BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 09.03.2021
CORAM:
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
W.P.(MD)No.4036 of 2015
and
M.P.(MD).No.1 of 2015

Mcsara Constructions
Represented by the Proprietor,
B.K.Manoharan,
No.44-1, Valluvan Illam,
Besant Road, Chokkikulam,
Madurai 625 002. ... Petitioner

-Vs-

1.The Commissioner of Central Excise,
Madurai Central Revenue Buildings,
No.4, Lal Bhadur Shastri Road,
Bibikulam,
Madurai 625002.

2.Velammal Educational Trust,
Represented by its Chairman,
Velammal Village, Madurai Tuticorin Ring Road,
Anuppanadi,
Madurai 625009. ... Respondents

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the file of the first respondent herein in order-in-original No.MAD-CEX-000-COM-09 & 10-2014, dated 08.12.2014, quash the same.

For Petitioner : Mr.N.Prasad
For R1 : Mrs.S.Ragaventhre
For R2 : Mr.Shaji Chellan

ORDER

Heard the learned counsel for the petitioner, learned standing counsel for R1 and the learned counsel for the second respondent.

2.The petitioner is engaged in the field of construction business. During the period from 01.04.2011 to 31.03.2013, the petitioner had carried out civil contract works for the second respondent. The petitioner is said to have constructed the school hostel building and the library building during the said period. The petitioner had registered himself as a provider of commercial and industrial construction services. Since the petitioner was under the impression that the second respondent is a educational trust and he had only put up educational buildings, he is not obliged to reflect the same in his returns or pay any service tax on the contract value received by him. However, the first respondent had a different perception. The first respondent issued notice dated 18.04.2013 for the period from April 2011 to March 2012 proposing to levy service tax together with penalty on the petitioner for the aforesaid work. The first respondent issued another show cause notice dated 19.05.2014 for the period from 01.04.2012 to 31.03.2013. The petitioner submitted his reply dated 27.05.2014 in response to the same. Rejecting the stand taken by the petitioner, the first respondent proceeded to hold that transaction in question is also amenable to levy of service tax and to that effect, issued the composite order dated 17.12.2014 covering both the periods, confirming the proposal set out in the two show cause notices. Challenging the same, the present writ petition came to be filed.

3.The first respondent has filed a detailed counter affidavit opposing the writ prayer. The standing counsel took me through the averments set out therein. It is also submitted that since the petitioner is having an effective alternative remedy of appeal, the present writ petition has to be dismissed on the ground of non exhaustion of alternative remedy. The learned counsel appearing for the second respondent submitted that the second respondent has been unnecessarily impleaded in the writ petition and that the matter is one between the petitioner and the first respondent.

4.I carefully considered the rival contentions and went through the materials on record. The petitioner had carried out the contract works for the second respondent. There is no doubt that the second respondent is an educational trust that is enjoying exemption under the Income Tax Act. The petitioner's stand from the beginning is that the service provided to such an educational trust cannot be called as commercial or industrial service.

5.The petitioner's counsel drew my attention to the decision of the Hon'ble Supreme Court reported in ***2015 372 ITR 699(SC) (M/s.Queen's Educational Society Vs. Commissioner of Income Tax).*** The Hon'ble Supreme Court, in the aforesaid decision, had summarized the applicable principles in the following terms:-

> “Thus, the law common to Section 10(23C) (iiiad) and (vi) may be summed up as follows:
>
> (1) Where an educational institution carries on the activity of education primarily for education persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.
>
> (2) The predominant object test must be applied the purpose of education should not be submerged by a profit-making motive.
>
> (3) A distinction must be drawn between the making of a surplus and an institution being carried on for profit. No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not be cease to be one existing solely for educational purposes.

(5) The ultimate test is whether on an overall view of the matter in the concerned assesment year the object is to make profit as opposed to educating persons."

It also added that when a surplus is ploughed back for educational purposes, the educational institution exists solely for educational purposes and not for purposes of profit.

6.The core argument of the learned counsel appearing for the petitioner is that when such a specific stand has been taken by the assessee, the adjudicating authority ought to have associated the second respondent before rendering any finding. He pointed out that Section 14 of the Central Excise Act, confers powers on the adjudicating authority to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any enquiry which such officer is making for any of the purpose of this Act. He also drew my attention to Section 83 of the Finance Act, 1994, which states that Section 14 of the Central Excise Act shall apply in relation to service tax proceedings also. According to the petitioner's counsel, this power ought to have been exercised in this case. He also pointed out that before the adjudicating authority, the petitioner had cited the instance of another contractor who rendered similar services for the second respondent trust and against whom, the proceedings were initially initiated but dropped by the adjudicating authority. Aggrieved by the said order passed by the authority, the department had filed an appeal in S.T.No.43 of 2011 before CESTAT, South Zonal Bench, Chennai. When the impugned order was passed, the said appeal was pending. Vide order dated 09.05.2018, the said appeal has been dismissed by the Tribunal.

7.The stand of the petitioner's counsel is that the first respondent being an authority subordinate to the Tribunal is squarely bound by such a decision and that it is not open to him to go beyond it. The petitioner's counsel would state that the entire issue will have to be re-visited by the first respondent by associating the second respondent by invoking the power under Section 14 of the Central Excise Act, 1944. In this regard, the learned counsel for the petitioner referred to the decision rendered by the Hon'ble Supreme Court in ***Employees State Insurance Corporation Vs. Bhakrabeas Management Board and another (2009) 10 SCC 671.*** That was a case arising under ESI Act. The authority had initiated the proceedings against the employer. But then, the employees were not associated either in individual or representative capacity. The Court felt that the statute is for the benefit of workmen and that therefore, they will have to be necessarily made a party.

8.Likewise, the issue before the authority was whether the service provided by the petitioner to the second respondent Trust can be considered as a commercial or industrial service. Such a finding cannot be rendered behind the back of the second respondent. In the very nature of things, the second respondent is both a necessary as well as an interested party.

9.I sustain the petitioner's counsel's contention that non-impleading of the second respondent in the adjudicating proceedings is really a serious defect. That vitiates the entire proceedings. That apart, it is evident from the record that the petitioner had also paid the service tax for the period from 01.07.2012 onwards. Rs.8,40,563/- was paid by the petitioner on 27.03.2013 and 31.03.2013. This was well before passing of the impugned order. The first respondent does not appear to have taken note of the remittance made by the petitioner herein.

10.Therefore, on these twin grounds set out above, the order impugned in the writ petition is quashed. The matter is remitted to the file of the first respondent to pass orders afresh in accordance with law. The first respondent shall invoke his power under Section 14 of the Central Excise Act, 1944 and summon the second respondent and will render a finding as to whether the service rendered by the petitioner to the second respondent is a commercial or industrial service by applying the tests laid down by the Hon'ble Supreme Court in ***2015 372 ITR 699(SC) (M/s.Queen's Educational Society Vs. Commissioner of Income Tax).*** The Writ Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (ADII)

// 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 Central Excise,
Madurai Central Revenue Buildings,
No.4, Lal Bhadur Shastri Road,
Bibikulam,
Madurai 625002.

+1 CC to M/s.S.MARIAPPA MURALI, Advocate (SR-10030 [F] dated 10/03/2021)

+1 CC to M/s.Y.PRAKASH, Advocate (SR-10454[F] dated 11/03/2021)

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and
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KB(31.03.2021) 5P 4C