IN THE HIGH COURT OF JUDICATUE AT MADRAS
DATED : 11.03.2019
CORAM
THE HONOURABLE Dr.JUSTICE ANITA SUMANTH

WP.No.28941 of 2017
and
WMP. No.31167 of 2017

M/s.K.P.Balasubramanian & Brothers
Rep by K.P. Balasubramanian,
Managing Partner,
Bannari Amman Complex,
No.223-A, Near Bus Stand,
Sathyaangalm - 638 402 ... Petitioner

Vs.

1.Assistant Commissioner of Central Excise
Erode II Division,
No.81, Bharathi Nagar, Soolai,
Veerappan Chatram Post,
Erode - 638 004.

2.Deputy Commissioner,
Erode II Division,
No.81, Bharathi Nagar, Soolai,
Veerappan Chatram Post,
Erode - 638 004.

3.Superintendent of Central Excise,
Customs & Service Tax,
Sathymangalam Range,
Sathyamangalam - 638 402. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari to call for the records relating to the Impugned order passed by the 1st respondent in C.No.V/RIP,RS,STA/15/02/2016-ST.Adj dated 27.07.2017 and quash the same.

For Petitioner : Mr.Karthick Ranganathan

For Respondents : Mr.V.Sundareswaran
Senior Panel Counsel

ORDER

The Writ Petitioner challenges an order in original dated 27.07.2017, levying Service Tax along with interest and penalty for the period from April 2011 to March 2016 on the ground that Restaurant Services are taxable in terms of Section

66 of the Finance Act 1994, (in short 'Act') with effect from 01.05.2011. The operative portion of the impugned order reads as follows:

' ORDER

(i) I order invocation of extended time limit under Proviso to Section 73(1) of the Finance Act, 1994;

(ii) I confirm and demand the amount of Rs.20,38,725/- (S.Tax-Rs.19,83,076/- + Edu.Cess-Rs.33,509/- + SHE.Cess-Rs.16,754/- + SW.Cess -Rs.5,387/- (Rupees Twenty Lakhs Thirty Eight Thousand Seven Hundred and Twenty Five only) from the Service Provider under Section 73(2) of the Finance Act, 1994;

(iii) I demand appropriate interest as applicable on the amount of Service tax demanded at Sl.No.(ii) above, under Section 75 ibid from the Service Provider;

(iv) I impose a penalty of Rs.10,000/- (Rupees Ten Thousand Only) on the Service Provider under Section 77 (1) (a) of the Finance Act, 1994;

(v) I impose a penalty of Rs.10,000/- (Rupees Ten Thousand Only) on the Service Provider under Section 77 (2) ibid;

(vi) I impose a penalty of Rs.20,38,725/- (Rupees Twenty Lakhs Thirty Eight Thousand Seven Hundred and Twenty Five only) on the Service Provider under Section 78 of the Finance Act, 1994. Further, in terms of proviso to sub-section 78(1) ibid, where service tax and interest is paid within a period of thirty days of the date of communication of this order, the penalty payable shall be 25% of the service tax determined (Sl. No.ii above), only if such reduced penalty is also paid within such period and

(vii) I demand appropriate late fee under Section 70 read with rule 7C of the Service Tax Rules 1994 from them.'

2. Heard Mr.Karthick Ranganathan, learned counsel for the petitioner and Mr.V.Sundareswaran, learned Senior Panel Counsel for the respondents.

3. There is no dispute on the position that the present order is statutorily appealable in terms of Section 85

of the Finance Act, 1994.

4. Be that as it may, Mr.Karthik Ranganathan, learned counsel for the petitioner, has made detailed submissions, assailing the order in original, particularly, on the aspect of levy of penalty. He points out that the extended period of limitation under Section 73 (i) of the Act, has been invoked by the Revenue and there is no justification for the same. The conditions precedent set out in terms of Section 73 (i) of the Act are not attracted to the facts of the present case. He specifically draws attention to the provisions of Section 78 of the Act, pointing out that such levy would be justified only if the Department is able to establish that the short levy or short payment of the tax is intended by the assessee to evade payment of service tax. According to him, such intent has not been established and as such, at least the levy of penalty ought to be quashed by the Court.

5. Mr.Sundareswaran, learned senior panel counsel for the respondent defends the order-in-original and objects to maintainability of the writ petition in the light of the efficacious alternate remedy provided.

6. Having heard both learned counsel, I am of the view that the petitioner has to establish various facts before the authorities, impermissible under Article 226 of the Constitution of India. The appropriate remedy, thus, would be for the petitioner to approach the first appellate authority, by way of statutory appeal.

7. The reliance placed upon the decision of this Court upon the case of Commissioner of Central Excise vs. Busy bee [MANU/TN/3252/2014] is not relevant insofar as that decision has been responded in a statutory appeal filed before the Court.

8.In the light of the above discussion, this Writ Petition is dismissed granting liberty to the petitioner to challenge the order-in-original dated 27.07.2017.

9. Mr.Sundareswaran, learned Senior Panel counsel confirms that the writ petition has been filed within 60 days from date of receipt of the order-in-original and that the petitioner has remitted a sum of Rs.20,38,725/- towards the demand of duty.

10. In the light of the aforesaid, the petitioner is permitted to file an appeal within two (2) weeks from the date of receipt of a copy of this order. If filed within the aforesaid period, the Commissioner of Service Tax (Appeals) will entertain the same without reference to limitation as the petitioner has approached the Court within the statutory period

for filing of an Appeal. Insofar as the petitioner has admittedly remitted an amount of Rs.20,38,725/- towards the disputed demand till date, no further pre-deposit is called for. Connected miscellaneous petition is closed. No costs.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

Rkp

To:

1.Assistant Commissioner of Central Excise
Erode II Division,
No.81, Bharathi Nagar, Soolai,
Veerappan Chatram Post,
Erode - 638 004.

2.Deputy Commissioner,
Erode II Division,
No.81, Bharathi Nagar, Soolai,
Veerappan Chatram Post,
Erode - 638 004.

3.Superintendent of Central Excise,
Customs & Service Tax,
Sathymangalam Range,
Sathyamangalam - 638 402.

+1cc to Mr. G.K.Muthukumaar, Advocate, S.R.No. 22822
+1cc to Mr. V.Sundareswaran, Advocate, S.R.No. 22798

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SPD(CO)
GN(15/04/2019)