scheme, but a Welfare Scheme. The term 'Insurance' used in the Welfare Scheme is a misnomer and thus would not fall under the definition of the term 'Insurance'. The 'Welfare Scheme' has not been approved by the Insurance Regulation and Development Authority of India (IRDA) and therefore, this is not an Insurance Policy in the eye of law; that KKT is not an Insurance Policy, but only a 'Welfare Scheme' and thus ought not to have been taxed under section 65(105)(zzzzo) of the Finance Act, 1994; that the Hospitals are service providers and the patients are service receivers; STAR is not service receiver, but, only administrator of the scheme, appointed by the Government of Tamilnadu on its behalf and there is no insurance policy or policy holder at all in the matter. Apart from the above preliminary objections, the petitioner contended that the gross receipts are inclusive of value of materials, consumables, medicines, implants used in the surgery, which are to be excluded from the taxable value. Therefore, it was contended that the notice proposing to impose service tax towards the service by way of treatment under KKT scheme is erroneous and beyond jurisdiction as it would not fall under section 65(105)(zzzzo) of the Finance Act, and there is no liability to pay service tax. Further it is contended that the levy of service tax is not warranted and the allegation of suppression and imposition of penalty is not sustainable.

7.The first respondent while adjudicating the show cause notice, in paragraph No.12, has referred to the objections raised by the petitioner. While rendering his findings, from paragraph No.14 onwards, committed a small error in framing the question to be decided, by stating that the issue to be decided is as to whether the service tax is payable on the entire amount received by the service provider or the amount retained by the service provider. However, the petitioner's contention is that they are not liable to be brought under the Service Tax Net and it appears that at no point of time, there was any concession availed by the petitioner on the quantum of the amount which has to be considered for the purpose of Health Service Tax.

8.The learned Additional Commissioner has made an elaborate exercise by referring to the statutory provisions and in particular section 67(1) of the Finance Act; Rule 5(2) of the Service Tax (Determination of Values) Rules, 2006, perused the copies of the sample bills of the petitioner and came to the conclusion that the dominant purpose of medical services and integral to such a service is a medical procedure that involves administering medicines and drugs and may involve, implants, stents, etc. The supply of these articles were integral to and essential for the treatment offered to patients and even if one may categorize these as incidental to the actual medical procedure, one cannot ignore that the medical procedure cannot be completed without supply of medicines, drugs, stents, implants, etc.

9.After referring the decisions of the Jharkhand High Court and Panjab and Haryana High Court, the first respondent came to the conclusion that the petitioner is a service provider, is liable to pay Service Tax on the gross amount received from the Insurance Company and the amount demanded in show cause notice is sustainable in law. In paragraph No.21 of the impugned order, the respondent has justified as to why the extendable period of limitation should be invoked, apart from other reasons in the other paragraphs for imposition of penalty.

10.However, one fundamental error which has crept in the impugned proceedings is that the authority while adjudicating the show cause notice did not examine the scope of the transaction between the petitioner and the Government/STAR. In fact that should have been the first endeavour of the adjudicating authority, since the petitioner raised a preliminary objection by stating that KKT is a Welfare Scheme and not an Insurance policy, no approval was obtained from IRDA and therefore, they will not fall within the definition of "Health Check up and Treatment Services". Thus, the primordial question would be whether while implementing the Welfare Scheme propounded by the State Government, if the work is entrusted to STAR would that by itself make it an Insurance Policy. The second aspect which has to be seen as to who is the insured, the specific case of the petitioner is that the recipient is the public, who are below the poverty line and there is no policy drawn between the beneficiary and STAR or the petitioner. Therefore, unless and until the Scheme has been examined in full, the respondent cannot come to a conclusion that the nature of transaction done by the petitioner would fall within the definition of section 65(105)(zzzzo) of the Finance Act. Therefore, this Court is of the view that such an exercise is required to be done before coming to the conclusion as to what is the nature of service rendered and whether it is an Insurance Policy or it is a Welfare Scheme. Thus, without examining the Government orders, the Scheme propounded by the Government arrangement with STAR, the petitioner and the

Government, conclusion could not have been arrived at and the case laws referred to could not have been made applicable without going into the facts and the terms of the subject schemes which may be distinct and different from those considered in the decision relied on by the respondent.

11.In the light of the above, this Court is of the view that the matter should be reconsidered by the respondent as indicated in the preceding paragraphs and such exercise should be done.

12.For all the above reasons, the Writ Petition is allowed, the impugned order is set aside and the matter is remanded to the respondents to reconsider the entire issues afresh, without in any manner being influenced by the findings recorded in the impugned order dated 29.04.2016. For the purpose of taking a holistic view of the entire matter, the petitioner should be directed to produce all the documents concerning the Scheme and if the petitioner is unable to produce certain documents, it will be open to the first respondent to call for the same from the competent authority of the State Government and thereafter, make a thorough examination of the factual aspects and after affording an effective opportunity of personal hearing to the petitioner, pass fresh orders on merits and in accordance with law. The petitioner is directed to co-operate in the adjudication and the first respondent shall endeavour to complete the entire exercise, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1.The Additional Commissioner
Office of the Commissioner of Central Excise
No.1, Foulks compound, Anai Road
Salem - 636 001.

2.The Joint Commissioner
Office of othe Commissioner of Central Excise
No.1,Foulks Compound,Anai Road
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+1cc to Mr.Mohammed Shattiq, Advocate Sr.60679
+1cc to Mr.V.Sundareswaran, Advocate Sr.60080

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W.M.P.No.20482 of 2016

cnr[co]
srg 25/11/2016