In the High Court of Judicature at Madras

Dated : 17.11.2017

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.29381 of 2017 & WMP.Nos.31651 to 31654 of 2017

The Executive Officer, Tharamangalam
Selection Grade Town Panchayat,
Tharamangalam, Salem District. ...Petitioner

Vs

1.The Additional Commissioner of
Central Excise & Service Tax,
No.1, Foulks Compound, Anai
Road, Salem-1.

2.The Superintendent of Central
Excise, Mettur I Range,
Mettur R.S. - 636402.

3.The Branch Manager, State Bank
of India Limited, Tharamangalam. ...Respondents

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari to call for the order of the 1st respondent in Order-in-Original in Sl.No.45/2012-ST(ADC) dated 14.12.2012 and the records of the 2nd respondent in O.C.No.543/2017 dated 08.8.2017 and quash the same.

For Petitioner : Ms.D.Naveena
For Respondents 1 & 2 : Mr.S.Rajasekar, SPC

ORDER

Mr.S.Rajasekar, learned Senior Panel Counsel accepts notice for respondents 1 and 2. Heard both. Since the order passed by the first respondent dated 14.12.2012 and the consequential recovery notice dated 08.8.2017 issued by the second respondent have been challenged in this writ petition, notice to the third respondent is dispensed with. By consent, the writ petition itself is taken up for final disposal.

2. The petitioner, which is a selection grade town panchayat, is entrusted with carrying out the duties and responsibilities enshrined under Article 243W read with Twelfth Schedule to The Constitution of India. The petitioner was served with the show cause notice dated 20.3.2012 invoking the extended period of limitation under the Proviso to Section 73(1) of the Finance Act, 1994 and demanding service tax under Section 73 of the said Act. The petitioner submitted their objections and after affording an opportunity of personal hearing, the first respondent passed an order dated 14.12.2012 stating that the extended period of limitation is invocable in the petitioner's case and confirmed the demand in the show cause notice.

3. Aggrieved by the said order, the petitioner filed an appeal before the Commissioner of Central Excise (Appeals-I), who, by an order dated 20.5.2015, dismissed the appeal as time barred. Immediately, the petitioner did not take any steps to approach the Tribunal nor come before this Court. Only after the impugned recovery notice dated 08.8.2017 was issued by the second respondent, the petitioner has rushed to this Court.

4. The learned counsel for the petitioner submits that the impugned order dated 14.12.2012 and the consequential recovery notice dated 08.8.2017 are contrary to the directions issued by the Hon'ble Supreme Court in S.L.P.Nos.27637 of 2011 as well as 4469 - 4470 of 2015 wherein the Hon'ble Supreme Court stayed the collection of service tax on rental arrangement services until 30.9.2011 vide its orders dated 14.10.2011 and 16.3.2015 respectively.

5. Therefore, it is submitted that the collection of service tax can be only from 01.10.2011. It is further contended that the impugned order passed by the first respondent is barred by limitation and that the first respondent invoked the extended period of limitation, which is unsustainable in as much as there has been no suppression of fact in a levy, which has been given retrospective effect. In this regard, reliance was placed on the decision of the High Court of Calcutta in the case of ***Infinity Infotech Parks Ltd. Vs. Union of India [reported in (2015) 85 VST 465].***

6. Without prejudice to the said submissions, it is further submitted that the first respondent has gone beyond the scope of Section 65(105)(zzzz) of the said Act and demanded service tax in respect of entry fee for weekly vegetable market, daily vegetable market, slaughter house, entry fee for bullock carts carrying agricultural produce,etc. According to her, when these markets are carried on in vacant/open site, which is specifically excluded, they do not fall within the scope of 'immovable property'.

7. Though the above grounds appear to have been canvassed before the Appellate Authority, in the light of the fact that the appeal was filed beyond the condonable period, the Appellate Authority was left with no option except to reject the appeal as time barred. It is to be noted that while filing the appeal, the petitioner has not filed a petition for condonation of delay, which is required to be done. Nevertheless, the Appellate Authority had entertained the appeal petition without assigning any number.

8. The petitioner would contend that the Order-in-Original was received by them on 14.1.2015 and that they had presented the appeal papers on 02.3.2015.

9. This contention was not accepted by the Appellate Authority on the ground that the Order-in-Original was dispatched to the petitioner by the Adjudicating Authority even on 14.12.2012.

10. However, this Court finds that the Appellate Authority has not recorded the date, on which, it was served, as it would be available on the file of the Adjudicating Authority, since such orders are invariably communicated by registered post. In any event, the petitioner should have filed an affidavit before the Appellate Authority clearly stating as to the date of receipt of the Order-in-Original and substantiate the same by producing necessary records. Only then, the Appellate Authority will be able to examine as to whether the averments made by the petitioner are factually correct and he will be well within his jurisdiction to call for a report from the Adjudicating

Authority.

11. Considering the fact that the petitioner is a Local Body, manned by an Executive Officer without an Elected Body and considering the administrative issues faced by the Local Body, this Court is inclined to exercise its discretion in this matter and give an opportunity to the petitioner to establish before the Appellate Authority as to the exact date of receipt of the Order-in-Original. Though the order passed by the Appellate Authority has not been directly challenged in this writ petition, considering the hard facts, this Court is inclined to grant appropriate relief.

12. For the reasons stated above, the writ petition is allowed, the order passed by the Commissioner of Central Excise (Appeals-I) dated 20.5.2015 in Appeal No.87/2015-ST is set aside and the matter is remitted back to the Commissioner of Central Excise (Appeals-I) for a fresh consideration. The petitioner is directed to file an affidavit before the Appellate Authority indicating the date of receipt of the Order-in-Original dated 14.12.2012 and enclose proof to substantiate their statement and a petition for condonation of delay, within a period of two weeks from the date of receipt of a copy of this order. If such an affidavit and a petition is filed, the Appellate Authority shall consider the same, examine the contents of the same, verify the veracity of the submissions and take a fresh decision in the matter. Such a decision shall be taken by the Appellate Authority within a

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period of four weeks from the date of receipt of the affidavit and the petition for condonation of delay. Till a decision is taken by the Appellate Authority, the impugned recovery notice shall be kept in abeyance. Since the petitioner has not impleaded the Commissioner of Central Excise (Appeals-1), No.1, Foulks Compound, Anai Road, Salem-1 as a party respondent in this writ petition, Registry is directed to mark a copy of this order to him. No costs. Consequently, the connected WMPs are closed.

17.11.2017

Internet : Yes

To

1.The Additional Commissioner of Central Excise & Service Tax, No.1, Foulks Compound, Anai Road, Salem-1.
2.The Superintendent of Central Excise, Mettur I Range, Mettur R.S. - 636402.
3.The Branch Manager, State Bank of India Limited, Tharamangalam.
4.The Commissioner of Central Excise (Appeals-I), No.1, Foulks Compound, Anai Road, Salem-1.

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