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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9353 OF 2019

Cargocare Logistics (India) Pvt. Ltd. … Petitioner

V/s.

The Union of India and Ors. ... Respondents.

Mr. Prakash Shah I/b. PDS Legal for the Petitioner.
Mr. Pradeep S. Jetly a/w. Mr. J.B. Mishra for Respondents 1 and 3.

CORAM : M.S. SANKLECHA &
NITIN JAMDAR, JJ.

DATE : 27 SEPTEMBER 2019.

P.C. **:-**

On 13 September 2019 we passed the following order :-

"This Petition under Article 226 of the Constitution of India challenges the two Orders-in-Original dated 18 March 2019 and 28 February 2019 passed by the Respondent No.2 Commissioner of GST & Central Excise, Mumbai East) and Respondent No.3 (Commissioner of Central Tax & GST, Thane) respectively, under the Finance Act, 1994 (the 'Act').

2. At the very outset, we informed the Petitioner that as both the impugned orders are appealable under the Act, we are not inclined to *entertain this Petition. At this our attention was drawn to the impugned orders dated 18 March 2019 and 28 February 2019 passed under the Act in respect of the same period i.e. 2011-12 to2014-15 are contradictory to each other. In law only one of the two stands taken by the Revenue is sustainable. In the order dated 28February 2019 the Respondent No.3- Commissioner of GST Thane, held that freight charged by the Petitioner's to its customers is a taxable service and therefore a payment of Rs.2.36 crores has been confirmed under section 73(2) of the Act with an equivalent penalty under section 76 of the Act. While the Order dated 18 March 2019 passed by Commissioner -GST Mumbai-East, for similar period holds that the freight charges are exempt from tax under the Act. Consequently Cenvat Credit to the extent of Rs.11.37 crores has been confirmed under Rule 6(3)(i) of the Cenvat Credit Rules, 2004, read with Section 73 (1) of the Finance Act, 1994 along with an equivalent penalty under section 78 of the Act. It is in the above circumstances, that the Petitioner prays that this Court should exercise its extraordinary jurisdiction in view of the arbitrary orders passed by the Respondent.*

3. On the face of it the two impugned orders in respect of similar period has taken a contrary stand. If the freight charges are exempt as held in the impugned order dated 18 March 2019, then the demand of Service Tax as made in the impugned order dated 28 February 2019 cannot stand and vice versa. Revenue can be correct or rather on facts can only take one of the two stands and not confirm the notices taking a dramatically opposite views.

4. In the above circumstances, we asked Mr. Jetly to take instructions from the Revenue which of the two

> *impugned orders the department stands by. At this Mr. Jetly stated that he would take instructions from his officers and if possible explain the basis for the contrary stand or alternatively which of the two orders would the Revenue stands by.*
>
> *5. In the above view, at the request of Mr.Jetly the Petition is adjourned to 27 September 2019."*

2. Today Mr. Jetly, learned Counsel appearing for the State on instructions states that the Revenue stands by both the impugned orders in original dated 18 March 2019 and 28 February 2019. Therefore the Petitioner should adopt the alternative remedy of filing an appeal under the Finance Act, 1994 in respect of both the impugned orders.

3. As recorded above in para 2 herein above, the two orders passed by the revenue are on the face of it contrary to one another. The order dated 28 February 2019 passed by the Commissioner of Central Tax & GST, Thane holds that service tax on freight is a taxable service. On the above finding he confirms the recovery of an amount of Rs.2.36 crores as Service Tax. On the other hand the Commissioner of GST, Mumbai (East) in his order dated 18 March 2019 holds that the freight charges are an exempted service. Thus as a result holds that the Petitioners are not entitled to Cenvat Credits of Rs.11.37 crores and confirmed the demand on that basis. The revenue can obviously be right only on one of two counts and not on

both counts i.e. either the impugned order dated 28 February 2019 is correct or the impugned order dated 18 March 2019 is correct.

4. In fact passing such contrary orders, only seems to suggest that the entire adjudication proceedings are a mere farce. The attitude of the Revenue even at the level of the Commissioner is that the demand has to be confirmed and the relief if any, the party has to obtain from Appellate Authorities. This attitude brings to a naught to claim of the State that it is business friendly.

5. Therefore in such a case, there is no question of the Petitioner being driven to the filing of an appeal to the Appellate Authorities under the Act in respect of both the impugned orders. In fact, we set aside both the orders dated 18 March 2019 and 28 February 2019 passed by the Respondent Nos. 2 and 3 herein.

6. We direct the Registry to serve a copy of final order upon the Central Board of Indirect Tax and Customs (CBIC) for its information. Needless to state CBIC will now appoint a common adjudicator in respect of the two show cause notices which led to contrary orders in respect of the same period.

7. Petition disposed of accordingly.

NITIN JAMDAR, J. **M.S. SANKLECHA, J.**

This order is corrected vide Speaking to Minutes order dated 3 October 2019