In the High Court of Judicature at Madras

Dated: 02.04.2019

Coram:

The Honourable Dr.Justice ANITA SUMANTH

Writ Petition No.30456 of 2018
& WMP No.35527 of 2018

Hitachi Power Europe GmbH
Project Office, Chennai
Represented by its Commercial Manager
Mr.Pravesh P.Jain .... Petitioner

Vs

1. Central Board of Indirect taxes and Customs,
 Department of Revenue,
 Ministry of Finance, Govt. of India,
 North Block, New Delhi.

2. Senior Audit Officer/CERA Party V
 361 Anna Salai,
 Lekha Pariksha Bhavan,
 Chennai - 600 018.

3. Assistant Commissioner of Service Tax,
 Service Tax II Commissionerate,
 IV Division, Newry Towers 2nd Floor,
 2054-I 2nd Avenue,
 Anna Nagar, Chennai - 600 040.

4. The Prinicipal Commissioner of CGST and
 Central Excise,
 26/1, Mahatma Gandhi Road,
 Chennai - 600 034. .... Respondents

PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus calling for the records on the files of the fourth respondent herein in Show cause notice no.42/2018 dated 11.10.2018, quashing the same while directing the fourth respondent herein to hold a pre Show Cause consultation and consider the information made available by the petitioner including any additional documents submitted during such process as directed by the first respodnent in para 5.0 of its circular in 1053/02/2017-CX dated 10.03.2017 and in line with the directions of this Court in W.P.No.11858 of 2017 dated 09.02.2018.

For Petitioner : Mr.N.Prasad

For Respondents : Mr.G.M.Syed Nurullah Sheriff - R1, R3 & R4

Mr.Ravikumar, Sr. Standing counsel -R2

ORDER

The petitioner is a company registered under the laws of Germany. It has a branch office in Chennai for performing on-shore supply of goods and supervisory services. It is an assessee to service tax.

2. The petitioner is an approved vendor for power projects of the National Thermal Power Corporation Limited (NTPC), Meja Urja Nigam Private Limited (MUNP) and Damodar Valley Corporation (DVC). Certain contracts and sub-contracts were awarded to BGR Energy Systems Limited and BGR Boilers Pvt. Limited and the latter, in turn, entered into two separate contracts with the petitioner for on-shore supply of goods and on-shore supply of services for the power projects. It is the liability to service tax under the aforesaid contracts that forms the lis as between the petitioner and the respondent before me.

I refrain from adverting to the taxability or otherwise of services rendered since this is a matter for assessment by the assessing authorities of the Service Tax Department. Suffice it to state that the Audit wing of the Central Board of Indirect Board Taxes and Customs (CBITC) had periodically audited the petitioner, two such audits being in January, 2016 and October/November, 2018. Differences of opinion appear to have been emerged from the audits conducted in regard to various issues, one of which related to the accounting methodology to be adopted for determining the taxability of the services rendered by the petitioner. The question raised hinged on whether the methodology to be adopted would be as per the Accounting Standards specified in the Company's (Accounting Standard Rules, 2006) and the Companies Act, 2013 (historically Accounting Standard 7 (AS-7)), or the specific Rules provided for this purpose, being the Point of Taxation Rules, 2011.

3. Be that as it may, I am not inclined to dwell further on the issue on merits, as what is disputed before me is, primarily, the procedure followed by the authorities in the present case.

4. The trajectory of events commenced on 25.09.2015 with an Intimation for conduct of Service tax Audit issued by the Audit department. On 16.06.2016 a notice was issued by the second respondent Senior Audit Officer/CERA Authority V putting the petitioner to notice about the proposed audit and calling upon it to keep in readiness all required documents and particulars for conduct of smooth audit. Audit was conducted between the period 16.06.2016 to 21.06.2016 when the records and documents in the petitioners' premises were scrutinised and analysed. No specific query was raised or explanation called for.

5. On 20.07.2016 a letter was issued by the Assistant Commissioner of Service Tax, arrayed as R3, making a reference to Audit slips 2,3 and 4 issued by CERA and enclosed with the letter and calling upon the petitioner to deposit the service tax due as per the Audit slips. An explanation was offered by the petitioner under cover of letter dated 06.10.2016, specifically seeking an opportunity of personal hearing prior to finalisation of proceedings. Thereafter, the third respondent issued yet another notice dated 23.11.2016 calling for various documentary evidences in support of the contentions made in letter dated 06.10.2016. A detailed reply dated 12.01.2017 was filed enclosing documentary evidences in support of the petitioners' stand, in the light of which, the petitioner requested dropping of the proposals raised by the Audit. The request for personal hearing was also reiterated.

6.On 06.09.2017, a communication was received from the Audit Commissionerate seeking various particulars for audit of the period covering five (5) years, pre- GST, upto 30.06.2017. Thereafter, a notice dated 24.05.2018 was received from the Superintendent of GST and Central Excise calling urgently for various particulars that were duly submitted under cover of letter dated 18.06.2018.

7. The above events culminated with the issuance of the impugned show cause notice (SCN) dated 11.10.2018, bearing reference to the CERA Audit. There is however, no reference to the exchange of communication between the petitioner and the Assessing Officer or the details furnished by the petitioner to the Department in the course of the Audit.

8. It is in the aforesaid circumstances that the petitioner is before the Court, contending mainly that no pre-consultation hearing has been conducted in the present case as mandated by several Circulars issued by the Board. Had such consultation been conducted, according to the petitioner there might well have been no necessity for a SCN which triggers the commencement of adversarial proceedings between the petitioner and the Department.

9. Heard Mr.Prasad for the petitioner, Mr.Syed Noorullah Sheriff for R1, R3 and R4 and Mr.Ravikumar for R2.

10. I have had occasion to deal with a similar issue in W.P.No.1618 of 2019 in the case of Freight Systems India (Pvt) Limited (order dated 28.02.2019) wherein I have held as follows:

> 8. The tenor of the Circulars / Instructions makes it clear that the introduction of the consultation process is as a measure to avoiding litigation. I refer to the Circulars / Instructions in some detail, since it is necessary to understand the purpose for which the process has been introduced.
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> 9. In its Instructions dated 21.12.2015 the Board states as follows:-
>
> > '5. Pre show cause notice consultation with the Principal Commissioners and Commissioners is being made mandatory prior to issue of SCN in the case of demands of duty above Rs.50 lakhs (except for preventive / offence related SCN's'.
>
> 10. Thereafter, Instruction / Clarification, dated 08.07.2016 referring to the earlier Circular dated 21.12.2015 provides for a clarification in the following terms:-
>
> > 'Please refer to the instruction issued vide F.No.1080/09/DLA/Misc/15 dated 21st December 2015, wherein, pre show cause notice consultation with the Principal Commissioner / Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs.50 lakhs (except for preventive / offence related SCN's) has been made mandatory.
> >
> > 2. Certain doubts have been expressed with regard to this. It is clarified that the pre show cause notices consultation shall be done by the adjudicating authority with the assessee concerned. This is a step towards trade facilitation and promoting voluntary compliance and also to reduce the necessity of issuing show cause notice.'

11. Instruction / Clarification F.No.1080/11/DLA/CC Conference/2016/2096/ 02148, dated 13.10.2016, further clarifies the consultation process in the following terms:-

> 'Subject: Pre-show cause notice consultation in cases other than those detected by Preventive / Anti-Evasion and amount involved being more than Rs.50 lakhs - Reg.
>
> Please refer to the notification issued vide F.No.1080/11/DLA/CC Conference/2016, dated 28th June 2016, wherein it has been clarified that the pre-show cause notice consultation with the assessee concerned shall be done by the adjudicating authority.
>
> 2.0 Certain doubts have been further expressed with regard to this. As per Circular No.985/09/2014-CX, dated 22.09.2014 Audit Commissionerate has been made responsible to issue the show cause notices, wherever necessary, after the audit objections are confirmed in the MCMs. Such show cause notices are answerable to and adjudicated by the Executive Commissioner or the Subordinate officers of the Executive Commissionerate as per the adjudication limits. In such cases, show cause notice issuing authority and adjudicating authority are different.
>
> 3.0 Hence, it is clarified that in cases where show cause notice issuing authority / Commissionerate and adjudicating authority / Commissionerate are different, pre-show cause notice consultation with the assessee concerned shall be done by the Commissioner of show cause notice issuing authority / commissionerate.
>
> 4.0 In cases where the SCN issuing authority is from the Executive Commissionerate, the pre-SCN consultation shall be done by the concerned commissioner.
>
> 5.0 All cases of pre-SCN consultation which leads to closure of case without issuing of SCN, either in part or whole, the file shall be submitted to the relevant reviewing

> authority for case of such nature to keep the reviewing authority informed of the decision.'

12. Master Circular No.1053/02/2017-CX, dated 10.03.2017, deals with the subject of consultation process at paragraph 5 in the following terms:-

> '5.0 Consultation with the notice before issue of Show Cause Notice: Board has made pre show cause notice consultation by the Principal Commissioner / Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs.50 lakhs (except for preventive / offence related SCN's) mandatory vide instruction issued from F.No.1080/09/DLA/MISC/15, dated 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice.'

13. A holistic reading of the above extracts makes it clear that the Customs Department has incorporated the Alternative Dispute Resolution Mechanism by way of the consultation process to reduce litigation wherever possible. This is to facilitate resolution of disputes raised by the Audit in the light of the responses sought and received from the Assessee thus obviating the necessity of even a show cause notice where the dispute can be resolved in an amicable fashion.

15. Clarifications dated 08.07.2016 and 10.03.2017 make it expressly clear that these are steps towards trade facilitation and promoting voluntary compliance and also a measure to reduce the necessity of issuing show cause notices where avoidable. This is thus, a laudable initiative that has to be diligently pursued for maximum benefit to both the assessee as well as the Revenue. In the present case, the objections dated 07.05.2018 are in general terms. The document furnished to the Department is of the year 2004, whereas enquiry is between October 2012 and June 2017. The business activities and methods of doing business are likely to have changed over the years. There is also no reference, as rightly pointed out by Mr.Chopda to the order of CESTAT, dated 28.03.2018. However, there has been no opportunity extended to the assessee for a face-to-face with the assessing officer, which, in my view, is what a

'consultation' entails. One could argue as Mr.Chopda has, that no personal hearing has been sought in this case and in any event, it will be afforded by the respondents prior to his decision whether to confirm the proposals in the show cause notice or otherwise.

` 16. That may be so. However, the import of the Circular / Instruction has to provide a medium for 'consultation' between the Assessee and the Department. In fact, Master Circular dated 10.03.2017 uses the phrase 'such consultation shall be done by the Adjudicating Authority with the Assessee concerned'.

17. According to Black's Law Dictionary, the word 'consultation' is defined as follows:

> '1. The act of asking the advice or opinion of someone. 2. A meeting in which parties consult or confer. 3. International law. The interactive methods by which states seek to prevent or resolve disputes.'

18. The obvious inference is that the consultation has to be between the assessee and the officer and prior to the stage of issuance of show cause notice. In fine, I conclude that the consultative process as envisaged by the Department mandates an opportunity of personal hearing with the Assessee, face to face, in order to make the process an effective one. The petitioner, in this case, has been denied this opportunity.

11.The discussions as above as well as the observations above apply on all fours to the present case, except that no opportunity was sought in that case for a personal hearing whereas, in the present case, the petitioner has sought an opportunity of personal hearing that has admittedly not been granted.

12.In addition, learned counsel also points to M.F.(D.R.) Office Memorandum F.No.296/51/2016-CX.9, dated 08.03.2016 wherein the Department monitors and reports upon the implementations of the Tax Administration Reform Commission (TARC) that was set up exclusively 'to review the application of Tax policies and Tax laws in the context of global best practices and to recommend measures for reforms required in tax administration to enhance its effectiveness and efficiency'. The inclusion of the 'consultative process' was one of the recommendations for best practices. The recommendation of the

TARC and the status of its implementation, as stated alongside, are extracted below:

FIRST REPORT - CHAPTER V

DISPUTE RESOLUTION			
SL	Para No.	RECOMMENDATIONS	STATUS
1.	V.7.(a)	For clarity in law and procedures, a process based on best practices viz., Consultative Policy making should be followed. Need to do away with the impression that the taxpayers views are not taken into cognizance while framing the statute and the attendant rules (Section V.4.b).	i. Consultative meetings with trade associations are regularly held at the time of preparation of budget. ii. Draft circulars etc., are put on CBEC website for comments by the trade. iii. Only in respect of tariff related changes public consultation is neither desirable or feasible.

13.While the report appears to proceed on the basis that the Consultative process is being implemented effectively and regularly, the present case would establish otherwise. The impugned SCN has been issued, admittedly, without engaging the petitioner/assessee in the process of pre-SCN consultation.

(*) 14.'In the light of the aforesaid discussions, that include the discussions and conclusion in W.P.No.1618 of 2019, extracted above, I set aside the impugned show cause notice dated 11.10.2018. The respondents will call upon the petitioner to appear before them with all relevant materials and afford it full opportunity of Pre-SCN Consultation, prior to issuance of show cause notice, if at all found necessary. The period when the Writ Petition was covered by an order of interim stay, i.e., 19.11.2018 till 02.04.2019 shall stand excluded for the purpose of computation of limitation in respect of proceedings, if any initiated by the Department.'

15. This writ petition is allowed in the aforesaid terms. There will be no order as to costs. Consequently, connected WMP is closed.

Sd/-
Assistant Registrar
Dated:17.06.2019

(*) Corrected as per order of this Court dated 01/10/2019 made in W.P.No.30456 of 2018 and W.M.P.No.35527 of 2018.

Sd/-
Assistant Registrar(Insp.Cell)
Dated:09.10.2019

/True Copy/

Sl Sub-Assistant Registrar

To

1.Central Board of Indirect taxes and Customs,
Department of Revenue,
Ministry of Finance, Govt. of India,
North Block, New Delhi.

To be Substituted to the order already despatched on 30.07.2019

2.Senior Audit Officer/CERA Party V
361 Anna Salai,
Lekha Pariksha Bhavan,
Chennai - 600 018.

3.Assistant Commissioner of Service Tax,
Service Tax II Commissionerate,
IV Division, Newry Towers 2nd Floor,
2054-I 2nd Avenue,
Anna Nagar, Chennai - 600 040.

4.The Prinicipal Commissioner of CGST and Central Excise,
26/1, Mahatma Gandhi Road,
Chennai - 600 034.

+1cc to Mr.N.Inbarajan, Advocate sr.83745
+1cc to Mr.T.Ravikumar, Advocate sr.32341
+1 cc to Mr.GM.Syed Nurullah Sheriff, Advocate, S.R.No.83770

Writ Petition No.30456 of 2018
& WMP No.35527 of 2018

nr 26/06/2019
SR(CO)
SSM(10/10/2019).