

Item No.4.

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION**

APPELLATE SIDE

HEARD ON: 26.07.2022

DELIVERED ON:26.07.2022

CORAM:

THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM

AND

THE HON'BLE MR. JUSTICE BIVAS PATTANAYAK

M.A.T. No.248 of 2022

With

I.A. No.CAN 1 of 2022

With

I.A. No.CAN 2 of 2022

**Principal Commissioner of Service Tax,
Kolkata Commissionerate – I, Kolkata - 1.**

Vs.

McLeod Russel India Ltd. & Ors.

Appearance:-

Mr. Vipul Kundalia,

Mr. Tapan Bhanja

..... for the appellant.

Mr. Rajeev Kumar Agarwal

**... for the respondent/
writ petitioner**

JUDGMENT

(Judgment of the Court was delivered by T.S. SIVAGNANAM, J.)

Re: I.A. CAN 1 of 2022

1. This application has been filed to condone the delay of 1365 days in filing the instant appeal.

2. We have heard Mr. Vipul Kundalia, learned counsel appearing for the appellant and Mr. Rajeev Kumar Agarwal, learned counsel appearing for the respondent.

3. We have perused the affidavit filed in support of the petition but we are not fully convinced with the reasons cited therein. However, we briefly heard the learned senior Standing Counsel for the appellant as well as Mr. Agarwal, learned Advocate for the respondent and we found that the correct legal position was required to be stated in this appeal or else the order may become a wrong precedent. Therefore, we exercise discretion and condone the delay in filing the appeal.

4. Accordingly, the delay in filing the instant appeal is condoned.

5. The application being I.A. CAN 1 of 2022 is allowed.

Re: M.A.T. No.248 of 2022

6. Affidavit of service filed in Court today is taken on record.

7. This intra-Court appeal is directed against the order dated 30th April, 2018 in W.P. No.17001(W) of 2016. The said writ petition was filed by the respondent herein challenging a show cause notice issued by the appellant department under Section 73 of the Finance Act, 1994 for recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. The learned Writ Court has allowed the writ petition and quashed the show cause notice not on the merit of the matter but on account of earlier order passed by the Learned Single Bench of this Court in a writ petition filed by the respondent herein in W.P No.48 of 2014. The learned Single Bench has referred to the operative portion of the order, which reads as follows:-

"The department has the jurisdiction and obligation to determine whether the writ petitioner is receiving support services from the government. Therefore, before it could demand or even show cause under Section 73 of the Finance Act, 1995, for Service Tax, it was

incumbent upon the department to make the determination whether the subject service could be classified as a support service and the writ petitioner exigible to service tax. If the department's answer was in the affirmative, only then, a show cause notice and thereafter a demand for service tax could have been issued. "

8. After noting the above observation made by the learned Single Bench in the earlier writ petition, the show cause notice was quashed with liberty to the appellant to act in accordance with the order dated November 20, 2014 passed in W.P. No.48 of 2014. Aggrieved by the same, the department is before us.

9. After we have elaborately heard the learned Advocates for the parties, we are of the considered view that the finding rendered by the learned Writ Court in the earlier writ petition in W.P. No.48 of 2014 dated 20th November, 2014 does not reflect the correct legal position. Section 73 of the Finance Act, 1994 deals with recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. Sub-Section (1) of Section 73 states that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within

thirty-months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amounts specified in the notice. The crucial words in the said provisions are "pay the amounts specified in the notice".

10. Therefore, at the very first instance when the show cause notice was issued, it was incumbent upon the Central Excise Officer to compute the amount, which is being demanded from the assessee giving the assessee an opportunity to submit its objections to the show cause notice.

11. Learned counsel appearing for the respondent submitted that the order passed in the writ petition in W.P. No. 48 of 2014 has been affirmed by the Hon'ble Division Bench in APOT No. 159 of 2015 dated 15th January, 2016. On going through the judgment rendered by the Hon'ble Division Bench, we find that the observations/findings rendered by the learned Writ Court in W.P. No. 48 of 2014 has not been affirmed by the Hon'ble Division Bench but appeal filed by the department was disposed of by

clarifying that it will be open to the department to decide the issue in accordance with law. Therefore, we are fully justified in interpreting the order in W.P. No. 48 of 2014 and holding that it does not reflect the correct legal position.

12. The learned single Bench in the earlier order, which we have quoted above, has stated that the department has an obligation to determine whether the writ petitioner is receiving support service from the Government and it is only thereafter a show cause notice can be issued. This finding rendered by the learned Writ Court is contrary to section 73 of the Act and therefore, the same does not reflect the correct legal position.

13. In the light of the above, the order passed by the learned single Bench quashing the show cause notice is not tenable and accordingly, the appeal stands allowed. The application (I.A. No. CAN 2 of 2022) stands disposed of. The order passed in the writ petition is set aside. Consequently, the writ petition is dismissed with a direction to the respondent/assessee to submit its reply to the show cause notice within three weeks from the date of receipt of a server copy of this judgment and order.

14. Thereafter, the concerned authority shall afford an opportunity of personal hearing to the authorised representative

of the assessee and adjudicate the show cause notice on merits and in accordance with law and pass a reasoned order.

15. Till the conclusion of the proceedings, no coercive action shall be taken against the respondent/assessee.

16. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree,

(BIVAS PATTANAYAK, J.)

NAREN/PALLAB (AR.C)