IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.01.2020

Pronounced on : 11.02.2020

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.39962 of 2015
and M.P.No.1 of 2015

M/s.Sree Vari Transports,
R.K.M.Building,
1st Floor, Salem Main Road,
Sankari 637 3021
Represented by S.Annadurai
Proprietor .. Petitioner

vs.

The Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Road, Salem 636 001. .. Respondent

Prayer.: Writ Petition filed under Article 226 of the Constitution of India to issue a writ of Certiorarified Mandamus to call for the records comprised in Order C.No.V/WCS/15/138/2013-ST.Adj date 5.11.2015 on the file of the respondent and quashing the same and consequently direct the respondent to pass an amendment order rectifying the error apparent on the face of the record.

For Petitioner: Mr.S.Durairaj

For Respondent: Mr.V.Sundareswaran
Sr.Standing Counsel

O R D E R

Heard the learned counsel for the petitioner and the respondent.

2. In this writ petition, the petitioner has challenged the impugned order dated 05.11.2015 bearing reference No.V/WCS/15/138/2013-ST.Adj passed by the respondent. The petitioner seeks to quash the same and to direct respondent to pass an order rectifying the error apparent of the face of record.

3. The impugned order has been passed by the respondent pursuant to an application filed by the petitioner under Section 74 of the Finance Act, 1994 holding that there is no error apparent on the face of record while passing Order in Original SI No: 07/2015 dated 29.05.2015.

4. Earlier the petitioner had been issued with a Show Cause notice No.95/2013 dated 23.10.2013 and a further Statement of the Demand dated 37/2013 dated 23.3.2015. The above Notice/Statement of Demand called upon the petitioner to pay an amount of Rs.1,44,86,243/- and for a sum of Rs.82,49,783/- being the service tax due and payable by the petitioner for the period between May 2008 to March 2013 and April 2013 to March 2004 towards 'Supply of Tangible Goods' within the meaning of section 65 (105) (zzzz) of the Finance Act, 1994 as in force up to 1.7.2012 and thereafter towards declared services i.e., supply of transfer of tangible goods without transfer of right to use in terms of 66 E(f) with effect from 1.7.2017.

5. The petitioner filed reply to the above Show Cause Notice/Statement of Demand and denied the liability stating that the petitioner was providing goods transportation agents services within the meaning of Section 65 (105)(zzp) and therefore service tax if any was payable only by the recipient of service and not by the provider of services.

6. The petitioner also submitted that with effect from 26.06.2008, supply of service of goods carriage, without transferring the right of possession in effective control of goods provided by any person to goods transport agency for use by the goods transport agency to provide service within the meaning of Section 65 (105)(zzp) of the Finance Act, 1994 was exempt in terms of Notification No.29/2008-ST dated 26.6.2008 and later under Notification No.1/2009-ST dated 05.1.2009 was issued.

7. Personal hearing was conducted before the respondent- Commissioner of Central Excise and Service Tax, Salem on 11.5.2015. During the course of the hearing, the petitioner filed an additional submission and enclosed a chart giving the working to substantiate that the gross receipt as per the show cause notice and TDS under Section 194C and 194I of the Income Tax Act, 1961. The petitioner also furnished TDS certificates evidencing deduction under Section 194C and 194I of the Income Tax Act, 1961 and therefore requested for requantification of the tax. The reply filed by the petitioner did not clearly spell out the reasons as to why the tax was not payable except for mere denial of tax liability and based on TDS certificate under Section 194C and 194I of the Income Tax Act, 1961. The reply merely dealt with the interpretation law without dealing with the factual allegations in the Show Cause Notice and the Statement of Demand.

8. At the time of personal hearing, the petitioner partially agreed that it was liable to pay tax only towards

'Supply of Tangible Goods', i.e., the lorries meant for transporting ready mix concrete and to the extent the GTA service was provided it was not liable to service tax.

9. Pursuant to the above, the respondent passed a detailed Order Original SI No: 07/2015 dated 29.05.2015 and confirmed the demand of service tax of Rs.2,27,36,026/- and interest under Section 75 of the Finance Act, 1994 and also levied penalty under Section 77 (1) (a) Of the Finance Act, 1944 and a further penalty of Rs.10,000/- under Section 77 (2) and a further penalty equivalent to an amount of tax not paid by the petitioner under Section 78 of the Finance Act, 1944.

10. Instead of filing an appeal before the appellate Tribunal, the petitioner filed has an application under Section 74 of the Finance Act, 1994 questioning the quantification arrived by the respondent stating that the basis on which the demand has been arrived in the order passed by the respondent was not the basis on which the demand was proposed in the show cause notice issued to the petitioner. It is stated that taxable amount has been arrived based on the balance sheet and the bank statements of the petitioner whereas in the show cause notice, the tax was arrived based on Form 26AS and therefore there should be requantification. It is the contention of the petitioner that gross receipt for which there was deductions made under Section 194C should not be taken into account for computing the tax liability as it for service provided towards 'Goods Transportation Agents Service' which is not taxable in the hands of the petitioner.

11. I have perused the records and considered the arguments advanced on behalf of the petitioner and the respondent.

12. The Show Cause notice has been issued pursuant to an investigation carried out by the Headquarters Preventive Unit office of the respondent Commissionerate. During investigation, it was the contention of the petitioner that they were rendering only goods transportation services and therefore they were not liable to pay tax and therefore in the light of Notification Nos.35/2004- ST, 32/2004-ST and 34/2004-ST dated 3.12.2004 the service tax was payable only on reverse charge other basis and that service tax was payable only by the recipient on 25% of the gross amount charged by the petitioner.

13. During the course of investigation, it appears that the petitioner was also called upon to furnish documents. Though summons was issued to the proprietor of the petitioner to furnish documents, no documents were furnished by the petitioner. After another summons was issued on 23.01.2013, the petitioner merely furnished Form 26AS which is the annual statement of account under Section 203 AA of the Income Tax Act, 1961 for the period between 2008-09 and 2011-12.

14. Since no the particular were furnished by the petitioner, the Directorate of Revenue Intelligence (DRI)

obtained the details from the persons who engaged the services of the petitioner through their counterparts. The Ledger copies, work order, the Bill raised in respect of the contracts entered by the petitioner with various persons were thus procured. Thereafter, statement was recorded from the proprietor of the petitioner who reiterated that the petitioner provided was merely engaged in goods transportation services.

15. The Directorate of Revenue Intelligence (DRI) issued show cause notice dated 23.10.2013 stating that the vehicles were supplied by the petitioner on hire charges basis and therefore the petitioner was liable to pay tax. Thereafter, statement of demand referred to supra, was issued to the petitioner for the subsequent period. The respondent Commissioner of Central Excise and Service Tax adjudicated the show cause notice and passed Order Original No.9/2015 (ST-Commissioner) dated 29.5.2015, it was concluded that the services provided by the petitioner was that of Supply of Tangible Goods without transfer of right to use. Thus the petitioner was held liable to tax, interest and penalty during the period in dispute.

16. The said order is a detailed order. There are no grounds to substantiate that part of the service were that of goods transport agent services. The petitioner had also not co-operated during the investigation and therefore DRI was able to issue the Show Cause Notice only after procuring records through Income Tax/Service Tax Commissionerate its recipient of the recipient of services.

17. If the petitioner is aggrieved, the petitioner should only file a statutory appeal. The petitioner cannot expect the court to exercise extraordinary jurisdiction under Article 226 of the Constitution of India to arrive at a conclusion as to whether there was any error apparent on the face of record as the order is detailed. The Supreme Court in Assistant Commnr., Income Tax, Rajkot. Vs.Saurashtra Kutch Stock Exchange LTD., 2008 (230) E.L.T. 835 (SC)] has held that:

> "An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long- drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error

apparent on the face of the record."

18. By this Writ Petition, the petitioner has attempted to avoid payment of pre-deposit Section 35F of the Central Excise Act, 1944 as made applicable to appeals under the Finance Act, 1994. The petitioner has an alternate remedy before The Customs Excise and Service Tax Appellate Tribunal (CESTAT) which is a more effective remedy though it would involve a pre-deposit. Further, the Finance Act 2014 has rationalised the amount of pre-deposit to a mere 7.5% of the disputed tax at the stage of 1st appeal. Therefore, the petitioner cannot avoid pre-deposits 7.5% of the disputed tax required for filing appeal by filing this writ petition.

19. The mere fact that Tax Deductions at Source (TDS) may have been made by some of the service recipients under section 194C and some under Section 194I of the Income Tax Act, 1961, may, ipso facto would not justify the conclusion that there was the wrong Assessment/Demand of Service Tax. There is no error apparent on the face of record.

20. It is for the petitioner to move the Tribunal by way of appeal against the order rejecting the application filed by the petitioner for alleged rectification of mistake under Section 74 of the Finance Act, 1994 an Order in Original SI No: 09/2015 dated 29.05.2015 merges with it.

21. In my view, it would not be open to the petitioner to bypass the appellate remedy under the Finance Act, 1994 by approaching this court under Article 226 of the Constitution of India.

22. Ultimately, the appellate Tribunal is empowered consider the facts and if required it can even remand the case back to the original authority to pass a fresh order. The Tribunal is the ultimate fact-finding authority.

23. It is for the petitioner to establish before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) that indeed it provided goods transport agent service and that the recipients were liable to pay tax on such services and not that of Services of Tangible Goods.

24. I find no merits in the present writ petition. Petitioner is therefore given a liberty to file an appeal within a period of 30 days from the date of receipt of copy of this order before the Customs Excise and Service Tax Appellate Tribunal (CESTAT) together with the deposit of 7.5% of the disputed tax. In case such an appeal filed by the petitioner, the CESTAT has requested to admit the appeal without insisting on limitation though the petitioner wrongly altered the trajectory of the proceedings by invoking Section 74 of the Finance Act, 1944 and thereafter before this court.

25. This Writ Petition stands dismissed in the light of the above observation. No cost. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

kkd

To

The Commissioner of Central Excise,
No.1, Foulks Compound,
Anai Road, Salem 636 001.

The Customs Excise and
Services Tax Appellate Tribuna .

+1cc to Mr.Sundareswaran, Advocate, SR. No. 10733

W.P.No.39962 of 2015
and M.P.No.1 of 2015

PP(CO)
RMP(17/07/2020)