IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.03.2022

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN
AND
THE HONOURABLE MR.JUSTICE J.SATHYANARAYANA PRASAD

WRIT APPEAL NO.772 OF 2022
&
CMP.No.5392 of 2022

1. Union of India,
represented by its Secretary to Govt.,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

2. The Assistant Commissioner of GST
& Central Excise,
Egmore Division, Chennai North
Commissionerate, Newry Towers,
1st Floor, Plot No.2054, I Block,
II Avenue, 12th Main Road, Anna Nagar,
Chennai 600 040

.. Appellants

Versus

M/s. Trinity's Clearing and Shipping Agencies,
represented by its Partner S.Alexander
No.30, Thambu Chetty Street, Parry's
Chennai 600 001.

.. Respondent

Writ Appeal filed under Clause 15 of Letters Patent against the order dated 5.11.2020 passed by this Court in W.P.No.26189 of 2018.

Prayer in W.P.No.26189 of 2018:-
Writ Petition filed under Article 226 of the Constitution of India praying to issue Writ of Certiorari, to call for the records relating to the impugned show cause notice No.42/2018 dated 19.04.2018 issued by the 2nd respondent and quash the same as without authority of law, arbitrary and invoking a provision which had been held ultra vires and unsustainable in law.

For Appellants : Mr.A.P.Srinivas, Senior Standing Counsel

For Respondent : Mr.K.Jeyachandran

JUDGMENT

(Judgment of the Court was delivered by R. Mahadevan, J)

This Writ Appeal is directed against the order dated 5.11.2020 passed in W.P. No. 26189 of 2018, in and by which, the learned Judge quashed the show cause notice dated 19.4.2018 issued by the 2nd appellant.

2. According to the respondent, they are engaged in the business of providing Custom House Agent Service, Transport of Goods by Road Service and Business Support Services with valid Service Tax registration. During the course of their business, the Principal Commissioner of Service Tax issued show cause notices proposing to demand service tax on the value of "non taxable services" by invoking Rule 5(1) of Service Tax (Determination of Value) Rules for the period from April, 2012 to September 2013 and from October 2103 to March 2015 and subsequently confirmed the proposal by order dated 21.1.2016. The respondent therefore filed WP. Nos. 14747 to 14749 of 2016 challenging Rule 5 of the said Rules and also the order passed by the Principal Commissioner of Service Tax dated 21.01.2016. On 22.04.2016, this Court admitted the writ petitions and granted interim stay.

3. The respondent further states that in identical case, Intercontinental Consultants case reported in 2013 (29) STR 9 the Delhi High Court passed an order to the effect that Rule 5 of Service Tax (Determination of Value) Rules was held to be ultra vires and void. Aggrieved by the said order passed by the Delhi High Court, the Department preferred an appeal before the Honourable Supreme Court. The Honourable Supreme Court affirmed the order passed by the Delhi High Court in the decision reported in the case of Union of India vs. Intercontinental Consultants and Technocrafts Private Limited reported in 2018 (10) G.S.T. L. 401 (SC). During the pendency of the appeal before the Honourable Supreme Court, the writ petitions which were pending before all the High Courts were ordered to be transferred to the Honourable Supreme Court and accordingly, WP Nos. 14747 to 14749 of 2016 were also transferred and disposed of by the Honourable Supreme Court.

4. However, the second appellant issued a show cause notice dated 19.4.2018 proposing to demand service tax on the non taxable service such as CFS, CCTL etc. invoking section 67 of the Finance Act read with Rule 5 of the Service Tax (Determination of Value) Rules, which was already held to be void by the Apex Court. Aggrieved by the said show cause notice dated 19.04.2018, the respondent has filed the writ petition in W.P. No. 26189 of 2018.

5. The learned Judge, by the order dated 05.11.2020, allowed the writ petition by concluding that the impugned show cause notice issued by the second appellant is contrary to the decision of the Hon'ble Apex Court and therefore it is legally not sustainable. Aggrieved against the same, the present writ appeal is filed before this Court.

6. The learned Standing counsel appearing for the appellants would submit that the Finance Act, 1994 was amended on 14.5.2015 with reference to Section 67, wherein the explanation for clause (a) was substituted by which the reimbursable expenditure or cost incurred by the Service provider has been included under the definition of "consideration" under section 67 of the Act. As per the notes on clause No.111 of the Finance Act, the Act amends Section 67 of 1994, so as to substitute clause (a) of the explanation to amplify the scope of the term "consideration". Thus, it is clear that the legal intent of the Government is clearly spelt and articulated that reimbursable expenditure or cost incurred by the Service Provider forms part of "consideration". Even otherwise, when show cause notice was issued by an authority having jurisdiction, the respondent cannot subject it to challenge before this Court by invoking Article 226 of The Constitution of India. The respondent has got a statutory remedy before the quasi judicial authority, but without exhausting the same, the present writ petition has been filed. He would further contend that the learned Judge has not taken note of the fact that the department has raised the demand only in respect of the period prospective to the amendment brought in under section 67 of the Act, which was also upheld by the Apex Court. While so, the learned Judge, without directing the respondent to file a statutory appeal, has allowed the writ petition. Thus, he prayed this Court to set aside the order passed by the learned single Judge.

7. The learned counsel appearing for the respondent would submit that the show cause notice was issued by the appellants demanding service tax invoking Section 67 of Finance Act read with Rule 5 of the Service Tax (Determination of Value ) Rules. Admittedly, Rule 5 of the said Rules was held ultra vires by

the Delhi High Court, which was subsequently affirmed by the Honourable Supreme Court. While so, invoking such a rule, which was already held ultra vires, the show cause notice has been issued, which is legally not sustainable. On the date of issuing the notice dated 19.4.2018, Rule 5 of Service Tax (Determination of Value ) Rules was held ultra vires and Section 67 also was not available and therefore, the proposal to demand service tax itself is invalid. After taking note of the same, the learned Judge rightly set aside the said show cause notice by the order impugned herein, which warrants no interference at the hands of this Court

8. Heard the submissions of Mr. A.P. Srinivas, learned Senior Standing Counsel appearing for appellants / department and Mr.K.Jeyachandran, learned counsel appearing for the respondent.

9. In the order dated 05.11.2020, which is impugned in this appeal, the learned Judge, while allowing the writ petition, observed as follows:-

> 'In view of the aforesaid decision of the Hon'ble Supreme Court of India, the impugned show cause notice in the present case invoking Rule 5(1) of the Rules cannot be sustained. The show cause notice in respect of other provisions, viz., Rule 6(1) of the Service Tax Rules, 1994 read with Section 68 of the Finance Act, 1994, and Rule 7 of the Service Tax Rules, 1994 read with section 70 of the Finance Act, 1994, are merely procedural in nature and consequential to Rule 5(1) of the Rules and as such, they cannot independently exist. Accordingly, the impugned show cause notice in entirety is quashed. However, this shall not be construed as precluding the petitioner from carrying out its obligations under other statutory provisions as required by law.

10. We have no disagreement with the legal proposition laid down in the decision rendered by the Honourable Supreme Court. However, it is to be pointed out that what was challenged before the learned Judge is only a show cause notice issued by the second appellant and it was not a final notice of demand. In such an event, it is open to the respondent to submit the explanation to the show cause notice dated 19.04.2018 in which all the grounds, canvassed in the writ petition, can be raised by the respondent. Therefore, we hold that the writ petition filed by the respondent is not maintainable as against the show cause notice issued by the second appellant. Accordingly, the order passed by the learned Judge is set aside and the matter is

remanded back to the second appellant to pass appropriate orders on the basis of the materials to be produced by the assessee. The respondent/assessee shall submit its explanation along with the relevant documents to the show cause notice impugned in the writ petition, within a period of four weeks from the date of receipt of a copy of this order. On such submission, the second appellant shall consider the same and pass appropriate orders, as per law, within a period of four weeks thereafter. If the respondent/assessee fails to file any objection, it is open to the second appellant to pass orders, based on the materials available, in the manner known to law.

11. This Writ Appeal is disposed of accordingly. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

msr/rsh

To

1. The Secretary to Govt.,
Union of India,
Department of Revenue,
Ministry of Finance,
North Block, New Delhi.

2. The Assistant Commissioner of GST
& Central Excise,
Egmore Division, Chennai North
Commissionerate, Newry Towers,
1st Floor, Plot No.2054, I Block,
II Avenue, 12th Main Road, Anna Nagar,
Chennai 600 040

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.21498

WA No.772 of 2022

NRL(CO)
RLP(26/04/2022)