

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.11.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

AND

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.A.Nos.1187 & 1188 of 2017

- 1 The Deputy Commissioner
(SIR-II) Service Tax Commissionerate- II No.
2054 Newry Towers second Avenue 12th Main
Road Anna Nagar Chennai-600040.
- 2 The Commissioner of
Service Tax No.2054 Newry Towers Second
Avenue 12th Main Road Anna Nagar Chennai-
600040
- 3 The Superintendent
(SIR-II GR.III) Service Tax II
Commissionerate No.2054 Newry Towers
Second Avenue 12th Main Road Anna Nagar
Chennai-600040
- 4 Union of India rep by its
Secretary Ministry of Finance Department
of Revenue Government of India North Block
New Delhi ... Appellants in both W.As./
Respondents

Vs

- 1 M/s.Service Care Pvt Ltd
Rep by National Head Payroll Services NO.
125 10th Cross Indira Nagar 1st Stage
Bangalore- 560 038 ... Respondent in both W.As./
Petitioner

Prayer : The appeal filed under Clause 15 of the Letters Patent Act, to set aside the order of the learned Judge dated 31.01.2017, passed in W.P.Nos.1468 & 1469 of 2017.

Prayer in W.P.No.1468 of 2017 : Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Prohibition or any other appropriate writ, order or direction prohibiting respondents from proceeding with issuance of recovery notices under Section 87 of the Finance Act, 1994, to the petitioner's clients and to pass such further or other orders as deemed fit in the facts and circumstances of the case.

Prayer in W.P.No.1469 of 2017 : Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Mandamus directing the respondents 1 to 3 to refund the amounts collected coercively from the clients of the petitioner being amounts belonging to the petitioner or to issue any other appropriate writ or order as this Hon'ble High Court may deem fit and proper to the facts and circumstances of the case.

For Appellant
in both W.As. : Mrs. Hema Muralikrishnan

For Respondent
in both W.As. : Ms.Radhika Chandra Sekar

JUDGEMENT

(Judgment of the Court was delivered by R.SURESH KUMAR,J.)

These two writ appeals were preferred by the appellants/Revenue as against the orders passed by the learned Judge made in W.P.Nos.1468 and 1469 of 2017 dated 31.01.2017.

2.The writ petitioner is the respondent herein and the respondents in the writ petitions/Revenue are the appellants herein. The appellants for the sake of brevity will be called as 'Revenue' and the respondent will be called as 'writ petitioner'/petitioner.

3. The case of the writ petitioner before the Writ Court was that, the petitioner is the Private Limited Company in the name and style of M/s.Service Care Pvt. Ltd., having office at Bangalore. The petitioner company's Managing Director's father, one Mohammed Jalaludin was running a proprietorship concern by name 'Service Care' at Chennai. The said proprietorship concern engaged in providing man power and house keeping services. The petitioner company also was doing the manpower and house keeping services at Bangalore. It had registered with the Commissionerate of Services Tax at Bangalore with centralized Service tax registration No.AAPCS7846ESD002 on 01.08.2011 at Bangalore and had been running the business there.

4. In the month of October 2011, the said Jalaluddin, the sole proprietor of 'Service Care' Chennai, died. Since it was the sole proprietorship concern of the said Jalaluddin, the 'Service Care at Chennai', had ceased to exist. Some of the clients, who had been served by the said proprietorship concern at Chennai after the closure of the said concern, had started entering into an agreement with the petitioner company at Bangalore for similar services. Accordingly, pursuant to the separate contracts entered into between the petitioner company and some of the clients, who were of course the erstwhile clients of the proprietorship concern at Chennai, the petitioner company had started rendering services with the said clients.

5. While that being so, on behalf of the Revenue, the third appellant herein, had issued a letter on 23.09.2016 demanding service tax due payable by the proprietorship concern at Chennai, from the petitioner company. In reply to the same, the petitioner company had filed an affidavit on 07.02.2015 informing the Revenue that the M/s. Service Care, Chennai was a proprietorship concern of the late father of the Managing Director of the petitioner company and once the proprietor died, the concern was closed and nothing was inherited by the petitioner company from the proprietorship concern and there was no liability on the part of the petitioner company to pay anything to the Revenue since the petitioner company from inception and after having registered with the Revenue for the purpose of service tax, had been discharging the service tax liability without fail.

6. Not satisfying with the said reply, the Revenue had issued further letter dated 23.09.2016 where they sought to recover the tax under Section 87(b) of the Finance Act, 1994. Even for the said demand letter, the petitioner company had filed a reply on 19.10.2016 where the petitioner had specifically stated that Section 87(b) proceedings cannot be initiated against the petitioner as no money was due from the petitioner to M/s. Service Care, Chennai which was a proprietorship concern of the father of the Managing Director of the petitioner company.

7. Subsequently, the Revenue issued notices to the clients of the petitioner company by way of garnishee notices directing them to deposit the payment due to the petitioner company with the department i.e., Revenue on the ground that M/s. Service Care Chennai, a proprietorship concern had not discharged the service tax due to the extent of Rs.54,00,844/- as on 31.03.2010.

8. In this regard since it was the definite case of the petitioner company that, M/s. Service Care Pvt. Ltd.,

Bangalore and the Service Care Chennai are two different entity. M/s.Service Care Chennai was a sole proprietorship concern, owned by the late father of the Managing Director of the M/s.Service Care Pvt. Ltd., Bangalore which is a company incorporated under the provisions of the Companies Act, 1956. The Managing Director of the Company was having a share of 75% at the petitioner company and the proprietorship concern of her father and the petitioner company has no connection whatsoever and neither the property nor the liability was inherited by the Managing Director of the petitioner company from the proprietorship concern and therefore, there was absolutely no due on the part of the petitioner company by way of service tax payable to the Revenue.

9. In this context since garnishee notice had been issued, in spite of reply to the aforesaid issues made unambiguously by the petitioner company to the Revenue, challenging the said action on the part of the Revenue in issuing garnishee notices to some of the clients of the petitioner company and also seeking for a prohibition in acting in such a manner by the Revenue, the petitioner company had filed two writ petitions before the Writ Court with the aforesaid prayer namely, one is for prohibiting the Revenue authority from acting upon and second one was for a writ of mandamus directing the Revenue to refund the amount collected coercively from the clients of the petitioner company.

10. While taking up consideration of these two writ petitions, the learned Judge of this Court at the initial stage since wanted to get some factual matrix from the Revenue had directed the Revenue to file the status report as to whether any assessment order had been made against the assessee, i.e., the proprietorship concern bearing the name M/s.Service Care. To the said query, on instructions, the Revenue counsel before the writ Court informed that, no such assessment had been made against the proprietorship concern. Further, query raised by the Writ Court to the Revenue was that, whether the clients of the erstwhile proprietorship concern including the one L & T Valves Ltd., against whom the garnishee order was issued, owed any money to the proprietorship concern. Since the two quires were answered in the negative by the Revenue before the writ Court, the learned Judge of the writ Court based, on the factual matrix of the case and taking into consideration the legal position of the provisions of law, especially, taking into account the provisions under Section 87 of the Finance Act, 1994, had come to a conclusion that the garnishee order issued to the clients of the petitioner company were liable to be set aside. Accordingly, it was set aside and with regard to the prayer of refund of amount collected from the clients of the petitioner company, liberty was given to the petitioner company

to initiate appropriate proceedings against the Revenue, for recovery of the said amount. Accordingly, the two writ petitions were ordered by the writ Court, by order dated 31.01.2017. Aggrieved over the said order passed by the writ court, the Revenue preferred these two instant writ appeals.

11. We have heard Mrs. Hema Muralikrishnan, learned Standing counsel appearing for the Revenue, who would submit that, the M/s. Service Care Pvt. Ltd., Bangalore i.e., the writ petitioner had requested the customers of M/s.Service Care, Chennai vide letter dated 13.07.2011 to transfer the contract effected from 01.07.2011 to the petitioners company namely, M/s.Service Care Pvt. Ltd., therefore, there is a continuity of business of M/s.Service Care, Chennai with M/s.Service Care Pvt. Ltd., Bangalore and especially when the petitioner company had been formed or incorporated by the daughter and son-in-law of the proprietor of Service Care, Chennai namely, late M.Jallaudin, the petitioner company would be liable to pay service tax due payable by the erstwhile proprietorship concern with whom the very same clients had business.

12. The learned Standing counsel for the Revenue would further submit that, one of the client of the proprietorship concern namely, M/s. L & T Valves Ltd., who became the client of the petitioner company, had informed that, it had transactions with M/s. Service Care, Chennai till July 2011 and from 31.07.2001 they had transactions with petitioner company at Bangalore and this itself would show that the contract given to the proprietorship concern M/s. Service Care by the said client had now been continued by the petitioner company therefore, whatever the assets and liability like the service tax due payable by the proprietorship concern, could have been inherited by the petitioner company, therefore, the demand made from the petitioner company and its clients are justifiable.

13. It was the further arguments of the learned Standing Counsel for the Revenue that, Smt.Shany Jalal, who is the Managing Director of the petitioner company is none other than the daughter of the said late Mohammed Jalal, who was the proprietor of the Chennai concern which was having the tax liability for a sum of Rs.54,00,844/- as per the account for the year ending 31.03.2010. Suppose the Managing Director of the petitioner company Ms.Shany Jalal has nothing to do with the business of her father at the Chennai proprietorship concern, the Managing Director of the petitioner company could not have any knowledge about the assets and liabilities of the said proprietorship concern whereas, the said Shany Jalal, Managing Director of the petitioner company is having up to date knowledge about the account of that concern. This shows that the continuity of the business of the proprietorship concern at

Chennai is undertaken by the petitioner company at Bangalore and therefore, for the service tax due demanded from the Managing Director of the petitioner company in so far as the proprietorship concern as on 31.03.2010, no separate assessment need to be made.

14. It is further submitted by the learned Standing counsel for Revenue that, since the said amount of Rs.54,00,844/- was an admitted liability, the Revenue has every right under the provisions of the Finance Act, to recover the same from the petitioner company and in this regard the Revenue would also be entitled to issue garnishee order to the clients of the petitioner company whoever be, as they were clients of the proprietorship concern at Chennai.

15. Learned counsel for the Revenue would further submit that, these factual matrix and the legal position concerning with the proprietorship concern were not considered in proper perspective by the learned Judge of the writ court and therefore, the said orders passed by the learned Judge may be erroneous and is liable to be interfered with.

16. Per Contra, Ms.Radhika Chandra Sekar, learned counsel appearing for the writ petitioner (the respondent herein) would submit that, first of all, the Revenue had no authority to straight away demand any due from the petitioner company on the alleged reason that the property tax due was payable by the erstwhile proprietorship concern, unless a proper assessment is made against the said proprietorship concern in the manner known to law.

17. Learned counsel for the writ petitioner/respondent would further submit that, the law is well settled in this regard as without proper assessment, no demand can be made even from the concerned person who is liable to pay the tax. She would further submit that, if at all the erstwhile proprietorship concern was liable to pay some taxes to the Revenue, that should not be recovered from the petitioner company as it is incorporated under the provisions of the Companies Act, 1956 and also there is no business connection whatsoever between the petitioners company and the erstwhile proprietorship concern.

18. Learned counsel for the writ petitioner/respondent would further submit that, merely because the Managing Director of the petitioner company is the daughter of the proprietor of the erstwhile proprietorship concern it cannot be presumed that the said proprietorship concern with all its liability and assets had been merged with the petitioner company. Therefore in that context, the Revenue could not have acted upon for

recovering the alleged service tax due of the said erstwhile proprietorship concern from the petitioner company.

19. The learned counsel for the writ petitioner would also submit that, once the proprietorship concern where the father of the Managing Director of the petitioner company was sole proprietor who is no more, the said proprietorship concern became defunct or was closed. Absolutely there is no link whatsoever between the erstwhile proprietorship concern and the petitioner company and therefore the Revenue has no authority to claim anything by way of due of service tax from the petitioner for the alleged service tax due payable by the erstwhile proprietorship concern.

20. In this regard, the learned counsel for the writ petitioner/respondent has relied upon the following judgements:

- (i) 2015 (40) STR 463 Jharkhand
- (ii) 2016 (41) STR 11 Bombay
- (iii) 2015 (40) STR 888 Gujarat
- (iv) 2015(38) STR 907 Bombay
- (v) 2015 322 ELT 372 SC

21. By relying upon these decisions, the learned counsel for the writ petitioner/appellant would urge that, absolutely the Revenue has no authority in invoking the provisions of Section 87 of the Finance Act, 1994. The Revenue has got no authority to issue garnishee order against the clients of the petitioner company without making any assessment on the erstwhile proprietorship concern, therefore, the entire move in this regard of the Revenue to recover the said alleged service tax due from the erstwhile proprietorship concern from the petitioner company is absolutely unlawful and therefore, in this regard, the judgement rendered by the writ court, which is impugned herein, is fully justifiable and sustainable, hence, it does not require any interference from this Court.

22. We have considered the rival submissions made by the learned counsel for the parties herein and also we have perused the materials placed before this Court and have carefully considered the same.

23. Before dwell into the point raised in these writ appeals, let us first take the relevant provisions of the Finance Act, 1994. Section 73 of the said Act reads thus:

- (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the [Central Excise Officer] may, within [thirty months] from the relevant date, serve notice on the person

chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :

Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

- (a) fraud; or
- (b) collusion; or
- (c) wilful mis-statement; or
- (d) suppression of facts; or
- (e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words [thirty months] the words "five years" had been substituted.

Explanation.—Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of [thirty months] or five years, as the case may be.

Section 73A reads thus:

(1) Any person who is liable to pay service tax under the provisions of this Chapter or the rules made thereunder, and has collected any amount in excess of the service tax assessed or determined and paid on any taxable service under the provisions of this Chapter or the rules made thereunder from the recipient of taxable service in any manner as representing service tax, shall forthwith pay the amount so collected to the credit of the Central Government.

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Section 87 reads thus:

Section 87 - Recovery of any amount due to Central Government.

Where any amount payable by a person to the credit of the Central Government under any of the provisions of this Chapter or of the rules made thereunder is not paid, the Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned below:—

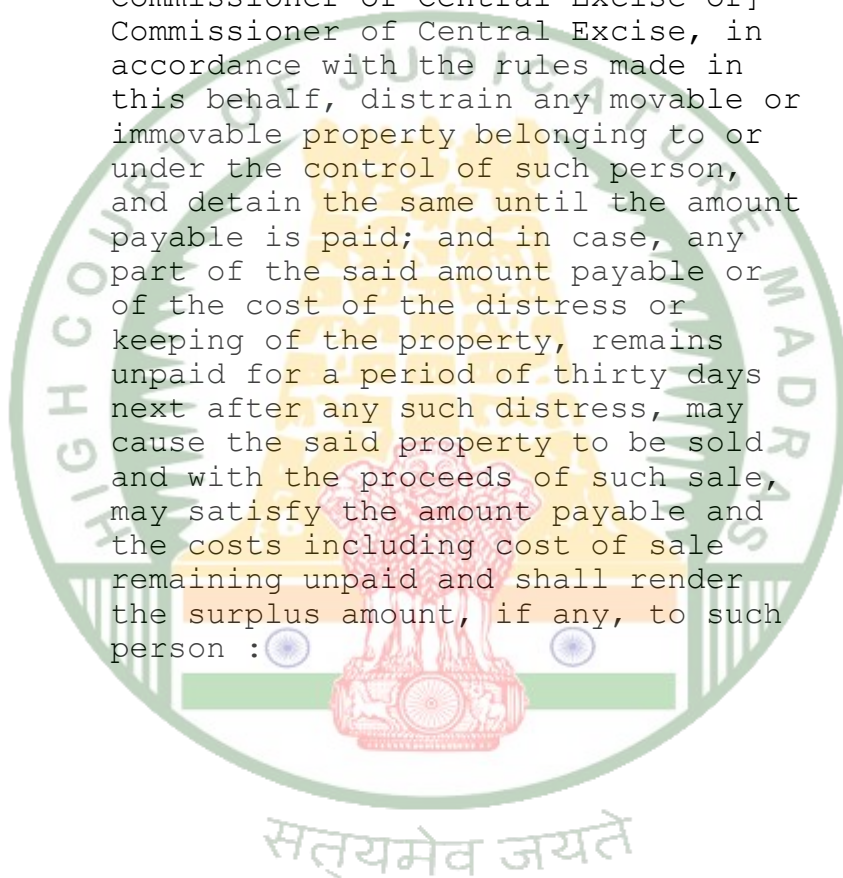
the Central Excise Officer may deduct or may require any other Central Excise Officer or any officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the said Central Excise Officer or any officer of customs;

(i) the Central Excise Officer may, by notice in writing, require any other person from whom money is due or may become due to such person, or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

every person to whom a notice is issued under this section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;

in a case where the person to whom a notice under this section is sent, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and all the consequences of this Chapter shall follow;

the Central Excise Officer may, on an authorisation by the [Principal Commissioner of Central Excise or] Commissioner of Central Excise, in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person :



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[Provided that where the person (hereinafter referred to as predecessor) from whom the service tax or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all goods, in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining the written approval of the Commissioner of Central Excise, for the purposes of recovering such service tax or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.]

the Central Excise Officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector, on receipt of such certificate, shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue.]

24. From the bare reading of the aforesaid provisions, the following would emerge:

(1) If service tax has not been levied or has been short levied or short paid or even erroneously refunded, within a period of 30 months from the relevant date, the Revenue could serve a notice to the assessee requiring him to show cause why he should not pay the amount specified in the notice.

(2) In Section 73(1) as has been extracted above, certain words are very important from the context of the issue raised herein. The first one is 'person chargeable' the second one is

'person to whom such tax refund has erroneously been made'.

25. The words 'person chargeable' and the words 'the person to whom such tax refund has erroneously been made', means the actual assessee, on whom, after show cause notice, if assessment is made, would be the person liable to pay the chargeable amount of service tax. So, notice seeking to show cause should be issued under Section 73 only to the person chargeable. Admittedly, M/s.Service Care Chennai is a proprietorship concern of a sole proprietor who is no more. So if at all any show cause notice to be issued under Section 73 of the Act, the notice must be given only to the person chargeable i.e., M/s. Service Case, Chennai and not to anyone.

26. Like that, under Section 73(A) of the Act, as has been extracted above, the following words are important:

"any person is liable to pay service tax". The word 'any person is liable to pay services tax', means, the person who had rendered service and has collected the amount in cases of the services tax assessment determined under the provisions of the concerned Sections of the Act or rules made thereunder, shall forthwith pay the amount so collected to the credit of the Central Government.

27. Here in the case in hand, it is the specific assertion of the writ Court after getting necessary instructions from the standing counsel for the revenue that, no assessment order had been passed against the assessee i.e., M/s.Service care, which was the proprietorship concern. There was no facilitating answer from the Revenue before the writ Court as to whether the clients of the erstwhile proprietorship concern including the one L & T Valves Ltd. against whom the garnishee order had been issued, owe to pay any money to the proprietorship concern.

28. When these two issues were made clear before the writ court that there was no assessment order on the erstwhile proprietorship concern and there was no observation that there were clients of the proprietorship concern who had conducted their business subsequently with the petitioner company, ofcourse with separate agreement in this regard, who had due of service tax payable to the erstwhile proprietorship concern, the provisions of Section 73(A) cannot be invoked against the petitioner company.

29. Like that in so far as the recovery of amount due to the Central Government as contemplated under Section 87 of the Act, as has been extracted above, here also the words, i.e., "may become due to such person or who holds or may subsequently hold money for or on account of such person" are important.

So, if any person from whom money became due, only against such person, Section 87 proceedings can be initiated. Here in the case in hand, there is no assessment and no determination of tax liability about the erstwhile proprietorship concern namely, M/s. Service Care, Chennai in the manner known to law. When that being so, the very invocation of the Provisions of Section 87 of the Act, as referred to above, is absolutely unjustifiable.

30. In support of this view of us, the learned counsel appearing for the writ petitioner/appellant has rightly relied upon the aforesaid decisions.

31. In the first decision i.e., 2015 (40) STR 463 Jharkhand, in the matter of Exman Security Services Pvt. Ltd. vs. Union of India, whether the issuance of notices under Section 87 straight away without making the assessment can be sustainable or not was decided. In this regard, the learned Judge of the Jharkhand High Court at Ranchi has held as follows:

(iii) Now the question before this Court is whether merely because a letter dated 23.04.2014 is written, whereby calculation is given by the petitioner of his letter at Rs. 4,45,97,399/- whether straightway notice under Section 87 of the Act, 1994 can be issued by the respondents. The answer is in negative mainly for the reason that:

32. In the judgement in 2016 (41) STR 11 (Bom.) in Quality Fabricators & Erectors vs. Deputy DGCEI, Zonal Unit, Mumbai, a similar issue was considered and the learned judges has held as follows:

13. Precisely this is a controversy which has been dealt with on several occasions by the Hon'ble Supreme Court and equally by this Court in the case of Harshad Shantilal Mehta (supra). The Hon'ble Supreme Court has held that the amount tax due means ascertained liability for taxes and unascertained and unassessed tax which is not legally binding on the assessee cannot be recovered by the mode found to be applicable in that case. The word 'due' has been interpreted to mean something which is payable and recoverable. The Hon'ble Supreme Court held that it does not refer merely to a liability created by the charging sections to pay the tax under the relevant law. It refers to an ascertained liability for payment of tax quantified in accordance with law. In other words, the taxes as assessed

which are presently payable by the notified person are taxes which have been taken into account."

33. Similarly in 2015 (40) STR 888 (Guj.) in the matter of Gopala Builders vs. Directorate General of Central Excise Intelligence, the learned Judge has held as follows:

" 11. This court is in agreement with the aforesaid view expressed by the Uttarakhand High Court, namely, that recovery under Section 87 of the Finance Act can be resorted to only after an amount is adjudicated to be due to the Central Government. Under the circumstances, at the stage of show cause notice when the liability of the petitioner is yet to be crystallized, it was not permissible for the respondents to resort to the drastic provisions of Section 87 of the Act.

12. Besides, as the facts reveal, no demand notice in respect of the aforesaid amount had been issued to the petitioner and directly garnishee orders had been issued to the clients of the petitioner. Such course of action adopted by the respondents of resorting to the provisions of Section 87 of the Act was not warranted in the facts and circumstances of the case. The impugned notices, Annexure "E" collectively to the petition, being contrary to the provisions of Section 87 of the Act, therefore, cannot be sustained."

34. Also in 2015 (38) STR 907(Bom.) in the matter of ICICI Bank Ltd., vs. Union of India, the Division Bench of the Bombay High Court has held as follows:

" 35 It would thus clearly reveal that provisions of section 72 and 73 involve complete adjudicatory process. Under section 72 the Central Excise Officer is required to assess value of taxable services to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment. The said power can be exercised by the Central Excise Officer in Talwalkar 43/64 44 2.wp3246.15.sxw either of the eventualities, i.e. when the return is filed under Section 70 or even it is not filed as required in the

said section. The said provision specifically provides for giving an opportunity of being heard to the assessee before final orders are passed by the authority.

The provisions of Section 73, specifically sub-section 1 and 2 would also show that where in opinion of Central Excise Officer, service tax has not been levied, paid or short-levied or short paid or erroneously refunded, the Central Excise Officer is empowered to serve notice on the person chargeable with the service tax, requiring him to show-cause why he should not pay the amount specified in the notice. Sub-section 2 thereof empowers the Central Excise Officer to determine the amount of service tax due from or erroneously refunded to such person and thereupon requiring such person to pay the amount so determined. However, prior to that, the Central Excise Officer is required to consider representation, if any, made by the assessee.

Provisions of sub-section 3 and 4A appears to have enacted so as to enable the assessee to voluntarily pay the service tax in two eventualities (1) when in the opinion of Central Excise Officer, the service tax is payable and (2) in the course of any audit, investigation Talwalkar 44/64 45 2.wp3246.15.sxw or verification, it is found that any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded.

If an assessee voluntarily pays service tax in either of these provisions, he saves himself from the rigours of penalty. In the first case, no penalty is leviable whereas in the second case penalty is leviable only to the maximum extent of 25 per cent as against 50 per cent in the normal case. Again in either of these eventualities, if the Central Excise Officer is of the opinion that the service tax has not been paid as per the liability which is cast upon such an assessee, again the said Central Excise Officer is empowered to conduct an enquiry as provided under sub-section 2 of section 73 of the Act and is further required to determine the amount payable by an assessee, upon which the assessee will be liable to pay the said amount. It can thus be

seen that though in the aforesaid two eventualities, assessee voluntarily accepts the liability and makes the payment, proceedings under Section 73(1) and (2) cannot be initiated against such assessee, atleast in so far as the duty which is admitted by him and paid.

However, even in these eventualities, in respect of service tax, which is disputed by him and not paid is the procedure as required under Talwalkar 45/64 46 2.wp3246.15.sxw sub-section 1 and 2 is required to be followed. It could thus be seen that prior to determination of the amount of service tax due from assessee or erroneously refunded to such person, an enquiry as contemplated either under the provisions of Section 72 or sub-section 1 and sub-section 2 of section 73 is required to be conducted. The amount of tax shall be payable, only after the determination by authority either under Section 72 or section 73. Not only that, even in case of voluntary option to pay the service tax as is available under sub-section 3 or 4A of section 73, except the admitted liability the amount payable would be required to be determined by an authority under sub-section 2 of section 73.

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39. In the present case also, as could be seen from aforesaid discussion that the scheme of the act is that the tax would be held to be payable only after adjudication either under Section 72 or sub-section 2 of section 73 of the said Act. As already stated by us hereinabove that even when an assessee voluntarily pays tax under sub-section (3) and 4A of section 73, even in that case, in so far as disputed amount is concerned, determination as required under subsection 2 of section 73 is required to be done. By now it is settled principle of law that when a law requires a particular things to be done, in a particular manner, it has to be done in that manner alone and not at all. Reference could be made to the Judgment of the Apex Court in

the case of Dhanajaya Reddy v/s. State of Karnataka reported in (2001) 4 SCC 9.

35. In the matter of Shabina Abraham vs. Collectorate of Central Excise and Customs, reported in 2015 (322) ELT SC the Honourable Supreme Court has decided the question as to whether an assessment proceedings under the Central Excise Act, 1944 and continuation against the legal representatives/estate of sole proprietor/manufacture after he is dead can be possible?. The facts of the said case before the Honourable Supreme Court reads thus:

"2. One Shri George Varghese was the sole proprietor of Kerala Tyre and Rubber Company Limited. By October 1985, this proprietorship concern had stopped manufacture and production of tread rubber. By a show cause notice dated 12.6.1987, for the period January 1983 to December 1985, it was alleged that the assessee had manufactured and cleared tread rubber from the factory premises by suppressing the fact of such production and removal with an intent to evade payment of excise duty. The provisions of Section 11A, as they then stood, of the Central Excises and Salt Act were invoked and duty amounting to Rs.74,35,242/- was sought to be recovered from the assessee together with imposition of penalty for clandestine removal.

3. On 14.3.1989, the said Shri George Varghese died. As a result of his death, a second show cause notice was issued on 18.10.1989 to his wife and four daughters asking them to make submissions with regard to the demand of duty made in the show cause notice dated 12.6.1987. By their reply dated 25.10.1989, the said legal heirs of the deceased stated that none of them had any personal association with the deceased in his proprietorship business and were not in a position to locate any business records. They submitted that the proceedings initiated against the deceased abated on his death in the absence of any provision in the Central Excises and Salt Act to continue assessment proceedings against a dead person in the hands of the legal representatives. The said show cause notice was, therefore, challenged as being without jurisdiction.

4. As the Central Excise Authorities posted the matter for hearing and refused to pass an order on the maintainability of the show cause notice alone, the legal heirs approached the High Court under Article 226 of the Constitution by filing a Writ Petition in January, 1990. The learned single Judge of the High Court quashed the proceedings against the legal heirs stating that the Central Excises and Salt Act did not contain any provisions for continuing assessment proceedings against a dead person. Against this, revenue went in appeal. The Division Bench of the High Court of Kerala reversed the single Judge's judgment."

36. After analysing the various extant provisions of law and after exhaustive discussions, the Apex Court has reversed the said judgement of the Division Bench of the High Court and held that, the assessment proceedings cannot be continued against the legal heirs of the dead person who was the sole proprietor of a concern or entity by whom tax due was to be paid.

37. On analysing these judgements of various high Courts as well as the Honourable Apex Court, we are of the clear view that, the attempt made by the Revenue to issue garnishee orders for recovering the amount of alleged service tax payable by the erstwhile proprietorship concern owned by the late father of the Managing Director of the writ petitioner company, was bad in law, and for the said action absolutely there is no scope for the Revenue under the relevant provisions of the Finance Act, 1994.

38. This aspect, ofcourse in the impugned judgement, was considered by the learned Judge determinatively by appreciating the legal position in proper perspective. The learned Judge in the writ Court, after having assessed the factual aspects i.e., no assessment order was passed against the assessee, i.e., the proprietorship concern, and also that there was no amount withheld by any of the client of the erstwhile concern owed to the said concern, has allowed these writ petitions.

39. Merely because the Managing Director of the present writ petitioner, who is none other than the daughter of the late proprietorship concern, who is the service tax assessee, was in due according to the Revenue, had knowledge about the impugned due payable by the erstwhile proprietorship concern as on 31.03.2010, it cannot be presumed that the said person/writ petitioner company has inherited the assets and liabilities of

the said proprietorship concern. Therefore, the Revenue, since has proceeded on a wrong premises, that too without making any assessment in the manner known to law against the said proprietorship concern, we have no hesitation to hold that, the said move on the side of the Revenue cannot be appreciated or accepted.

40. In the result, both these writ appeals are failed and accordingly they are liable to be rejected. Hence, these writ appeals are dismissed. However, there shall be no order as to costs.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

smi
To

1. The Deputy Commissioner (SIR-II),
Service Tax Commissionerate-II,
No.2054, Newry Towers,
Second Avenue, 12th Main Road,
Anna Nagar, Chennai-600 040.
2. The Commissioner of Service Tax,
No.2054, Newry Towers,
Second Avenue, 12th Main Road,
Anna Nagar, Chennai-600 040.
3. The Superintendent (SIR-II, GR.III),
Service Tax II Commissionerate,
No.2054, Newry Towers,
Second Avenue, 12th Main Road,
Anna Nagar, Chennai-600 040.
4. The Secretary,
Union of India,
Ministry of Finance, Department of Revenue,
Government of India, North Block,
New Delhi.

+1cc to Mr.K.Vaitheeswaran, Advocate, S.R.No.79584
+1cc to Ms.Hema Muralikrishnan, Advocate, S.R.No.79846

Judgment in W.A.Nos.1187 & 1188 of 2017

SR(CO)
TR(01/08/2018)