In the High Court of Judicature at Madras

Dated : 29.11.2016

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.41759 of 2016 & WMP.No.35752 of 2016

M/s.Brizo Global Logistics Pvt. Ltd., rep.by its AGM (Finance) ...Petitioner

Vs

The Principal Commissioner of Service Tax, Service Tax I Commissionerate, Anna Nagar, Chennai-40. ...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 of the respondent in the impugned Order-in-Original No.CHN-SVTAX - 001- COM - 28 & 29-2016-17 dated 15.9.2016, quash the same as the Respondent has not followed the circular and the decision same is contrary to the law laid down by the Supreme Court in the case of Kamalakshi Finance Corporation Limited (1991) 55 ELT 433 and direct the respondent to follow the decision in the case of Greenwich Meridian Logistics India Pvt Ltd and the Circular No. 197/ 7/ 2016 - Service Tax dated 12.08.2016 issued by the Central Board of Excise & Customs which is directly applicable to the case of the petitioner.

For Petitioner : Mrs.Radhika Chandra Sekhar
For Respondent : Mrs.Hema Muralikrishnan, SPC

ORDER

Mrs.Hema Muralikrishnan, learned Senior Panel Counsel accepts notice for the respondent. Heard both.

2. The petitioner has filed this writ petition challenging the Order-in-Original dated 15.9.2016 passed by the respondent, in and by which, the respondent confirmed the demand of service tax payable during the period from December 2013 to March 2015 under Section 73(2) read with Section 73(1) of the Finance Act, 1994. Further, the petitioner has been directed to pay interest under Section 75 apart from imposing penalties under Sections 77(2) and 76 of the said Act.

3. The petitioner is a freight forwarder and is also registered as a multi model transport operator, engaged in the business of providing transport for export of goods from India and import of goods into India. The petitioner would state that they collect cargo from shippers, arrange carriage to final destination and hand over the consignment at the customer's door step for both import and export. The petitioner is a registered service provider and discharges service tax wherever applicable.

4. The respondent issued a show cause notice with a statement of demand proposing to impose service tax during the relevant period on the ground that differential amount of ocean freight collected from the customers is taxable under the head 'business support services' for the period prior to 1.7.2012 and for the period post 1.7.2012, the transaction does not fall

within the purview of Rule 10 of the Place of Provision Rules.

5. The petitioner filed their objections to the proposal stating that the difference between the selling price and the purchase price is nothing but profit or loss and cannot be subjected to service tax, that the activity is only purchase and sale of cargo space, that the services are provided by the petitioner to the clients on a principal to principal basis and not as an agent of any other person and that ocean freight itself is not subject to service tax. It was further contended that the petitioner is a multi model transport operator and that such services are not notified under Section 65(105) of the Finance Act, 1994 and hence, the same is not liable to be taxed.

6. The petitioner referred to the decision of the respective Customs, Excise and Service Tax Appellate Tribunals in the case of ***Bax Global India Ltd. Vs. C.S.T., Bangalore [reported in (2008) 9 STR 412 (Trl.- Bang)]*** and ***Greenwich Meridian Logistics (I) Pvt. Ltd. Vs. C.S.T. Mumbai [reported in (2016) 43 STR 215 (Tri.- Mumbai)].*** The petitioner filed additional submissions dated 16.8.2016 by relying upon the circular issued by the Central Board of Excise and Customs dated 12.8.2016 and stating that they are squarely covered by the circular and that the proposal in the show cause notice is not tenable.

7. The respondent, by the impugned order, confirmed the proposal in the show cause notice on the ground that the activity does not qualify to be a sale for the reason that what are claimed to be sold namely space are not

goods; that the petitioner has not produced any copy of the multi model bill of lading and a sample contract/e-mail correspondence; that the case law cited by the petitioner cannot be taken into consideration, as the petitioner has not provided documents, that the Place of Provision Rules does not provide that the place of provision of a service is beyond taxable territory, when both the service receiver and the service provider are located within the taxable territory, that the circular of the Central Board of Excise and Customs dated 12.8.2016 cannot be made applicable as service of booking space to arrange for the transport of export cargo is not the same as the service of the transport itself, that no contract bill of lading or document evidencing that the petitioner takes the responsibility for safe carriage of goods was produced and that Rule 3 of the Place of Provision Rules is applicable, which prescribes that the location of the service shall be the location of the recipient of the service and the claim of the petitioner that the freight expenses are more than the freight income is not acceptable.

8. The petitioner is before this Court challenging the impugned order on the ground that the respondent failed to take into consideration the circular of the Central Board of Excise and Customs, on which, reliance was placed and also the above referred to decisions of the respective Tribunals and the documents, which were placed before the respondent in the form of annexure to the reply dated dated 24.3.2014. It is further submitted that the respondent, in the impugned order, accepted that the petitioner is an

intermediary. In such circumstances, the respondent ought not to have confirmed the proposal in the show cause notice.

9. Before examining the correctness of the submissions made by the learned counsel for the petitioner, the first hurdle that the petitioner should cross is as to why the writ petition should be entertained, when the petitioner has an effective alternate remedy of appeal before the Customs, Excise and Service Tax Appellate Tribunal.

10. The answer to this question, which was posed by this Court, is by contending that the respondent ignored the circular issued by the Central Board of Excise and Customs and the decisions of the Tribunal and on the admitted facts, the proposal in the show cause notice, could not have been confirmed. In the preceding paragraph, this Court pointed out the grounds, particularly the grounds, on which, the proposal in the show cause notice has been confirmed.

11. Therefore, the respondent referred to the circular and while adjudicating the show cause notice, gave an interpretation as to how the circular is not applicable to the petitioner's case. The respondent further stated that on account of non furnishing of documents, the case laws cannot be referred to.

12. In the considered view of this Court, to adjudicate the correctness of the impugned order, necessarily the disputed questions of fact have to be gone into. It is not the case of the petitioner that the type of transaction is

covered by the decision of the Tribunal or the High Court or the Hon'ble Supreme Court. The petitioner seeks to interpret the nature of activity done by them and would seek umbrage under the circular dated 12.8.2016 and also relied upon certain decisions of the Tribunals.

13. Firstly, the factual issues are to be thrashed out, which obviously cannot be done in a writ petition and the nature of the activity done by the petitioner has to be analyzed threadbare. The Tribunal is empowered to adjudicate into the factual issues and that is why the Statute has provided a remedy by way of an appeal to the Tribunal.

14. The learned counsel for the petitioner submits that if they have to approach the Tribunal, they are required to comply with the mandatory condition of pre-deposit so as to be entitled to pursue the appeal.

15. This condition namely the condition of mandatory pre-deposit, being a statutory condition, cannot be ignored by the petitioner and that can hardly be a reason for the petitioner to bypass the appeal remedy available under the Statute. Therefore, this Court is of the firm view that the petitioner should necessarily exhaust the above remedy available under the Statute by approaching the Tribunal under the Act. Hence, the writ petition is held to be not maintainable.

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

17. However, the petitioner is granted liberty to approach the Tribunal. It is needless to state that the petitioner shall comply with the mandatory condition of pre-deposit at the time of filing the appeal. On filing of such appeal, the Tribunal shall entertain and dispose of the appeal without in any manner influenced by the observations contained in this order.

29.11.2016

Internet : Yes

To
The Principal Commissioner of Service Tax, Service Tax I Commissionerate,
Anna Nagar, Chennai-40.

RS

T.S.SIVAGNANAM,J

RS

WP.No.41759 of 2016&
WMP.No.35752 of 2016

29.11.2016