



W.P.(MD).No.9099 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.11.2022

CORAM

THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

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and

W.M.P.(MD).No.6519 of 2022

M/s.Trichy Rasi Travels,
Represented by its partner S.Sankar,
No.5&6, Hotel Gajapriya,
Royal Road,
Trichirapalli-620 001.

... Petitioner

Vs.

The Commissioner of GST & Central Excise,
No.1, Williams Road, Cantonment,
Tiruchirapalli.

...Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, calling for the records in Order-in-Original No.GEXCOM/ADJN/COM/305/2021-ADJN Dated 07/01/2022 issued by the Respondent and quash the same as arbitrary, illegal and against the principles of judicial discipline and clear violation of Section 65B(44) and 66D(e) of the Finance Act, 1994.

For Petitioner : Mr.S.Karunakar

For Respondent : Mr.R.Nandakumar
Senior Standing Counsel Assisted by
Mrs.S.Raghavendra,
Junior Standing Counsel.



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ORDER

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The Writ Petition is filed challenging the impugned order dated 07.01.2022 passed by the Respondent under Section 73 of the Finance Act, 1994. The petitioner is a registered service tax assessee with Service Tax Registration No.AAKFT0716CSD001 with PAN No.AAKFT0716C.

2. The impugned order is challenged primarily on the ground that on the basis of the alleged inputs received from Central Board of Direct Taxes there was difference between gross value of service declared by them in the Income Tax Return for the Financial year 2015-16 and the taxable value of services declared by them in their ST-3 returns filed for the corresponding period. The above difference was treated as representing value of taxable services and it was proposed to levy tax liability on the difference amount which worked out to Rs.2.70 Crores. The following table is relevant in this regard:

<i>Sl.No.</i>	<i>Period</i>	<i>Differential value between ITR and Sts Returns/TDS and ST3 Returns whichever is higher (Rs.)</i>	<i>Total Taxable value Rs.</i>	<i>Service Tax short paid (Rs.)</i>
1	01.04.2015 to 31.03.2016	6,26,03,352/-	(6,26,03,352) @ 14.5%	99,77,486/-



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SL.No.	Period	Differential value between ITR and Sts Returns/TDS and ST3 Returns whichever is higher (Rs.)	Total Taxable value Rs.	Service Tax short paid (Rs.)
2	01.04.2016 to 31.03.2017	7,51,24,022/-	(7,51,24,022)@15%	1,12,68,603/-
3	01.04.2017 to 30.06.2017	2,25,37,207/-	(2,25,37,206)@15%	33,80,581/-
	TOTAL	16,02,64,581/-		2,37,26,670/-

3. A perusal of the impugned order would reveal that the petitioner was issued with show cause notice dated 23.04.2021, to which the petitioner did not file any reply within the time stipulated in the show cause notice. Thereafter, a personal hearing was fixed on 23.09.2021. The petitioner neither filed any reply nor appeared for personal hearing on 23.09.2021. One more opportunity of personal hearing was extended by fixing the same on 20.10.2021. In response, the petitioner vide E-mail dated 18.10.2021 requested three weeks time for submission of records, for the reasons that their Auditor was not keeping well. Another opportunity was given and a personal hearing was fixed on



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25.11.2021. The petitioner vide letter dated 24.11.2021 filed his reply to the show cause notice, wherein, it was stated asunder :

"i) They enclosed the details required for perusal. They submit that they have started the travels only during 2015-16 and they did not have businesses and they have got licence from IATA only during 2016-17.

ii) During that period, they have done business only through other IATA agents for which they had earned Rs. 1,79,959/- as Commission.

iii) The turnover as shown in the Income Tax Return was the amount collected for tickets and they have made payments to the main agents.

iv) Moreover, they deal in agricultural products like paddy etc., in their native place Tiruvallur and they lease out their tractor for agriculture in their native place.

v) In view of the above, they request to do the needful for the completion of their service tax.(sic)."



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4. Along with the above reply, Profit & Loss Account for the year ended 31.03.2016 and 31.03.2017 signed by the Managing Partner of the petitioner unit and copies of Income Tax Returns and Form 26 AS was submitted. The petitioner was represented through the Managing Partner during the personal hearing on 24.11.2021 and submitted his reply. It was his primary contention that they got IATA licence only in 2016-17 and prior to that they were doing business only through other IATA agents and received Commissions and that for the period from April 2015 to June 2017, Nil Returns were filed as the Commissions received by them was below the threshold limit.

5. At the time of personal hearing petitioner was issued with a letter dated 25.11.2021 and the petitioner was required to submit the documents set out in the said letter viz.,

a) The Profit & Loss Account statement signed by the Chartered Accountant. b) Nature of activities undertaken / services provided by the petitioner etc. c) Ledger account for purchase of ticket from the main agents and commission received by the petitioner from main agent for the period from April 2015 to June 2017. d) Copy of all the documents issued by IATA and IATA agents statement in respect of the petitioner's for the years 2015-16,



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2016-17 and 2017-18(up to June 2017). Break-up details of ticket sales as international and domestic with supporting documents.

6. The petitioner consented to furnish the documents/details on or before 06.12.2021 during the course of the personal hearing. However, the petitioner failed to furnish the above details within the said period. Thereafter, the petitioner vide letter dated 03.12.2021 requested for a month's time for the reasons that their accountant was not well and that their Auditor was tied up with other work. The petitioner was issued with another letter dated 08.12.2021 wherein it was informed that extension of time to the petitioner was granted upto 20.12.2021 and the petitioner was called upon to furnish the documents sought for by the respondent. It was informed that no further extension would be granted. However, once again the petitioner vide letter dated 20.12.2021, sought for time to furnish the documents and the time was extended upto 27.12.2021. However, no documents / details were furnished by the petitioner till 04.01.2022.

7. After extending the above opportunities, the impugned order came to be passed on the premise that the petitioner was engaged / rendered in activities



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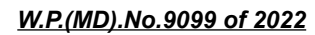
/ services with / for third parties for a consideration. There is no claim that the activity with the third parties is covered by way of the activities specified in the Negative List in terms of Section 65 D of the Finance Act, thus, the above activities would qualify as "service" as defined under Section 65 B (44) of the Finance Act.

8. A perusal of the impugned order also indicates that the assessment order were made in view of the fact that the petitioner despite being granted several opportunities failed to furnish the documents. In this regard, it is relevant to extract the following:

"In the above context, the Noticee were specifically required to furnish the following documents to determine their service tax liability:

i) Ledger account for purchase of tickets from main agents as claimed by them and Ledger account for Commission received by them for the period from April, 2015 to June, 2017.

ii) IATA Agent's statement in respect of M/s.Trichy Rasi Travels, Trichy for the years 2015-16, 2016-17 and 2017-18(upto June, 2017).



However, the Noticee have deliberately failed to furnish the above details / documents to prove the nature of services provided by them during the period from April, 2015 to June, 2017 and the consideration received for providing such services. In view of the above, I have no other option but to hold the entire amount of income received by them as taxable and to determine the service tax payable thereon at the rates prescribed under Section 66B of the Finance Act, 1994. I further hold that as the Noticee had failed to furnish any documents to prove that they are eligible for threshold exemption, the benefits under Notification No.33/2012-ST dated 20.06.2012 as amended could not be extended to them for the financial year 2015-16."

9. It was submitted by the petitioner that the impugned order is without jurisdiction as they were engaged in trading activities during April 2015 to June 2017 and thus, levy of service tax under the Finance Act is bad for want of



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jurisdiction. That trading activities is excluded in terms of Section 65B(44) of the Finance Act, 1994. That the impugned order had erred in assuming that the sale receipts of tickets shown in the income tax return as representing value of taxable services. That the petitioner was unable to furnish the documents in view of the fact that the Chartered Accountant had passed away on 25.08.2021.

10. This Court finds that the following questions viz., a) Whether the activities carried out by the petitioner would constitute taxable services or otherwise. b) Whether the value of taxable service rendered by the petitioner would fall below the threshold limit prescribed under the Finance Act for levy of service tax are all within exclusive knowledge of the petitioner. Despite repeated notices / opportunities, I find that the petitioner has not availed the same. The orders of assessment were made in view of the fact that the petitioner had neither furnished the documents sought for nor the petitioner set out a case that the documents sought for were not required for the enquiry whether the petitioner was liable to service tax or otherwise.



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11. To the contrary, it is submitted by the learned counsel for respondent that the petitioner requested for time repeatedly and despite the fact that the respondent had granted atleast seven opportunities, the petitioner had failed to avail the same. It may not be open to the petitioner to find fault with the orders of assessment with the impugned order on the ground of not being afforded with reasonable opportunity. That the impugned orders of assessment involves mixed question of fact and law and is an appealable order and therefore, the writ petition ought not to be entertained.

12. This Court finds that there is merit in the submission of the learned counsel for the respondent.

13. In the instant case, the question as to whether an activity would constitute taxable services or otherwise is a mixed question of fact and law. Secondly, the question as to what is the value of taxable service is again a mixed question of fact and law and once there is a proposal made by the Revenue, it is for the assessee to come forward and let in evidence and demonstrate the activities that would not constitute taxable service or the value of the taxable service arrived at is erroneous. Having failed to produce the documents in their possession and facts which are within the exclusive



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knowledge, it may not be open to the petitioner to challenge the orders of assessment as being bad for want of jurisdiction or having been made in violation of principles of natural justice.

14. It is trite law that adjudication of disputed questions of fact is outside the purview of Article 226 of the Constitution of India, when there is an alternate remedy by way of appeal. In this regard, it may be relevant to refer to the following:

(i) *State Bank of Travancore v. Mathew K.C.*, reported in (2018) 3 SCC 85:

"10. In United Bank of India v. Satyawati Tondon (2010) 8 SCC 110, the High Court had restrained Satyawati Tondon v. State of U.P., [2009 scc OnLine All 2608] further proceedings under Section 13(4) of the Act, Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding : (SCC pp. 123 & 128, paras 43 & 55).



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43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

(ii) **Thansingh Nathmal v. Supdt. of Taxes**, reported in (1964) 15 STC

468 :



“7.....The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.”



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(iii) Assistant Collector of Central Excise vs. Dunlop India Ltd.,

reported in **(1985) 1 SCC 260** and the relevant paragraph 3 reads as under:

"3. In Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433, it was held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the



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Constitution. But then the Court must have good and sufficient.

reason to bypass the alternative remedy provided by statute.

Surely matters involving the revenue where statutory remedies

are available are not such matters."

15. In these circumstances, this Court is not inclined to entertain the writ petition and the same is dismissed on the ground of existence of alternate remedy. The petitioner may file an appeal within a period of three weeks from the date of receipt of a copy of this order, if so advised.

16. Registry is directed to return the Original impugned order to enable the petitioner to file an appeal. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

18.11.2022

Index : Yes / No

Internet : Yes/ No

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MOHAMMED SHAFFIQ, J.,

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To

The Commissioner of GST & Central Excise,
No.1, Williams Road, Cantonment,
Tiruchirapalli.

Copy to:

The Section Officer,
E.R.Section,
Madurai Bench of Madras High Court.

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