

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION (T) NO. 60 OF 2017

1. M/s S. Kumar's Associates G.S. Compound New Bus Stand, T.P. Nagar. Korba-495677 (C.G.), proprietor Smt. Priya Agrawal, W/o Mr. Sanjay Agrawal, aged about 41 years, resident of G.S. Compound, Transport Nagar, Korba-495677 (C.G.), through its power of attorney holder, Mr. Sanjay Agrawal, S/o Mr. Gaurishankar Agrawal, aged about 43 year's resident of G.S. Compound, Transport Nagar, Korba-495677 (C.G.)
2. Smt. Priya Agrawal, aged about 41 years, w/o Mr. Sanjay Agrawal, resident of G.S. Compound, Transport Nagar, Korba- 495677 (C.G.)

... Petitioners

Versus

1. Additional Commissioner (Preventive), Customs, Central Excise & Service Tax, Bilaspur office of the Commissioner Customs & Central Excise, Bilaspur, Central Excise Building, Dhamtari Road, Tikrapara, Raipur (C.G.)- 492001
2. Union of India, through its Secretary, Ministry of Finance Department of Revenue, North Block (New Delhi) - 11001

... Respondents

For Petitioners	:	Mr. Siddharth Dubey, Advocate.
For Respondents	:	Mr. Vinay Pandey, Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

21/07/2017

1. By way of the present petition under Article 226 of the Constitution of India, the Petitioners have sought for quashment of Annexure P-1, dated 21.3.2017, passed by Respondent No.1-Additional Commissioner (Preventive), whereby he has issued a garnishee notice to the management of South Eastern Coalfields Limited (SECL) asking the SECL authorities to henceforth deposit whatever amount due payable to the Petitioners in due course to be deposited as service tax in the government exchequer under the head of mining service.
2. The said notice has been issued invoking the powers under Section 87 and Section 87(b)(i) of the Finance Act, 1994. It is also relevant to mention that the said notice is in respect of the assessment year 2016-17.

3. The allegation against the Petitioners is that they have not paid the service tax for quite some time including the year 2016-17 and therefore it has been necessitated for the department to issue a letter to the garnishee for recovery of the dues by collecting those money which the management of SECL was to pay to the Petitioners.

4. Learned Counsel for the Petitioners at the outset submits that the entire case of the department in initiating proceeding against the Petitioners for alleged default of service tax is bad in law, misconceived and totally unsustainable. According to the Petitioners, till date no proceeding whatsoever has been drawn against the Petitioners so far as the assessment year 2016-17 is concerned. According to him, procedure has been duly envisaged and prescribed under the Finance Act for determining the alleged default of non-payment of service tax. He further submits that the said Act also provides for provision of recovery of default in payment of service tax. According to the Petitioners, before issuance of an order of recovery, even before a garnishee notice is sent, so far as the applicability of the Act is concerned there has to be an assessment order first passed and only then can they initiate such proceedings. According to the Petitioners, no show cause notice whatsoever has been issued to the Petitioners for the assessment year 2016-17 and no final adjudication has been done by the Respondents in determining the dues payable by the Petitioners for the year 2016-17 and in the absence of any proceeding being drawn either determining the liability part, notice issued to the garnishee is bad in law and the order of freezing the account of the Petitioners also is bad in law. In view of the same, the Petitioners prayed for the quashment of the impugned order and to issue appropriate proceeding against the Petitioners and then pass an order.

5. Learned Counsel for the Respondents on the contrary opposes the petition and submits that it is a case where there is a clear breach on the part of the Petitioners inasmuch as not depositing the service tax and therefore the petition deserves to be rejected. According to him, the impugned order dated 21.3.2017 is nothing but an order of freezing of amount payable to the Petitioners for their known source of income. He however submits that the said letter is only a letter of intimation of depositing whatever amount payable to the Petitioners by the department to be deposited directly to the Department. He also refers to the reply that they have filed, referring to a show cause notice.

6. However, undisputedly, the said show cause notice pertains to a proceeding drawn for the default of the financial year 2011-12 to 2015-16 and the Counsel for the Respondents was not able to justify on this aspect as to whether for the financial year 2016-17 any show cause notice or an assessment proceeding have been initiated against the Petitioners or not.

7. Counsel for the Respondents only opposes to the extent that the Petitioners are continuous defaulters since long and they have been avoiding payment of service tax that they are otherwise liable to pay. The assessment could not be finalized and therefore for the subsequent period also they are defaulting, which led to the issuance of the impugned order to the management of SECL.

8. Having heard the submissions made on either side and on perusal of the documents enclosed along with the petition and the reply of the Respondents, undisputedly, in the year 2016-17, there has been no proceeding drawn against the petitioner-firm by the Respondents for assessment of the default in payment of service tax. It is also not in dispute that no show cause notice also has been issued to the Petitioners for the

default, if any, for the year 2016-17. The show cause notice which is being referred to by the Respondents in their reply, is for the assessment year 2011-12 to 2015-16. This, in the opinion of this Court, is not proper, legal or justified. The Finance Act clearly envisages certain provisions of law which deal with the taxable service for charging the service tax. Section 72 deals with the provision for best judgment assessment, which a person or an establishment which is liable to pay service tax is supposed to do. The best judgment assessment is subjected to special audit, and in the event of any default, notices are issued to the concerned to explain and on receipt of reply, a proceeding is drawn and it is finally adjudicated upon and if it appears to be a default, the authorities concerned are empowered with the powers to impose interest as well as penalty. Section 87 deals with the recovery on any amount due to Central Government.

9. A perusal of these two Sections would clearly reflect that there has to be a proper legal proceeding drawn so far as default of payment in service tax is concerned and an order has to be passed against the concerned and only then can the recovery proceeding or freezing proceeding or the order of freezing could have been passed. In the instant case, since no proceeding has been drawn, no show cause notice has been issued, no determination has been done, the impugned order (Annexure P-1) asking the SECL to detain the amount payable to the petitioner-firm until the amount is paid, is not sustainable and the same is accordingly set aside/quashed.

10. Needless to mention that quashment of Annexure P-1 is only to the extent of any order if it has been passed in respect of the default of payment of service tax for the year 2016-17. At the same time, the Respondents are also entitled to initiate appropriate proceeding under the Act after due issuance of a show cause notice and permitting the

Petitioners to participate in the assessment proceedings and then appropriate action and if required the same nature of order like the impugned order can also be issued.

11. The writ petition stands accordingly allowed and disposed off.

Sd/-
(P. Sam Koshy)
Judge

/sharad/