IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 10085 OF 2018

M. P. Enterprises .. Petitioner.
v/s.
The Union of India & Others .. Respondents.

Mr. Bharat Raichandani i/b.UBR Legal, for the Petitioner.
Mr. Pradeep S. Jetly with Mr. J.B. Mishra, for the Respondents.

CORAM: M.S.SANKLECHA &
RIYAZ I.CHAGLA,JJ.
DATE : 18th SEPTEMBER, 2018.

P.C:-

At the request of the parties, this Petition is taken up for disposal at the stage of admission.

2 This Petition under Article 226 of the Constitution of India, challenges a notice dated 30th August, 2018 issued by the Deputy Director in the office of the Director General of GST Intelligence (Respondent No.2 herein). The impugned notice dated 30th August 2018 attaches the Petitioner's Account in Union Bank of India under Section 87 (b)(i) of the Finance Act, 1994 (the Act), for recovery of service tax payable under the Act.

3 This, the Petitioner complains is, without jurisdiction. This for the reason that the impugned notice dated 30th August, 2018, has been issued when there is no amount adjudicated as payable under the Act after issuing a show cause notice under Section 73 of the Act.

Consequently, it is the Petitioner's grievance that attachment by the impugned notice dated 30th August, 2018 is contrary to and in defiance of the binding decisions of this Court in ***Quality Fabricators & Erectors v/s. Dy. DIR, DGCEI, 41 STR 11, Lawson Tours & Travels (I) P. Ltd.,v/s. Dy. DIR, DGCEI, 317 ELT 248, ICICI Bank Ltd. V/s. Union of India 38 STR 907*** and ***Cleartrip (P) Ltd., v/s. Union of India 42 STR 948.***

4 Briefly, the fact leading to this Petition, are as under:-

(a) The Petitioner is a partnership firm. It is engaged in the business of renting, transport services, management services etc. and is duly registered with the authorities under the Act. Petitioner is paying service tax by filing periodic returns under Section 70 of the Act;

(b) On 8th September, 2017 the Officer of Respondent No.2 carried out a search operation at the premises of the Petitioner and its group Companies. Consequent to the search, the Officer of Respondent No.2 were of the view that there was non-payment and/or short-payment of service tax by the Petitioner for the period 2012-13 to 2014-15. Thereafter, an investigation was carried out and statement of the Petitioner's partners were recorded;

(c) Consequent to the above, Respondent No.2 issued an impugned notice dated 30th August, 2018, attaching Petitioner's Bank Account in Union Bank of India. Further, the impugned notice also directed the bank to pay the amount lying therein into the treasury under the head '*service tax*'. Further, the impugned notice dated 30th August, 2018 also informed the bank that failure to comply with the notice, would lead to the bank being declared as assessee in default under the Act;

(d) Consequent to the above impugned notice dated 30th August, 2018, the bank i.e. Union Bank of India has deposited an amount of Rs.19,19,676/- towards service tax into the treasury. This, as directed by the impugned notice dated 30th August, 2018; and

(e) Consequent to the above, on 3rd September, 2018, the present Petition was filed.

5 After the filing the present Petition, Respondent No.2 has issued a show cause notice dated 8th September, 2018, calling upon the Petitioner to show cause why service tax amount of Rs.2,81,97,456/- should not be demanded and recovered for the period 1st October, 2012 to 30th June, 2017. This notice was issued in terms of proviso to Section 73(l) of the Act. It also records the fact that an amount of Rs.19,19,676/- out of the above, had already been recovered, consequent to the impugned notice dated 30th August, 2018.

6 It is in the above facts that, Mr. Raichandani, learned Counsel in support of the Petition, submits as under:-

(a) that the impugned notice dated 30th August, 2018 is without jurisdiction inasmuch as Section 87 of the Act, has been invoked prior to issue and/or adjudication of the show cause notice. Therefore, the impugned notice dated 30th August, 2018 is not sustainable in law. In support, he relied upon the decisions of this Court in Quality Fabricators & Erectors (supra), Lawson Tours & Travels (I) P. Ltd., (supra) and ICICI Bank Ltd. (supra) – wherein this Court had taken a view that unless the amount payable is crystallized by a proper adjudication order, there is no question of recovery under Section 87 of the Act; and

(b) On instructions, he states that the Petitioner at this stage, only seeks the vacation of the attachment of its account at Union Bank of India. It is further stated on instructions that the amount of Rs.19,19,676/- which has been deposited by the Petitioner's bank with the Revenue may be retained by it till such time as show cause notice dated 8th September, 2017 is adjudicated upon.

7 In response, Mr. Jetly, learned Counsel for the Respondent opposing the Petition, submits as under:

(a) The Petitioner had filed a declaration on 11th April, 2016 under Section 73(3) of the Act, that the service tax payable by it for the period 2012-13 to 2014-15 aggregating to Rs.28,34,866/- which was payable and was not paid along with interest of Rs.18,29,539/- thereon is now being paid in terms of Section 73(3) of the Act. In view of the aforesaid declaration dated 11th April, 2016, no show cause notice was issued and investigation into the Petitioner's activities was closed. However, during the course of search, the Revenue was of the *prima facie* view that the service tax liability paid by the Respondent in their declaration under Section 73(3) of the Act, was out of adjustment of false/ fake/ non-existing/ fabricated/forged and bogus challans. Thus, to the above extent, there was no need to await an order on adjudication proceeding. Therefore, the impugned notice ought not to be set aside and/or interfered with at this stage;

(b) The invocation of Section 87 (b)(i) of the Act by the Respondent in the present facts, was justified as what is being sought to be recovered is only an amount of service tax liability which is due and not been paid as admitted by the partners of the Petitioner. Thus, it is the clear case where Section 87 (b)(i) of the Act being applicable to the present facts; and

(c) The decisions of this Court relied upon by the Petitioner are inapplicable to the facts of this case for the reason that in none of them, was there any admission of liability, as in the present facts.

8 We have considered the rival submissions. The contention of the Revenue that the declaration filed under Section 73(3) of the Act on 11th August, 2016 was found to be incorrect. Therefore, the declaration to the extent it is found incorrect, would entitle the Revenue to recover the same as submitted by Mr. Jetly, cannot be accepted. This as the submission completely ignores the proviso to Section 73(3) of the Act. This proviso to Section 73 (3) of the Act caters to/ provides for such contingencies. It in terms states that where the amount as declared under Section 73(3) of the Act has not been paid, then the same is to be recovered by issuing a notice under Section 73(1) of the Act. Only the period within which the notice is to be issued, will commence from the date of receipt of information. Therefore, the very act of issuing the show cause notice dated 8th September, 2017 under Section 73(1) of the Act is in accord with the proviso to Section 73(3) of the Act. Therefore, till the same is adjudicated, the issue of coercive proceedings for recovery, cannot arise.

9 On perusal of the show cause notice dated 8th September, 2017, we note that it is the Revenue's contention that it appears, consequent to the investigation that the Petitioner had claimed payment

of service tax on the basis of forged and fabricated service tax challans. Thus, the show cause notice itself has given an opportunity to the Petitioner to respond to the same and satisfy the authorities that the *prima facie,* view as formed by them and indicated in the notice, inter alia, on the above ground was not justified. Therefore, this would most certainly be a matter of adjudication. At the stage of adjudication, the Petitioner would have an opportunity to explain the meaning and significance of the alleged admission. Therefore, till such time, as the show cause notice is adjudicated, it cannot be conclusively stated that any amount of service tax was paid by the Petitioner on the basis of forged/ fabricated/bogus challans. This would necessarily have to await adjudication order passed after following the principle of natural justice. Thus, the invocation of Section 87 of the Act, at this stage, would in these facts, be pre-mature.

10 Section 87 of the Act provides that only after the amount payable by an assessee to the Government has been determined and on such determination, the assessee does not make payment due to the Central Government that Section 87 of the Act can be invoked. Today, no amount has been determined as payable by an Adjudication Order. This, is evident from the show cause notice 8th September, 2017, where the amounts short paid, is subject of adjudication. Therefore, it cannot be said that any amount is due to the Central Government.

11 Our Court has in Quality Fabricators & Erectors (supra), Lawson Tours & Travels (I) P. Ltd., (supra), ICICI Bank Ltd. (supra) and Cleartrip (P) Ltd., has consistently held that Section 87 of the Act, can only be invoked for adopting coercive proceedings for recovery after the

authorities determined the amount payable by an assesee on an adjudication order. Without adjudication, no steps for coercive recovery under Section 87 of the Act can be taken by the authorities. However, the distinction sought to be drawn on behalf of the Revenue that in all the aforesaid cases, there was no admission of any amount of service tax being due and not paid as in this case, does not merit acceptance. This for the reason that, the fact remains that the show cause notice dated 8th September, 2017 has called upon to the Petitioner to establish that the payments made were not on the basis of false, forged and fabricated challans. Thus, the issue is still open and it cannot be said that any amount which has been crystallized as due to the Government. The crystallization of the amount will take place only when an adjudication order is passed.

12 It is entirely possible that in response to the show cause notice dated 8th September, 2017 and at the hearing before the adjudicating authorities, the Petitioner would be able to establish that, prima facie, the view formed in the show cause notice with regard the service tax being discharged on the basis of false, forged and fabricated challans, was not justified. In such a case, it is likely that demand attributable to the statements made by the partners may be set aside. Thus, the issue raised by the Petitioner stands concluded in its favour by the decisions of this Court in Quality Fabricators & Erectors (supra), Lawson Tours & Travels (I) P. Ltd., (supra) and ICICI Bank Ltd. (supra).

13 The impugned notice dated 30th August, 2018 is quashed and set aside. However, the amount which have already been received by the Revenue consequent to the notice dated 30th August, 2018, would be

continued to be retained by the Respondent till the passing of on adjudication order on the show cause notice dated 8th September, 2018. However, it is made clear that the quashing of the impugned notice dated 30th August,2018 will not prevent the Revenue from invoking Section 73C of the Act, if found necessary by the Revenue, on compliance with conditions therein and in accordance with law.

14 **Writ Petition allowed** in the above terms. No order as to costs.

(RIYAZ I. CHAGLA,J.) **(M.S.SANKLECHA,J.)**