



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR
WRIT PETITION NO. 5303/2014

(M/S NATIONAL FLYING TRAINING INSTITUTE PVT. LTD. GONDIA **VERSUS** CENTRAL BOARD OF
 EXCISE & CUSTOMS, NEW DELHI & ANOTHER)

*Office Notes, Office Memoranda of Coram,
 appearances, Court's orders of directions
 and Registrar's orders.*

Court's or Judge's order

Shri R.S. Thakar with Shri S.C. Thakar, counsel for the petitioner.
 Shri K.K. Nalamwar, counsel for the respondents.

CORAM : A. S. CHANDURKAR AND MRS. VRUSHALI V. JOSHI, JJ.

DATE ON WHICH ARGUMENTS WERE HEARD : AUGUST 03, 2023

DATE ON WHICH ORDER IS PRONOUNCED : OCTOBER 31, 2023

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The challenge raised in this writ petition is to the Instruction dated 11.05.2011 issued by the Director, Service Tax under the Ministry of Finance through its Department of Revenue holding that the Course Certificate being issued by Flying Training Institutes cannot be held as “recognized in law” for the purposes of exemption from paying service tax. A challenge is also raised to the show cause notice dated 18/21.10.2013 that has been issued by the Commissioner, Central Excise, Custom and Service Tax Commissionerate, Nagpur requiring the petitioner-M/s National Flying Training Institute Private Limited to show cause why the petitioner should not be classified under the taxable category of Commercial Coaching or Training Centre as defined by Sections 65(26) and (27) of the Finance Act, 1994. Consequentially, service tax for the period from September-2008 to June-2012 has been demanded from the petitioner.

2. The petitioner is registered under the Companies Act, 1956 and is being run as a Joint Venture between Airport Authority of India and National Flying School, Mauritius. It claims to provide aviation training to the candidates seeking to obtain Commercial Pilot License – CPL. With a view to ensure that Flying Training Institutes have the requisite capability of imparting initial flying training to the candidates who seek to obtain CPL, the Civil Aviation

Requirement – CAR issued under Rule 133A of the Aircraft Rules, 1937 has laid down the procedure as well as minimum requirements with regard to infrastructure, procedure and manpower for undertaking flying training activities. An approval of the Director General of Civil Aviation – DGCA is also necessary. The personnel imparting instructions are required to be employed with the approval of the DGCA. The flying training has to be completed in accordance with the syllabus prescribed by the DGCA. After imparting necessary instructions in training, written examination is conducted by the DGCA. It is after passing this examination that a candidate is entitled to apply for CPL. Thus, according to the petitioner its Flying Institute is recognized and approved by the DGCA and all its activities are under direct control and supervision of the DGCA. According to the petitioner, pursuant to instructions from the Customs Central Excise and Service Tax Authorities it applied for registration on 02.11.2010 under the category of “Commercial Coaching and Training Services”. It paid service tax from October-2010 under protest. After such registration it started recovering service tax from the concerned candidate and also started filing returns. It is in the aforesaid backdrop that the show cause notice dated 18/21.10.2013 came to be issued to it.

3. Shri R.S. Thakar, learned counsel for the petitioner after referring to various provisions of the Act of 1994 and especially Sections 65(27), 65(105) (zzc) and 66 submitted that there was no liability whatsoever for the petitioner-Institute to pay the service tax. He submitted that Instruction dated 11.05.2011 impugned in the present writ petition was also the subject matter of challenge in **Writ Petition (C) No. 3513 of 2012** [*Indian Institute of Aircraft Engineering Versus Union of India & Others*] before the Delhi High Court. By the judgment dated 21.05.2013 it was held that the said Instruction requiring the petitioner therein to be assessed to service tax was contrary under Section 65(27) of the Act of 1994 as well as the notification dated 25.04.2011. Referring to the aforesaid decision, it was submitted that

since the Institute had been approved by the Competent Authority and the training/certificates offered by the Institute had value in the eyes of law even if it was only for the purposes of eligibility for obtaining CPL, it had been held that the training offered by such institutes was recognized by law. This decision had been assailed before the Hon'ble Supreme Court but the said challenge had been withdrawn. He further submitted that the judgment of the Delhi High Court in *Indian Institute of Aircraft Engineering* (supra) had been consistently followed by other High Courts as well as the jurisdictional Tribunals. In view of this adjudication, it was submitted that issuance of the show cause notice was without any legal basis.

4. The learned counsel referred to the provisions of Section 73(1) of the Act of 1994 to submit that the limitation prescribed for issuance of the show cause notice was eighteen months from the relevant date or the taxable event in respect of the period when service tax was not levied or paid. This period could be extended to five years if the non-levy or non-payment was on account of any fraud, collusion, wilful mis-statement or suppression of facts. The reference in the show cause notice dated 18/21.10.2013 to the period prior to eighteen months was without jurisdiction and hence the claim as made in the said notice for the period from October-2008 to April-2012 was barred by limitation. It was thus submitted that the challenge to the show cause notice ought to be entertained in the light of the law laid down in *Calcutta Discount Company Limited Versus Income Tax Officer & Another* [1961(41) ITR 191] and *Whirlpool Corporation Versus Registrar of Trademarks Mumbai & Others* [(1998) 8 SCC 1]. It was pointed out that during pendency of the writ petition the show cause notice came to be adjudicated on 24.12.2014 and by amending the writ petition a challenge to the same was also raised. If the show cause notice was found to be bad in law the consequential adjudication would also fall to the ground.

5. Shri K.K. Nalamwar, learned counsel for the respondents opposed the aforesaid submissions. According to him the writ petition did not deserve to be entertained since an alternate remedy of preferring an appeal against the order dated 24.12.2014 was available. According to him the challenge raised to the judgment of the Delhi High Court in *Indian Institute of Aircraft Engineering* (supra) was not pursued before the Hon'ble Supreme Court on account of low tax effect in the light of Instruction dated 22.08.2019. The ratio of the said decision was not applicable to the facts of the present case on the ground that the petitioner-Institute did not offer any degree or license to the candidates seeking training with it. The authority to do so was with the DGCA. Since the petitioner-Institute was merely offering training and was not empowered to issue any license, it could not be said that the courses run by it were 'recognized by law'. To substantiate the said contention the learned counsel sought to refer to the nature of training imparted by the petitioner-Institute. He also referred to the additional affidavit filed on record and denied that the petitioner-Institute was being discriminated or singled out in this regard. Various other Institutes had also been charged with service tax and their challenge was pending before the respective Tribunals. It was thus submitted that the writ petition did not deserve to be entertained.

6. We have heard the learned counsel for the parties and with their assistance we have perused the relevant material on record. On perusing the judgment of the Delhi High Court in *Indian Institute Aircraft Engineering* (supra) we find that Instruction dated 11.05.2011 that is impugned in the present writ petition was also the subject matter of consideration therein. The Division Bench after considering various provisions of the Act of 1994 including Section 65(27) alongwith Rule 133-B of the Rules of 1937 has held in clear terms that the certificate/training qualification offered by the Institute approved by the DGCA have been conferred some value in the eyes of law. A distinction has been made under the relevant Statutes and the Rules framed thereunder between an approved institute and an un-approved one. Since a successful

candidate from an approved institute is entitled to enforce the right conferred on him by Statute, the inference drawn was that the Course Completion Certificate offered by such Institute was recognized by law. The observations in paragraphs 25 and 27 of the said judgment are relevant and the same read as under :-

“25. We are of the view that the Act, the Rules and the CAR, having provided for grant of approval to such institutes and having laid down conditions for grant of such approval and having further provided for relaxation of one year in the minimum practical training required for taking the DGCA examination, have recognized the Course Completion Certificate and the qualification offered by such Institutes. The certificate/training/qualification offered by Institutes which are without approval of DGCA would not confer the benefit of such relaxation. Thus, the certificate/training/qualification offered by approved Institutes, has by the Act, Rules and the CAR been conferred some value in the eyes of law, even if it be only for the purpose of eligibility for obtaining ultimate licence/approval for certifying repair/maintenance/airworthiness of aircrafts. The Act, Rules and CAR distinguish an approved Institute from an unapproved one and a successful candidate from an approved institute would be entitled to enforce the right, conferred on him by the Act, Rules and CAR, to one year relaxation against the DGCA in a Court of law. The interference can only be one, that the Course Completion Certificate/training offered by such Institutes is recognized by law.

27. The reasoning in the impugned Instruction dated 11.5.2011 that because the qualification awarded by the Institute does not culminate in automatic issuance of license/authorization by the DGCA to certify the repair, maintenance or airworthiness of an aircraft and for which purpose a further examination to be conducted by the DGCA is to be taken, in our view mixes up and confuses, qualification with a license to practice on the basis of that qualification. An educational qualification recognized by law will not cease to be recognized by law merely because for practicing in the field to which the qualification relates, a further examination held by a body regulating that field of practice is to be taken. Immediate instance can be given of the qualification in the field of law.

Though by amendment of the recent years, the right to practice law on the basis of the said qualification has been made subject to clearing/passing a Bar Exam to be held by the Bar Council of India, the same does not make the qualification of law not recognized by law. The recognition accorded by the Act, Rules and CAR supra to the Course Completion Certificate issued by the Institutes as the petitioner cannot be withered away or ignored merely because the same does not automatically allow the holder of such qualification to certify the repair/maintenance or airworthiness of an aircraft and for which authorization a further examination to be conducted by the DGCA has to be passed/cleared.”

We are in complete agreement with what has been held by the Delhi High Court and we do not find any reason whatsoever to take a different view of the said provisions.

7. The learned counsel for the respondents is justified in contending that in view of low tax effect, the guidance under Instruction dated 22.08.2019 issued by the Department of Revenue was followed. He submits that since Instruction dated 11.05.2011 had not been held to be illegal or *ultra vires*, the withdrawal of the proceedings on the basis of earlier Instruction dated 17.08.2011 was justified. Even if it is held that the proceedings before the Hon'ble Supreme Court were withdrawn on account of low tax effect, as stated above since there is no justifiable reason to take a different view from the one taken by the Delhi High Court, we are inclined to follow the ratio of the decision in *Indian Institute of Aircraft Engineering* (supra).

8. Coming to the objection raised to the maintainability of the writ petition on the ground that an alternate remedy is available for being availed by the petitioner, we find that the present writ petition was filed on 10.09.2014 raising a challenge to Instruction dated 11.05.2011 and the show cause notice dated 18/21.10.2013. Since Instruction dated 11.05.2011 was also the subject matter of consideration by the Delhi High Court *vide* its decision in *Indian Institute of Aircraft Engineering* (supra) that was decided on

21.05.2013, the writ petition was entertained. It was informed however that the judgment of the Delhi High Court was subjected to challenge before the Hon'ble Supreme Court. The hearing of the writ petition was therefore deferred till the time the proceedings were decided by the Hon'ble Supreme Court. In the interregnum, the show cause notice issued to the petitioner was adjudicated. The challenge to the judgment of the Delhi High Court has now been disposed of. In these facts as well as the fact that the very same Instruction dated 11.05.2011 was the subject matter of consideration by the Delhi High Court, we do not find any justifiable reason to direct the petitioner to avail the statutory remedy against the order dated 24.12.2014. In this regard, we may refer to a recent decision in **Civil Appeal No.8129 of 2019** [*Ghanshyam Mishra & Sons Versus Edelweiss Asset Reconstruction Company Limited*] wherein it is held that if the proceedings are shown to be without jurisdiction such challenge could be entertained under Article 226 of the Constitution of India. As we find that the challenge to the very same Instruction on which the petitioner seeks to challenge the show cause notice issued to it has been considered by the Delhi High Court, we do not find any reason for not considering the challenge as raised in the writ petition on merits. No disputed questions of fact are raised and the only issue that requires consideration is the applicability of Instruction dated 11.05.2011 to the case of the petitioner in the light of the provisions of Section 65(27) of the Act of 1994.

9. On the aspect of limitation of period of eighteen months as prescribed by Section 73(1), it is seen from the show cause notice dated 18/21.10.2013 that it does not refer to any fraud, collusion, wilful mis-statement or suppression of facts at the behest of the petitioner to invoke the larger period of limitation of five years. For this reason the provisions of Section 73(1) would be attracted and the period beyond eighteen months would not be liable to be taken into consideration. Thus the period of demand from August-2008 to April-2012 being beyond eighteen months from issuance of the show cause notice dated 18/21.10.2013 is liable to be excluded.

10. For aforesaid reasons, we are satisfied that the petitioner has made out a case for grant of relief. Accordingly it is held that Instruction dated 11.05.2011 cannot be made applicable to the facts of the present case. Hence the show cause notice dated 18/21.10.2013 and the order dated 24.12.2014 passed on that basis are set aside. Consequentially the petitioner would be entitled to refund of the amounts of service tax as paid under protest pursuant to the show cause notice dated 18/21.10.2013 in accordance with law.

11. Rule is made absolute in aforesaid terms with no order as to costs.

(MRS.VRUSHALI V. JOSHI, J.)

(A. S. CHANDURKAR, J.)

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