M/L 84
15.05.2024
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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

WPA 11595 of 2024

Swadhin Bose
Versus
The Joint Commissioner of CGST, I/C,
Ballygunge Division Kolkata South CGST & CX
Commissionerate & Ors.

Mr. Avra Mazumder
Mr. Suman Bhowmik
Ms. Alisha Das
Ms. Elina Dey
Mr. Samrat Das
… For the petitioner.

Mr. Bhaskar Prasad Banerjee
Mr. Abhradip Maity
… For the State

1. The present writ petition has been filed, inter alia, challenging the order dated 23rd February, 2023 passed by the Joint Commissioner, Howrah, under Section 73 of the Finance Act, 1994 (hereinafter referred to as the "said Act").

2. It is the petitioner's case that the petitioner is an individual carrying his business under the name and style of M/s Union Publicity Bureau and is registered under the said Act. The petitioner has duly been allotted a serviced tax registration number. The petitioner works as an advertisement agent for which the petitioner is entitled to commission @ 15% of the total contract value.

3. According to the petitioner, the levy of service tax on services rendered by advertising agencies had come within the purview of Service Tax Act, from 1st November, 1996 in terms of the notification dated 21st October, 1996. According to the petitioner, the said notification only obliges the petitioner to make payment of service tax on the commission receivable. Despite the fact that the petitioner has been complying with the provisions of the said Act, the petitioner was served with a show cause-cum-demand notice by invoking the extended period under proviso to Section 73(1) of the said Act on 31st December, 2020, for the financial years 2014-15, 2015-16 and 2016-17. The petitioner had duly responded to the said show cause notice by a response dated 12th February, 2021. The said show cause issued under Section 73(1) of the said Act, ultimately culminated in the order in original dated 23rd February, 2023.

4. Mr. Mazumder, learned advocate representing the petitioner by drawing attention of this Court to the Instruction F. No.341/43/96-TRU at page 50 of the writ petition submits that by reasons of the aforesaid internal instructions the authorities could not have made the petitioner liable to make payment of service tax on the entire value of the contract and the same ought to have been limited to the extent of commission receivable by the petitioner. It is submitted that though the show cause was

issued by the Joint Commissioner, Ballygunge Division and the petitioner had duly responded to the said authority, the hearing was conducted by a separate authority, being the Joint Commissioner, Howrah, the respondent no.2 herein. According to the petitioner, the aforesaid has the effect of vitiating the order.

5. By drawing attention of this Court to paragraph 3 of the said order, it is submitted that despite the fact that the petitioner had responded to the show cause, the adjudicating authority by treating the petitioner not to have responded to the show cause had passed the aforesaid order. The aforesaid also has the effect of vitiating the order. On the aforesaid grounds the adjudication order should be set aside and the matter should be remanded back to the adjudicating authority for adjudication afresh.

6. Mr. Banerjee, learned advocate representing the respondents on the other hand submits that the petitioner was offered personal hearing on three several occasions by the adjudicating authority, as would appear from paragraph 4 of the said order. Unfortunately, the petitioner did not avail any such opportunities. While on the first occasion, he did not turn up, on the subsequent two occasions he had sought for adjournment. Mr. Banerjee, submits that the legality and validity of the

order passed by the adjudicating authority under Section 73 of the said Act cannot be called in question in an application under Article 226 of the Constitution of India. Admittedly, there is an appellate forum. The petitioner without availing the statutory remedy in the form of an appeal has approached this Court. As such this Court ought not to entertain the present writ petition. In any event, he submits that the above writ petition has been filed beyond the statutory period of limitation and on such ground as well, the instant writ petition ought not to be entertained.

7. Heard the learned advocates appearing for the respective parties and considered the materials on record. I find that the petitioner by way of this writ petition questions an adjudication order. The grounds of challenge to such order are; that the petitioner's representation has not been considered; the petitioner is not liable to make payment of service tax on the entirety of the contracted value; the adjudicating authority by glossing over the notifications which exempts the petitioner from making payment of service tax save to the extent of the commission receivable, has purported to pass the aforesaid order; and that the authority who issued the show cause notice and received the response did not adjudicate upon the show cause notice.

8. On the issue of decision being rendered by an authority other than the authority who issued the show cause notice, Mr. Banerjee has drawn the attention of this Court to paragraph 5 of the aforesaid order which clearly indicates that although, the case was within the jurisdiction of Kolkata South CGST & CX Commissioner, the Chief Commissioner of Central Tax and Central Excise, Kolkata Zone, in exercise of power conferred upon him by Rule 3 of the Service Tax Rules, 1994 read with Notification No.14/2017-CE(NT) had assigned the case to the present adjudicating authority who had ultimately passed the said order.

9. Having regard to the above, I do not find any illegality or irregularity on the part of the adjudicating authority in deciding the show cause issued under Section 73 of the said Act.

10. On the issue of non-consideration of the reply, I find that it is true that it has been recorded in the order impugned that the noticee did not submit any reply, however, at the same time, I also notice that despite being afforded with the repeated opportunities to appear before the adjudicating authority, the petitioner chose not to appear and as such the recording that the reply of the petitioner was not on record, does not call for interference by attracting the jurisdiction of this Court under Article

226 of the Constitution of India.

11. The petitioner may have reasons for not being able to appear before the adjudicating authority, however, such reasons cannot form the subject matter of enquiry in a writ application.

12. Insofar as the non-consideration of instruction at page 50 of the writ application is concerned, though the adjudicating authority may be bound by the instructions issued by Ministry of Finance, I find that there appears to be some discussions in paragraph 5.3.2 of the said order.

13. As regards the finding on grant or non-grant of exemption to the petitioner, such a finding may not be to the liking of the petitioner or of this Court, however, the correctness of such a finding in my view cannot be questioned under Article 226 of the Constitution of India.

14. In any event, the petitioner otherwise has a statutory remedy in the form of an appeal. The Finance Act has inbuilt adequate mechanism for redressal of grievance of the petitioner, *inter alia*, including the appellate forum.

15. Having regard thereto, I am of the view that the petitioner ought not to question the legality and validity of the adjudication order passed under Section 73 of the said Act before this Court in exercise of its extraordinary

jurisdiction. The same also cannot in the given facts form subject matter of enquiry in a petition under Article 226 of the Constitution of India.

16. This apart, if the petitioner has chosen not to prefer any appeal, and by passage of time if the appeal has become time barred, the same cannot be a ground for entertaining this petition.

17. The writ petition fails and is accordingly dismissed.

Urgent Photostat certified copy of this order, if applied for be made available to the parties upon compliance of requisite formalities.

(Raja Basu Chowdhury, J.)