IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.16060 of 2009
and
M.P.Nos.1, 2 & 3 of 2009

Birlasoft (India) Limited,
represented by Vimal Rai Khanna,
Chief Finance Officer,
No.36, Vijayaraghava Road,
Chennai - 600 017. ... Petitioner

vs

1.The Assistant Commissioner (CT),
T.Nagar (East) Assessment Circle,
46, Greenways Road,
Chennai - 600 028.

2.The Commissioner of Service Tax,
Noida.

3.Union of India,
represented by the Secretary,
Ministry of Finance,
Department of Revenue,
New Delhi. ... Respondents

Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorarified, to call for the records on the files of the First Respondent herein in TNGST.1561751/04-05 dated 08.07.2009 and quash the same.

For Petitioner : Mr.N.Prasad

For R1 & R2 : Mr.G.Dhanamadhri
Government Advocate

For R3 : No appearance

O R D E R

Heard the learned counsel for the petitioner and the 1st and 2nd respondents. There is no representation for the 3rd respondent.

2.The petitioner has challenged the impugned order dated 08.07.2009 passed by the 1st respondent Assistant Commissioner (CT), in TNGST.1561751/04-05.

3.By the impugned order, the 1st respondent Assistant Commissioner (CT) has confirmed a demand of Rs.41,14,399/-. Apart from the above tax of Rs.41,14,399/-, the 1st respondent has also imposed surcharge of Rs.2,05,722/- and a penalty of Rs.64,80,181/- under Section 16(2) of the TNGST Act, 1959.

4.It is the case of the petitioner that they are engaged in providing IT services and are paying service tax from the year 2008 on the said activity. It is submitted that this activity undertaken by them cannot be subjected to tax levy under the TNGST Act and that the issue is squarely covered by decision of the Hon'ble Supreme Court in Tata Consultancy Services Vs. State of Andhra Pradesh, 137 STC 620.

5.It is further submitted that already the assessment was completed and order came to be passed on 30.12.2005, wherein the issue relating to service provided by petitioner on site of the premises of the customer was exempted by the Commercial Tax Officer. The petitioner was issued with a re-assessment notice under Section 16 of the TNGST Act, 1959. The petitioner replied and asked the respondents for time, to give them an opportunity to make further submissions, in case the department wanted further clarification.

6.It is submitted that impugned order came to be passed without considering the request of the petitioner. It is further submitted that the petitioner can demonstrate that it was not engaged in manufacturer or sale of any software, but was engaged only in providing IT service and that from the year 2008 on the same service they are paying service tax. The petitioner therefore submits that levy of tax under TNGST Act, 1959 was not justifiable. It is further submitted that while quantifying the demand, the 1st respondent has calculated the tax at the maximum rate of 12.6% under Entry 40 of Part D to I Schedule to the TNGST Act, 1959, whereas the software would be liable to tax at 4 % during the relevant time in terms of 18 of Part D to I Schedule to the TNGST Act, 1959.

7.It is submitted that even if the above rate was applied, the demand would be for a lesser amount. The learned counsel for the 1st and 2nd respondents submits that the impugned order passed by the 1st respondent is well reasoned and requires no interference. He further submits that the petitioner has an alternate effective remedy before the Appellate Commissioner. The decision of the Hon'ble Supreme Court has considered by the 1st respondent in TCS case which was at par.

8.I have considered the submissions made by the both side counsel and perused the records.

9.I am of the view that the petitioner has made out a case for interference as the impugned order has been passed based on the book entry in the profit and loss account alone. The authorities can not solely rely on the book entry alone. Instead, they should have called for the agreement signed between the petitioner and its customers before coming to a conclusion, as to whether the petitioner was providing service or was engaged in the sale of software.

10.Since the dispute pertains to the assessment year 2004-05 and the case has been languishing for last 10 years, I am of the view, to meet the ends of justice, the impugned order can be set aside on terms.

11.The petitioner is therefore directed to deposit a sum of Rs.7,50,000/- within a period of four weeks from the date of receipt of a copy of this order. The impugned order passed by the 1st respondent shall be treated as Show Cause Notice. The petitioner may give their reply / representation to the 1st respondent within a period of 30 days from the date of receipt of a copy of this order.

12.The 1st respondent shall thereafter pass a speaking order in accordance with law. In case, if the petitioner succeeds in the denovo proceedings, the amount directed to be deposited by the petitioner by this order, shall be refunded to the petitioner without further orders.

13.The present Writ Petition is allowed with the above observations. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Assistant Commissioner (CT),
T.Nagar (East) Assessment Circle,
46, Greenways Road, Chennai - 600 028.

2.The Commissioner of Service Tax,
Noida.

3.Union of India,
represented by the Secretary,
Ministry of Finance, Department of Revenue,
New Delhi.

+1cc to Mr.N.Inbarajan, Advocate Sr.103008
+1cc to the Special Government Pleader Sr.103284

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srg 18/02/2020