

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.02.2019

CORAM

THE HON'BLE Dr. JUSTICE ANITA SUMANTH

W.P.No.23414 of 2018

&

W.M.P.Nos. 27337 & 27338 of 2018

Shri Tirupathi Kumar Khemka

....Petitioner

Vs

1. The Deputy Commissioner of Central Excise & GST,
Egmore Division,
Newry Tower, Plot No.2054, Ist Block,
Chennai- 600 040.

2. The Bank Manager,
Citi Bank, No.2, Club House Road,
Chennai-02

...Respondents

PRAYER: Writ Petition filed under Article 226 of the
Constitution of India praying for a writ of Certiorari, calling
for the records on the file of the 1st respondent in
C.No.IV/16/140/2017-MISC-III dated 30.08.2018 and quash the same.

For Petitioner : Mrs.Naveena D

For Respondent : Mr.T.L.Thirumalaisamy SPC For R1

MR.V.Balasubramani-R2

सत्यमेव जयते
O R D E R

The short point for determination in this writ petition is
whether a director of the company would be liable for arrears of
Central Excise that have, admittedly, arisen in the assessment
of the company under the provisions of the Central Excise Act,
1944 (in short the 'Act').

2.Heard, Ms.Naveena, learned counsel for the petitioner,
Mr.T.L.Thirumalaisamy learned Panel counsel for R1 and
Mr.V.Balasubramanian, learned counsel for R2.

3. An assessment under the provisions of the Central Excise Act, 1944 was made on NEPC India Ltd. (in short 'company') vide an order-in-original dated 30.12.2008 in relation to the period 01.01.2005 to 31.03.2006 giving rise to a demand of Rs.25,96,876/- along with interest.
4. The matter was carried in appeal and the Commissioner (Appeals) vide order dated 22.12.2009 partly allowed the appeal setting aside the demand pertaining to 'Consulting Engineer service' and penalty. However, the Commissioner (Appeals) confirmed the demand of service tax with regard to 'Goods Transport Agency services'. The department challenged the aforesaid order by way of appeal to the CESTAT that dismissed the same. A denovo order of adjudication thus came to be passed on 20.08.2013, quantifying the demand outstanding.
5. The counter filed by the Assessing Officer, the 1st respondent states that the order of assessment was not challenged in appeal. This is however erroneous in so far as a copy of the appellate order dated 22.12.2009 has been placed on record evidencing that the company had carried the matter in first appeal. No second appeal was however filed at the instance of the company and the order of the Commissioner (Appeals) has attained finality. The demand as raised by the assessing officer and confirmed in first appeal is thus outstanding.
6. Thereafter, a notice was issued on 07.08.2018 to the petitioner calling upon him in his capacity as a director of the assessee company, to pay the amounts demanded as per the order-in-original. According to the counter affidavit, nearly a dozen letters were issued to the Directors of the Company, including the petitioner, to no avail.
7. There being, admittedly, no response from the petitioner to the notices calling for the payment, the impugned notice was issued under section 11(2) of the Act dated 30.08.2018 to the Branch Manager, Citi Bank attaching the personal bank account of the petitioner. The 1st respondent justifies the issuance of the impugned notice on the ground that the petitioner, as a Director of the company is responsible for the actions of the company as well as its day to day functions, and was liable to remit the arrears of the company to the Department forthwith.

8. Ms. Naveena, learned counsel appearing for the petitioner points out that the provisions of Section 87 of the Finance Act, 1994 providing for levy of service tax do not entitle/authorize the respondent to collect arrears of payments of service tax from any entity except, specifically, the assessee itself. Thus, according to her, the impugned order is bereft of jurisdiction insofar as no liability of the company can be fastened upon its directors. She relies on the cases of (i) A. Venkatachalam Chettiar Vs. Assistant Commissioner of Commercial Taxes, Coimbatore [2018 98) G.S.T.L. 97 (Mad.)] (ii) V.A. Ramesh Vs. Assistant Commissioner of Customs, Chennai [2016 (339) E.L.T. 18 (Mad)] (iii) Anita Grover Vs. Commissioner of Centrals Excise [2013 (288) E.L.T. 63 (Del.)] (iv) Om Prakash Walecha vs state of Haryana [2009 (238) E.L.T. 215 (P & H)], to buttress her submissions.

9. Mr. Thirumalaisamy speaking for the revenue relies on the provisions of Section 9AA of the Central Excise Act to the effect that if an offence is committed by a company, every person who was in charge of, and responsible to the company for the conduct of business of the company, shall also be deemed to be guilty. He states that the provisions of section 83 of the Finance Act 1994 incorporate the application of certain provisions of the Central Excise Act into the Finance Act 1994 as a result that the provisions of section 9AA also stand integrated into the latter. Thus, the petitioner, as a director, is also liable to meet outstanding demands of the company.

10. Heard learned counsels.

11. The provisions of Section 9AA of the Central Excise Act read as follows:

9-AA. Offences by companies

(1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation. - For the purposes of this section, -

(a) 'company' means anybody corporate and includes a firm or other association of individuals; and

(b) 'director' in relation to a firm means a partner in the firm.

12. Thus, the scheme of the Central Excise Act provides specifically that every person who is proven to have been in charge of and responsible to a company for the conduct of its business shall be deemed to be guilty of the offences committed by the company. This requires a determination to the effect that the director in question was, in fact at the relevant point in time, in charge of and responsible to the company for the conduct of its business. This determination has to be made prior to fastening of the liability of a company upon such director, and admittedly has not been done in the present case.

13. As far as Service tax is concerned, the provisions of Section 87 of the Finance Act 1994 provides for recovery of amounts and reads thus:

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 31 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)

14. No doubt, the provisions of Section 83 of the Finance Act 1994 state that the provisions of Section 9 AA of the C E Act would apply to proceedings under the Finance Act as well. Thus, there is no ambiguity with respect to the position that the liability of a company may be fastened upon a director, if the statutory conditions set out section 9 AA have been complied with. However, the admitted position in the present case is that there has been no determination of the liability of the director, the petitioner herein, in terms of section 9 AA of the Act. The counter itself makes it clear that only demands for the outstanding payments were being made without the pre-requisites of section 9 AA being satisfied.

15. The 1st respondent has thereafter issued the impugned garnishee notice straight away in terms of section 11(2) of the Act without any determination under section 9AA that itself should be preceded by a show cause notice. In the light of the admitted position that there has been no show cause notice to the petitioner invoking the provisions of section 9 AA of the Act, no opportunity of hearing granted and no determination under section 9 AA, the impugned garnishee notice in terms of section 11(2) of the Act attaching the personal bank account of the petitioner is clearly premature and misconceived.

16. The levy of service tax under Finance Act 1994 stands cancelled with effect from 01.07.2017 with the advent of Goods and Service tax. The revenue relies upon the provisions of Section 79(1) of the Central Goods and Service Tax Act (CGST Act) read with Section 142(viii)(a) and Section 89 thereof, setting out various saving clauses and transitional provisions. These provisions are of no benefit to the revenue as only such proceedings that have been initiated, legitimately and in accordance with the provisions of the erstwhile statutes would stand saved. In the present case, the revenue has admittedly not made any determination in terms of section 9AA of the Act holding the petitioner responsible for the defaults of, and

offences committed by the company which is a statutory pre-requisite for coercive recovery.

17. For the aforesaid reasons, I am of the view that the impugned notice is liable to be quashed and I do so. This writ petition is allowed. Consequently, connected miscellaneous petitions are also closed. No costs.

s/d-
Assistant Registrar (CS VII)

True Copy

Sub-Assistant Registrar

To

1. The Deputy Commissioner of Central Excise & GST,
Egmore Division,
Newry Tower, Plot No.2054, Ist Block,
Chennai- 600 040.

+1 CC to Mr.S.Duraiaraj, Advocate sr 9639.

+1 CC to Mr.T.L.Thirumalaisamy, Advocate sr 9825.

+1 CC to Mr.M.Arunachalam, Advocate sr 10300.

W.P.No.23414 of 2018

&
W.M.P.Nos. 27337 & 27338 of 2018

RK (CO)
SP (07/06/2019)

सत्यमेव जयते

WEB COPY