IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 11.04.2018
CORAM:
THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.Nos.726 & 727 of 2018
and CMP No.6957 of 2018 in WA.No.726 of 2018

M/s.Ocher Studios Pvt. Ltd.,
Rep. by its Director,
Dr.J.Murali Manohar .. Appellant in both WAs

versus

1. The Additional Commissioner
of Service Tax,
M.H.U.Complex - 6th Floor,
No.692, Anna Salai, Nandanam,
Chennai - 600 035.

2. The Superintendent (Grade IV)
Service Tax Division IV
Office of the Deputy Commissioner
of Service Tax,
Chennai IV Division,
Service Tax Commissioner,
Newry Towers - Third Floor,
No.2054-I, Second Avenue,
Twelfth Main Road, Anna Nagar,
Chennai - 600 040 .. Respondents in both WAs

Writ Appeals filed against the common order dated 10.01.2013 in W.P.Nos.502 & 503 of 2013.

WP.No.502 of 2013:Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records comprised in the proceedings of the 2nd respondent bearing C.No. IV/ 16/ 52/ 09/1979 dated 12.12.2012 and to quash the same.

WP.No.503 of 2013:filed under Article 226 of the Constitution of India to issue a Writ of Mandamus to direct the respondents herein to issue a Certified copy of the order passed in the order in original No.47/2011 dated 26.05.2011 by the 1st respondent to enable the petitioner to file an appeal under the provisions of Central Excise Act, 1944.

For Appellant : Mr.T.T.Ravichandran in both WAs.
For Respondents: Mr.V.Sundareswaran in both WAs.

COMMON JUDGMENT

(Order of the Court was delivered by S.MANIKUMAR, J.)

Being aggrieved by the common orders in WP.Nos.502 & 503 of 2013 dated 10.01.2013, instant writ appeals have been filed.

2. Mr.V.Sundareswaran, learned standing counsel for the respondent, is put on notice.

3. W.P.Nos.502 of 2013, has been filed for issuance of a writ of certiorari, to quash the order of Superintendent (Grade IV) Service Tax Division IV, Office of the Deputy Commissioner of Service Tax, Chennai IV Division, Service Tax Commissioner, Chennai, the 2nd respondent in both the appeals, in C.No.IV/16/52/09/1979 dated 12.12.2012, which is reproduced hereunder.

"Sir,

Sub: Service Tax - Non Payment of Service Tax dues - Reg.

Ref: Order-in-Original 47/2011 dt. 26.5.2011 and this office letters of even No.dt.13.9.2011, 23.12.2011 & 21.2.2012

An amount of Rs.44,85,475/- has been confirmed in the above referred Order and a balance amount of Rs.30,90,000/- is due from you with appropriate interest on the amount confirmed.

You are also required to pay penalty of Rs.13,14,018/- under Section 78 of Finance Act and a penalty of Rs.200/- per day or at 2% per month starting from the first day after due date till the date of payment, whichever is higher under Section 76 of the Act.

As it is more than one year since the order was passed and the arrears became due and you have still not paid the same to the Government. You are requested to pay the same immediately, within 10 days from the date of receipt of this letter failing which recovery action under Section 87 of Financial Act will be initiated."

4. W.P.No.503 of 2013, has been filed for a mandamus directing the respondents herein to issue a certified copy of the order-in-original No.47 of 2011 dated 26.05.2011, passed by the Additional Commissioner of Service Tax, Chennai, the 1st respondent, so as to enable the appellant to file an appeal under the provisions of the Central Excise Act, 1944. Vide said order dated 26.05.2011, the Additional Commissioner of Service Tax, Chennai, has passed the following orders

"17. ORDER

i) I confirm Service Tax demand of Rs.13,14,018/- Rupees Thirteen Lakhs Fourteen Thousand and Eighteen Only) on M/s.Ocher Studios Pvt. Ltd., Chennai, under the proviso to Section 73(1) of the Finance Act, 1994 and order them to pay the said amount in terms of the provisions of Section 73(2) of the Act ibid.

ii) I confirm the Service Tax demand of Rs.30,90,000/- (Rupees Thirty Lakhs Ninety Thousand Only) on M/s.Ocher Studios Pvt. Ltd., Chennai, under the proviso to Section 73(1) of the Finance Act, 1994 and order them to pay the said amount in terms of the provisions of Section 73(2) of the Act ibid.

iii) I order for reversal of irregular Cenvat Credit of Rs.81,457/- under Rule 14 of the Cenvat Credit Rules, 2004 and payment of equal amount in terms of Section 73(1) of the Finance Act, 194.

iv) I appropriate the service tax of Rs.10,76,782/- (Rupees Ten Lakh Seventy Six Thousand Seven Hundred and Eighty Two only), paid by Cash and the Service Tax of Rs.2,37,236/- (Rupees Two Lakhs Thirty Seven Thousand Two Hundred and Thirty Six only) adjusted through Cenvat Credit, against the demand made at (i) above;

v) I appropriate the Service Tax of Rs.81,457/- (Rupees Eighty One Thousand Four Hundred and Fifty Seven only) paid against (iii) above;

vi) I order for payment of interest at applicable rate of the demands made at (i), (ii) & (iii) above in terms of Section 75 of the Finance Act, 1994;

vii) I confirm the interest of Rs.81,058/- (Rupees Eighty One Thousand Fifty Eight Only) payable on belated payment of Service Tax made during the period from October' 2005 to September' 2008 under Section 75 of the Finance Act, 1994;

viii) I confirm the interest of Rs.26,853/- (Rupees Twenty Six Thousand Eight Hundred and Fifty Three only) payable on belated payment of Service Tax of Rs.12,36,000/- made on 5.08.2008 under Section 75 of the Finance Act, 1994;

ix) I appropriate an amount of Rs.81,058/- paid towards the demand of interest against (vii) above;

x) I appropriate an amount of Rs.6,557/- (Rupees Six Thousand Five Hundred and Fifty Seven only) paid on 23.12.2008 towards interest against (viii) above;

xi) I impose penalty of Rs.13,14,018/- (Rupees Thirteen Lakhs Fourteen Thousand and Eighteen only) on (i) under Section 78 of the Finance Act, 1994. However, this penalty shall be reduced to 25% of the said amount if the same is paid along with interest and the reduced penalty, within thirty days from the receipt of this order.

xii) I impose of Rs.200/- (Rupees Two Hundred only) on M/s.Ocher Studios Pvt. Ltd., for every day or at the rate of two percent of tax determined per month, which ever is higher, starting with the first day after the due date till the date of actual payment under Section 76 of the Act, in respect of the demand made at (ii) & (iii) above. However, the total amount of the penalty payable under this section shall not exceed the actual service tax payable."

5. Before the writ Court, contention has been made, that order-in-original No.47 of 2011, dated 26.05.2011 in SCN No.174 of 2009 dated 16.04.2009, was not communicated to the appellant and therefore, the appellant was constrained to seek for a certified copy of the order-in-original.

6. On this day, when the matter came up for admission, Mr.T.T.Ravichandran, learned counsel for the appellant submitted that on the plea of non service / communication of the order-in-original No.47 of 2011 dated 26.05.2011, writ Court called for the files and perused the same.

7. After perusal of the files, on the plea of non-service / communication of the certified copy of the order-in-original No.47 of 2011 dated 26.05.2011, at paragraph Nos. 3 and 4, in common order in WP.Nos.502 & 503 of 2013 dated 10.01.2013, writ Court observed as hereunder.

"3. Both the writ petitions are totally misconceived as it could be evident from the file produced by the respondents that the order-in-original No.47 of 2011 dated 26.05.2011 was dispatched on 13.9.2011, as per the endorsement dated 13.9.2011, and the petitioner studio has received the same on 15.9.2011. The postal acknowledgement card contains the seal and signature of the person, who has received the order.

4. In such view of the matter, the plea of the non-service of the order-in-original No.47 of 2011 dated 26.05.2011 does not appear to be justified and

accordingly, the consequential demand for payment of arrears in terms of the adjudication order cannot be interfered with or stayed. The petitioner has to workout his remedy as against the order-in-original No.47 of 2011 dated 26.05.2011 in accordance with law. Accordingly, W.P.No.502 of 2013 stands dismissed. Consequently, connected Miscellaneous Petition is dismissed."

8. Ultimately, at paragraph No.5, writ Court ordered as hereunder:

"5. Since the copy of the order passed in the order-in-original No.47 of 2011 dated 26.05.2011 has already been dispatched and received by the petitioner, and in any event a copy of the order has also been furnished to the learned counsel for the petitioner today, no further direction can be issued in W.P.No.503 of 2013. Accordingly, the writ petition stand closed. However, there is no order as to costs."

9. Impugned order is assailed on the following grounds:

(a) Writ Court ought to have seen that the appellant has not denied the receipt of the free copy of the order in original bearing No.47 of 2011 dated 26.5.2011. The appellant sought for Mandamus only for the grant of the Certified copy of the order but the respondents handed over a Xerox Copy of the same to the appellant's counsel and hence no appeal can be preferred on the basis of a Xerox Copy and hence to this limited extent the order of the Writ Court has to be interfered with.

(b) the respondents herein ought to have filed a counter affidavit but without filing the same produced a filed before the Writ Court and the appellant's counsel did not have an opportunity to inspect the said file and only certain copies were furnished to the appellant's counsel on the date of hearing and hence the contentions of the respondent could not be repudiated before the Writ Court and therefore to this extent, the order of the Writ Court is liable to be interfered with.

(c) Writ Court failed to see that the Impugned order dated 12.12.2012, the respondents have stated that recovery proceedings would be instituted against the appellant if the demand has not been paid and since the appellant has no opportunity to file an appeal before the Appellate Authority, the order of the 2nd respondent ought to have been interfered with.

(d) Writ Court failed to consider that the impugned order is violative of the statutory provisions contained in Central Excise Act of 1944 and the Constitution provisions under Article 14 and Article 265 of the Constitution of India.

(e) Writ Court failed to consider that the petitioner was not permitted to file an appeal under the provisions of the Central Excise Act of 1944 against the order in original bearing No.47 of 2011 dated 26.5.2011. It was brought to the notice of the respondents that the certified copy of the order has not been furnished and hence the statutory appeal could not be filed. However, till date the order had not been communicated to the petitioner and hence the impugned order is liable to be quashed.

(f) Impugned order is violative of the principles of natural justice. Once the statute has granted a right of appeal and the petitioner has not exercised such a right due to non furnishing of the copy of the order to the appeal, respondents have no locus standi to take steps to recover Service Tax and hence the impugned order dated 12.12.2012 is liable to be quashed.

(g) the respondents herein have not followed the procedure established by law as mandated under Article 265 of the Constitution of India and since the recovery proceedings are against the constitutional mandate, the same is liable to be quashed.

10. Though, Mr.T.T.Ravichandran, learned counsel for the appellant made submissions on the above grounds and further added that somebody would have received the certified copy of the order and that the same does not amount to communication / service of certified copy of the order on the appellant, we are not inclined to accept the said contention. On one hand, the appellant has admitted receipt of the certified copy and on the other hand, has contended that certified copy was not furnished. At page 27 of the typed set of papers, appellant had enclosed the speed post acknowledgment due, maintained in the Office of the Commissioner of Service Tax, Service Tax Commissionerate, Chennai, which figures the name of the appellant at Serial No.23, in the Register, and it fortifies the contention of the respondents that certified copy of the order-in-original No.47 of 2011 dated 26.05.2011, was sent. We also saw the postal acknowledgement, at page No.28 of the typed set of papers, which contains the seal of M/s.Ocher Studios Pvt. Ltd. Thus, as rightly observed, plea of non service /communication, of the certified copy of the order-in-original No.47 of 2011 dated 26.05.2011, cannot be countenanced.

11. Order-in-original is of the year 2011. No prejudice would be caused to the respondents, if a fresh certified copy of the same is furnished. Inasmuch as the appellant had already received the copy of the order-in-original No.47 of 2011 dated 26.05.2011, as early as on 15.09.2011, it is made clear that limitation would commence only from 15.09.2011 and not from the date of receipt of another certified copy of the order-in-original No.47 of 2011 dated 26.05.2011.

12. In the light of availability of an alternate remedy, order-in-original No.47 of 2011 dated 26.05.2011, cannot be set aside. Hence, W.A.No.726 of 2018, filed against the order made in W.P.No.502 of 2013, to quash the order-in-original No.47 of 2011 dated 26.05.2011, is dismissed.

13. W.A.No.727 of 2018, filed against W.P.No.503 of 2013, for issuance of certified copy of the order is allowed and the 2nd respondent herein is directed to issue a certified copy of the order-in-original No.47 of 2011 dated 26.05.2011, within a period of three weeks from today.

14. In the result, W.A.No.726 and 2018 is dismissed and W.A.No.727 of 2018, is allowed. No Costs. Consequently, the connected Civil Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

ars
To
1. The Additional Commissioner
of Service Tax,
M.H.U.Complex - 6th Floor,
No.692, Anna Salai, Nandanam,
Chennai - 600 035.

2. The Superintendent (Grade IV)
Service Tax Division IV
Office of the Deputy Commissioner
of Service Tax,
Chennai IV Division,
Service Tax Commissioner,
Newry Towers - Third Floor,
No.2054-I, Second Avenue,
Twelfth Main Road, Anna Nagar,
Chennai - 600 040
+1 cc to Mr.T.T.Ravichandran Advocate sr 27859
+1 cc to Mr.V.Sundareswaran Advocate sr 27033

W.A.Nos.726 & 727 of 2018
and CMP No.6957 of 2018
in WA.No.726 of 2018

kgk(co)
aa27/04/2018