

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4235 OF 2011
WITH
CIVIL APPLICATION NO. 2587 OF 2013

Chanakya Mandal	}	
A trust registered under the	}	
provisions of the Bombay	}	
Public Trust Act, through its	}	
trustee Avinash	}	
Dharmadhikari, having its	}	
registered office at:- 1557,	}	
Sadashiv Peth, Near Navi	}	
Peth Vitthal mandir,	}	
Pune 411 030.	}	Petitioner

versus

1. Union of India	}	
(summons to be served on	}	
the learned Government	}	
Pleader appearing for State	}	
of Maharashtra under	}	
Order XXVII, Rule 4 of	}	
the Code of Civil Procedure,	}	
1908)	}	
	}	
	}	
2. The Secretary,	}	
Ministry of Finance,	}	
Government of India,	}	
New Delhi	}	
(summons to be served on	}	
the learned Government	}	
Pleader appearing for State	}	
of Maharashtra under	}	
Order XXVII, Rule 4 of	}	
the Code of Civil Procedure,	}	
1908)	}	
	}	
	}	
3. Superintend (HPU-III)	}	
Central Excise, Pune	}	
(summons to be served on	}	
the learned Government	}	

Pleader appearing for State }
of Maharashtra under }
Order XXVII, Rule 4 of }
the Code of Civil Procedure, }
1908) }

Mr. Anil V. Anturkar - Senior Advocate
i/b. Mr. Sugandh B. Deshmukh and
Mr. Ajinkya Udane for the petitioner.

Mr. M. Dwivedi with Mr. Vipul A.
Bajpayee for the respondents.

**CORAM :- S. C. DHARMADHIKARI &
PRAKASH. D. NAIK, JJ.**

DATED :- APRIL 18/19, 2017

ORAL JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. By this petition under Article 226 of the Constitution of India, the petitioner seeks a writ of mandamus or any other writ, order or direction in the nature thereof so as to declare that the explanation added to section 65(105)(zzc) by the Finance Act 14 of 2010 dated 8th May, 2010 with retrospective effect from 1st July, 2003 is unconstitutional and ultra vires Article 14 of the Constitution of India.

2. The petitioner before us proceeds on the footing that the above explanation is added to section 65(26) and (27) of the Finance Act, 1994. Rather, it is an explanation added to the definition of the term "taxable service". We are concerned with

that part. The term that is defined for the purpose of understanding a taxable service, namely “commercial training or coaching”, “commercial training or coaching centre”. That is evident from a reading of the Act itself, is for the purpose of the expressions, which are used in the term “taxable service”. It is that expression which refers to the commercial training or coaching centre.

3. Therefore, the Board of Excise and Customs ("CBEC" for short) may be making a reference to section 65(26) and (27), but the explanation is not added thereto.

4. The petitioner before us is a Trust registered under the Bombay Public Trust Act, 1950. The petitioner Trust claims that it provides, not necessarily by charging a fee, the necessary training and coaching so as to enable the students to appear for the Indian Administrative Services and other civil services examinations.

5. The petitioner states that in terms of a brochure, copy of which is annexed as Annexure 'B' to the petition, the Trust carries on the activities and more particularly set out in the said brochure. The brochure shows as to how the petitioner Trust has conceived the courses for complete development. In fact, a

complete development centre for self motivated youth is what is essentially spelt out from these activities. The courses are for UPSC examination, MPSC examination etc. The brochure would indicate as to how this Trust enables these students to gain a certain degree of confidence and face these competitive examinations. The petitioner points out that profit generation is not the motive or the main or predominant aim. Therefore, admission to the institution is never denied at any time on the ground that the student is not in a position to pay the fees. The particulars of students enrolled in the last three years have been set out in Annexure 'C' to the petition. Thus, the case of the petitioner is that it cannot fall within the net of service tax. However, on 27th August, 2010, a letter was addressed by the Superintendent of Central Excise, Pune-III to the petitioner, copy of which is annexed as Annexure 'D' to the petition. This letter refers to a circular dated 28th January, 2009 of the Central Board of Excise and Customs. That circular refers to the levy of service tax on educational institutions. The letter refers to the amendment in regard to non-levy of service tax on institutions, which are not profit making. However, after the Finance Act of 2010, an explanation has been inserted as set out above. That has been inserted with retrospective effect. It is in these circumstances that the attention of the petitioner was invited to

this amendment and the petitioner was called upon to furnish the details of the fees collected for the respective courses from 2005-06. The petitioner also refers to a letter dated 15th October, 2009. Thus, these were all reminders to the petitioner. The petitioner responded to the same by addressing a letter dated 28th October, 2010 and giving the information as demanded. The petitioner placed on record two points for consideration of the authority, namely that the petitioner is a educational public Trust and hence, service tax was not leviable on its activities, at least in 2010. This point was previously discussed with the officers of the second respondent while forwarding the documents. The petitioner then invites the attention of this court to Annexure 'F' to this petition, which, according to the petitioner, seeks to bring into focus the amendments and effected to the Act. By this communication, copy of which is at page 118 of the paper book, the petitioner was reminded that as far as the unsigned statements/data submitted, it is not clear whether all amounts pertaining to commercial training or coaching have been considered. The data needs to be submitted only after it has been signed by a responsible person. There has to be a complete reconciliation with the figures reflecting in the balance-sheet. The petitioner was directed to convey the name and designation of a responsible person whose statement can be recorded under

section 14 of the Central Excise Act, 1944 as made applicable to service tax under section 83 of Chapter V of the Finance Act, 1994.

6. The petitioner then purported to comply with this reminder by pointing out that the information which has been forwarded is complete and therefore, it was maintained that no further compliance with the requisitions contained in this letter is necessary.

7. Then, the petitioner highlighted the provisions of the Finance Act, 1994 and we would come to them a little later. The petitioner also relied upon Annexure 'H' which is a copy of the circular dated 28th January, 2009 issued by the Board. Thus, the petitioner maintains throughout that the essential criteria would be whether the educational institution predominantly work for profit or otherwise. In no case it can be termed as a trade or a business, but at best an occupation. Therefore, the profit is generated incidentally and that is not the only purpose for which the institution is established and functions accordingly. It is to impart education, which is a noble activity.

8. The petitioner has, in the process, relied upon certain decisions of the Customs, Excise and Service Tax Appellate

Tribunal (CESTAT) and which have taken a view that institutions like the petitioner cannot be brought within the purview of the service tax leviable under the Finance Act, 1994.

9. Concededly, this view is taken by certain tribunals prior to 2010 and we need not refer to that in great details. The petitioners are also highlighting the fact that they are registered under the provisions of section 12 of the Income Tax Act, 1961.

10. Mr. Anturkar learned senior counsel appearing for the petitioner invited our attention to section 65(26) and (27) of the Finance Act, 1994. He read out to us the passages and paragraphs from the order of the tribunal functional at Chennai, taking a particular view of the levy. Mr. Anturkar does not dispute that in 2010 the Act was extensively amended and to insert an explanation. However, Mr. Anturkar would contend that this amendment is not retrospective. If it is held to be retrospective, then, merely because the legislature holds a particular view, it cannot overturn or reverse a binding judgment of a court of law. It has to alter the basis or foundation of the law on which the judgment has been delivered. That has not been done and simplicitor overruling of a binding decision rendered by a competent court is impermissible.

11. Mr. Anturkar, alternatively, submits that the language of this explanation and particularly the words employed “hereby declared” would demonstrate as to how the legislature intended not to give retrospective effect to the 2010 amendment. The amendment is thus but prospective.

12. Further alternatively, he would contend that if the amendment is construed as having retrospective effect, then, that clearly violates the mandate of Article 14 of the Constitution of India. Mr. Anturkar would submit that if the predominant intent is not to earn profit, then, the activity can be said to be charitable or philanthropic only. Further, educational institutions do not work or operate with any business motive and to generate a profit. Despite several amendments and introducing the explanation, the fundamental character of such institutes must be considered as that has never been altered.

13. It is urging as above that Mr. Anturkar submits that the writ petition be allowed. Mr. Anturkar relies upon a five Judge Bench judgment in the case of *Shri Prithvi Cotton Mills Ltd. and Anr. vs. Broach Borough Municipality and Ors.*¹.

¹ 1969 (2) SCC 283

14. On the other hand, Mr. Dwivedi appearing for the respondents would submit that there is no merit in the writ petition and it should be dismissed. Mr. Dwivedi has pointed out that Mr. Anturkar's submissions proceed on an erroneous basis that there is an explanation introduced to the definition. The definition of the term "commercial training or coaching" as appearing in section 65(26) means any training or coaching provided by a commercial training or coaching centre and that is defined in section 65(27) to mean any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than sports, with or without issuance of a certificate and includes coaching or tutorial classes. Mr. Dwivedi submits that the further flaw in Mr. Anturkar's submissions is that the petitioner's activities are not a source of income. There is no connection or relevance to profit. Mr. Dwivedi submits that coaching for any examination or imparting skill are definitely falling within the purview of the term "commercial training or coaching" and if not, at least the definition of "coaching centre". The show cause notice demands the tax after an adjudication. Mr. Dwivedi refers to the civil application moved in this writ petition and which refers to this factual aspect. Thus, he would submit that the other show cause notice dated 19th April, 2011, which is pending adjudication

would be adjudicated in accordance with law. The demand now crystalised is limited to the show cause notices which have been already adjudicated. Mr. Anturkar's submissions have no basis for though the explanation has been introduced with retrospective effect from 1st July, 2003 by the Finance Act 2010 dated 8th May, 2010, still, the assessment and recovery of service tax would be in accordance with the provisions contained in the Central Excise Act, 1944. The Central Excise Act, 1944 puts a fetter on the power to demand the tax. Therefore, there is no basis for the apprehension that the petitioner will be called upon to pay the amounts from the inception of the services. It is only in accordance with law that the demand is raised, crystalised and quantified. In these circumstances, Mr.Dwivedi submits that the petition has no merit and be dismissed.

15. With the assistance of both advocates, we have perused the writ petition and the annexures thereto. We have also perused the decisions brought to our notice by Mr. Anturkar and Mr.Deshmukh. We do not think that in the facts and circumstances of the case the legislature has reversed any binding decision. The legislature had before it an already enacted statute, namely, the Finance Act, 1994. The Finance Act, 1994 contains Chapter V and titled as "Service Tax". Section 64 of that

sets out the extent, commencement and application. Section 65, which has been substituted by Finance Act, 2003 with effect from 14th May, 2003 contains the definitions. The two definitions with which we are concerned are set out in section 65(26) and 65(27).

They read as under:-

“65(26) “Commercial training or coaching” means any training or coaching provided by a commercial training or coaching centre

65(27) “commercial training or coaching centre” means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes.”

16. Therefore, the legislature refers to a commercial training or coaching. It means any training or coaching provided by a commercial training or coaching centre. The commercial training or coaching centre means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes. However, Mr. Anturkar's submissions overlook the other important provision of this statute and namely the definition of the term “taxable service”. That is to be found in section 65(105). The term “taxable service” means any service provided or to be provided. The

words “provided or to be provided” were inserted with effect from 16th June, 2005 by Finance Act, 2005. Then, we have sub-clause (zzc), which read as under:-

“65(105) “taxable service” means any service provided or to be provided -
(zzc) to any person, by a commercial training or coaching centre in relation to commercial training or coaching.”

17. Therefore, taxable service means any service provided or to be provided to any person, by a commercial training or coaching centre in relation to commercial training or coaching as defined above.

18. An explanation has been inserted by Finance Act, 2010 and it says, for the removal of doubts, it is hereby declared that the expression “commercial training or coaching centre” occurring in this sub-clause and in clauses (26) and (27) and (90a) shall include any centre or institute, by whatever name called, where training or coaching is imparted for consideration, whether or not such centre or institute is registered as a Trust or a society or similar other organisation under any law for the time being in force and carrying on its activity with or without profit motive and the expression “commercial training or coaching” shall be construed accordingly. Therefore, the explanation removes any doubts with regard to the nature of the activity and its character.

There was a confusion whether such activity and commenced by any Trust or society, which has obtained registration under any statute such as the Bombay Public Trust Act, would be covered by the definition. There was a scope then for argument that those institutions or Trusts do not operate or function with a profit motive or with business generation in mind. Therefore, the legislature steps in and explains this definition as above. This amendment is inserted by the Finance Act, 2010 (14 of 2010) dated 8th May, 2010 with retrospective effect from 1st July, 2003. Pertinently, Mr. Anturkar does not challenge, by putting in issue, the power of the legislature to enact such a provision retrospectively. That the tax can be imposed by introducing such a provision or the general power to amend the statute with retrospective effect has not been questioned. Once the statute itself clarifies that the retrospective effect is from 1st July, 2003, then, we do not see any basis for the argument of Mr. Anturkar. Now, the essential feature or the intent, namely, to make profit or otherwise is wholly irrelevant. Pertinently, Mr. Anturkar does not dispute that the petitioner is coaching the students. A educational coaching is covered by the expression "coaching centre" as defined in section 65(26) and (27). That it is not on commercial basis or predominantly for profit is the only argument canvassed throughout. On some occasions in the past,

it was accepted but after the insertion of the explanation even that is unavailable. Now, irrespective of profit motive and so long as such service is rendered for consideration, it falls within the purview of the tax. As held by the Hon'ble Supreme Court in the case of *Commercial Tax Officer and Ors. vs. M/s. Bishwanath Jhunjhunwala and Anr.*² it is the language of the provision which must be taken as decisive. Where the language is unambiguous and clear, full effect has to be given to the amended provision. In paras 12 and 13 of this judgment, the Hon'ble Supreme Court held as under:-

“12. What, therefore, we have to seek is the clear meaning of the said Notification. If there be no doubt about the meaning, the amendment brought about by the said Notification must be given full effect. If the language expressly so states or clearly implies, retrospectivity must be given with effect from 1st November, 1971, so as to encompass all assessments made within the period of six years therefore, whether they have become final by reason of the expiry of the period of four years or not.

13. By reason of the said Notification, with effect from 1st November, 1971, Rule 18(80)(5)(ii) has to be read as barring the Commissioner (or other authority to whom power in this behalf has been delegated by the commissioner) from revising of his own motion any assessment made or order passed under the Act or the rules if the assessment has been made or the order has been passed more than six years previous to 1st November, 1971. Put conversely, with effect from 1st November, 1971, Rule 18(80)(5)(ii) permits the Commissioner (or other authority) to revise of his own motion any assessment made or order passed under the Act or the rules provided the assessment has not been made or the order passed more than six years previously. This being the plain meaning, the said Notification must be given full effect. Full effect can be given only if the said Notification is read as being applicable not only to assessments which were incomplete but also to assessments which had reached finality by reason of the earlier prescribed

2 AIR 1997 SC 357

period of four years having elapsed. Where language as unambiguous as this is employed, it must be assumed that the Legislature intended the amendment provision to apply even to assessments that had so become final; if the intention was otherwise, the Legislature would have so stated.”

19. Further, as stated by the Hon'ble Justice G. P. Singh in the Principles of Statutory Interpretation, Seventh Edition page 172-173 that an explanation may be added to include something within or exclude something from the ambit of the main enactment or the connotation of some word occurring in it. It is possible that it may have been added in a declaratory form to retrospectively clarify a doubtful point of law. Still further, there can be a limited retrospectivity as well and all of this is permitted by law. It is too well settled to require any reiteration that in matter of taxation the legislature enjoys greater freedom and latitude and it is allowed to pick and choose districts, objects, persons, methods and even rates of taxes if it does so reasonably. In this case, the legislature has indeed acted reasonably and taxed the service provided by training and coaching centre and classes.

20. There is substance in the contention of Mr. Dwivedi that Mr. Anturkar's submissions overlook the fact that the Finance Act, 1994 under Chapter V introduced service tax. That is imposed on taxable services. The taxable services themselves are defined. In these circumstances and going by the character and

nature of the levy, we do not think that we can accept Mr.Anturkar's submissions. Now, such clarificatory provision can operate with retrospective effect. That has been given retrospective effect in terms of the powers conferred on the legislature is apparent. In these circumstances, this is not an exercise of overruling any binding judgment of a competent court. This is altering the basis or foundation of the law on which the judgment is delivered. In the circumstances, the first contention must fail.

21. Equally, once there is a power to make retrospective amendment and of the above nature, then, one cannot pick one or two words from the explanation and read them in isolation. The explanation would have to be read as a whole. So read, it clarifies the definition of the term “commercial training centre” or “coaching”. Once commercial training or coaching centre is defined and which definition is clarified by this explanation, then, the earlier views of the Benches of CESTAT would not hold the field. No assistance can be derived from the same. Further, as clarified by Mr. Dwivedi, there is no scope for any apprehension that the petitioner would be taxed by going backward for a decade or more. The service tax has to be computed, assessed and recovered in terms of the clear provisions of law and the power to

levy, asses and recover is referable to the Central Excise Act, 1944. Therefore, the provisions of section 11A and its sub-sections and other sections of the Central Excise Act, 1944 would apply. If so applied, there is no basis for the apprehension that the tax would be recovered by extending the retrospective effect given to this explanation. The effect may be from 1st July, 2003, but to recover the tax from that date, there should be a power and there should be no fetter on that power. If there is any fetter or restriction on that power, then, that would operate. The show cause notice would have to be adjudicated in accordance with law. At such adjudication, the petitioner would be provided all opportunities to defend itself and a adverse adjudication order can be challenged in appeal as provided by the statute. In these circumstances, when there are inbuilt safeguards and checks on the power to recover the tax, then, all the more we do not see any reason to entertain this writ petition.

22. As a result of the above discussion, the writ petition fails. Rule is discharged. There would be no order as to costs.

23. In the light of the disposal of the writ petition, the civil application does not survive and stands disposed of as such.

(PRAKASH.D.NAIK, J.)

(S.C.DHARMADHIKARI, J.)