IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.23611 of 2017
and
WMP.No.24800 of 2017

Anand Cine Service,
Represented by its Partner,
Mrs.A.Padma Manohar,
No.3, Sarangapani Street,
T.Nagar,
Chennai – 600 017. ... Petitioner

vs

Commissioner of Service Tax-II,
Office of the Commissioner of Service Tax-II,
2054-1, II Avenue, Newry Towers,
Anna Nagar,
Chennai – 600 040. ... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of order in Original No.CHN-SVTAX-002-COM-48- 2016-2017 dated 27.03.2017 in C.No.IV/09/434/2014-STC-II Adjn issued by the respondent and quash the same.

For Appellant : Mr.Joseph Prabakar

For Respondents : Mr.A.P.Srinivas

ORDER

The petitioner has challenged the impugned order in original order dated 27.03.2017 passed by the respondent / Commissioner of Sales Tax - II. The demand has been made on the petitioner for the period commencing from August 2010 to September 2011, January 2011 to March 2014 and thereafter in terms of statement of demand dated 15.04.2016 for the period from April 2014 to December 2015. The allegation of the respondent is that the petitioner had rendered supply of Tangible Goods services as defined in Section 65(105)(Z)(Z)(Z)(J) of the Finance Act of 1994, as amended.

2. The case of the petitioner is that the petitioner is the supplier of Cine equipments, gensets, crane etc, for the purpose of shooting. According to the petitioner, there is a deemed sale under the TNVAT Act, 2006 and therefore this transaction is outside the purview of the Finance Act, 1994 and hence the department cannot levy sales tax under the category ''Supply of Tangible Goods''. He further submits that after 01.07.2012, this supplier would not come within a category declared service as defined in Section 66(E) of the Finance Act 1994.

3. The learned counsel for the petitioner relied on the decision of this Court reported in M/s.Anand Cine Services and others - Vs- The State of Tamil Nadu, rep. By Joint Commissioner (CT), Chennai, (Central) Division, PAPJM Building, Greams Road, Chennai - 600 006, the decision of the Division Bench of this Court rendered in T.C.(R).Nos.10 to 13 of 2010 rendered in petitioner's own case wherein the Division Bench of this Court has held that the petitioner was liable to pay Sales Tax of VAT on the same transactions and therefore the same transaction cannot be subjected to sales tax again under the provisions of Finance act, 1994 as amended from time to time. That apart, the learned counsel for the petitioner submits that all along the petitioner was subjected to ''photographic services'' from the year 2003-2007 and the petitioner paid Service Tax for the aforesaid services and thereafter entertained a bonafide view that it was not liable to pay tax.

4. Further, contention of the petitioner is that invocation of extended period of limitation under proviso to Section 73 was clearly barred in terms of the decision of the High Court and that of decision of the Hon'ble Supreme Court in Nizam Sugar Factory Vs. Collector of Central Excise, A.P. (2006 (197) E.L.T. 465 (S.C.),) wherein the Hon'ble Supreme Court has held that the allegations of suppression of fact against the appellant cannot be sustained if the department was aware of the facts. When the first show cause notice was issued all the relevant facts were within the knowledge of the authorities. Later on, while issuing the 2nd and 3rd show cause notices the similar facts could not be taken as suppression of facts on the part of the assessee and that those facts were already within the knowledge of the authorities.

5. The learned counsel for the petitioner also submits that the very same activity undertaken by the petitioner is also being exempted by the sales tax authority by exemption notification dated 13.08.2010 by G.O.Ms.No.137 and therefore there is no basis in the order passed by the Commissioner of Sales Tax issuing huge demand for the period and therefore they cannot be sustained. The learned counsel for the petitioner submits that the demand has been confirmed based on the entries in the balance sheet of the petitioner by invoking the provision of point of taxation rules 2011, even though the said Rule came into force only on 01.03.2011. The amounts sought to be taxed under the aforesaid provisions pertains to the income reflected in the balance sheet on 31.12.2010.

6. The learned counsel for the respondent submits that the petitioner have an alternate remedy to approach the Appellant Tribunal and therefore the present writ petition was without merits. He also submits that the petitioner may be directed to file an appeal in accordance with law before the Tribunal since it involves huge process it does not mean that the petitioner can disputed the question of fact and challenge the order under Article 226 of the Constitution of India.

7. Heard the learned counsel for the petitioner and the learned counsel for the respondent.

8. The submission of the petitioner is that there is no case for invocation of larger period of limitation of tax and that the tax cannot levied as per the decision of petitioner's own case in TCR.Nos.10 to 13 etc., can be canvassed by the petitioner effectively before the Tribunal. The Tribunal can consider all the submissions on merits including the question that of limitation. There were several items which form part of the demand and the department has made out a case to levy tax. This Court under Article 226 is not in a position to go into disputed questions of fact. Suffice to state, the petitioner has alternate and effective remedy before the Tribunal. After 2014 the Section 35 F of Central Excise Act, 1944 as made applicable to Finance Act 1994, has also been liberalised by asking litigants to pay upto 7.5% as pre-deposit of the disputed taxes. The petitioner can deposit the same to have its appeal admitted and disposed.

9. Therefore, the petitioner should file an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Chennai, within a period of 45 days from the date of receipt of copy of this order along pre-deposit the amount. If such appeal is filed, the Tribunal is requested to take up the petitioner's appeal and dispose the same on merits in accordance with law.

Accordingly, this writ petition is disposed of with the above observations. No costs. Consequently, connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

drl

To

1.The Commissioner of Service Tax-II,
Office of the Commissioner of Service Tax-II,
2054-1, II Avenue, Newry Towers,
Anna Nagar,
Chennai - 600 040.

2. The Customs Excise and Service Tax Appellate Tribunal
Chennai

+1 CC to Mr. Joseph Prabakar, Advocate sr 104420.
+1 CC to Mr.A.P.Srinivas, Advocate sr 104978

W.P.No.23611 of 2017
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SJ(CO)
SP(20/02/2020)