$~9

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 914/2019 & CM APPL. 4125/2019 (for stay)**

AMADEUS INDIA PVT. LTD. ..... Petitioner

Through: Mr. M.S. Syali, Senior Advocate with Mr. Mayank Nagi and Mr. Tarun Singh, Advocates.

versus

PRINCIPAL COMMISSIONER, CENTRAL EXCISE, SERVICE TAX AND CENTRAL TAX COMMISSIONERATE ..... Respondent

Through: Mr. Harpreet Singh, Sr. Standing Counsel with Ms. Suhani Mathur, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATEEK JALAN

O R D E R

% 08.05.2019

Dr. S. Muralidhar, J.:

1. The present writ petition by Amadeus India Pvt. Ltd.(AIPL) is in a narrow compass. The question that arises is whether prior to issuing the impugned show cause notice (SCN) dated 4th September 2018, the Office of the Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate, Delhi South (the Respondent herein) ought to have held a pre-notice consultation with the Petitioner in terms of para 5.0 of 'Master Circular' dated 10th March, 2017 issued by the Central Board of Excise and Customs ('CBEC')?

2. The facts in brief are that the Petitioner provides, *inter alia,* computer data processing software, which is used by travel agents and ticket booking entities in the Airline industry. The question whether the services provided by the Petitioner is amenable to service tax engaged the attention of the Customs Excise Services Tax Appellate Tribunal ('CESTAT') Principal Bench in ***Acquired Services Pvt. Ltd. v. Commissioner of Service Tax (2014) 36 STR 1148 (TRI-10)***. The CESTAT held that the services provided by AIPL to overseas entities did not constitute either business auxilliary services or export of services. The said decision is stated to be pending in appeal before the Supreme Court of India.

3. It appears that on 20th August 2016, the Anti-evasion Unit of the Service Tax Commisionerate undertook a search of the registered premises of the Petitioner. During the course of search which continued till 5th September, 2016, statements of representatives of the Petitioner were recorded under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994. In response to the queries raised by the Respondents, the Petitioner furnished details by a letter dated 5th September, 2016.

4. After nearly 2 years, on 10th August 2018, fresh summons were issued to the Petitioner seeking the audited balance sheets, reconciliation statements of taxable value declared in ST-3 returns, month wise invoices copies of agreements between the Amadeus IT Group etc. According to the Petitioner, it submitted the requisite information on 17th August 2018 and again on 24th August, 2018 and 30th August, 2018. A copy of the said submission dated 24th August, 2018 filed by the Petitioner in response to a letter dated 20th

August, 2018 has been placed before this Court.

5.Thereafter on 4th September, 2018 the impugned SCN was issued by the Respondent to the Petitioner, *inter alia*, alleging that tax was not paid on taxable services rendered by the Petitioner. The SCN specified the quantum of tax that was required to be paid by the Petitioner as Rs. 99,45,64,411/-. The Petitioner was also asked to show cause why penalty under Section 76 of the Finance Act, 1994 read with Section 174 of the Central Goods & Services Tax Act, 2017 (CGST Act) should not be levied, in addition to the recovery of interest under Section 75 of the Finance Act, 1994.

6. On 3rd October 2018, the Petitioner drew the attention of the Respondent to the Master Circular dated 10th March, 2017 read with an instruction dated 21st December, 2015 issued by the CBEC in terms of which a pre-show cause notice consultation was mandatory in cases involving demand of duty above Rs. 50 Lakhs. A reminder was again sent by the Petitioner on 13th November, 2018. When no response was received, the present writ petition was filed on13th December, 2018.

7. While directing notice to be issued on 12th February, 2019 this Court required the Respondent to produce the records 'including summary or the report pursuant to the investigatins and enquiry, which pre-dated the impugned show cause notice'.

8. This Court has heard the submissions of Mr. M.S. Syali, learned senior counsel for the Petitioner and Mr. Harpreet Singh, learned Sr. Standing

Counsel for the Respondent.

9. Before proceeding to examine the facts leading to the filing of the present petition, it is necessary to advert to the background to the issuance of the Master Circular by the CBEC. The first report of the Tax Administration Reform Commission ('TARC') made a recommendation that

> "It is desirable to avoid disputes where a collaborative approach can provide a solution. An administrative pre-dispute consultation mechanism may be instituted in both the organizations for resolving tax disputes at the pre-notice stage through an open dialogue with the taxpayer, in which both sides articulate and discuss their respective positions and views on the matter at hand. An amicable resolution would be possible when a common view emerges on the facts and the legal position. It is expected that this process, if followed in proper spirit, would lead to elimination of a large number disputes leaving only a few contentious matters in which mutual agreement is not reached. Such disputes would follow other legal channels."

10. Further, the TARC was of the view that the tax officers should not be allowed to resort to coercive actions for recoveries during the consultation process. The TARC recommended that only those officers competent to issue notices should engage in such consulation; they should adopt 'an open and receptive attitude and give full consideration to tax payer's points of view first before formulating their own opinion.' This exercise was to narrowed down the issues and confine the notice only 'in respect of unreserved issues'. Further the points on which agreement has been reached should not be contested any further by either party.

11. The above recommendations were accepted and the CBEC issued the

Master Circular on 10th March, 2017. The relevant paragraph of the said Master Circular, which has been relied upon by both parties reads as under:

> "5.0 Consultation with the noticee 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 SCNs) 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."

12. It will be immediately noticed that there are two exceptions carved out for the Respondent to engage in a pre-SCN consultation. The first is that the SCN is preventive and the second is that it is related to an offence in terms of the Finance Act, 1994.

13. In the present case, as is evident from the impugned SCN, the alleged non-payment of service tax pertains to period between 2012-2013 to 2016-2017. Consequently, there is no 'preventive' aspect involved in the SCN and this is not even disputed by learned counsel for the Respondent. However, what is urged before the Court by the Respondent is that since the SCN was preceded by a search that was conducted in the business premises of the Petitioner, and the Petitioner also rendered itself liable for penal action 'for suppression of facts and contravention of various statutory provisions with intent to evade payment of due service tax' and other incidental levies, the

SCN partakes of the character of an 'offence related' SCN and therefore falls within the exceptions carved out under para 5.0 of the Master Circular.

14. The above submission runs contrary to the very object of para 5.0 which is to narrow down the scope of the dispute by engaging the Assessee on specific areas where the Respondent may require information/clarification from the Assessee regarding alleged evasion of service tax. In the context of the present case, in relation to documents recovered during the search and statements recorded of representatives to the Petitioner in that process, several questions may have arisen for consideration by the Respondent which may require a clarification from the Petitioner as to its conduct. It is to facilitate this very exercise that para 5.0 finds place in the Master Circular. The mere possibility that at the end of the adjudication process, the Petitioner may have to face consequences for having committed an 'offence' under Finance Act, 1994 need not per se render the SCN itself as an 'offence related' SCN. If that were to be the logic, then in every case para 5.0 can be dispensed with on the ground that the adjudication of the SCN is likely to be lead to the noticee facing proceedings for having committed an offence. The exception would then become the rule and not vice versa, and the need for any pre-notice consultation being rendered redundant. Further, without the conclusion of the adjudication on the SCN, the Respondent would not be in a position to decide whether an offence is made out.

15. In any event, as far as the present case is concerned the officers of the Respondent do not appear to have taken any conscious decision in regard to the requirement of the Master Circular. A pointed question was posed by the

Court to Mr.Harpreet Singh whether prior to issuing the impugned SCN, a decision was taken by the Respondent in the light of para 5.0 of the Master Circular not to undertake the pre-notice consultation. After going through the notes in file, Mr. Harpreet Singh stated that there was no noting in the file to that effect. In other words, it appears that the Respondent completely ignored the Master Circular before proceeding to issue the impugned SCN.

16. The mandatory character of the Master Circular can be traced to Section 83 of the Finance Act, 1994 which makes Section 37 B of the Central Excise Act, 1944 applicable in relation to service tax. In terms Section 37 B of the Central Excise Act, 1944 instructions issued by the CBEC would be binding on the officers of the Department.

17. The legal position in this regard is well-settled. Illustratively a reference may be made to the decision in ***State of Tamil Nadu v. India Cements Ltd. (2011) 13 SCC 247 (SC)***. Specific to the Master Circular, a reference may be made to the judgment dated 9th February, 2018 passed by the High Court of Judicature at Madras in W.P.(C). 11858/2017 (***Tube Investment of India Ltd. v. Union of India***). In that case, after noticing that para 5.0 of the Master Circular was not adhered to, the High Court set aside the SCN challenged and delegated the parties to stage prior to the issuance of the SCN.

18. In the present case, the Court is satisfied that it was necessary in terms of para 5.0 of the Master Circular for the Respondent to have engaged with the Petitioner in a pre SCN consultation, particularly, since in the considered

view of the Court neither of the exceptions specified in para 5.0 were attracted in the present case.

19. Accordingly, without expressing any view on the merits of the case of either party in relation to the issues raised in the impugned SCN, the Court sets aside the impugned SCN dated 4th September, 2018 and relegates the parties to the stage prior to issuance of impugned SCN. The Respondent will now fix a date on which the authorised representative of the Petitioner would be heard in relation to the issues highlighted in the submissions dated 24th August, 2018 of the Peititioner in response to the communicatioin dated 20th August, 2018 addressed to it by the Respondent. Needless to state that the Petitioner will extend its full cooperation to the Respondent by providing the necessary information.

20. The petition is allowed in the above terms. The application is disposed of. No order as to costs.

S.MURALIDHAR, J.

PRATEEK JALAN, J.

MAY 08, 2019
rr