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W.P(MD).No.14084 of 2017



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.10.2022

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THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P(MD).No.14084 of 2017

and

W.M.P(MD).No.11015 of 2017

M/s.GRT Regency,
(A Unit of GRT Hotels and Resorts Private Limited),
Represented by its CEO,
Mr.T.Natarajan,
3/187, Periyannayagapuram Main Road,
Korampallam, Opposite District Collectorate,
Tuticorin-628 101.

... Petitioner

Vs.

The Assistant Commissioner of Central Excise,
C-50, SIPCOT Industrial Complex,
Madathur (Post),
Tuticorin-628 008.

...Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, to call for the records of order in Original No.24/2017-ST, dated 05.04.2017 in C.No.V/ST/15/101/2015-Adjn. issued by the Respondent and quash the same.

For Petitioner : Mr.Joseph Prabakar
For Respondent : Mr.R.Nandhakumar
Senior Standing Counsel

ORDER



This writ petition is filed challenging the order in Original No.24/2017-ST, dated 05.04.2017 in C.No.V/ST/15/101/2015-Adjn. issued by the Respondent and quash the same.

2. The Petitioner is running a Hotel called GRT Regency registered with Service Tax Department and has paid service tax, *interalia*, on Restaurant Services and Short Term Accommodation Services. The Department conducted Internal Audit and found that the Petitioner did not pay service tax on certain charges collected from the customers towards in-room dining, in-room beverages supply and mini bar and also on laundry, Miscellaneous Income and Telephone. The Department was of the view that these charges should be included in the value of room rent and the petitioner ought to have paid service tax on these charges under “Short Term Accommodation Services”. While so, show cause notice, dated 16.10.2015 was issued by the Commissioner of Central Excise, Tirunelveli, whereby, the Petitioner was directed to show cause as to why service tax of Rs.15,28,564/- (Rupees Fifteen Lakhs Twenty Eight Thousand Five Hundred and Sixty Four only) for the period 2010-2011 to 2014-2015 under Proviso to Section 73(1) of Finance Act, 1994, should not be demanded.



3. The constitutional validity for levy of service tax on accommodation service provided by hotel, guest house etc., was challenged by the Federation of Hotels and Restaurants Association of India before the Delhi High Court. The Delhi High Court in the case of **Federation of Hotels and Restaurants Association of India Vs Union of India** reported in **2016 (44) STR 3 (Del)** held that in the absence of machinery provision for levy and collection of tax on accommodation, the levy does not survive and no tax is payable. The Court in paragraph 77(ii) struck down Section 65(105)(zzzw) of Finance Act, 1994 pertaining to levy of service tax on the provision of “Short Term Accommodation Services” and corresponding instructions/circulars seeking to operationalise the levy as unconstitutional and invalid.

4. The learned counsel for the petitioner would submit that the impugned order is barred by limitation and thus a nullity and there is no need to even examine the question of the levy being unconstitutional or otherwise. In view of the above submission, the question that arises for consideration is whether the impugned order, dated 05.04.2017 is barred by limitation. The period for which the demand has been made is from April 2010 to September 2013. The Petitioner is an assessee registered under the Service Tax Department and has been discharging service tax on various other services.



However, the Petitioner was of the view that short term service was not liable to service tax inasmuch as it falls within the exclusive competence of the State in terms of Entry 52 of List II of the Seventh Schedule to the Constitution of India and insofar as short term accommodation services, the Petitioner is of the view that it would be covered by Entry 52 of list II of the Seventh Schedule to the Constitution of India. Thus, levy of service tax is beyond the legislative competence of the Union. The above view is also supported by the decision of the High Court of Kerala in the case of ***Kerala Classified Hotels and Resorts Association Vs Union of India*** reported in ***2017 (47) STR 215 (Ker.)***, ***2013 (31) STR 257 (Ker.)*** and in the case of ***Union of India Vs Kerala Classified Hotels and Resorts Association*** reported in ***2014 (36) STR 1205 (Ker.)*** and the decision of the High Court of Delhi in the case of ***Federation of Hotels and Restaurants Association of India Vs Union of India***, reported in ***2016 (44) STR 3 (Del.)***. In view of the same, it was submitted that the Petitioner had not disclosed the above receipts under the Service Tax Act.

5. Admittedly the impugned proceedings are initiated invoking the extended period of limitation under Section 73 of the Finance Act, 1994. Thus, the notice issued on 16.10.2015 culminating in the impugned order



dated 05.04.2017 can be sustained only if it is shown that service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

6. To the contrary, the learned Senior Standing Counsel for the Respondent sought to sustain the impugned order by submitting that the extended period of limitation would enable the revenue to issue notice within five years from the relevant date. In any event, there is an alternate remedy by way of appeal. In this regard, reliance was sought to be placed on the following judgments:

(a) Kuttukaran Trading Ventures Vs Commissioner of Central Excise, Customs and Service Tax, Cochin reported in 2014 (35) STR 481 (Ker).

(b) Master Marine Services Private Limited Vs Commissioner of Service Tax, Mumbai, The CESTAT, West Zonal Bench reported in 2014 (35) STR 79(Tri).

7. Assuming the levy is valid, the impugned proceeding invoking the extended period of limitation cannot be sustained. To invoke the extended



period, it ought to be demonstrated that service tax has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax. It has been consistently held by the Hon'ble Supreme Court that any non-disclosure or claim of non-liability on the basis of bonafide interpretation of law would not enable the Respondent to invoke the extended period of limitation. This Court also finds that the attempt made by the learned counsel for the Respondent to sustain the impugned proceedings, by invoking extended period of limitation cannot be sustained, in view of the fact that the view taken by the Petitioner has also been approved by at least two High Courts. Therefore, the question of existence of mental element/*mens rea*, which is a condition precedent for invoking the extended period, is absent, thus the invocation of extended period is unsustainable. In this regard, it may be relevant to refer to the following judgments:

(i)Pushpam Pharmaceuticals Vs Collector reported in 1995 (78) ELT 401, which reads as under:

“3. Law about excisability of exempted goods was settled by this Court in Wallace Flour Mills Co. Ltd. v. CCE [(1989) 4 SCC 592 : 1990 SCC (Tax) 10] . Till then conflicting decisions



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were rendered by different High Courts and Tribunals and it was not settled whether the turnover of assessable and exempted goods were liable to be clubbed for determining liability. Therefore, two questions arise whether the appellant was bound in the state of uncertainty in law to include the turnover of the two items and if it failed to do so then it amounted to suppression of fact and second whether it was the duty of appellant to keep the Department informed about the turnover of the goods which were not liable to any duty. No rule could be pointed out requiring a manufacturer to disclose the turnover of exempted goods. Even assuming it was, the appellant could not be held guilty of suppression when the law itself was not certain.

4. Section 11-A empowers the Department to reopen proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have



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only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.”

(ii)State of Rajasthan v. Jaipur Udyog Ltd., reported in (1974) 3 SCC 247:

“4. We are told that the Respondent is guilty of an offence falling under Section 10(b) which reads:

“If any person ... being a registered dealer, falsely represents when purchasing any class of goods that goods of such class are covered by his certificate of registration....”

Now the only question is whether the Respondent was guilty of falsely representing, when purchasing the goods referred to earlier that those goods were covered by the certificate of registration. Unless it is shown that he had made such a false representation, Section 10-A is not attracted. Two Judges of the High Court and one Member of the Board of Revenue have come to the conclusion that the Respondent was entitled to the preferential rate which he claimed. That is the view of the law taken by them. Assuming, without deciding, that the view taken by them is incorrect, even then it is impossible to say under the circumstances of the case that the Respondent was guilty of making any false representation. The view of the law, which he is contending for, is supported by the view taken by two Judges of the High Court and one Member of the Board of Revenue. Hence



we fail to see how such a view of the law can be taken as false representation.”

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(emphasis supplied)

The above judgment was followed by this Court in the case of ***the State of Tamil Nadu, rep. by the Deputy Commissioner of Commercial Taxes, Madras (Central) Division, Madras-6 and another Vs. Tvl. Nu-Tread Tyres*** reported in ***2006 SCC OnLine Mad 665***:

“13. In State of Rajasthan v. Jaipur Udyog Limited, 1972 (30) STC 565 the question that arose was whether the assessee was guilty of falsely representing that the goods purchased were covered by the Registration Certificate. The Supreme Court expressed the view that unless it is shown that the assessee had made such a false representation Section 10-A would not stand attracted. In that case, the Board of Revenue as well as the High Court had come to the conclusion that the assessee was entitled to the concessional rate which he claimed. The State disputed that decision and went before the Supreme Court. The Supreme Court said, “Assuming, without deciding, that the view taken by them (Board of Revenue and the High Court) is incorrect, even then it is impossible to say under the circumstances of the case that the respondent (assessee) was guilty of making any false representation.” The view taken by the Supreme Court in that case was where there is a possibility of two view in the matter as to whether the goods purchased are covered by the registration certificate or not, the mere



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issue of a C form certificate by the assessee without any further circumstance or material will not lead to the conclusion that the assessee has made false representation.”

(iii) *Padmini Products v. CCE*, reported in (1989) 4 SCC 275:

“12....the appellant could not be held to be guilty of the fact that excise duty had not been paid or short-levied or short-paid or erroneously refunded because of either any fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder. These ingredients postulate a positive act. Failure to pay duty or take out a licence is not necessarily due to fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act. Suppression of facts is not failure to disclose the legal consequences of a certain provision. ...As mentioned hereinbefore, mere failure or negligence on the part of the producer or manufacturer either not to take out a licence in case where there was scope for doubt as to whether licence was required to be taken out or where there was scope for doubt whether goods were dutiable or not, would not attract Section 11-A of the Act. In the facts and circumstances of this case, there were materials, as indicated to suggest that there was scope for confusion and the appellant believing that the goods came within the purview of the concept of handicrafts and as such were exempt. If there was scope for such a belief or opinion, then failure either to take out a licence or to pay duty on that behalf, when there was no contrary evidence that the producer or the manufacturer



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knew these were excisable or required to be licensed, would not attract the penal provisions of Section 11-A of the Act.”

(emphasis supplied)

8. The proceedings having been challenged as bad for want of jurisdiction, the question of alternate remedy may not have a bearing for exercise of discretion under Article 226 of the Constitution of India. In this regard, it may be relevant to note that the remedy under Article 226 of the Constitution of India, is a discretionary remedy and existence of an alternative remedy, would not result in an embargo against exercise of jurisdiction under Article 226 of the Constitution of India, more-so, where the impugned proceedings are challenged on the ground of want of jurisdiction. The proceedings being barred by limitation, thus, the same is bad for want of jurisdiction and a nullity. In such circumstances, interference under Article 226 of the Constitution of India is warranted inasmuch as question of limitation relates to jurisdiction. An order barred by limitation is a nullity. In this regard, it may be useful to refer to the following judgments:

“20.....The revisional jurisdiction having, thus, been invoked by the Commissioner of Income Tax beyond the period of limitation, it was wholly without jurisdiction rendering the entire proceeding a nullity¹.”

¹ *Commissioner of Income Tax, Chennai Vs. Alagendran Finance Limited, (2007) 7 SCC 215*



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“67. Such an extended period of limitation can be invoked only if a positive act of fraud etc. on the part of the assessee is found. Such a positive act must be in contradistinction to mere inaction like non-taking of licence etc. It has to be pleaded and established.

68. Even in *Easland Combines [(2003) 3 SCC 410 : (2003) 152 ELT 39]* this Court held: (SCC pp. 424-25, para 31)

“31. It is settled law that for invoking the extended period of limitation duty should not have been paid, short-levied or short-paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation.”

69. The question of limitation involves a question of jurisdiction. The finding of fact on the question of jurisdiction would be a jurisdictional fact. Such a jurisdictional question is to be determined having regard to both fact and law involved therein. The Tribunal, in our opinion, committed a manifest error in not determining the said question, particularly, when in the absence of any finding of fact that such short-levy of excise duty related to any positive act on the part of the appellant by way of fraud, collusion, wilful misstatement or



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suppression of facts, the extended period of limitation could not have been invoked and in that view of the matter no show-cause notice in terms of Rule 10 could have been issued.²”

9. Applying the above principles, it appears that there is no room for invoking the extended period on the facts set out above. The impugned order dated 05.04.2017 is thus set aside as barred by limitation and thus bad for want of jurisdiction and a nullity.

10. With the above observations, the writ petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

11.10.2022

Index : Yes / No
Internet : Yes/ No
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MOHAMMED SHAFFIQ, J.,

sn

2. *ITW Signode India Ltd. v. CCE, (2004) 3 SCC 48*



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To

The Assistant Commissioner of Central Excise,
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