

THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION No.7638 OF 2017

ORDER

(Per Sri Justice Sanjay Kumar)

M/s. NRI Academy, Guntur, the petitioner, assails the Order-in-Original dated 29.11.2016 passed by the Commissioner, Central Excise, Customs and Service Tax, Guntur, Andhra Pradesh, the second respondent, requiring it to pay Rs.53,94,36,220/- towards service tax in relation to its commercial coaching services, with interest and penalties.

The affidavit filed in support of the writ petition states thus: The petitioner academy is a registered partnership firm with two partners, viz., A.Rajendra Prasad and his wife, A.Madhavi. It has 9 branches located at Guntur, Visakhapatnam, Vijayawada, Hyderabad, Eluru, Tirupati, Ongole, Tenali and Nellore. The petitioner academy entered into Memorandum of Understanding (MoU) dated 01.04.2009 with M/s. NRI Educational Society (*hereinafter*, 'the society'), a society formed under the Societies Registration Act with 7 members. A.Rajendra Prasad, the Managing Partner of the petitioner academy, is a member of the society and is also the President & Correspondent of the society's colleges for Intermediate education in the State of Andhra Pradesh. On the strength of this MoU, the petitioner academy operated 43 recognized junior colleges of the society, viz., NRI Junior Colleges, imparting education in Intermediate curriculum to students. These colleges were affiliated to the Board of Intermediate Education, Andhra Pradesh, and imparted Intermediate education to students in the streams of MPC, BiPC, CEC & MEC. The petitioner academy applied for service tax registration on 01.06.2011 and requisite documents for that purpose were submitted on 06.07.2011. Meanwhile, the Superintendent of

Service Tax, Vijayawada, issued summons dated 20.07.2011 to the petitioner academy calling upon it to furnish certain information. On 27.07.2011, the petitioner academy requested the Superintendent not to initiate proceedings as it had already applied for registration on 01.06.2011. By letter dated 18.11.2011, the Superintendent requested the petitioner academy to pay service tax and file its returns. Again, on 25.11.2011, the Superintendent requested the petitioner academy to pay service tax and file returns. Upon registration, the petitioner academy filed a 'nil' return on 18.08.2012, for the period October 2011 to March 2012. Thereunder, it claimed exemption under Service Tax Notification No.33/2011 dated 25.04.2011. The petitioner academy then surrendered its registration under letter dated 21.08.2012, on the ground that it did not have to pay service tax in terms of the aforesaid Notification dated 25.04.2011. While so, the Director General of Central Excise, Intelligence Zonal Unit, Ahmedabad, issued demand-cum-show cause notice dated 17.04.2015 under Section 73(1) of the Finance Act, 1994 (*for brevity*, 'the Act of 1994') calling upon the petitioner academy to pay service tax of Rs.60,19,70,994/- in relation to the coaching fees of Rs.522,89,65,907/- collected by it from 01.10.2009 to 31.03.2015. This show-cause notice was issued on the premise that the petitioner academy provided the taxable service of 'commercial coaching or training services'.

The petitioner academy submitted its reply, *vide* letter dated 28.12.2015, whereunder it sought setting aside of the show-cause notice dated 17.04.2015 on the ground that it had not imparted coaching for BITSAT, VIT, NEET, etc., as alleged in the show-cause notice, but had only imparted education in Intermediate curriculum, in addition to making available study material for students appearing for the competitive examinations referred to in the show-cause notice. However, the second

respondent passed the impugned Order-in-Original dated 29.11.2016 levying Rs.53,94,36,220/- towards service tax payable by the petitioner academy for the taxable service of commercial coaching during the period 01.10.2009 to 31.03.2015. The demand of interest thereon stood confirmed under Section 75 of the Act of 1994. The second respondent also imposed a penalty of Rs.10,000/- for failure to apply for registration apart from a penalty of Rs.10,000/- for contravention of the provisions of the Act of 1994 and a further penalty of Rs.53,94,36,220/- for suppressing the value of the taxable services provided, resulting in the evasion of service tax, under Section 78(1) of the Act of 1994.

The petitioner academy contends that the impugned Order-in-Original dated 29.11.2016 is unsustainable as the show-cause notice dated 17.04.2015 was issued invoking power under the *proviso* to Section 73(1) of the Act of 1994 but the extended period of limitation thereunder could only be invoked when fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of Chapter V of the Act of 1994 or the Rules made thereunder is committed with intent to evade payment of service tax and no such situation was discernible on facts in the case on hand. The petitioner academy pointed out that the service tax department was well aware of the activity undertaken by it all through and could not accuse it of suppression. It therefore contended that the department had invoked the extended period of limitation without justification and the show-cause notice dated 17.04.2015 issued beyond the normal period of limitation was unsustainable. The petitioner academy stated that it did not obtain service tax registration till 29.01.2012 being under the *bonafide* belief that the coaching activity undertaken by it was not taxable, in terms of the earlier Notification bearing No.10/2003 and thereafter, under

Notification No.33/2011. The petitioner academy stated that, having gotten itself registered, it filed a 'nil' return and then decided to surrender its registration altogether as it had no liability to pay service tax. It contended that the service tax department was well aware of the issue right from the year 2011 and could not take recourse to the extended period of limitation to justify the show-cause notice dated 17.04.2015. It further stated that though an appellate remedy was available to it against the impugned Order-in-Original, as the said order was without jurisdiction/authority of law, it was invoking the extraordinary jurisdiction of this Court under Article 226 of the Constitution. It pointed out that an appeal was not an efficacious remedy as it was onerous, requiring pre-deposit of 7.5%, i.e., Rs.4,04,57,777/-, for maintaining it. In consequence, the petitioner academy sought relief as set out in its main prayer.

The Deputy Commissioner of Central Excise and Service Tax, Office of the Commissioner of Customs and Central Excise, Kannavarithota Guntur Commissionerate, filed a counter on behalf of the respondents. Therein, he stated thus: The petitioner academy chose to be selective in presenting the facts and did not place the full facts before this Court. Having applied for service tax registration on 01.06.2011, though it was providing taxable services since 2009, the petitioner academy waited till 18.08.2012 to file a 'nil' return for the period October, 2011 to March, 2012, though it received its centralized registration certificate on 30.01.2012. He further stated that the petitioner academy's claim that it had imparted education only in Intermediate curriculum was incorrect as it was engaged in coaching students for All India Entrance Examinations. He placed reliance on the MoU dated 01.04.2009 and the statement made by A.Rajendra Prasad, the Managing Partner of the petitioner academy. He also cited the bills

generated by the petitioner academy indicating different fee structures. He stated that the actual tuition fee prescribed by the Board of Intermediate Education, Andhra Pradesh, was collected by the society and not by the petitioner academy. He pointed out that the admitted position was that the petitioner academy and the society were collecting separate fees from the students which clearly showed that the fee towards Intermediate curriculum was collected by the society while the fee towards specialized coaching was collected by the petitioner academy. He asserted that the petitioner academy and the society had suppressed the fact that they were both separate legal entities and the nature of their activities and claimed that the petitioner academy had acted with the conscious intention of evading payment of service tax, by not bringing the actual facts to the knowledge of the department. He stated that there was no merit in the argument that the department was well aware of the activities since 2011 and asserted that the extended period of limitation was rightly invoked. He pointed out that the petitioner academy was not entitled to claim benefit either under Notification No.10/2003-ST dated 20.06.2003 or under Notification No.33/2011-Service Tax dated 25.04.2011. He denied the petitioner academy's claim that the Commissioner's order went beyond the show-cause notice and pointed out that the nature of the entrance exams for which coaching was given by the petitioner academy was specifically mentioned in para 22.1(i) of the show-cause notice dated 17.04.2015..

The petitioner academy filed a reply affidavit in June, 2017. Therein, it reiterated its stand that it was not required to pay service tax from 2009 onwards as it was not providing commercial coaching or training but only imparting coaching in Intermediate curriculum. It further stated that the MoU was not acted upon and that coaching for All India Entrance Examinations

was only a proposal which never fructified. It asserted that the statement of A.Rajendra Prasad, the Managing Partner, was twisted out of context to suit the interest of the department and that it never provided any coaching for All India Entrance Examinations and was therefore not liable to pay service tax.

The Assistant Commissioner of Central Excise and Service Tax, Office of the Commissioner of Customs and Central Excise, Kannavarithota, Guntur Commissionerate, then filed counter-affidavit dated 21.09.2017 in response to the aforestated reply affidavit. As filing of such an additional-counter affidavit in response to a rejoinder is not contemplated by procedural norms, the same is eschewed from consideration.

In so far as availability of the appellate remedy is concerned, it is well settled that refusal by this Court to entertain a writ petition on the ground of existence of an alternative remedy is in exercise of self-imposed restraint, guided by settled principles and judicious exercise of discretion and it would ultimately depend upon the facts of the individual case as to whether this Court would choose to do so or not. However, even if a writ petition is entertained, it cannot be equated with an appellate remedy and the scope of judicial review would only be on limited recognized grounds, compared to the wider scope of appellate jurisdiction. Keeping this aspect in mind, we propose to adjudicate this writ petition as the issue of limitation has been raised which would go to the root of the matter. (See STATE OF PUNJAB V/ s. BHATINDA DISTRICT CO-OPERATIVE MILK P. UNION LTD.¹).

Perusal of the MoU dated 01.04.2009 reflects that A.Rajendra Prasad signed therein both for the petitioner academy as well as the society in the respective roles of Managing Partner of the petitioner academy and Secretary & Correspondent of the society. The MoU recorded that the

¹ 2017 (217) ELT 325 (SC)

petitioner academy was a coaching centre for +2 level or Intermediate courses, giving coaching for All India entrance examinations along with Intermediate examinations and the petitioner academy approached the society to forward its students to write examinations and as the society had recognition from the Board of Intermediate, Andhra Pradesh, it agreed to forward its students to the petitioner academy. Clause 1 of the terms and conditions recorded that the society would forward all its admitted students in +2 courses to the petitioner academy for a period of seven years and the students would be allowed to complete their two years with the petitioner academy's institutions. Clause 2 provided that the application fee and tuition fee for coaching would be collected from students by the petitioner academy only and the society could not claim the said amounts. Clause 3 stipulated that the expenditure like rents, faculty benefit to the teaching staff and salaries to the non-teaching staff and other expenses would be borne by the petitioner academy only. Clause 4 provided that other statutory formalities like provident fund, ESI and Income-tax would be taken care of by the petitioner academy only. Clause 5 provided that students should be enrolled and recognition fee should be forwarded to the Board of Intermediate within 31st August of every academic year by the society. Clause 6 stipulated that the society could directly collect recognition fee, tuition fee and special fee from the students as per the Board of Intermediate norms. Clause 7 provided for the society to directly collect the public examination fees from the students and make arrangements for the students to attend and write the examinations and practicals. Clauses 8 to 13 are not of much relevance to the case on hand. Clause 14 recorded that the students of the petitioner academy should be forwarded through the society for appearing at the Intermediate examinations.

Now, a look at the statutory backdrop: Section 65(105)(zzc) of the Act of 1994 includes within the ambit of 'taxable service' any service provided to any person by a commercial training or coaching centre in relation to commercial training or coaching and the 'Explanation' thereto clarifies that 'commercial training or coaching centre' shall include any centre or institute, by whatever name called, where training or coaching is imparted for consideration, whether or not such centre or institute is registered as a trust or a society or similar other organization under any law for the time being in force and carrying on its activity with or without profit motive and the expression 'commercial training or coaching' shall be construed accordingly. The Explanation to Section 65(105)(zzc) was introduced by Finance Act 2010, but with retrospective effect from 01.07.2003. Section 65(26) of the Act of 1994 defines 'commercial training or coaching' to mean any training or coaching provided by a commercial coaching or commercial training centre. Section 65(27) of the Act of 1994 defines 'commercial training or coaching centre' to mean any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than sports, with or without issuance of a certificate, and includes coaching or tutorial classes *but does not include a preschool coaching and training centre or any institute or establishment which issues any certificate or diploma or degree or any educational qualification recognized by law for the time being in force*. The portion of the definition in italics was deleted by the Finance Act, 2011, with effect from 08.04.2011. However, Notification No.10/2003-Service Tax dated 20.06.2003 was issued by the Central Government, in exercise of power conferred by Section 93 of the Act of 1994, exempting the taxable service provided by a commercial training or coaching centre, in relation to the commercial training or coaching which

forms an essential part of a course or curriculum of any other institute or establishment, leading to issuance of any certificate or diploma or degree or educational qualification recognized by law for the time being in force to any person, from the whole of the service tax leviable thereon under Section 66(2) of the Act of 1994. The *proviso* however states that such exemption would not be applicable if charges for such services are paid by the person undergoing such course or curriculum directly to the commercial training or coaching centre. This Notification came into force on 01.07.2003. Thereafter, by Notification No.33/2011-Service Tax dated 25.04.2011, the Central Government, in exercise of power conferred by Section 93(1) of the Act of 1994, exempted (i) preschool coaching and training; and (ii) coaching or training leading to grant of a certificate or diploma or degree or any educational qualification which is recognized by any law for the time being in force, when provided by any commercial coaching or training centre, from the whole of the service tax leviable under Section 66 of the Act of 1994. This Notification came into force on 01.05.2011. Thereafter, Section 66B was inserted in the Act of 1994 *vide* the Finance Act, 2012, with effect from 01.06.2012, authorizing levy of service tax on all services other than those specified in the negative list. Section 66D enumerates the services in the negative list. Clause (l) (ii) thereunder refers to services by way of education as a part of curriculum for obtaining a qualification recognized by any law for the time being in force.

In the demand-cum-show cause notice dated 17.04.2015, reference was made to the statement of one Bhaskara Rao, Manager (Honorary) of the petitioner academy, which had been recorded under Section 14 of the Central Excise Act, 1944 (for brevity, 'the Act of 1944') which is made applicable to service tax matters, *vide* Section 83 of the Act of 1994. Therein,

the Manager practically admitted the liability of the petitioner academy to pay service tax for the coaching activities undertaken by it. Reference was also made in the notice to the statement of Sri A.Rajendra Prasad, Managing Partner of the petitioner academy-cum-member of the society, which was also recorded under Section 14 of the Act of 1944. Scanned images of application forms submitted by students to the petitioner academy were also reproduced therein. The format of the said application indicates that one student was admitted into MPC Intermediate and paid for Engineering NRI Special Programme-I. The other options available, as is evident from the said application form, are Medical in NRI Special Programme-I and under Programme-II (IC), Global Scholars (JEE Main & Advanced + BITSAT + VIT), Techno-Scholars (Jee Main + BITSAT + VIT) and Medi-Scholars (EAMCET + AIIMS + JIPMER + AFMC + CMC); and under Programme-III (Regular), JEE Main, Medical, Engineering, CEC, MEC + CPT and MEC. The fee collected from the said student towards MPC Intermediate and NRI Engineering Special Programme-I was Rs.40,000/- for the first year and Rs.45,000/- for the second year. Similarly, another application form evidences that a student who chose Medical NRI Special Programme-I was charged Rs.85,000/- for the first year and Rs.90,000/- for the second year. Another candidate belonging to MPC Intermediate who chose Techno-Scholars (JEE Main + BITSAT + VIT) was charged Rs.52,000/- for the first year and Rs.60,000/- towards the second year. As opposed to this, a candidate who opted for MEC group in Intermediate was charged only Rs.10,000/-. A brochure brought out by the petitioner academy, reproduced in the notice, indicated that there was a vast discrepancy in the day scholar fee particulars for the academic year 2014-15 depending on the points that the student was aiming for. The notice also adverted to the differences between the petitioner academy and

the society in status and functioning. Referring to the grant of affiliation to the society's colleges by the Board of Intermediate Education, Andhra Pradesh, it was pointed out that the same specifically required appointment of qualified teaching staff as per the prescribed procedure to impart Intermediate education to the students. The notice referred to the fact that the petitioner academy and the society were independent and separate legal entities engaged in separate activities, i.e., the society was providing education to Intermediate students whereas the petitioner academy was providing coaching to such students, and both charged fees separately and filed separate income-tax returns showing different sources of income. It was pointed out that the petitioner academy showed income under the head 'Application Fees & Fees (Tuition/Coaching)', whereas the society showed income from 'Recognition Fees', 'Intermediate Tuition Fees', 'Admission Fees', 'Application Fees', 'Bus Fees', 'Smart Class Fees', 'Exam Fees', 'Hostel Fees', 'Public Examination Fees' and claimed exemption from payment of income-tax under Section 10(23C) of the Income-tax Act, 1961 (for brevity, 'the Act of 1961'). The balance-sheet filed by the petitioner academy for the assessment year 2012-13 was extracted in the show-cause notice, wherein the petitioner academy claimed expenditure towards bus rents and rent expenses, running into crores of rupees, while the society also claimed such expenditure during the very same assessment year. The petitioner academy showed fee receipts from Guntur, Vijayawada, Vizag, Hyderabad, Eluru and Tirupati, aggregating to Rs.115,76,19,629, whereas for the same assessment year, the society showed admission fee receipts of Rs.24,25,000/-; application fee receipts of Rs.3,05,500/-; bus fees of Rs.1,17,69,002/-; smart class fees of Rs.9,62,000/-; tuition fees of Rs.10,45,15,800/-, scholarships from the Board of Intermediate to the tune of Rs.1,28,65,670/-;

Intermediate tuition fee receipts from junior Intermediate students to the tune of Rs.2,59,49,127/-; and from senior Intermediate students to the tune of Rs.2,62,19,984/-. It claimed expenditure towards bus maintenance to the tune of Rs.29,31,218/- and building rents to the tune of Rs.1,68,20,220/-. It also claimed expenditure towards salaries paid to the tune of Rs.6,58,59,623/- and college salaries to the tune of Rs.55,29,230/-. On the strength of this material, the Additional Director General opined that the petitioner academy was a coaching institution and was providing commercial coaching for Intermediate exams in the streams of MPC, BiPC & MEC along with State and All India level competitive entrance examinations like IIT JEE (Mains & Advanced), BITSAT, EAMCET, AIIMS, JIPMER, AFMC, VIT, NEET, CPT, IPCC etc. He further opined that the petitioner academy was collecting tuition/coaching fees directly from students for providing commercial coaching and it did not result in any degree, diploma or certificate being given to such students. He accordingly opined that the petitioner academy would come within the category of a 'coaching centre' falling within the ambit of Section 65(27) of the Act of 1994 and its activity would be liable to taxation under Section 65(105)(zzc). Basing on the investigation undertaken and in the light of what he had discussed in the body of the show-cause notice, the Additional Director General summed up the outcome of the investigation in para 22.1 and called upon the petitioner academy to show cause as to why the amount of evaded service tax to the tune of Rs.60,19,70,994/- leviable on coaching fees, amounting to Rs.522,89,65,907/-, collected in respect of the taxable service of 'commercial coaching or training service' provided by the petitioner academy during the period 01.10.2009 to 31.03.2015 should not be recovered from it under Section 73(1) of the Act of 1994 by invoking the extended period of five

years as per the *proviso* to Section 73(1); interest at the appropriate rate under Section 75 of the Act of 1994 should not be collected apart from penalties under Sections 77 and 78 of the Act of 1994. Along with the show-cause notice, the documents relied upon therein were also furnished.

The petitioner academy furnished its reply to the show-cause notice under its letter dated 28.12.2015 whereunder it essentially claimed that its activity stood exempted from the service tax regime by virtue of the Notifications relied upon it. It also claimed that the dichotomy drawn by the Additional Director General between the society and the petitioner academy was superfluous and asserted as under:

'This dichotomy is superfluous. Further, it is not the NRI Educational Society that is recognized by the Board of Intermediate education but the NRI Junior colleges of the said Society are recognized and affiliated to the Board of Intermediate Education, individually. In fact, NRIA has not been imparting coaching in the colleges so affiliated and accordingly the distinction between coaching and education is uncalled for. The coaching imparted by the recognized/affiliated colleges managed by NRIA is nothing but education in intermediate curriculum. Further, the above exemption notifications have been issued exclusively in relation to commercial coaching service rendered by Commercial Training or Coaching Centre. Therefore, distinguishing coaching rendered by Commercial Training or Coaching Centre from education and postulating that NRIA is not entitled to the benefit Negative List entry as contained in clause (I) of section 66D of the Finance act, 1994 is not correct, since, commercial training or coaching provided by a Commercial Training or Coaching Centre for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and including coaching or tutorial classes, is a service within the meaning of Commercial Training or Coaching Service. The coaching rendered by Junior colleges managed by NRIA is definitely in the curriculum of Intermediate course for imparting skills or knowledge or lessons in the subjects and fields which constitute Intermediate curriculum, formulated by the Board of Intermediate Education. Therefore, the distinction between education and coaching is inconsequential if the activity involves imparting of skills or knowledge or lessons in Intermediate curriculum.

The service rendered even by a Commercial Training or Coaching Centre gets exempted under the above legal provisions, if such coaching or education leads to issue of a Certificate or Educational Qualification which is recognized by the law. Neither M/s NRI Education Society is providing education to intermediate students nor does M/s NRI Academy provide coaching. Only the recognized junior colleges belonging to M/s NRI Education Society, managed by M/s NRI Academy, impart education in intermediate curriculum. NRIA have not been organizing any campuses or conducting any separate classes for coaching in competitive examinations. Their activity is confined only to managing junior colleges imparting formal education in intermediate curriculum under a MOU with M/s NRI Education Society.'

It further stated that exemption from service tax was intended for any coaching or training that led to grant of a certificate or diploma or degree or any educational qualification recognized by law, in terms of Notification No.33/2011-Service Tax dated 25.04.2011. As regards the extended period of limitation, it claimed that it was under the *bonafide* belief that the activities of junior colleges were not chargeable to service tax and therefore, it did not apply for service tax registration in 2009. It further stated that when advised and with an intention to comply with legal requirements, it applied for service tax registration on 01.06.2011 and submitted required documents on 06.07.2011. However, having filed a 'nil' return on 18.08.2012 for October 2011 to March 2012, claiming exemption from service tax under Notification No.33/2011-Service Tax dated 25.04.2011, it stated that it had surrendered its registration, *vide* letter dated 21.08.2012. These facts were cited by it in proof of it having been transparent all through and that the department was well aware of the issue from 2011 itself. It further claimed that the service tax authorities themselves were not sure of the taxability of the services provided by the petitioner academy and chose not to pursue the matter further and pointed out that if the department had not been convinced with its stand, it could have called for the required information in

exercise of statutory power and initiated action at that stage itself to raise a demand. It asserted that for the fault and failure, in this regard, on the part of the department in exercising the jurisdiction vesting in it, the extended period of limitation could not be invoked. It further stated that disclosure or non-disclosure on the equation between the society and the petitioner academy under the MoU was inconsequential as its liability to pay service tax was not dependent on such equation but on the nature of the coaching imparted by it. It also disclaimed liability to pay any penalties as failure to pay service tax was not intentional but due to entertaining the *bonafide* belief that no tax was leviable thereon in the light of the legal regime obtaining under the Notifications. It accordingly prayed for setting aside of the show-cause notice and for dropping of all further proceedings against it.

The impugned Order-in-Original dated 29.11.2016 demonstrates that the Commissioner of Central Excise and Service Tax, Guntur, recorded his findings in para 30 thereof. He referred to the fact that the petitioner academy was an institution/establishment run on commercial basis and was imparting coaching to students undertaking Intermediate examinations and various entrance examinations. The petitioner academy was found to meet the parameters to fit into the definition of 'commercial training and coaching centre' providing taxable services, as per Section 65(105)(zzc) read with Sections 65(26) and (27) of the Act of 1994. The contention of the petitioner academy that its coaching falls under the exclusion clause was not accepted as it was an admitted fact that it did not issue any certificate to the students undergoing the entrance exam coaching. He pointed out that the petitioner academy did not have any recognition or own any colleges affiliated to the Board of Intermediate Education, Andhra Pradesh, and that the students enrolled in the society's junior colleges affiliated to the Board of Intermediate

Education, Andhra Pradesh, through the society, which collected relevant tuition fees and Intermediate examination fees, were entrusted to the petitioner academy to impart coaching relating to Intermediate course also apart from coaching for entrance examinations. The Commissioner also noted that Notification Nos.10/2003-ST dated 20.06.2003 and 33/2011-ST dated 25.04.2011, sought to be relied upon by the petitioner academy, were withdrawn with effect from 01.07.2012 and further found that it did not fall within the ambit of either of the Notifications, whereby it could claim exemption from service tax. He pointed out that the coaching provided by the petitioner academy was not an essential part of the course or curriculum leading to issue of a certificate or any educational qualification, as the courses were designed by the petitioner academy to suit the students succeeding in various competitive examinations also. Further, the students paid fees for such coaching directly to the petitioner academy which clearly disentitled it from claiming the benefit of the exemption under Notification No.10/2003-ST dated 20.06.2003, in the light of the *proviso* therein. As regards the exemption provided under Notification No.33/2011-Service Tax dated 25.04.2011, he opined that as the activity of the petitioner academy was neither pre-school training nor coaching leading to grant of a certificate or any educational qualification recognized by law, it could not claim the benefit thereof. The Commissioner also noted that the society was independently collecting fees from students directly as prescribed by the Board of Intermediate Education, Andhra Pradesh, and the fees collected by the petitioner academy was in addition to the said fees and far in excess of the fees prescribed by the Board. He therefore opined that the fee paid by the students to the petitioner academy was only attributable to its activities relating to the specialized training or coaching in the subjects relating to

various competitive examinations. He further noted that the exemption, if any, would only be available in respect of that part of the coaching which led to grant of an Intermediate certificate by the Board and the present demand raised under the show-cause notice did not include the amount collected by the society as tuition fees towards Intermediate course. He therefore held that the petitioner academy was not eligible for any exemption and that all the fees charged by it would have to be counted towards providing coaching for competitive entrance exams only. As regards the contention of the petitioner academy that with effect from 01.07.2012, the services provided by it would fall within the negative list, the Commissioner opined that as per Section 66D of the Act of 1994, the negative list only exempted education up to higher secondary school or equivalent, but not services relating to specialized coaching for various entrance examinations. As he found that the petitioner academy was providing coaching for entrance exams like EAMCET, AIEEE and IIT-JEE, he opined that it could not be classified as merely higher secondary school education, whereby the petitioner academy could claim to fall within the ambit of Section 66D of the Act of 1994. He accordingly concluded that the services provided by the petitioner academy were classifiable under the head 'commercial training or coaching' falling under Section 65(26) of the Act of 1994 for the period 01.10.2009 to 30.06.2012 and from 01.07.2012, the said activity fell within the category of a taxable service under Sections 65B(44) and (51) and not within the negative list in Section 66D of the Act of 1944. As regards the petitioner academy's claim that the amounts collected towards mess charges, hostel charges, sale of books and reading material, transportation charges, snacks, etc., had to be deducted, the Commissioner observed that the fee invoices did not indicate collection of amounts under specific heads and the amounts sought to be

deducted were shown as expenditure straightaway. The Commissioner however allowed the benefit of CENVAT credit on the inputs/input services used by the petitioner academy for providing the taxable services. Taking into account the fact that the petitioner academy had not collected any amount towards service tax liability from the students, the Commissioner quantified the tax liability by taking the gross receipts as cum-tax value and arrived at the figure of Rs.53,94,36,220/-, being the service tax component of Rs.52,37,24,481/- with education cess of Rs.1,04,74,492 along with Secondary & higher education cess of Rs.52,37,247/-. The Commissioner further found that non-payment of service tax by the petitioner academy had come to light only on account of investigation/verification by the department and the petitioner academy never brought out the fact of rendering taxable services, as it had suppressed the fact that the petitioner academy and the society were separate legal entities and that the petitioner academy was imparting coaching for competitive exams along with Intermediate course. The Commissioner opined that invocation of the longer period of five years under the *proviso* to Section 73(1) of the Act of 1994 was therefore justified. He disagreed with the petitioner academy's argument that the department was aware of its activities since 2011 as the petitioner academy, with the conscious intention of evading payment of service tax, did not bring the full facts to the knowledge of the department. The Commissioner also did not accept the plea of the petitioner academy that it was under the *bonafide* belief that its activities did not constitute taxable services. He pointed out that the petitioner academy never sought any clarification from the Department or the Advance Rulings Authority regarding the taxability of its services. He therefore held that the extended period of limitation was rightly invoked against the petitioner academy. He also held the petitioner academy

liable to pay interest on the service tax dues under Section 75 of the Act of 1994, apart from penalty under Section 78(1) thereof. He accordingly passed the order confirming the demand for payment of service tax along with interest and penalties.

Sri S.Ravi, learned senior counsel appearing for Sri Pushyam Kiran, learned counsel for the petitioner academy, would point out that the petitioner academy, having entered into the MoU dated 01.04.2009 with the society, merely imparted coaching in Intermediate curriculum to the students who were admitted in Intermediate course in the society's colleges. He would state that though the petitioner academy also supplied study material to such students who were desirous of appearing for competitive exams, it was only an extension of the instruction and curriculum taught to such students for the Intermediate course and as there is no possibility of distinguishing and delineating the teaching imparted under the individual heads of Intermediate curriculum coaching and coaching for competitive examinations respectively, the service tax department could not treat the entire fee receipts of the petitioner academy as liable to taxation under the service tax regime. Learned senior counsel would point out that the fee collected towards Intermediate course would be exempt as such coaching would result in issuance of a certificate or a qualification and was thereby exempted from service tax. Learned senior counsel would further state that the Board of Intermediate Education stipulates that the management of an Intermediate college should collect tuition fees/special fees/miscellaneous fees from the students at the rates not exceeding the limits prescribed by the Government or the Director of Intermediate Education from time to time. The learned senior counsel would state that it was on the strength of this

directive that the MoU dated 01.04.2009 provided for collection of tuition fee and special fee from the students by the society also.

Significantly, the petitioner academy had filed a 'nil' return for the period October 2011 to March 2012 claiming exemption under Notification No.33/2011-Service Tax. It is however to be noted that in terms of Notification No.10/2003-Service Tax dated 20.06.2003, the exemption thereunder is not applicable in the event the person undergoing the course or curriculum paid for the commercial training or coaching services directly to the commercial training or coaching centre. It is not in dispute that the petitioner academy, being the commercial coaching centre, itself received fees directly from the students forwarded to it by the society. Therefore, the exemption provided under the said Notification could not have been claimed by it even if it imparted coaching leading to grant of an educational qualification. As regards the exemption under the later Notification No.33/2011-Service Tax dated 25.04.2011, the same was to be applied to coaching or training which led to grant of a certificate/diploma/degree or any educational qualification recognized by law. It had no application to a case where commercial coaching or training did not result in grant of a certificate/diploma/degree or educational qualification recognized by law.

Perusal of the statement of A.Rajendra Prasad recorded under Section 14 of the Act of 1944 reflects that he admitted in clear terms that the students of Intermediate colleges of the society who took coaching in the classes conducted by the petitioner academy paid separately to the petitioner academy as well as to the society. The statement of Bhaskara Rao, Manager of the petitioner academy, which was also recorded under Section 14 of the Act of 1944 was one of the other documents furnished along with the show-cause notice. He also admitted that the society was directly

collecting recognition fees, admission fees, application fees, bus fees, smart class fees, tuition fees and special fees separately from the students as per the Board of Intermediate norms and that the petitioner academy was giving coaching for State and All India Entrance Examinations, like EAMCET, AIEEE, IIT-JEE, BITSAT, AIIMS, JIPMER, AFMC, CMC etc. He also acknowledged that the statements as to the fees collected by the petitioner academy from students during the last five years had already been taken under a panchanama. He also admitted that the petitioner academy and the society were separate legal entities engaged in separate activities, i.e., the petitioner academy was providing commercial coaching services while the society was providing education services to Intermediate students for which both of them collected separate fees. When asked as to why the petitioner academy had not paid any service tax leviable on the coaching fees of Rs.474,70,20,803/- received by it during the financial years 2009-10 to 2013-14 for all its branches and again in the financial year 2014-15, for the Guntur branch, he answered that as regards payment of service tax, only A.Rajendra Prasad, the Managing Partner, could give a reply as he was the final authority.

Essentially what has to be looked at is whether the core activity of the petitioner academy was taxable, i.e., whether it was in the nature of imparting education to students for the purpose of enabling them to get a qualification or whether it was in the nature of commercial training or coaching for other purposes, bringing it within Section 66 of the Act of 1994. The issue, therefore, is whether the coaching provided by the petitioner academy to Intermediate students for appearing at entrance exams could be assessed to service tax separately when fees was allegedly received by the petitioner academy cumulatively, not only for such coaching activity but also for imparting education towards Intermediate curriculum. Sri S.Ravi, learned

senior counsel, would contend that it is not open to the service tax department to undertake such bifurcation when there is no clear division or apportionment under different heads apparent from the fees receipts.

In so far as the Notifications are concerned, it may be noted that the first Notification No.10/2003-ST dated 20.06.2003 specifically stated that the exemption thereunder would not be applicable if charges for the services of commercial training or coaching were paid by the person undergoing the course directly to the commercial training or coaching centre. It is an admitted fact that the petitioner academy directly received the coaching fees from the students. Therefore, it could not have claimed the benefit of this exemption in view of the *proviso* therein, as already stated *supra*.

In so far as Notification No.33/2011-ST dated 25.04.2011 is concerned, the exemption granted thereunder is for coaching or training leading to grant of a certificate or diploma or degree or any educational qualification which is recognized by any law for the time being in force. As the fee received for imparting coaching in Intermediate curriculum is separate and was claimed by the society alone, such fee would be liable to exemption under this Notification and not the coaching fee received by the petitioner academy which was for the specialized coaching imparted by it to the students for undertaking entrance examinations. Therefore, neither of the Notifications applied to the petitioner academy. Similarly, Section 66D of the Act of 1994 does not come to the rescue of the petitioner academy as the entry therein exempts pre-school education or higher secondary education or education as a part of the curriculum for obtaining a qualification and it has no application to coaching for entrance exams.

The argument of Sri S.Ravi, learned senior counsel, is that the authorities could not dissect the coaching imparted by the petitioner

academy for Intermediate curriculum and the entrance examinations, as the matrix was interlocked due to the fact that the content was the same, cannot be accepted. There may be no possibility of dissecting such coaching but the inescapable fact remains that the fees paid by the students for the two were distinct and separate as the society and the petitioner academy collected fees separately. The material placed on record also indicates the manner in which the fee was collected for specialized coaching as opposed to the fee collected from a student for just the Intermediate curriculum. The details so collected were sufficient for the authorities to undertake such dissection of the fees charged by the petitioner academy and the society.

The edict of the Supreme Court in COMMISSIONER, CENTRAL EXCISE AND CUSTOMS, KERALA V/ s. LARSEN AND TOUBRO LTD.² is of no consequence as that was a case where an indivisible works contract was under consideration and it was not possible to segregate parts thereof for application of the service tax regime, unlike the case on hand.

Reliance placed by Sri S.Ravi, learned senior counsel, on SRI CHAITANYA EDUCATIONAL COMMITTEE V/ s. COMMISSIONER OF CUSTOMS, CENTRAL EXCISE AND SERVICE TAX, GUNTUR³ in relation to Sri Chaitanya Educational Committee is misplaced as the case is distinguishable on facts. Therein, there was no break-up of the fees for Intermediate coaching and entrance exams coaching and as the cumulative fees collected from the students could not be artificially split up, the Tribunal applying the law laid down by the Supreme Court in relation to composite works contracts, observed that the composite activity of imparting coaching for Intermediate as well as entrance exams could not be vivisected for the purposes of levying service tax. That is not the situation obtaining in the

² (2016) 1 SCC 170

³ 2018-TIOL-1504-CESTAT-HYD

case on hand as the material gathered by the authorities clearly demonstrates that the break-up of the fees is clear and demonstrable.

The sheet-anchor of the petitioner academy's case is that the department could not have invoked the extended period of limitation as it obtained registration in the year 2012 and filed a 'nil' return claiming the benefit of exemption under the Notification No.33/2011 dated 25.04.2011 and therefore, the authorities are presumed to be aware of its activities and cannot claim ignorance or attribute suppression to it. However, as rightly pointed out by Sri M.V.J.K.Kumar, learned counsel for the Revenue, the mere factum of filing a 'nil' return, followed by cancellation of the registration, speaks more of the premeditated acts of the petitioner academy and do not disclose any *bonafides* on its part. The full facts were never presented to the department whereby the petitioner academy could claim such benefit in the context of the limitation period. The actual transaction between the petitioner academy and the society only came to light after investigation by the authorities and therefore, the authorities were justified in invoking the extended period of five years limitation.

The convoluted scheme in the form of the MoU dated 01.04.2009 adopted by the petitioner academy and the society, two separate legal entities, manned by one single individual, A.Rajendra Prasad, essentially seems to have been directed at avoiding tax liability but in effect, it amounted to evasion of tax, which is *per se* illegal. The manner in which the petitioner academy and the society went about the transaction manifests in no uncertain terms that the intention was to evade tax. Further, the desperate ploy of the petitioner academy in its reply affidavit to completely disown its coaching activity for entrance exams clearly highlights its lack of

bonafides and its real intention. That being so, the question of giving it the benefit of the normal limitation period would not arise.

Reference was made by Sri S.Ravi, learned senior counsel, to Section 11A(1) of the Act of 1944 in relation to the extended period of limitation under the *proviso* thereto. However, the case law cited in that regard is also distinguishable on facts. For example, in JAYANT JUNEJA V/ s. COMMISSIONER OF CENTRAL EXCISE, JAIPUR⁴, the Supreme Court was dealing with a case where the assessee *bonafide* believed that the manual manufacture of wooden furniture by artisans/craftsmen was wholly exempt from payment of duty. A specific declaration to this effect was furnished to the Central Excise Department about the activity being carried out by the assessee in July, 1987 and the department did not take any action thereon till October, 1996, when it issued a show-cause notice. It was in these circumstances that the Supreme Court held that the same would clearly be time-barred and the *proviso* to Section 11A(1) of the Act of 1944 could not be invoked.

Reliance placed on NESTLE INDIA LTD. V/ s. COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH⁵ is also misplaced as that was a case where the Supreme Court held that the extended period of limitation could not be invoked as the assessee had been clearing goods for more than 20 years prior to issuance of the show-cause notice. The Supreme Court further observed therein that extended period of limitation would be applicable only when there is a positive act other than mere inaction or failure on the part of the manufacturer and there must be conscious or deliberate withholding of information to invoke the larger period of limitation. In the case on hand, suppression of the full facts, despite the petitioner academy obtaining

⁴ 2015 (326) ELT 634 (S.C.)

⁵ (2009) 12 SCC 294

registration and quickly canceling it, coupled with the filing of a 'nil' return in the interregnum, shows that it was not just a mere case of inaction or failure but a conscious and premeditated act on the part of the petitioner academy.

The decision of this Court in BHARAT METAL BOX CO. V/ s. CEGAT, MADRAS⁶ is also of no avail to the petitioner academy. That was a case where there was no suppression as the petitioner had brought the full facts to the notice of the department but despite the same, no action was taken till expiry of the normal period of limitation. It was in these circumstances that this Court held that the extended period of limitation under Section 11A of the Act of 1944 would have no application.

As pointed out by the Supreme Court in C.C.E., VI SAKHAPATNAM V/ s. M/ S. MEHTA & CO.⁷, when an assessee suppresses material facts with intent to evade payment of duty, the department is entitled to issue a show-cause notice within five years from the date of acquisition of knowledge of such facts. In the case on hand, the mere factum of the petitioner academy obtaining registration and filing a 'nil' return followed by cancellation of the registration seems to be a self-serving act for the purpose of warding off extended period of limitation at a later point of time. This premeditated act on the part of the petitioner academy was only to present a *fait accompli* and there is no indication of the full facts, including the existence of the MoU, having been disclosed by the petitioner academy at that point of time. When the authorities did not have the complete facts before them, a presumption that they were aware of the core activity of the petitioner academy, i.e., coaching for entrance examinations, would not arise. Invocation of the extended period of limitation was therefore justified.

⁶ 1998 (98) E.L.T. 68 (A.P.)

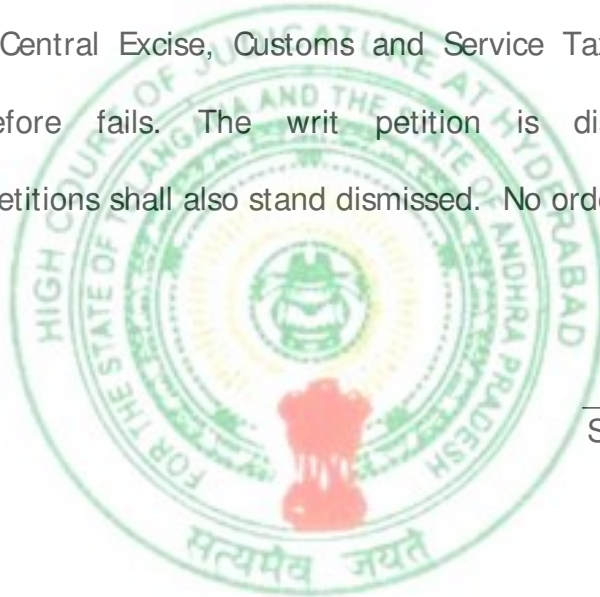
⁷ Civil Appeal No.1090 of 2009 dated 10.02.2011

As regards the contention of Sri S.Ravi, learned senior counsel, that non-includable items were also brought within the ambit of taxable services, we find from the order under challenge and also the material placed on record that separate heads were not shown in the invoices under which fees were collected by the petitioner academy, whereby students were made aware of how much they were paying for the coaching and how much they were paying for other services, such as transportation, snacks, etc. These were straightaway shown as expenditure by the petitioner academy and claimed as such. The Commissioner opined that when there was no separate receipt towards each head and what was collected was fees alone, the petitioner academy could not thereafter claim deductibles from such fees by showing such self-serving and unauthenticated expenditure. The amounts claimed towards expenditure under various heads by the petitioner academy cannot be tested by this Court and, therefore, even if they are liable to be excluded from the amount received towards the taxable services, such an exercise would not fall within the realm of this writ petition. Perhaps, this aspect would have been more suitable for appellate review but as stated *supra*, entertainment of this writ petition would be subject to the rider that this Court, in exercise of writ jurisdiction, would not sit in appeal over the order under challenge. This Court cannot undertake an examination of the expenditure actually incurred by the petitioner academy, given the fact that both the petitioner academy as well as the society claimed expenditure under various heads for the same facilities allegedly provided to the students. The veracity of their claims of such expenditure is therefore open to doubt and without further verification, the bald claim of the petitioner academy that the amounts claimed by it towards such expenditure constitute non-taxable services rendered by it warranting their deduction from the

amount received towards the fees cannot be countenanced. This factual aspect is therefore incapable of adjudication on merits in a writ petition.

On the above analysis, this Court finds that invocation of the extended period of limitation was justified on facts. The coaching services rendered by the petitioner academy were taxable under the service tax regime and were not covered by the exemptions, be it under the Notifications or the Act of 1994. As regards the alleged inclusion of non-includables in the taxable services, the same is beyond the purview of a writ petition involving factual verification which this Court cannot undertake.

Challenge to the Order-in-Original dated 29.11.2016 passed by the Commissioner, Central Excise, Customs and Service Tax, Guntur, Andhra Pradesh, therefore fails. The writ petition is dismissed. Pending miscellaneous petitions shall also stand dismissed. No order as to costs.



SANJAY KUMAR,J

T.AMARNATH GOUD,J

8th AUGUST, 2018

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