IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 04.11.2019
CORAM
THE HONOURABLE DR. JUSTICE ANITA SUMANTH
Writ Petition No.22839 of 2010
and M.P.Nos.1 and 2 of 2010

V.S.Agency
rep. By its Partner
Mr.C.Santhanam
.... Petitioner

Vs

1 The Commissioner of Central Excise
Chennai III Commissionerate, Chennai - 34.

2. The Assistant Commissioner of Central Excise,
Hosur II Division, 67/A Sipcot,
Hosur - 635 126.

3. The Superintendent of Central Excise,
Preventive, Hosur II Division,
Hosur.
.... Respondents

PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus calling for the records of the third respondent culminating in his communication dated 28.09.2010 and quash the same and to forbearing the respondents from calling upon or demanding the firm to submit returns under section 69 of the Finance Act, 1994 and pay service tax on incentives received from the financiers of the vehicles sold by the petitioner to the customers or take any proceedings against the petitioner in this regard.

For Petitioner : Ms.L.Maithili

For Respondents : Mr.A.P.Srinivas,
Sr. Standing Counsel

ORDER

The petitioner is a partnership firm and an authorised dealer of TVS Motor Company engaging in the sale of various models of TVS brand two wheelers. The showroom of the petitioner stocks a large number of vehicles that are offered to sale to prospective customers. After selection of the vehicle for purchase, the customers are guided by the personnel of the petitioner to available options for finance that are offered at the site by representatives of finance companies.

2. The Writ Petitioner in its affidavit states that 'it is with a view to cover such segment of customers i.e., 'salaried employees or businessmen' that the firm encourages them to approach the finance companies'. Furthermore, the petitioner also encourages such availment of finance with a view to improving its own business as evidently the availability of finance would improve the possibility of purchase and in turn, improve the business prospects of the petitioner. As can be seen from the statement recorded from the Manager of the petitioner concern on 14.05.2010, there are four finance companies, representatives of which are present in the premises of the petitioner for provision of finance to the clients i.e., HDFC Bank, IndusInd Bank, ICICI Bank and TVS Finance and Services Ltd.

3. Admittedly, commission has been received by the petitioner from the aforesaid four entities. The commission, according to the petitioner, relates to merely providing desk space within its premises to enable them to carry out documentation for loan, if at all the representatives are in a position to persuade the prospective customers to avail finance facilities. Apart from the aforesaid four entities, learned counsel for the petitioner points out that there are other entities, such as Reliance, whose representatives are also present in the premises of the petitioner, but who do not pay any commission to the petitioner. According to her, there is no contractual agreement inter se the petitioner and the finance companies and there can be no inference of any services having been rendered by the petitioner to the finance companies. The commission received from the companies is offered as income for the purposes of income tax by the petitioner, but according to the petitioner, would not be liable for levy of service tax in terms of Finance Act, 1994 (in short 'Act'), as the activity engaged in does not constitute taxable service.

4. The petitioner has been resisting summons received from the respondent/Service Tax Authorities calling upon it to appear and furnish details in connection with the on going enquiry for

subjecting the amount of commission received, to service tax. Hence the present Writ Petition challenging summons dated 28.09.2010 calling for the attendance of the petitioner along with TDS statements for the previous five years, Credit/Debit notes received from finance company/TVS Motor Company and free service details.

5. The petitioner relies upon the decisions of the Larger Bench of the Customs, Excise and Service Tax Appellate Tribunal in the case of M/s.Pagariya Auto Center V. CCE, Aurangabad (2014-TIOL-141-CESTAT-Del-LB) and of the South Zonal Bench of the CESTAT, Chennai in IndusInd Bank Ltd. V. Commissioner of Service Tax, Chennai (2019 (25) G.S.T.L. 220).

6. Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondents would point out that the present proceedings are highly premature, since what is challenged is only a summons. He points out that the law permits an enquiry to be carried out when there is apprehension on the part of the respondent of escapement of receipts to service tax. Thus, the petitioner ought to co-operate with the Department and not rush to Court challenging the summons issued. He relies on a judgment of the Supreme Court in the case of Commissioner of Customs, Calcutta V. M.M.Exports (2007 (212) E.L.T. 165) and two decisions of the Madras High Court, one of the Division Bench in the case of Additional Director General, D.G.R.I., Chennai V. J.K.S. Air Travels (2015 (321) E.L.T. 213) and one of the learned single Judge in the case of Sakthi Printeck V. Deputy Director, DRI, Chennai (2018 (360) E.L.T. 842).

7. Having heard both learned counsel, I am inclined to accept the stand of the Revenue that this Writ Petition is premature. What has been challenged is a summons issued in terms of the provisions of Section 14 of the Central Excise Act, 1944, which entitles the Central Excise Officer, duly empowered by the Central Government in that behalf, to summon persons to give evidence and produce documents in an on-going enquiry.

8. In the present case, enquiry is admittedly on-going in regard to the taxability of the commission received by the petitioner. The apprehension of the petitioner appears to be that the respondent has pre-determined the issue and is hence merely seeking to collate requisite documents to enable the issuance of a show cause notice without application of mind as to whether such show cause notice is actually called for or not.

9. The relevant statutory provision in terms of which the commission received is sought to be brought to tax is Section 65 (19) of the Act dealing with 'business auxiliary service', reading as follows:

(19) "business auxiliary service" means any service in relation to, —

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or 3[Explanation.— For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(v) production or processing of goods for, or on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

(i) deals with goods or services or documents of title to such goods or services; or

(ii) collects payment of sale price of such goods or services; or

(iii) guarantees for collection or payment for such goods or services; or

(iv) undertakes any activities relating to such sale or purchase of such goods or services;

(b) excisable goods" has the meaning assigned to it in clause (d) of section 2 of the Central Excise Act, 1944 (1 of 1944);

(c) "manufacture" has the meaning assigned to it in clause (f) of section 2 of the Central Excise Act, 1944 (1 of 1944).'

10. In the present case, the question as to whether the petitioner is actually rendering services to the finance companies is one of fact. One cannot deny that there is a symbiotic relationship between the petitioner and the financial institutions and one does benefit from the efforts of the other in terms of furthering their own respective business interests. The petitioner by the efforts of the finance companies, gets the benefit of increased business, quite apart from the the finance company benefiting by the marketing efforts of the petitioner. However, whether such an arrangement would fall within the realm of 'taxable services' is yet unclear and will emanate only upon further detailed enquiry of facts.

11. The CESTAT in the case of IndusInd Bank Ltd. (supra) concludes, in a similar case, that though there may be a symbiotic relationship between the company engaged in banking and financial services on the one hand and a dealer of vehicles on the other, such services cannot automatically fall within the realm of 'taxable services', since neither of the entities is engaged in the rendition of 'service' as understood by Finance Act, 1994. Then again, the Larger Bench of the CESTAT while dealing with the question of whether provision of table space to a financial institution by a dealer in vehicles would constitute 'business auxiliary services' for the purpose of taxability, has opined that the question would involve appreciation of facts on a case to case basis.

12. At paragraph 21, the Bench observes that where mere space was provided along with furniture for facilitating accommodation of representatives of financial institutions in the premises of a dealer and consideration is received for that singular activity, such consideration may perhaps constitute rent for the provision of space and associated amenities and may not amount to business auxiliary service. If, on the other hand, the transactional documents and other evidences on record indicate substantial activity falling within the contours or integers of the definition of business auxiliary service, then one may come to the legitimate conclusion that the services are taxable.

13. These constitute questions of fact and cannot be looked into in a Writ Petition in terms of Article 226 of the Constitution of India. It would thus be appropriate to direct the petitioner to cooperate with the on-going enquiry, appear before the respondent for completion of proceedings and allow the same to come to a logical conclusion. Having said so, the tenor of the counter filed by the respondent appears to indicate that the departmental view is that receipt of incentive/commission from financial institutions would squarely be covered under the category of business auxiliary service. This is putting the cart before the horse and validates the apprehension of the petitioner that a show cause notice and a conclusion adverse to the petitioner are a foregone conclusion.

14. Thus, while dismissing the Writ Petition and fixing a date when the petitioner will appear before the respondent for enquiry, I make it clear that the respondent shall not approach this issue with a pre-determined mind. Let a proper examination of factual aspects be embarked upon before arriving at a conclusion one way or the other. I direct the petitioner to appear before the third respondent for this purpose on Monday, the 18th of November, 2019 along with all materials as sought for in the summons impugned. No further notice need be issued in this regard. Let either an order dropping the proceedings, or a show cause notice be issued within a period of four (4) weeks from conclusion of the personal hearing. No costs. Consequently, connected Miscellaneous Petitions are also dismissed.

Sd/-
Asst.Registrar (CS II)

/true copy/
Sub Asst. Registrar

To

1 The Commissioner of Central Excise
Chennai III Commissionerate, Chennai - 34.

2. The Assistant Commissioner of Central Excise,
Hosur II Division, 67/A Sipcot,
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3. The Superintendent of Central Excise,
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+1 cc to Mr.A.P.Srinivas Advocate sr91195

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