In the High Court of Judicature at Madras

Dated : 05.10.2016

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.35241 of 2016
& WMP.Nos.30357 & 30358 of 2016

M/s.Sundaram Finance Ltd. ...Petitioner

Vs

The Commissioner, LTU Audit
Circle, Anna Nagar West Extension,
Chennai-101. ...Respondent

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records pertaining to the impugned proceedings in No.LTUAC/CHN/02/2016-(C) dated 9.6.2016 in C.No.III/10/58/2015-Audit issued by the respondent herein, quash the same as wholly arbitrary, unreasonable and ultra vires the Service Tax provisions of the Finance Act 1994 and consequentially forbear the respondent, his officers, men and agents from assessing, demanding, collecting and recovering the amounts arising out of the profit on sale of securitization by the petitioner herein.

For Petitioner : Mrs.Pushya Sitaram, SC for
Mr.Arun Kurian Joseph
For Respondent : Mr.K.Ravi, CGSC

ORDER

Mr.K.Ravi, learned Central Government Standing Counsel accepts notice for the respondent. Heard both.

2. The petitioner is an assessee on the file of the respondent under the provisions of the Finance Act and the challenge in this writ petition is to a show cause notice dated 9.6.2016 for the alleged non payment of service tax on charges/fees received for and after securitization of future receivables.

3. At the very commencement of the arguments by the learned Senior Counsel appearing for the petitioner, this Court posed a question as to why this writ petition should be entertained as

against a show cause notice.

4. The learned Senior Counsel appearing for the petitioner has submitted that the respondent has invoked the extended period of limitation and issued a show cause notice alleging as if the petitioner has suppressed the nature of transaction whereas factually, it is not so and that the petitioner maintains high ethical standards in their accounting.

5. The learned Senior Counsel has referred to a letter sent by the Superintendent of the respondent Department to the petitioner on 7.7.2010 and submitted that the Department was very well aware of the nature of transaction and stated that service tax is not payable. Therefore, it is submitted that the extended period of limitation could not have been invoked in the case of the petitioner.

6. It is also submitted that in the year 2010, a show cause notice was issued to the petitioner dated 2.12.2010 as to why service tax should not be demanded under the head 'business auxiliary services' provided during the period from 2007-08 to 2009-10 and should not be demanded under Sections 65 and 68 read with Proviso to Section 73(1) of the Finance Act apart from proposal to demand interest and levy penalty. The petitioner submitted their reply to the show cause notice and ultimately, an order came to be passed, which appears to have confirmed the proposal in the show cause notice, as against which, the petitioner has preferred an appeal before the Customs, Excise and Service Tax Appellate Tribunal, which, in turn, granted an order of interim stay.

7. It is also submitted that the Central Board of Excise and Customs released a manual in 2012 titled 'Taxation of Services : an Education Guide', in which, the answer to questions 2.8.8 and 2.8.9 would be very relevant and would directly apply in favour of the petitioner and there is absolutely no basis for issuing the show cause notice. The learned Senior Counsel referred to the copy of the sample of servicer agreement and the copy of the sample of deed of assignment, both dated 22.1.2013. By referring to the definition of the term 'servicer fee', it is submitted that whatever service element is there in the transaction, the petitioner has been remitting the service tax periodically and there is no default on this aspect.

8. Hence, it is also submitted that the nature of transaction of the petitioner is, in fact, to sale of the property with full rights being transferred in the assignee and that except for the petitioner, no other non banking financial institution, which has been carrying on similar line of business activity, has been put to such problems and the impugned show

cause notice would amount to harassment.

9. I have heard Mr.K.Ravi, learned Central Government Standing Counsel for the respondent.

10. As pointed out earlier, the order impugned in this writ petition is a show cause notice. The legal principle is that this Court, exercising jurisdiction under Article 226 of The Constitution of India, should not interdict proceedings at the stage of show cause notice unless and until it is clearly established that the show cause notice has been issued by an incompetent authority i.e. to say it is without jurisdiction or it is so obnoxious and infringes a provision of law or a settled legal principle.

11. The endeavour of the learned Senior Counsel for the petitioner to state that the show cause notice amounts to harassment, that the question of suppression of fact will never arise and that there is no reason for invoking the extended period of limitation, are all essential questions of fact and further, the question as to whether the letter given by the Superintendent of the respondent Department to the petitioner dated 7.7.2010 would be an answer to the allegation in the show cause notice is a matter to be adjudicated. That apart, it cannot be decided at this stage of the matter as to whether the reason assigned in paragraph 46 of the impugned show cause notice alone is the reason for invoking the extend period of limitation.

12. The learned Central Government Standing Counsel appearing for the respondent has referred to various other paragraphs of the impugned show cause notice, more particularly paragraphs 35, 36, 37 and 45 to show that the issues involved in the matter are pure questions of fact for the Authority to consider.

13. Thus, taking into consideration the overall circumstances of the case and taking note of the submissions made on either side, this Court is of the considered view that the show cause notice cannot be interdicted at this stage of the matter on the grounds canvassed by the petitioner. This is so because the grounds raised are all pure questions of fact and the impugned show cause notice having been issued under a Taxation Statute, as held by the Division Bench in the case of Nivaram Pharma Pvt. Ltd. Vs. The Customs, Excise and Gold Control Appellate Tribunal [reported in (2005) 2 MLJ 246] following various decisions of the Supreme Court that the Court, exercising jurisdiction under Article 226 of The Constitution, should not interdict proceedings, the party should be directed to avail hierarchy of remedies available under the statute.

14. For the above reasons, this Court is not inclined to entertain the writ petition as against the impugned show cause notice.

15. Accordingly, the writ petition is dismissed as not maintainable. No costs. Consequently, the above WMPs are also dismissed.

16. It is made clear that the findings rendered by this Court in the preceding paragraphs are only for the limited purpose to decide as to whether the writ petition is maintainable or not and these findings will, in no manner, prejudice the rights of the petitioner while submitting their reply to the show cause notice and while the show cause notice is adjudicated.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

To
The Commissioner, LTU Audit Circle,
Anna Nagar West Extension,
Chennai-101.

+1 cc to M/s.Arunkurian Joseph Advocate sr 57595

+1 cc to K.Ravi Senior Standing Counsel sr 57605

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