IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.03.2018
Delivered on : 28.06.2018

CORAM:

THE HON'BLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HON'BLE MR.JUSTICE P.VELMURUGAN

W.A No.1629 of 2016 and
CMP Nos.20252 and 20253 of 2016

M/s.Sundaram Finance Ltd.,
No.21, Patullos Road,
Chennai - 600 002. ...Appellant/Petitioner

Vs

1.Commissioner,
LTU Audit Circle,
1775 Jawaharlal Nehru Inner Ring Road,
Annanagar West Extension, Chennai - 600 101.

2.Commissioner of Central Excise and Service Tax,
Large Taxpayer Unit,
1775, Jawaharlal Nehru Inner Ring Road,
Annanagar West Extension,
Chennai - 600 101. ...Respondents

(R2 impleaded vide order dated 19.01.2017
made in CMP No.679/2017 by HGRJ and ASMJ)

Prayer:- Writ Appeal filed under clause 15 of the Letter Patent against the order dated 05.10.2016 made in W.P.No.35241 of 2016.

WP.No.35241 of 2016

Petition under Article 226 of the Constitution of India praying for the issuance of a writ of certiorarified Mandamus to call for the records pertaining to the impugned proceedings in No.LTUAC/ CHN/02/2016-(C) dated 9.6.2016 in C.No.III/10/ 58/2015-Audit issued by the respondent herein, and quash the same as wholly arbitrary unreasonable and ultra vires the Service Tax provisions of the Finance Act 1994 consequentially for bear the respondent his officers men and agents from Assessing, demanding, collecting and recovering the amounts arising out of the profit on Sale of Securitization by the petitioner herein

For Appellant : Ms.Pushya Seetharaman
Senior Counsel for
Mr.Arun Kurian Joseph

For Respondents : Mr.A.P.Srinivas
Senior Standing Counsel

J U D G M E N T

K.K. SASIDHARAN,J.

The Facts

The challenge in this intra court appeal is to the order dated 5 October 2016 in W.P.No.35241 of 2016 dismissing the writ petition filed by the appellant to quash the show cause notice issued by the Commissioner, LTU Audit Circle, Chennai, alleging non-payment of service tax on charges/fees received out of the profit on sale of securitization of future receivables.

2. The appellant is a Non-Banking Financial Company engaged in extending finance facilities in the area of vehicle finance, including that of equipment through hypothecation, leasing and hire-purchase modes. The appellant provides taxable services under the categories of Banking and other financial services, Business Auxiliary Services and Business Support Services. The appellant is an assessee on the file of the service Commissionerate, Chennai.

3. The transaction carried out by the appellant as Non-Banking Financial institution would result in receiving the finance facilities extended by it to various customers comprising the principal along with the interest and certain specified instalments. This mode of mobilisation of funds is governed by the guidelines issued by the Reserve Bank of India from time to time.

4. The sale of the debtors (future receivables) have the sanction of the Reserve Bank of India. The original securities, hypothecated assets, etc., would continue to be in the original names. The appellant apart from sale of receivables to the bank through a Deed of Assignment also undertakes the responsibility of collecting payments from the debtors and for the said purpose, a separate agreement is entered into under the Service Agreement. The appellant undertakes to collect the debts from various borrowers and remit the same besides rendering certain other services to the Banks. The appellant is paid an agreed specified percentage of the Principal and/or interest amounts collected. The appellant is paying service tax on such payment in accordance with law.

5. The first respondent issued a show cause notice to the appellant to treat the profit made by it on sale of receivables as consideration for service. The respondent demanded service tax on such consideration and called upon the appellant to submit its response.

6. The appellant vide letter dated 23 November 2015 provided the details of the income generated on securitization / direct assignment and sale price received through securitization / direct assignment. Since the respondent decided to proceed further inspite of the explanation given by the appellant, a writ petition was filed in W.P.No.35241 of 2016 challenging the show cause notice dated 9 June 2016.

7. The appellant challenged the show cause notice before the Writ Court on the ground that the profit element, which is termed as Excess spread of income on sell-down amount is merely the difference between the actual interest collected on a hire-purchase transaction and that paid to the financial institutions, who had purchased the debtors from the company. It is the grievance of the appellant that the show cause notice considered the aspect of sale of securitization/sell-down of future receivables as being liable to tax and thus calculated the service tax liability.

8. The learned single Judge dismissed the writ petition on the ground that the issues involved in the matter are pure question of fact which should be decided by the authority on merits. Feeling aggrieved, the appellant has come up with this intra court appeal.

Summary of Submissions

9. The learned Senior Counsel for the appellant contended that the show cause notice proposes to levy service tax on the profits derived from sale of current assets namely receivables to banks by way of securitization transactions for the period 2011-12 to 2014-15 which is beyond jurisdiction both on the ground of limitation and on the ground that the transaction is one of sale, to which service tax would not apply. The learned Senior Counsel contended that the first respondent by issuing the show cause notice acted beyond its jurisdiction. It was contended that 65B(44) of the Finance Act, excludes "transaction in money and actionable claims" while defining the term Service. According to the learned Senior Counsel, the respondent has no jurisdiction to tax the transaction in question and as such, the show cause notice has no sanction of law.

10. The learned Senior Standing Counsel for the Revenue

contended that the adjudicating authority is yet to decide the matter on merits. According to the learned Senior Standing Counsel there are certain vital issues to be decided by the adjudicating authority on the basis of materials. Since a prima facie case is made out for initiating proceedings against the appellant, there is no question of interdicting the proceedings during the show cause stage.

Discussion

11. The only question that arises for consideration is as to whether the appellant has made out a case for quashing the show cause notice issued by the first respondent.

12. The appellant is providing service under the category of banking and other financial services. The primary business of the appellant is providing Loans, Hire Purchase and Financial Leasing, which includes, Equipment Leasing to their customers. The appellant during the course of its business enters into loan / hire-purchase / leasing transactions with its customers. The appellant receives the principal and interest amounts in equated monthly instalments. The appellant securitizes / sells-down the receivables, whereby, the future Equated Monthly Instalments to be received from the customers are pooled together and sold to a trust or assigned to a buyer. The appellant assigns / sells the future receivables to be received out of rural lending to banks as per the guidelines framed by the Reserve Bank of India relating to Priority Sector Lending.

13. The appellant had sold the future receivables and had sold or assigned directly to the buyers at a premium. These buyers are mostly banks. The Banks buy the future receivables from the appellant in order to fulfill the legal obligation casted upon them by the Reserve Bank of India to lend money to priority sector. The first respondent proceeded under the premise that the main consideration received by the appellant for securitization / sell-down of future receivables is a one time payment received in the form of 'Upfront Fee'. This consists of the actual amount of receivables assigned to the assignee viz., the value of the future receivables assigned and the premium amount for securitization / sell-down which have been accounted in the accounts of the appellant.

14. The show cause notice proceeds also under the premise that the appellant makes a profit by paying reduced rate of interest to the assignee, the rate of interest collected by them from the customers on the assigned properties along with the principal amount. The difference between the amount of interest collected by the appellant from the customers and paid to the assignee is a profit to the appellant in the form of 'Excess Spread Income Sell-down on securitization / sell-down.

Similarly, the Collection Efficiency Fee is paid by the assignee to the appellant by judging the efficiency shown in collecting the Equated Monthly Instalments from the customers. As per the Service Agreement, when the appellant collects above 98.76% of the Equated Monthly Instalments from the customers, they are eligible for the 'Collection Efficiency Fee'. This fee is paid on a monthly basis at a rate which varies from 0.05% to 1.25% of the principal amount collected during the month when the collection of receivables was made in the range of 98.76% to 100%. The respondent considered this payment as an incentive for better and efficient collection of Equated Monthly Instalments from the customers in addition to the 'Sell-down Servicing Fee' and the 'Excess Spread Income Sell-down' received by them. According to the respondents, the other consideration received by the appellant from the assignee after securitization is the 'Sell-down Servicing Fee' on a monthly basis. The appellant collects all the future receivables from the customers, maintains the Books of Account in respect of the assigned properties, implements the KYC norms to their customers, makes payment of receivables to the assignee etc., In order to render the aforesaid services, the appellant collects service charges from the assignee. It is the contention of the respondents that the activity of securitization / sell-down of future receivables to the Banks performed by the appellant helped the Banks in fulfilling their legal obligation of rural lending and lending to priority sector. The respondents considered such activities under the category of services provided in relation to business or commerce. In short, the respondents considered such services under the broad category of 'Business Support Services' prior to 1 July 2012 which would also constitute within the definition of 'service' under Section 65B(44) of the Finance Act, 1944 with effect from 1 July 2012.

15. The proceedings under challenge in W.P.No.35241 of 2016 was only a show cause notice. The appellant has no case that the first respondent has no jurisdiction to initiate proceedings by issuing the show cause notice. The appellant has taken up a contention that the proceedings are barred by limitation. The issue regarding limitation is a mixed question of fact and law. In fact, the learned Senior Standing Counsel for the Revenue has produced materials in support of his contention that the show cause notice was issued within the period of limitation. It is for the adjudicating authority to decide this issue.

16. The first respondent is the adjudicating authority. The appellant cannot be heard to say that the explanation would not be considered by the first respondent and an order on merits would not be passed. None of the ground taken by the appellant in the writ petition would constitute 'sufficient grounds' to set aside the show cause notice. We are therefore of the view

that the learned single Judge was justified in dismissing the writ petition. We do not find any error or illegality in the order warranting our interference.

17. In the upshot, we dismiss the intra court appeal. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

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2.Commissioner of Central Excise and Service Tax,
Large Taxpayer Unit,
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+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.41623
+1cc to Mr.J.Sree Vidya, Advocate, S.R.No.41811

W.A No.1629 of 2016

BR(CO)
GSP(18/07/2018)