



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.03.2021

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

WEB COPY

W.P. (MD) No.4252 of 2021

and

W.M.P. (MD) No.3448 of 2021

M/s.T.V.Sundram Iyengar & Sons Pvt. Ltd.,
Rep. by its Senior GM(Indirect Taxes),
P.Venkatesh,
TVS Building, 7-B, West Veli Street,
Madurai - 625 001.

... Petitioner

Vs.

The Commissioner of CGST & Central Excise,
Central Revenue Buildings, GST Bhavan,
No.4, Lal Bahadur Shastri Road,
Bibikulam,
Madurai - 625 002.

... Respondent

Prayer: Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, calling for the records in File No.C.No.V/ST/15/30/2018-Adjn. comprising of Order in Original No.MDU-ST-COM-09/2020 dated 17.12.2020 on the file of the respondent and quash the same as illegal, arbitrary and violative of principle of judicial discipline and the principle of natural justice and consequently give a direction, directing the respondent to decide the issue afresh considering the submissions made by the petitioner.

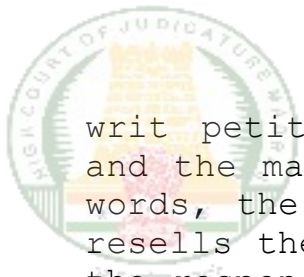
For Petitioner : Mr.B.Kumar, Senior Counsel,
for Mr.S.P.Maharajan.

For Respondent : Mr.S.Gurumoorthy,
Senior Panel Counsel.

O R D E R

Heard the learned counsel appearing for the writ petitioner and the learned Standing counsel appearing for the respondent.

2.The petitioner is a dealer in motor vehicle parts and motor vehicle chassis. The petitioner has entered into dealership agreements with various manufacturing entities. The case of the



writ petitioner is that the relationship between the petitioner and the manufacturer is on principal to principal basis. In other words, the petitioner purchases chassis from the manufacturers and resells the same in its own name and on its own account. While so, the respondent issued show cause notice dated 28.08.2018 proposing to levy service tax with interest and penalty on the trade discount received from the manufacturers by way of credit notes. The petitioner submitted their reply and also sought copies of the documents relied upon in the show cause notice.

3.The adjudicating authority also proposed to rely on an investigation report received from a subordinate official. Contending that the authority should not proceed with the adjudication process without furnishing a copy of the investigation report, the petitioner filed W.P.(MD)No.16037 of 2019. Vide order dated 03.09.2020, this Court had allowed the said writ petition and directed the adjudicating authority to make available the scrutiny report submitted by the Superintendent, Head Quarters Preventive Unit, Madurai to the petitioner. Thereafter, personal hearing was conducted and the impugned order dated 17.12.2020 came to be passed confirming the demand of Service Tax together with interest and penalty. Questioning the same, this writ petition came to be filed.

4.The respondent has filed a detailed counter affidavit and the learned Standing counsel took me through its contents.

5.The stand of the respondent is three-fold. The writ petition as such is not maintainable because the petitioner is very much having the alternative remedy of appeal. Secondly, the adjudicating authority has rendered certain adverse findings on fact against the assessee and it is not open to this Court to undertake an analysis of the documents referred to in the adjudication order. Thirdly, the contention of the petitioner is that they are having only principal to principal relationship with the various manufacturers is not correct. According to the respondents, the activity of the petitioner would fall within Section 66E(e) of the Finance Act.

6.The learned Senior counsel appearing for the petitioner drew my attention to a very recent Judgment of the Division Bench of Madras High Court rendered in **W.A.No.493 of 2021 dated 18.02.2021 (Mahindra & Mahindra Ltd., V. The Joint Commissioner (CT) Appeals, Chennai and another)**. In the said Judgment, the Hon'ble Judges have set out the parameters for interference under Article 226 of the Constitution of India by bypassing the appeal remedy. One of the parameters is that if perversity is writ large or if there is unreasonableness or unfairness in the action taken



by the authority, then, the Writ Court can interfere. The learned Senior counsel would strongly contend that the case on hand would clearly fall within those parameters. He also took me through the relevant clauses in the dealership agreements and contended that the core activity of the petitioner is to engage in sales of the goods sold to them by the respective manufacturers. He would submit that the incidental clauses regarding attainment of business performance are really not relevant to the determination of the issue on hand. He took me through the relevant provisions in the Finance Act. He also relied on a catena of case laws in support of his contention that where the relationship between the parties is on principal to principal basis and where there is only an element of sale, the element of service is automatically excluded. His core grievance is that even though all these case laws were projected for consideration of the adjudicating authority, they were casually and summarily brushed aside. He wanted this Court to set aside the impugned order and allow this writ petition.

7.I carefully considered the rival contentions and went through the materials on record.

8.Before I take up the facts for consideration, it would be necessary to run through the relevant statutory provisions. Section 66B of the Finance Act, 1994 is the charging provision. It reads as follows:-

"66B. Charge of service tax on and after Finance Act, 2012

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of fourteen percent. on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed."

9.Section 66D of the Act contains the negative list of services. Services from (a) to (q) have been set out. The case of the petitioner is that they fall within Section 66D(e) of the Act. As per the said provision, "trading of goods" is a service that is included in the negative list. On the other hand, the stand of the respondent is that the petitioner's case would fall within Section 66E(e) of the Finance Act, 1994 which reads as follows:-

"66E. Declared services.

The following shall constitute declared services, namely:-

...



(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; "

10. Before entering into the rival contentions, it is necessary to be clear as to what is statutorily meant by the expression "service". Section 65B(44) of the Finance Act, 1994 reads as follows:-

"65B. Interpretations.

In this Chapter, unless the context otherwise requires,-

(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include-

(a) an activity which constitutes merely, (i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or

(ii) such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of article 366 of the Constitution; or

(iii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

(c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1 . - For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,-

(A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

'Explanation 2. - For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include -

(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or



denomination for which a separate consideration is charged; (ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out

(a) by a lottery distributor or selling agent on behalf of the State Government, in relation to promotion, marketing, organising, selling of lottery or facilitating in 7 organising lottery of any kind, in any other manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998;. (Finance Act 2016)

(b) by a foreman of chit fund for conducting or organising a chit in any manner.;

Explanation 3. – For the purposes of this Chapter,

(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4. – A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory;”

11.A mere perusal of the aforesaid definition would indicate that there must be (i) service provider, (ii) service recipient and (iii) consideration for providing a service. The aforesaid definition also clearly exempts the activity of transfer of title in goods by way of sale.

12.A mere reading of the dealership agreement entered into between the assessee on the one hand and the manufacturers on the other would indicate that the petitioner purchases the goods from the manufacturers by way of sale. The petitioner has enclosed sample invoices also in the typed set of papers. The authority does not contest the genuineness of these documents. The authority has only gone by some of the clauses in the dealership agreement. For instance, the dealer has undertaken that the entries in the business document will guide the business processes, operational targets and performance goals. The business document would be treated as part and parcel of the dealership agreement and failure on the part of the dealer to fulfill any of the terms and conditions prescribed in the business document will be treated as

<https://hccourtscorpus.org/in/law-services/>

The learned Senior counsel would strongly contend



that merely because the petitioner is called upon to conduct his business in a certain ambience would not by itself amount to rendering of service to the manufacturers. He would repeatedly draw my attention to the fact that for maintaining certain standards of business operations, no separate consideration is paid by the manufacturers to the petitioner. It is only when the petitioner has reached certain sales targets, the manufacturer on his own disburses trade discount to the petitioner by way of credit notes. The dealership agreement does not contain any clause regarding trade discount.

13.The learned Senior counsel would draw my attention to the Advance Ruling given by the Authority on 22.04.2016 in Ruling No.AAR/ST/11/2016 in Application No.AAR/44/ST/31/2013. In the said Ruling, Section 66E(e) of the Finance Act, 1994 came up for consideration. The Hon'ble authority ruled as follows:-

"13.Revenue has also argued that the applicant provides Declared Service in terms of Section 66E(e) of the Finance Act, 1994 to media Owners, Section 66E(e) reads as under;

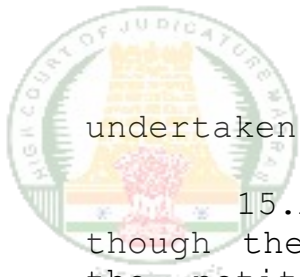
"66E.The following shall constitute declared services, namely;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act."

It is observed that there is no agreement or contractual obligation between the applicant and the Media Owner to give volume discount is not fixed and is to be given at the discretion of Media Owner. Further, volume discount is gratuitous. Applicant/Advertising Agencies cannot claim it as a matter of right. Therefore, applicant is not providing declared services to the media Owner."

I am inclined to adopt the very same reasoning to the present case also.

14.The learned Senior counsel would further contend that an agreement will have to be read as a whole and that the individual clauses occurring in the agreement cannot be torn out of context. In this regard, he placed reliance on the decision of the Supreme Court reported in **2008 (10) S.T.R.545 (SUPER POLY FABRICKS LTD., V. COMMISSIONER OF C. EX., PUNJAB)**. In the aforesaid decision, the Supreme Court held that there may not be any doubt whatsoever that a document has to be read as a whole. The purport and object with which the parties thereto entered into a contract ought to be ascertained only from the terms and conditions thereof. Neither the nomenclature of the document nor any particular activity



undertaken by the parties to the contract would be decisive.

15. Applying the aforesaid ratio to the facts on hand, even though the document may be styled as a dealership agreement and the petitioner may have to conform to certain business standards, if read as a whole, one can come to the safe conclusion that the relationship between the parties was one of seller and buyer on principal to principal basis.

16. The adjudicating authority has not read the document as a whole but instead gave undue emphasis to certain individual clauses occurring in the agreement. Therefore, I come to the conclusion that the finding of the authority that the relationship between the parties is not on principal to principal basis is clearly unreasonable.

17. The learned Senior counsel drew my attention to the decisions of the various Benches of the Customs Excise and Service Tax Appellate Tribunal (CESTAT), namely, **(2018) 66 GST 398 (Prabhakar Marotrao Thaokar & Sons vs. Commissioner of Central Excise, Nagpur)** and **2019 (24) G.S.T.L. 569 (Tr.-Del) (Hindustan Petroleum Corporation Ltd., vs. Commissioner of Central Excise, Delhi-II)**, for the proposition that where the sale transaction is on principal to principal basis, merely because a discount was passed by the manufacturer to the assessee, that may not be construed as commission and therefore, it cannot be the subject matter of levy of service tax.

18. All these decisions were actually brought to the notice of the adjudicating authority. The adjudicating authority has chosen to disregard them on the ground that the revenue has filed appeal before the Supreme Court questioning some of the decisions. It is admitted that no interim order has been granted by the Supreme Court. It is well settled that merely because a matter is pending before the higher forum, such pendency will not take away the precedential value of the appealed decision. The adjudicating authority ought to have followed the Tribunal decisions which clearly support the stand of the petitioner. The aforesaid Tribunal decisions were binding on the authority. By deciding the issue involved in the present proceedings in defiance of the binding decisions, the impugned order has been rendered invalid and without jurisdiction. As held in **East India Commercial Co. Ltd., Calcutta Vs. Collector of Customs, Calcutta [1983 (13) E.L.T 1342 (S.C)]**, if the proceedings are without jurisdiction, the question of applying the rule with regard to exhaustion of alternative remedy will not arise. The order impugned in this writ petition is quashed.



19. This writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

WEB COPY

Sd/-

Assistant Registrar(P&A)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

The Commissioner of CGST & Central Excise,
Central Revenue Buildings, GST Bhavan,
No.4, Lal Bahadur Shastri Road, Bibikulam,
Madurai - 625 002.

+3 CC to M/s.S.GURUMOORTHY, Advocate (SR-14857[F] dated
31/03/2021)

+1 CC to M/s.S.P.MAHARAJAN, Advocate (SR-14968[F] dated
31/03/2021)

+1 CC to M/s.S.GURUMOORTHY, Advocate (SR-14970[F] dated
31/03/2021)

W.P. (MD) No. 4252 of 2021

30.03.2021

(CO)

AS(12.05.2021) 8P 7C