21.11.2022
Item No. 57
Court No.6.
Tanmoy/PA

R.V.W. 33 of 2015
In
MAT 1293 of 2014
With
I.A. No. CAN/1/2015
(Old No.CAN/1663/2015)

The Commissioner of Service Tax.
Vs
Naresh Kumar & Co. Ltd. & Ors.

Mr. J.K. Mittal,
Mr. Amitava Mitra,
Mr. Paritosh Sinha,
…for the review applicant.

Mr. Kausik Kanti Maiti,
…for the respondent

This application has been taken out by the respondent no. 1 in the appeal for review of a judgment and order dated January, 2015, whereby M.A.T 1293 of 2014 was allowed by setting aside the judgment and order dated April 25, 2014, passed by the learned Single Judge.

The review applicant had approached the learned Single Judge challenging a show-cause notice issued by the Service Tax authorities calling upon the review applicant to show-cause as to why the value of High Speed Diesel (HSD) supplied by the service recipient to the review applicant (service provider) should not be taken into account for computing the value of the relevant service for the purpose of charging Service Tax on such service. The said show-cause notice was issued on the basis of sub-rule 5 of the Service Tax (Determination of Value) Rules, 2006, read with Section 67 of the Finance Act, 1994. In fact, Rule 5 was framed by the Government in exercise of power under Section 67 of the Finance Act, 1994.

The review applicant challenge the show-cause notice, inter alia, on the ground that Rule 5 of the 2006 rules is beyond the scope of Section 67 of the Finance Act, and hence is bad in law. The learned Single Judge allowed the writ petition by quashing the show-cause notice.

The Commissioner of Service Tax preferred an appeal. Before the Appeal Court, it was submitted on behalf of the review applicant that Rule 5 has been declared *ultra vires* by a Division Bench of the Delhi High Court in the case of ***Intercontinental Consultants & Technocrats Private Limited v. Union of India & Ors reported in 2013 (29) STR 9 (Delhi).*** The Division Bench however expressed its reservations about and differed from the view taken by the Delhi High Court in the said case and allowed the appeal by an order dated January 5, 2015, with the following observations:-

"For the aforesaid reasons, we are unable to sustain the impugned Judgment, which is accordingly set aside.

In the result, the appeal is allowed. Parties shall, however, bear their own cost.

The writ petitioner is granted six weeks time to furnish reply to the show-cause notice. All points are kept open.

We should not be deemed to have expressed any opinion on merits of the matter. The adjudicatory authority shall decide the matter in accordance with law without being influenced by any observations which may have been made by us which it is clarified is only for the purpose of disposal of this appeal.

In the event, the adjudicatory authority passes any order adverse to the writ petitioner the same shall not be given effect to without allowing four weeks time to the writ petitioner to challenge the order which may be passed in accordance with law.”

The aforesaid order is under review in the present application.

Learned Advocate for the applicant drew our attention to the decision of the Hon’ble Supreme Court in the case of ***Union of India and Another v. Intercontinental Consultants and Technocrats Private Limited reported in (2018) 4 SCC 669*** whereby the Hon’ble Supreme Court has upheld the Delhi High Court Division Bench Judgment declaring Rule 5(1) of 2006 Rules as ultra vires and bad in law. In particular learned Counsel placed paragraph 33 of the Supreme Court judgment before us, which reads as follows:-

*"**33**. In the aforesaid appeals, the issue is as to whether the value of free supplies of diesel and explosives in respect of the service of "Site Formation and Clearance Service" can be included for the purpose of assessment to service tax under Section 67 of the Act. These assessees had not availed the benefit of the aforesaid Notifications Nos. 15/2004 and 4/2005. Therefore, the issue has to be adjudged simply by referring to Section 67 of the Act. We have already held above that the value of such material which is supplied free by the service recipient cannot be treated as "gross amount charged" and that is not the "consideration" for rendering the services. Therefore, value of free supplies of diesel and explosives would not warrant inclusion while arriving at the gross amount charged on its service tax is to be paid. Therefore, all these appeals are also dismissed."*

Learned Counsel submits that in view of the above, nothing survives of the show-cause notice which was the subject matter of challenge before the learned Single Judge. He submits that reply to the show-cause notice was given way back in 2015. However, the Service Tax Department is yet to dispose of the show-cause notice. He prays for reviewing the order of the Division Bench by dismissing the appeal and upholding the order of the learned Single Judge.

Learned Counsel further submits that the show-cause proceedings were required to be disposed of within one year as per statutory mandate. However, although reply to the show-cause notice was submitted in 2015, the proceedings are still pending. On that ground also the show-cause notice ought to be quashed. In this connection learned Counsel refers to a Division Bench Judgment of the Delhi High Court in the case of ***Sunder System Pvt. Ltd. v. Union of India reported at 2020 (33) G.S.T.L. 621(Del.)***.

Learned Advocate for the Department submits that subsequent change of law is not a ground for review. In any event, the Department should be directed to dispose of the show-cause proceedings by passing an order within a stipulated time frame.

We have considered the rival contentions of the parties.

In the present case there is no change of law. The Hon'ble Supreme Court has given a particular interpretation to a statutory provision. The same is law declared under Article 141 of the Constitution of India and is binding all the other Courts in the Country. In view of the aforesaid decision of the Hon'ble Supreme Court, in our opinion it is necessary to review the order dated January 5, 2015, whereby M.A.T. 1239 of 2014 was disposed of.

We are of the view that although O.47 R. 1 puts a restriction on the parties to approach the Court for review of an order only on the grounds mentioned therein, but, that provision does not and cannot curtail the High Court's power to pass order *ex debito justitiae*.

In the case of State of Rajasthan & Anr. v. Surendra Mohnot & Ors. reported at (2014) 14 SCC 77 the Hon'ble Supreme Court notices its earlier decision on the High Court's inherent power to review its earlier order. The law appears to be fairly settled that nothing under Article 226 of the constitution precludes a High Court from exercising the power of review which inheres in every Court of plenary jurisdiction to prevent miscarriage of justice or to correct grave and palpable errors committed by it.

Having considered the rival contentions of the parties, we are of the considered opinion that indeed, nothing survives of the show-cause notice. The notice was issued by the Department relying on Rule 5(1) of the 2006 Rules. The show-cause proceedings are still pending. In view of the declaration of law by the Hon'ble Supreme Court to the effect that Rule 5(1) of the 2006 Rules is bad in law, no further effect can be given to the show-cause notice. The show-cause proceedings have become infructuous.

The show-cause proceedings must fail. There is no reason to keep such proceedings pending and hanging over the head of the review applicant. The show-cause proceedings are accordingly deemed to be closed.

The review application is disposed of on the above terms.

(Apurba Sinha Ray, J.) **(Arijit Banerjee, J.)**