IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:02.11.2016

Date of Reserving the Order	Date of Pronouncing the Order
24.10.2016	02.11.2016

Coram

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

W.P.No.30142 of 2016
and
W.M.P.Nos.26110 and 31737 of 2016

VSA Vaniga Valagam
Represented by its Co-owner,
A.Rajendran
Veerapandiayar Nagar,
Salem - 636 004. .. Petitioner

vs

The Additional Commissioner of Central Excise
and Service Tax,
O/o of The Commissioner of Central Excise,
No.1, Foulk's Compound,
Anai Road, Salem - 636 001. .. Respondent

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari, calling for the records of the respondent in C.No.V/RIP/15/18/2015-ST.Adj. Dated 29.04.2016 and quash the same.

For Petitioner : Mr.R.Janakiraman
For Respondent : M/s.Hema Muralikrishnan
Senior Standing Counsel

ORDER

The petitioner called as VSA Vaniga Valagam represented by its co-owner A.Rajendran has filed this writ petition challenging the order in original dated 29.04.2016 passed by the respondent confirming the demand in the show cause notice dated 06.04.2015 and directing recovery of service tax of Rs.37,07,600/- along with other cess and charges under the category of “Renting of Immovable Property Service” under Section 73(2) of Chapter V of Finance Act, 1994 (hereinafter referred to as “the Act”); ordering recovery of appropriate interest and imposing penalty. As against the impugned order, the petitioner has an appellate remedy of filing an appeal before the Commissioner (Appeals-I), Coimbatore on payment of 7.5% of the service tax demanded. However, the petitioner has not availed such remedy and has filed this writ petition challenging the order in original.

2.Mr.R.Janakiraman, the learned counsel for the petitioner submitted that the impugned proceedings which commenced with the issuance of show cause notice dated 06.04.2015 has been issued in the name of a building and such demand is not sustainable as the provisions of the Finance Act does not provide for recovery of service tax from the property. Therefore, the impugned proceedings being without jurisdiction is liable to be set aside. It is further submitted that in terms of Section 65(90a) of the Act the charges is on the service provider and not on the property and hence each of the seven co-owners have to be considered as service providers for the purpose of invoking the provisions of the Act. Further it is submitted that in the hands of the co-owners service tax cannot be levied as the individual recipients are within the threshold limit and there is no liability under the Act. Further there was no definition of person under the Finance Act during the relevant period and service tax can be levied only on the service provider, namely, in the instant case the individuals who are the co-owners. To substantiate such contention, the learned counsel referred to Income Tax Assessment made in the names of the individual co-owners in respect of their share and income from the property (i.e.) VSA Vaniga Valagam is not an assessable entity under the Income Tax Act.

3.It is submitted that though show cause notice was issued initially and the petitioner had submitted reply in 2008, no action was taken and a fresh notice was issued on 06.04.2015 which is barred by time. Thus the contention of the petitioner is that treating all the seven co-owners as one entity for the purpose of levy of service tax on the rental income is without jurisdiction and the petitioner is entitled to challenge the impugned proceedings by way of this writ petition and when the authority is acting without jurisdiction, the petitioner cannot be subjected to lengthy proceedings and unnecessary harassment and this Court can interfere with such proceedings. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I, Calcutta and another reported in 1961 Vol. 41 ITR 191. The learned counsel also referred to the Family Arrangement Deed dated 15.07.2005 entered into between co-owners of the property to demonstrate as to how the rental income has been shared among the co-owners, etc.

4.Mrs.Hema Muralikrishnan, learned Senior Standing Counsel appearing for the respondent raised a preliminary objection regarding the maintainability of the writ petition on the ground that the petitioner has not availed the appellate remedy available under the Act. Without prejudice to such submission, it is submitted that the petitioner had earlier filed a writ petition before this Court in W.P.No.748 of 2009 challenging the constitutional validity of the enactment and the present impugned proceedings have been issued after final orders were passed by the Hon'ble Division Bench of this Court on 20.06.2014 upholding the validity of Section 65(105)(zzzz) and after the order was received another notice was issued to the petitioner and proceedings have been finalized. With regard to the jurisdictional aspect, it is submitted that the contention raised by the petitioner is wholly untenable and the respondent has sufficient jurisdiction to pass the order. It is further submitted that the property, VSA Vaniga Valagam is co-owned by seven persons who have joined together and constructed the building.

5.The seven co-owners have jointly leased various portions of the property to different persons and the rent is paid by the tenants to all the seven co-owners jointly. The rent so received in consolidated form is thereafter distributed among the seven co-owners in the agreed ratio. Therefore it is submitted that this does not mean that each of the seven co-owners are separately providing the service of renting of immovable property, but all of them are jointly providing the service of renting of immovable property and thus acted as an Association of Persons (AOP). Since no name was given to the AOP by the co-owners, the respondent has used the name VSA Vaniga Valagam for the AOP and this does not mean that the respondent has assessed the building for service tax by treating the building as an assessee. It is further submitted that the petitioner is under the misconception that the building is treated as an assessee, whereas, the notice has not only been issued to the AOP, namely, VSA Vaniga Valagam but also to each of the co-owners separately as co-owners are jointly and severally liable to pay tax liability of the AOP. Further it is submitted that the petitioner is estopped from raising such contention since they themselves filed the earlier writ petition in the name of VSA Vaniga Valagam in W.P.No.748 of 2009. That apart, the petitioner themselves have admitted in their reply dated 05.05.2015 that the assessee is an AOP consisting of seven co-owners.

6.With regard to the contention that all the seven co-owners have to be separately treated as service providers and if done they are within the threshold limit and hence there is no liability under the Act, it is submitted that the seven co-owners have not provided the service of renting of immovable property separately or individually, but have provided them jointly and the consolidated income received is shared among themselves in the agreed ratio. Therefore, it does not mean that the co-owners have individually provided the service of renting of immovable property. In fact the seven co-owners have appointed a Power Agent to act on their behalf to enter into lease agreements, etc. Thus the service provided by the seven co-owners by renting of immovable property is an indivisible service in the name of VSA Vaniga Valagam which is a joint entity of seven co-owners. With regard to the position prior to July 2012 which do not contain the definition of person, it is submitted that the respondent rightly referred to the provisions of the General Clauses Act, 1897 and passed a detailed order and the interpretation given by the respondent is perfectly valid. Further with regard to the invocation of extended period of limitation, it is submitted that since there is suppression of turnover by the AOP, the extended period of limitation is clearly invocable. Therefore it is submitted that if the petitioner is aggrieved they should file an appeal before the Appellate Authority as provided under the Act.

7.In reply, the learned counsel for the petitioner submitted that the notice was sent only to the property VSA Vaniga Valagam and a copy of the notice has been marked to the co-owners and the petitioner had sent a reply. Even earlier, the petitioner when they filed a writ petition in W.P.No.748 of 2009 they contended that they are not an assessable entity in spite of that show cause notice dated 06.04.2015 was again issued to VSA Vaniga Valagam treating it as service provider. Further the respondent has never used the term AOP anywhere in the notice and for the first time, he is using the same in the counter affidavit that the assessment is on AOP contrary to the notice and order and the assessment having not been done in the status of AOP it is not open to the respondent to say that the assessment is on AOP. While admitting that in the reply dated 05.05.2015 to the show cause notice dated 06.04.2015 the petitioner stated that “The Assessee is an AOP consisting of co-owners......”. But while filing an additional written submissions on 14.03.2016 the petitioner took a different stand that there is no AOP. Further it is submitted that the Income Tax Department has accepted that there is no AOP and that the co-owners do not satisfy conditions precedent to constitute a AOP. It is further submitted that reference to the General Clauses Act is untenable since the enactment under which the petitioner has been proceeded with is a taxation statute and it is not open to the Taxing Authorities to import the definition from the General Clauses Act. Further, the amendment to the Act came into force only in 2012 and no assessment can be made prior to 2012 in the status of AOP. In support of such contention, reliance was placed on the decision of the Hon'ble

Division Bench of this Court in Commissioner of Income Tax vs. G.Murugesan and Bros. Report in 1969 72 ITR 0696.

8.Heard the submissions of the learned counsel appearing on either side and carefully perused the materials placed on record.

9.The petitioner seeks to justify their action in invoking extraordinary jurisdiction of this Court and challenging the order in original by filing this writ petition alleging that the respondent has no jurisdiction to pass the impugned order. The plea of lack of jurisdiction is not raised on the jurisdiction of the respondent in exercise of his powers under the provisions of the Finance Act, 1994, rather it is by contending that the petitioner VSA Vaniga Valagam is a property and cannot be an assessee under the provisions of the Finance Act. Therefore, it is contended that the property cannot be a service provider and cannot be assessed to tax. That the property cannot be made liable to pay tax under the head of "Renting of Immovable Property Service" as the property is owned by seven co-owners and if at all the persons to be treated as service providers are the individual co-owners and if done so, they fall within the threshold limit and not liable to pay service tax.

10.This is the second time the petitioner is before this Court. Earlier this petitioner filed W.P.No.748 of 2009 wherein they have sought for a writ of Declaration to declare the provision of Clause (90a) of Section 65 and Sub-Clause (zzzz) to Clause 105 of Section 65 of the Finance Act inserted by Finance Act, 2005 with effect from 01.06.2007 as ultra vires and violative of Article 14, 19(1) and 265 of the Constitution of India. A Division Bench of this Court, to which I was a party, by a common order dated 20.06.2014 dismissed the writ petition. Even prior to the filing of writ petition, show cause notice was issued to the petitioner and the petitioner had submitted a reply, but before orders could be passed the constitutional validity of the provision was questioned by the petitioner before this Court and ultimately the writ petition was dismissed on 20.06.2014. During the pendency of the said writ petition, an order of stay was in force. After dismissal of the writ petition, notice dated 06.04.2015 was issued to VSA Vaniga Valagam and the seven co-owners, in all eight noticeeses.

11.At this juncture, it has to be pointed out that in the earlier writ petition the petitioner was VSA Vaniga Valagam, Veerapandiayar Nagar, Salem - 636 004 and in the instant writ petition the petitioner is shown as VSA Vaniga Valagam represented by its co-owner A.Rajendran, Veerapandiayar Nagar, Salem - 636 004. Thus the petitioner appears to have taken slightly different stand in describing itself. The contention raised by the petitioner is that in respect of their reply dated 07.11.2014, notice was issued in the name of VSA Vaniga Valagam which is the name of the building and only a copy of the notice was marked to the co-owners. On perusal of the show cause notice dated 06.04.2015 this Court is of the view that apart from VSA Vaniga Valagam and others, namely, A.Ranganayaki and six others are all co-noticees. Therefore to that extent the contention raised by the petitioner deserves to be rejected. The question therefore to be decided is whether the "Renting of Immovable Property Service" is rendered by VSA Vaniga Valagam which is owned by seven persons stated to be represented by a Power Agent who has leased out the property, income is collected consolidatedly and shared among the co-owners at the agreed ratio in terms of the Family Arrangement Deed dated 15.07.2005.

12.In the counter affidavit a stand has been taken that VSA Vaniga Valagam is an Association of Persons. The petitioner would contend that at no earlier point of time the respondent took such a stand and for the first time it is stated in the counter affidavit. However, this submission appears to be factually incorrect since in paragraph 3.10 of the show cause notice the respondent would stated that all the seven co-owners are in the capacity of Association of Persons. That apart, the petitioner while submitting their reply dated 05.05.2015 admitted that the assessee is an AOP consisting of seven co-owners. The petitioner now seeks to wriggle out all such stand by referring to additional written submissions made before the respondent on 14.03.2016.

13.It is highly doubtful as to whether the petitioner could wriggle out from the stand taken in the reply dated 05.05.2015. In respect of the income received jointly, the assessment of the property tax have done under three assessments and all other factors have weighed in the minds of the respondent while passing the impugned order. Thus the question of jurisdiction raised by the petitioner is not one which impinges upon the authority of the respondent to issue show cause notice, rather to contend that the petitioner VSA Vaniga Valagam cannot be an assessee under the provisions of the Finance Act. As mentioned earlier the show cause notice was issued to VSA Vaniga Valagam and seven others and for the first time the petitioner describes themselves as VSA Vaniga Valagam represented by a co-owner. This was not the stand taken while submitting the reply dated 05.05.2015 and the additional written submission dated 14.03.2016. Therefore, the petitioner has sought to improve upon their submission by mentioning a different cause title than what was mentioned by them before the respondent as well as before this Court in the earlier writ petition. Thus the issue involved in the instant case revolves upon disputed and complicated questions of fact and the plea of jurisdiction raised by the petitioner essentially involves adjudication into facts and it is not purely a jurisdictional aspect as brought forward in several other cases including that of the decision in the case of Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I, Calcutta and another reported in 1961 Vol. 41 ITR 191. Therefore this is a fit case where the petitioner should be relegated to avail the appellate remedy and the writ petition cannot be entertained to adjudicate disputed questions of facts raised by the petitioner.

14.In the light of the above, the writ petition is held to be not maintainable and accordingly, the writ petition is dismissed. Liberty is granted to the petitioner to file an appeal before the Commissioner (Appeals-I), Coimbatore and while entertaining the appeal and computing the period of limitation, the period during which this writ petition was pending i.e. from 26.08.2016 to till the date of receipt of the certified copy of this order shall stand excluded. Needless to state that the appeal shall be decided uninfluenced by any observations made in this order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

To

The Additional Commissioner of Central Excise
and Service Tax,
O/o of The Commissioner of Central Excise,
No.1, Foulk's Compound,
Anai Road, Salem - 636 001.

+1 cc to M/s.R.Janakiraman,advocate,sr.62919

+1 cc to M/s.Hema Murali Krishnan,advocate,sr.62591.

ssk(co)
krd 23/11

W.P.No.30142 of 2016
and
W.M.P.Nos.26110 and 31737 of 2016