IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 802 OF 2019

Arambhan Hospitality Services Limited } Petitioner
versus
The Union of India and Ors. } Respondents

Mr.V.Sridharan-Senior Advocate with Mr.Jas Sanghavi and Mr.Vinay Jain I/b. M/s.PDS Legal for the petitioner.

Mr.Sham Walve with Mr.Ram Ochani for the respondents.

CORAM :- S. C. DHARMADHIKARI &
M. S. KARNIK, JJ.
DATE :- JANUARY 29, 2019

P.C. :-

1. This writ petition under Article 226 of the Constitution of India seeks to quash and set aside the communication dated 17th May, 2018 and the consequential recovery notices issued under section 87 of the Finance Act, 1994 to the bank and debtors, including two notices dated 22nd June, 2018 issued by the second respondent and one notice dated 4th January, 2019 issued by the third respondent.

2. The petitioner is a company incorporated under the Companies Act, 1956 and carrying on business in hospitality services from the address mentioned in the cause title, whereas,

respondent no. 2 to this writ petition are the authorities in-charge of levying, assessing and collecting service tax.

3. The service tax was leviable under Chapter V of the Finance Act, 1994. The petitioner provided services of catering and housekeeping to offshore oil and gas industry on mobile installations. The petitioner claims to have international reputation in such catering services and had employed about 800 people either as permanent or as contractual/casual employees. They are dependent on the petitioner for their livelihood. It is claimed that the petitioner was paying taxes regularly, but on account of some recession in the industry from the year 2011-12, the petitioner faced financial difficulties. The customers did not make timely payments and that is why the petitioner stated that the crises followed. In para 5.4 of the petition, major outstandings of the petitioner are mentioned and it is claimed that the petitioner also reached a settlement with one of the debtors. It is claimed that though there was a settlement, still, the payments have not been made by one entity, namely, M/s. Gol Offshore Limited.

4. It is claimed that a visit was made by the investigation team and certain documents were seized. Thereafter, some records were called for and the petitioner pointed out that the details

would be duly forwarded. Accordingly, the details were forwarded. The petitioner, by two e-mails, communicated to the department that Rs.2 lakhs have been paid towards service tax liability and Rs.44,36,158/- towards the Goods and Service Tax (GST) liability. It is claimed that on 13th April, 2018, the department pointed out that the outstanding amount of service tax is Rs.1,86,63,841.78. It is claimed that this letter was replied and it was pointed out that because of delay in clearance of payment by the major customers, the petitioner has failed to effect the payment.

5. The petitioner's representative appeared before the authorities and in answer to a summons. However, the department issued notices of recovery invoking section 87 of the Finance Act, 1994 to the Branch Manager of Bassien Catholic Co-operative Bank Ltd., Bandra Branch and Branch Manager of Indusland Bank Ltd., Andheri Branch directing them to make payment of Rs.2.51 crores along with estimated interest thereon of Rs.4.47 crores till 31st May, 2018 amounting to Rs.6.98 crores. The petitioner also pointed out that the records would demonstrate as to how the payments have been made and therefore, no coercive measures be taken. However, the department proceeded to freeze the bank accounts. The

petitioner's request was to de-freeze or to release the bank accounts from attachment.

6. The petitioner has questioned the communication dated 17th May, 2018, copy of which is annexed to this petition. In this communication, the above facts have been recorded. It reads as under:-

> "OFFICE OF THE COMMISSIONER, CENTRAL GOODS & SERVICES TAX, MUMBAI WEST
> 1st Floor, Mahavir Jain Vidyalaya, CD.Barfiwalla Marg, Juhu Galli, Andheri (West), Mumbai – 400 058
> Email : cgstmumbaiwest.inv.t1@gmail.com Tel No.022-26200253"
>
> ---
>
> F.No.V/CGST/Mum-West/INV/T1/Arambhan/76/2017-18
> Mumbai, May, 2018
>
> To,
> 1. Shri Alfred Arambhan,
> Chairman & Managing Director of
>
> 2. Ms.Pooja Alfred Arambhan,
> Director & Chief Finance Officer of
> M/s.Arambhan Hospitality Services Ltd.
>
> (i) 201-201,Benston-B Wing,
> Sherly Rajan Road, Bandra (West),
> Mumbai – 400 050
>
> (ii) 17, Bahubali Building,
> Cawasji Patel Street, Kala Ghoda,
> Fort, Mumbai – 400 001
>
> Subject : Enquiry against M/s. Arambhan Hospitality Services Ltd. Holding STC No.AADCC6347AST001 and GST No.27AADCC6347A1ZZ-Reg...
>
> Ref : Your letter dated 10.05.2018, forwarded vide email of same date.
>
> * * * *

With reference to the above subject, and your letter dated 10.05.2018, your attention is invited to the statement tendered by Shri Alfred Arambhan before the investigation Officer on 10.04.2018 and subsequent correspondence exchanged thereafter till date, through letters/emails.

1. In the above referred statement, you have voluntarily declared that the pending Service Tax liability for the period 2012-13 till June 2017 is worked out by you to be approximately Rs.2.51 Crores. You have not provided any basis as to how you have worked out this pending liability. Besides this, you have also accepted that your company is liable to pay appropriate interest on the delayed payment of Service Tax. You had further stated that you have not worked out the Tax Liability of your company under GST regime and assured to provide the details thereof within a week's time. You also accepted that your company is also liable to pay appropriate interest thereon. You had further assured that the outstanding Tax liability alongwith appropriate interest would be paid by you by the end of April, 2018.

2. Further, during oral discussions, you had informed that you are proposing to have a meeting with some shareholders to raise funds. You had also informed that there are some outstanding dues from one M/S Punj Lloyd Ltd. amounting to Rs.1.19 Crores. You suggested that the outstanding tax dues would be discharged/paid from these sources.

3. Vide email dated 19.04.2018, you were asked to submit the reconciliatory of ST-3 Returns filed by you vis-a-vis the Balance Sheet for the period under scrutiny to arrive at the correct Service Tax liability of your company. With reference to your above assurances, you were asked to furnish a copy of correspondence entered into by you with M/s Punj Lloyd and also to inform the outcome of meeting with the shareholders.

4. With reference to the above, vide the subject referred letter dated 10.05.2018, you have communicated that you have paid an amount of Rs.64,36,158.22 against your pending Tax liability. In this connection, it is brought to your notice that the admitted Service Tax liability (excluding interest and penalties) as per your statement dated 10.04.2018 is Rs.2.51 Crores and you have paid only Rs.20 Lakhs against the said liability and you have paid an amount of Rs.44,36,158.22 against your GST liability for the period from July, 2017 onwards, which was not quantified by you during the recording of your statement dated 10.04.2018. Thus you have given a misleading figure by saying that the payment of Rs.64,36,158/- is against your Tax liability of Rs.2.51 Crores

for the period 2012-13 till June 2017. But in fact still Rs.2.31 Crores of Service Tax liability is still pending. ALSO NOTE THAT THE LIABILITY OF APPLICABLE STATUTORY INTEREST AND PENALTIES ARE NOT CONSIDERED BY YOU TO ARRIVE AT YOUR TOTAL TAX LIABILITIES.

5. As regards your pending receivables from M/s Punj Lloyd Ltd., you have forwarded only the letter dated 04.04.2018, written to them for confirmation of balance dues of Rs.1.19 Crores-no claim of interest thereon is made in the said letter as claimed by you in your letter dated 10.05.2018. It seems you have not taken further efforts for recovery of your dues and simply forwarded the letter for making the recoveries from your debtors on your behalf. IT MAY BE NOTED THAT THE ONUS OF DISCHARGING YOUR ADMITTED PENDING TAX LIABILITY IS PURELY ON YOU AND YOU CANNOT TAKE ANY SHELTER OR HAVE ANY RIGHT TO CLAIM ANY IMMUNITY FROM YOUR TAX LIABILITY BY CLAIMING THAT THE DEPARTMENT SHOULD MAKE RECOVERIES OF YOUR TAX DUES FROM YOUR DEBTORS ON YOUR BEHALF. The recovery mechanism prescribed under the Law is purely for the Department's purpose and no assessee has any right to claim any benefit of the same.

6. As regards raising funds by way of issuing warrants/shares, you have informed that the investors have already deposited 25% of the committed amount of Rs.5.00 Crores. However, it appears that the said funds received is not utilised for payment of Service Tax dues, being a Crown's Debt. Further, you have stated that the balance funds would be raised only by June, 2019 and requested this office to accept the proposal to discharge entire dues by June, 2019.

7. All the above submissions made by you show that you are having a very casual approach towards the Service Tax liability for which you have not taken any concrete efforts since the visit of the officers from this Department on 28.03.2018. A period of more than one and half months have passed and <u>you have paid only Rs.20 Lakhs against the self-admitted Service Tax liability of Rs.2.51 Crores</u> for the period from 2012-13 till June 2017 and even not counted for the liability of applicable interests and penalties.

8. Further, as regards the liability under GST regime, i.e. for the period from July 2017 to March 2018, you have reported that you have made payment of Rs.44,10,180/- vide various challans all dated 03.05.2018, after adjusting the ITC amounts. However, it is observed that though the liability was discharged at a later date than the due date, you have

refrained yourself from paying appropriate interest thereon. The GSTR-3B Returns were also filed late, i.e. on 04.05.2018 without paying Late Fees due. Thus, the Tax liability under GST is also not discharged fully.

9. Even though agreed to provide, you have not yet provided the reconciliation statement of income shown in your financials with the turnover reflected in the ST-3 Returns for last five financial years. Further, though agreed under statement recorded on 10.04.2018, to provide the copies of agreements entered into by your company with your main clients, viz., M/s ONGC and M/s Great Ship Limited, you have not yet provided the same. You are therefore, once again asked to provide the copies of the said agreements alongwith the copies of ledgers of these customers and copies of invoices issued to them against the services provided.

10. You are, therefore, once again requested to expedite the mater and pay all the applicable dues urgently, without wasting further time, else the Department will be constrained to initiate action against you as provided under the law.

(MALLIKARJUN MAMANI)
ASSISTANT COMMISSIONER (INV.)
CGST, MUMBAI WEST

7. After filing of this petition, an additional affidavit has been placed on record by the petitioner pointing out that the recovery notice has been issued by the third respondent seeking to recover some amount from a fixed deposit of the petitioner with the Bassien Catholic Co-operative Bank Ltd. An amount of Rs.71,12,315/- has been recovered from this fixed deposit. The petitioner submits that the impugned period is 1st April, 2012 to 30th June, 2017, during which, they have made substantial payments or recoveries have been effected. Now, there is an excess payment.

8. Mr.Sridharan learned senior counsel appearing for the petitioner would submit that the department cannot proceed on the footing that there is an admitted liability and that there is a default. The question is of taxability of services and a detailed representation was forwarded by the petitioner raising this issue. Today, the respondents are proceeding on the footing that the petitioner has never raised any dispute nor has it denied any liability. In fact, the position is otherwise. There is a specific issue raised and in that regard, our attention is invited to what is styled as a representation. It is claimed that in this representation, all the contested issues have been raised. It is claimed that if this is addressed by the authorities and after the petitioner is heard and an order is passed, then, that would serve the ends of justice. The petitioner has undertaken before us not to claim any refund of the taxes which have been paid. Further, the petitioner has also undertaken not to withdraw any sums from the bank accounts with the above two banks, save and except in ordinary and regular course of business. The petitioenr would not transfer any sums to the credit of these accounts to any entity or sole proprietary concerned of the Managing Director. Based on these undertakings, it is claimed that the petitioner be given an opportunity to make good its case.

9. On the other hand, Mr.Walve appearing for the respondents would submit that there is a huge sum which is still due and payable. The petitioner has not pointed out that there is no dispute ever raised about the liability. In fact, the petitioner is not fair in not inviting the attention of this court to firstly, sub-section (1B) of section 73 and then to section 73A of the Finance Act, 1994. The service tax collected from any person has to be deposited with the Central Government. The liability to pay interest is also automatic, according to the Revenue. Thus, this is a case where the Revenue should be allowed to proceed with the recovery. In fact, interest of justice demands that there should not be any opportunity given now to the petitioner at this belated stage to dispute the liability. Mr.Walwe, therefore, submits that the writ petition be dismissed.

10. The petitioners have, on 19th November, 2018, addressed a letter to the Commissioner, CGST, Mumbai West. This letter is on the subject of withdrawal of recovery notice issued to the bankers and clients of the petitioner under section 87 of the Finance Act, 1994. Since section 87 of the said Act has been referred, we would reproduce it for ready reference:-

> "**SECTION 87. Recovery of any amount due to Central Government.** - Where any amount payable by a person to the credit of the Central Government under any of the provisions of this Chapter or of the rules made there under is not paid,

the Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned below:-

(a) the Central Excise Officer may deduct or may require any other Central Excise Officer or any officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the said Central Excise Officer or any officer of customs;

(b) (i) the Central Excise Officer may, by notice in writing, require any other person from whom money is due or may become due to such person, or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

(ii) every person to whom a notice is issued under this section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or any insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in a case where the person to whom a notice under this section is sent, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be an assessee in default in respect of the amount specified in the notice and all the consequences of this Chapter shall follow;

(c) the Central Excise Officer may, on an authorisation by the Principal Commissioner of Central Excise or Commissioner of Central Excise, in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person;

> **Provided** that where the person (hereinafter referred to as predecessor) from whom the service tax or any other sums of any kind, as specified in this section, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all goods, in the custody or possession of the person so succeeding may also be attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining the written approval of the Principal Commissioner of Central Excise or Commissioner of Central Excise, for the purposes of recovering such service tax or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.

> (d) the Central Excise Officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector, on receipt of such certificate, shall proceed to recover from such person the amount specified there under as if it were an arrear of land revenue."

11. Section 87 provides for recovery of any amount due to Central Government. Where any amount payable by a person to the credit of the Central Government under any of the provisions of this Chapter or of the rules made thereunder is not paid, then, the Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned in sub-clauses of this section.

12. Section 73 deals with a situation of collecting tax not paid to the Government and section 73A enables this collected amount to be recovered and remitted to the Central Government.

13. In the present case, what we find is that two or three letters were addressed, one of which was of 19th September, 2018. The petitioner pointed out the nature of business and then urged that the petitioner's major clients went out of business leaving it with huge outstanding overheads. It has pointed out that it has taken all the contingency measures. It has also pointed out the hardship on account of the notices under section 87 of the Finance Act, 1994. What we have on record, therefore, is a request to withdraw these notices. These are on several grounds. The petitioner, in one of its communications has stated that it does not carry out any activities in India and therefore, the provisions of the Finance Act, 1994 do not apply. The petitioner, therefore, disputes its liability to pay service tax and interest.

14. To our mind, this issue, though raised by the petitioner at a belated stage, requires a consideration at the hands of the respondents. The petitioner has been consistently maintaining that their bank accounts need not be frozen. It has also set up a main and alternate case. It is apparent from the annexures to the writ petition that the respondents say that the petitioner has admitted the service tax liability as in July/August, 2018 of Rs.2.51 crores. However, it is the respondents who are saying that the figures provided by the petitioner under a statement of

the service tax liability up to 31st March, 2017 are different. That is set out in the communication of the respondents of 20th August, 2018 (Exhibit 'R') at page 80 of the paper book. The petitioner's returns were also scrutinised and it is claimed that there is a self declared unpaid service tax liability. A reference has also been made to the communication, by which, the petitioner was called upon to provide justification with supporting documents for the difference of service tax liability appearing in the self assessed service tax returns filed by the petitioner and the service tax liability declared in the statements. Thus, it is claimed that in the statement of 31st July, 2017, the petitioner agreed to provide the detailed workings of interest liability for delayed payment of service tax as well as for GST. However, despite granting time, the details have not been forwarded.

15. Then, there is a reference made to one M/s.Sunita Enterprises Ltd. and it is claimed that the documents in relation to this entity were also agreed to be provided. The communications from the respondents are that the de-freezing of the bank accounts is not possible because the petitioner has not come forward with strong proposal giving payment schedule in near future nor has it provided any justification for the claims raised.

16. To our mind, therefore, instead of this court going into these disputed issues, in facts peculiar to this case and without this order being treated as a precedent for the future cases, the respondents should provide an opportunity to the petitioner so as to make good its case and particularly the stand in the writ petition. The petitioner has raised several grounds. It has also said that it does not carry out activities in India. It has also raised the issue with regard to the activity of catering undertaken by it and urged that this is a deemed sale and not leviable to service tax.

17. Finally, we find that the petitioner has specifically stated that section 87 cannot be resorted to unless the determination of the disputed issues takes place. Merely because there is a self assessment done does not mean that the petitioner can be saddled with such recovery notices. The petitioner has also alternatively and without prejudice pointed out its financial difficulties and claimed that the appropriation or adjustments could not have been made towards the alleged interest liability.

18. In these circumstances, we are of the firm opinion that the petitioner should be given an additional opportunity to make good its case. We accept the statements made by Mr.Sridharan as undertakings to this court and which are to the effect that the

petitioner, despite its success before the authorities, will not claim any refund of the amount paid and remitted to the respondents as taxes. Thus, no refund claim would be laid before the respondents. Secondly, in the event the two bank accounts are released, the proceeds thereof shall be utilised entirely during the ordinary and regular course of the petitioner's catering business and its dealings and transactions as hospitality service provider. The petitioner will also not transfer any of the amounts in the two bank accounts upon their release from attachment to the accounts maintained in the name of its sole proprietor or any sole proprietary concern of the petitioner. The amount, thus, would not be diverted to any personal account.

19. In the light of these statements, which are made and accepted as undertakings given to this court, we grant the petitioner an opportunity to appear before the Commissioner, CGST, Mumbai West Commissionerate, Mumbai, who shall, after the personal hearing is concluded, pass a reasoned order. He shall do so as expeditiously as possible and in any event, by 10th March, 2019. The contentions as raised before us can be raised before him and we clarify that we have not expressed any opinion on the same. It is entirely for the authority to decide and determine whether such contentions, as are brought to our notice

and raised in the memo of this writ petition, deserve to be accepted or not.

20. In the light of the undertakings accepted by us, the two bank accounts, one with Bassien Catholic Co-operative Bank Ltd., Bandra Branch and another with Indusland Bank Ltd., Andheri Branch shall stand released from attachment. Till the order, as directed above, is passed by the authority, let the garnishee notices issued by the respondents be held in abeyance.

21. With the aforesaid directions, the writ petition is disposed of. There would be no order as to costs.

(M.S.KARNIK, J.) **(S.C.DHARMADHIKARI, J.)**