IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.11.2019

CORAM

THE HON'BLE MR. JUSTICE K.RAVICHANDRABAABU

W.P.No.27161 of 2019
and
W.M.P.No.26549 of 2019

Hindustan Oil Exploration Company Limited,
Represented by its Managing Director,
Elango Pandarinathan
"Lakshmi Chambers",
192, St.Mary's Road,
Alwarpet, Chennai - 600018. ...Petitioner

Vs.

1. The Commissioner,
GST and Central Excise, Chennai Outer
Newry Towers No.2054/I : II Avenue,
Anna Nagar,
Chennai - 600040.

2. Additional Director General
Directorate General of Central Excise Intelligence
Chennai Zonal Unit
C-3, C-Wing, II Floor, Rajaji Bhavan,
Besant Nagar,
Chennai - 600090. ...Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records pertaining to the proceedings in F.No.IV/09/79/2016-ST II (ADJ) comprising of Order in Original No.02/2019 (R) dated 29.05.2019 on the file of the first respondent and quash the same and consequently, direct the first respondent herein to decide the matter afresh in accordance with law after affording the petitioner herein an opportunity for personal hearing and considering the submissions advanced by the petitioner herein.

For Petitioner : Mr.N.Venkataraman
Senior Counsel

For Respondents : Mrs.Aparna Nandakumar
Standing Counsel for R1
Mr.V.Sundareswaran
Standing Counsel for R2

O R D E R

This writ petition is filed challenging the order of the first respondent dated 29.05.2019. Consequently, the petitioner seeks for a direction to the first respondent to decide the matter afresh in accordance with law after affording the petitioner and an opportunity of personal hearing.

2. The petitioner is a Public Limited Company engaged in the business of exploration and production of crude oil and natural gas. The petitioner was served with show cause notice dated 30.03.2016 by the second respondent, calling upon the petitioner to show cause to the first respondent as to why :

> "(i) the production of oil service provided by HOEC as discussed above should not be classified as "Mining Services" under Section 65 (105) (zzzy) of the Finance Act, 1994 or the taxable service, as the case may be;
>
> (ii) Service Tax of Rs.25,28,69,990/- (Service Tax of Rs.24,55,04,845/-, Education of Rs.49,10,098/- and Secondary Higher Education Cess of Rs.24,55,047/-) on the amount received by them for the taxable services provided should not be demanded and recovered from them for the period 2010-11 to 2014-15 as per Annexure B under Section 73(1) of the Finance Act, 1994;
>
> (iii) the service of Survey and Exploration provided by HOEC as discussed above should not be classified as "Survey and Exploration Services" under Section 65 (104a) read with Section 65 (105) (zzv) of the Finance Act, 1994 or the taxable service, as the case may be;
>
> (iv) Service Tax of Rs.84,40,92,590/- (Service Tax of Rs.81,95,07,369/-, Education of Rs.1,63,90,148/- and Secondary Higher Education Cess of Rs.81,95,073/-) on the amount received by them for the taxable services provided should not be demanded and recovered from them for the period from 2010-11 to 2014-15 as per Annexure C under Section 73(1) of the Finance Act, 1994;
>
> (v) Interest on the service tax demanded in para (ii) and (iv) above should not be demanded under Section 75 of the Finance Act, 1994;
>
> (vi) Penalty should not be imposed on HOEC under Section 76, 77 and 78 of the Finance Act, 1994 for the reasons stated above."

3. The petitioner filed a reply to the show cause notice on 23.05.2016. Personal hearing was conducted on 28.03.2017 and thereafter, the impugned Order in Original came to be passed on 29.05.2019, wherein and whereby, the first respondent ordered as follows :-

> "(i) I order that the production of oil service provided by the assessee be classified as "Mining Services" under Section 65 (105) (zzzy) of

the Finance Act, 1994 up to 30.06.2012 and as the taxable service from 01.07.2012.

(ii) I confirm the demand of Rs.25,28,69,990/- (Rupees Twenty Five Crore Twenty Eight Lakh Sixty Nine Thousand Nine Hundred And Ninety Only) [Service Tax of Rs.24,55,04,845/-, Education Cess of Rs.49,10,098/- and Secondary Higher Education Cess of Rs.24,55,047/-] for the period from 2010-11 to 2014-15 under Section 73(1) of the Finance Act 1994 read with Section 73(2) of the Finance Act, 1994.

(iii) I order that the service of Survey and Exploration provided by the assessee be classified as "Survey and Exploration Services" under Section 65 (104a) read with Section 65 (105) (zzv) of the Finance Act, 1994 up to 30.06.2012 and as the taxable service from 01.07.2012.

(iv) I confirm the demand of Rs.59,12,22,600/- (Rupees Fifty Nine Crore Twelve Lakh Twenty Two Thousand Six Hundred Only) (Service Tax of Rs.57,40,02,524/-, Education Cess of Rs.1,14,80,050/- and Secondary Higher Education Cess of Rs.57,40,026/-) for the period from 2010-11 to 2014-15 under Section 73(1) of the Finance Act 1994 read with Section 73(2) of the Finance Act, 1994.

(v) I order that the assessee shall pay interest under Section 75 of the Finance Act, 1994 in respect of demands confirmed at (ii) and (iv) above from the due date for payment till the date of actual payment.

(vi) I impose a Penalty of Rs.84,40,92,590/- (Rupees Eighty Four Crore Forty Lakh Ninety Two Thousand Five Hundred and Ninety Only) under Section 78 of the Finance Act, 1994. However, the penalty payable shall be reduced to 25% of the Service tax demanded, provided the amount of service tax confirmed, interest and 25% penalty are paid within 30 days from the date of receipt of this order, as per clause (ii) of second proviso to Section 78(1) of the Finance Act, 1994.

(vii) I drop the demand of Rs.25,28,69,990/- (Rupees Twenty Five Crore Twenty Eight Lakh Sixty Nine Thousand Nine Hundred And Ninety Only) (Service Tax of Rs.24,55,04,845/-, Education Cess of Rs.49,10,098/- and Secondary Higher Education Cess of Rs.24,55,047/-) towards Survey and Exploration Service, this being a duplication of demand under Mining Service."

4. Challenging the above said order, the present writ petition is filed mainly by contending that the first respondent, before passing the impugned order, failed to

consider two Circulars issued on 12.02.2018 and 05.03.2018 in Circular No.32/06/2018 - GST and Circular No.35/2018 - GST, respectively.

5. According to the petitioner, had the Adjudicating Authority considered those two Circulars which are in favour of the petitioner, he would have not passed the impugned Order in Original by treating the petitioner as a Service Provider and fixing the tax liability on the petitioner. Therefore, it is contended before this Court that the Adjudicating Authority has to consider those two Circulars and decide the matter afresh by giving an opportunity of hearing to the petitioner.

6. The learned Senior counsel appearing for the petitioner after inviting this Court's attention to those two Circulars, submitted that facts and circumstances would show that the petitioner is not a Service Provider and therefore, based on those two Circulars, they are not bound to pay the service tax as demanded in the impugned proceedings. Thus, he contended that the matter needs to go back to the Adjudicating Authority once again for considering the matter afresh based on the above said two Circulars.

7. On the other hand, in the counter affidavit filed by the first respondent, it is stated that the Adjudicating Authority examined the factual matrix in the light of the definition of “service” in Section 65B (44) of the Finance Act, 1994 and did a detailed scrutiny on the terms and conditions of Joint Venture Agreement and Production Sharing Contract as mandated by the Board Circular dated 24.09.2014 and came to the conclusion that the payment from cash calls received from mining and exploration operation was consideration for taxable service. Thus, it is stated that the contention of the petitioner that the cash calls are not subject to service tax is wholly untenable and erroneous.

8. The learned counsel appearing for the Revenue after reiterating the contentions raised in the counter affidavit submitted that even though the Assessment order has not specifically referred to the Circulars in Nos.32/06/2018 - GST and 35/2018 - GST dated 12.02.2018 and 05.03.2018 respectively, relied on by the petitioner, in fact it has dealt with the effect of such Circulars and decided the matter after considering the facts and circumstances of the present case and accordingly, the Adjudicating Authority has come to the conclusion that the petitioner is a Service Provider, liable to pay service tax. Therefore, the learned counsel contended that all the factual contentions raised by the petitioner before this Court, based on the above two Circulars, is a matter which needs to be considered and decided only by the next fact finding authority viz., the Appellate Authority and therefore, the petitioner is not entitled to maintain the present writ petition, when admittedly, as against the impugned order, a statutory

appellate remedy is available to the petitioner.

9. Heard both sides. I have given my careful consideration to the submissions made by the learned counsel appearing for both parties and also perused the materials placed before this Court.

10. The order under challenge is an order of adjudication passed by the first respondent after issuing a show cause notice to the petitioner, considering the objection filed by them and after providing an opportunity of personal hearing. The Adjudicating Authority has come to the conclusion that the petitioner is a Service Provider and consequently, liable to pay Service Tax. To arrive at such conclusion, the Adjudicating Authority has made a detailed analysis of the facts and circumstances of the case as well the case laws cited by the petitioner. The only point raised before this Court is that the Adjudicating Authority has not considered those two Circulars viz., Circular No.32/06/2018 - GST and Circular No.35/2018 - GST dated 12.02.2018 and 05.03.2018 respectively, which according to the petitioner are in their favour.

11. On the other hand, it is the contention of the Revenue that even though no specific reference is made in the impugned order about those two Circulars, effect of the said Circulars were considered by the Adjudicating Authority and only thereafter the impugned order was passed by holding the petitioner as a Service Provider. No doubt, those two Circulars were issued before the date of the impugned order. At the same time, the effect of those two Circulars and consequences thereof, in the case of the petitioner, is certainly a factual aspect of the matter which needs to be considered and decided only by a next fact finding authority viz., the Appellate Authority, even assuming that the Adjudicating Authority has not considered those two Circulars which according to the petitioner are in their favour. There is no dispute to the fact that as against the present order passed by the first respondent, a statutory appellate remedy is available before the CESTAT and therefore, all the factual contentions raised by the petitioner by relying on those two Circulars can very well be raised before the Appellate Tribunal, which, undoubtedly, also a fact finding authority, will have to go into the merits of the contentions raised by the petitioner and decide as to whether the Adjudicating Authority has in fact considered the effect of such Circulars while passing the impugned order or not, even though, those two Circulars were not referred to in the impugned order.

12. When such remedy is available to the petitioner and more particularly, when this Court finds that the dispute raised in this writ petition by relying on those two Circulars cannot be considered and decide without going into the factual aspects of the matter, I am of the

firm view that the petitioner has to only resort to the statutory appellate remedy by filing regular appeal before the CESTAT. Therefore, without expressing any view on the merits of the contentions raised by both parties, this writ petition is disposed of only by granting liberty to the petitioner to file such appeal within a period of four weeks from the date of receipt of a copy of this order before CESTAT. On receipt of such appeal, the CESTAT shall consider the same on its own merits and pass orders in accordance with law, without reference to the period of limitation. The original impugned order filed before the Registry shall be returned to the petitioner forthwith. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

sni
To

1. The Commissioner,
GST and Central Excise, Chennai Outer
Newry Towers No.2054/I : II Avenue,
Anna Nagar,
Chennai - 600040.

2. Additional Director General
Directorate General of Central Excise Intelligence
Chennai Zonal Unit
C-3, C-Wing, II Floor, Rajaji Bhavan,
Besant Nagar,
Chennai - 600090.

+1cc to Mr.V.Sundareswaran , Advocate SR.No. 94253
+1cc to Mr.S.Muthuvenkataraman , Advocate SR.No. 93925

W.P.No.27161 of 2019

A.SK(17/12/2019)