IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P(C). No.10433 of 2022

Bijay Kumar Baral .... ***Petitioner***

Mr. Sidhartha Ray, Advocate and
Mr. Kshirod Kumar Sahoo, Advocate

-versus-

Additional Commissioner of Central, GST & CX, Commissionerate, Rourkela .... **Opposite Parties**

Mr. Radheshyam Chimanka,
Sr. Standing Counsel for CGST

CORAM:
JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

ORDER (Oral)

Order No. **18.05.2022**

01. **1.** This matter is taken up by virtual/physical mode.

2. Asserting that proceeding under Section 73 of Chapter V of the Finance Act, 1994 by virtue of Demand-*cum*-Show Cause Notice dated 3rd December, 2020 issued by the Additional Commissioner of Central Tax, GST and CX Commissionerate, Rourkela is incompetent in view of provision laid in Section 174 of the Central Goods and Services Tax Act, 2017 (for brevity referred to as "the CGST Act"), the Petitioner approached this Court by way of the writ petition under Article 226/227 of the Constitution of India seeking to quash Order-in-Original dated 25th February, 2022 passed by said Officer pertaining to financial year 2015-16 raising demand comprising the following:

i. Service Tax including Cesses for an amount of Rs.54,05,706/- under Section 73(2) read with proviso to sub-section (1) of Section 73;

ii. interest thereon as applicable;

iii. penalty of Rs.10,000/- under Section 77(1)(a) for failure to take registration in contravention of Section 69 read with Rule 4 of the Service Tax Rules, 1994;

iv. penalty of Rs.1,08,000/- under Section 77(1)(c)(ii) for failure to produce the documents;

v. penalty of 20,000/- under Section 77(2) for contravention to provisions of Section 70 read with Rule 7; and

vi. penalty of Rs.54,05,706/- under Section 78(1) for wilful suppression of taxable value of services and wilful contravention of statutory provisions and rules made thereunder with the intent to evade payment of service tax.

3. Annexure-4 enclosed to the writ petition, *i.e.,* Demand-*cum*-Show Cause Notice alleges that having receipt total amount of Rs.3,72,80,731/- from different customers for providing taxable services during the financial year 2015-16, the Petitioner neither got service tax registration nor paid any service tax on the taxable consideration received, thereby it has failed to discharge the liability. It is admitted case of the Petitioner that it, being engaged in the business of transportation in the name and style "M/s. Mahadev Transport", rendered service to the recipient namely, Bhusan Power and Steel Limited. It has been submitted in the writ petition that though certain opportunities were afforded by the Adjudicating Authority, the Petitioner failed to appear and furnish the required documents as instructed by the Additional Commissioner of GST and CX. At Paragraph 3.11 of the writ petition it is stated that "the Petitioner has not submitted the details of service recipients to whom the service provided during 2015-16". At Para 3.8 of the writ petition, the Petitioner has candidly admitted that the Adjudicating Authority had directed it to appear for personal hearing through video conference on 25th January, 2022. However, the Petitioner did not choose to avail the opportunity of personal hearing. As a consequence of non-cooperation of the petitioner, the Adjudicating Authority had proceedced to confirm the demand of Service Tax as stated in the Show Cause pertaining to financial year 2015-16.

4. It appears from the averments and documents enclosed to the writ petition that the Petitioner did not choose to participate in the proceeding under Section 73. Mr. Chimanka appearing for CGST Authority submitted that the fact of not taking registration under the Service Tax and non-discharge of appropriate liability even though the petitioner has rendered services indicates that the Authority concerned was justified in initiating proceeding under Section 73. Furthermore, the Petitioner has not raised any objection as to limitation before said Adjudicating Authority, which plea it seeks to raised in the writ petition proceeding.

8. From the aforesaid submission and counter-submission it transpires that adjudication with reference to evidence on record is required to be made as to whether the conduct of the Petitioner by not discharging its Service Tax liability is a pointer for invocation of jurisdiction under Section 73 of the Finance Act. It is also necessary for the appropriate authority on the basis of pleadings and material particulars available on record to decide whether there was justification in subjecting the assessee-petitioner to adjudication in view of existence of the circumstances spelt out in proviso to Section 73 of Chapter V of the Finance Act, 1994 so that extended period of limitation is attracted. In the considered view of this Court, these questions do require factual adjudication. Needless to note that plea of limitation is mixed question of fact and law. The appellate authority is vested with power to deal with both question of law as also fact. The petitioner has raised further plea as to whether the provision of Section 174 of the Central Goods and Service Tax Act, 2017 would save the initiation of proceeding under Section 73 of Chapter V of the Finance Act, 1994. Such a plea being not raised before the Adjudicating Authority even though adequate opportunity was afforded for production of documents as well as personal hearing, can be raised by the petitioner before the appellate authority.

9. The Petitioner after arguing for some time sought for permission to withdraw the writ petition to avail alternative remedy of appeal as is available under Chapter-V of the Finance Act, 1994. This Court, therefore, declines to express its views on merit of the case. However, the Petitioner is at liberty to prefer appeal.

10. With the above observation, the writ petition stands disposed of.

(Jaswant Singh)
Judge

(M.S. Raman)
Judge

Laxmikant May 18th, 2022 Cuttack