IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

909 WRIT PETITION NO. 6201 OF 2024

MS B.T. GHUGE CIVIL ENGINEER AND CONTRACTOR THROUGH HIS WIFE SWARNA BABASAHEB GHUGE
VERSUS
THE UNION OF INDIA THROUGH THE SECRETARY AND OTHERS

Mr.Alok Sharma, Advocate for the Petitioner.
Mr.D.S.Ladda, Advocate for Respondent Nos. 1 to 4.

(CORAM : RAVINDRA V. GHUGE AND Y.G.KHOBRAGADE, JJ.)

DATE : JULY 4, 2024

PER COURT :

1. The Petitioner has put forth prayer Clauses (A), (B) and©, as under :-

(A) This Writ Petition may kindly be allowed by holding that, the notification no.25/2012 is squarely applicable and the petitioner is not liable to pay the service tax for the services provided to the Government Authority.

(B) That the Hon'ble Court may set aside the order passed by the Additional Commissioner of Central Excise of OIO No.97/ST/TPI/ADC/2023-24 dtd.28.08.2023 and remand the matter back to the Additional Commissioner to decide the issue

afresh by according an opportunity of personal hearing.

(C) That the Hon'ble Court may direct the respondent no.3 to decide the application seeking rectification of mistake by considering the submissions along with the annexure afresh.

2. We have extensively heard the learned Advocates for the respective sides.

3. The Petitioner widow, sole proprietary firm claims exemption on the basis of Service Tax Mega Exemption Notification No.25/2012, dated 20th June, 2012 issued by the Ministry of Finance, Government of India. More particularly, reliance is placed on Clause 12, which reads as under :-

"12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of --

[a] civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession ;

[b] a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains act, 1958 (24 of 1958);

[c] a structure meant predominantly for use as (I) an educational, (ii) a clinical, or (iii) an art of cultural establishment ;

[d] canal, dam or other irrigation works ;

[e] pipeline, conduit or plant for (I) water supply (ii) water treatment, or (iii) sewerage treatment or disposal ; or

[f] a residential complex predominantly meant for self-use or the use of their employees or other persons specific in the Explanation 1 to clause 44 of section 65B of the said Act;"

4. The Petitioner has challenged the order passed by the Additional Commissioner of Central Excise dated 28.08.2023, on the ground that the concerned authority has recorded in paragraph Nos. 21, 22, 23 and paragraph 34 (operative part of the order), as under :-

"21. The issue before me to decide is whether the services provided by the noticee were exempted from Service Tax or to demand Service Tax of Rs.86,38,193/- (Including Education Cess, Secondary & Higher Education Cess, Krishi Kalyan Cess and Swatch Bharat Cess) for the FY 2015-16 & 2016-17 along with penalty under Section 70, Section 77,

Section 78 and Interest under Section 75 of the Finance Act, 1994.

22. Ongoing through the reply to SCN dated 17.03.2023, I find that the noticee submitted that their total turnover is to the Government of Maharashtra which is Exempted as per Notification 25/2012 dt. 20.06.2012 vide Sr No.12 A. and further they requested to drop the impugned SCN. However, I find that the noticee falled to submit any documents in support of claiming exemption under Notification 25/2012 dt. 20.06.2012 vide Sr No.12 A. It is settled legal position that to claim any sort of exemption, the onus is on the claimant only to prove and satisfy that they are rightly entitled to claim exemption.

23. Hon'ble Courts in several decisions have held that to avail tax exemption under a Notification, burden to proof for its entitlement is on the assessee claiming exemption. The reliance is placed on the decision of Hon'ble Supreme Court's Constitutional Bench in the case of Commr. of Customs (Imp), Mumbal V/s. Dilip Kumar and Company reported in 2018 (361) ELT 577 (SC). The relevant para 52 is reproduced below :

"To sum up, we answer the reference holding as under -

1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption.

2) When there is ambiguity in exemption notification which is subject to strict Interpretation, the benefit of such ambiguity cannot be claimed by the subject/ assessee and it must be interpreted in favour of the *revenue.*

3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export Case (supra) stands over-ruled."

34. Accordingly, I decided the case and pass the following order :-

ORDER

i. I confirm the Service Tax demand of Rs.86,38,193/- (Rupees Eighty Six Lakhs Thirty Eight Thousand One Hundred Ninety Three only) (Including Cess) under erstwhile Section 73(1) of Finance Act 1994 read with Rule 6 of Service Tax Rule 1994 read with Section 174 of CGST Act, for non-payment of Service Tax on taxable Service provided / received for the period 2015-16 & 2016-17.

ii. I order recovery of Interest on the Service Tax amount of Rs.86,38,193/- at appropriate rate under erstwhile Section 75 of the Finance Act 1994 read with Section 174 of CGST Act, 2017.

iii. I impose Penalty of Rs.86,38,193/- up on the noticee under Sections 78 of the Finance Act, 1994 read with Section 174 of the CGST Act, 2017. However, benefit of reduced penalty @25% of the service tax is available with noticee if service tax, interest and reduced penalty is also paid within a period of thirty days of the date of receipt of the order of Central Excise Officer determining the amount of service tax under sub-section (2) of Section 73 of the Finance Act, 1994 in terms of second proviso of Section 78(1) of Finance Act, 1994 read with Section 174 of the CGST Act, 2017.

iv. I impose penalty of Rs. 80,000/- (Rupees Eighty Thousand only) under erstwhile Section 77(2) of the Finance Act, 1994 read with Section 174 of CGST Act, 2017, late fee under section of 70 of the Finance Act 1994 read with Rule 7C of Service Tax Rules 1994, on the assessee for non-filing of ST-3 returns.

V. I impose penalty of Rs.10,000/- (Rupees Ten Thousand only) under erstwhile Section 77 (1)(a) of the Finance Act, 1994 for failure to take registration under Section 69 of the Act read with Rule 4 of the Rules, 1994;"

5. The grievance of the Petitioner has it's origin, in some what tragic circumstances. The Petitioner firm was a sole proprietary firm. The sole proprietor, the Petitioner's husband, committed suicide on 18.10.2022. His widow (present Petitioner), was not connected with the said proprietary firm. A show cause-cum-demand notice dated 24.04.2021 was issued under section 174(2) of the Central Goods and Service Tax Act, 2017. Since the Proprietor had committed suicide, his wife has tendered a reply on 17.03.2023 setting out therein that the entire work assignment which the proprietary firm had acquired, was with the State Departments/State instrumentality. Hence, an exemption was sought under Clause 12 of the above referred notification, dated 20th June, 2012.

6. This contention was met with an order under Paragraph Nos. 21, 22 and 23 reproduced above. The authority has recorded in paragraph 20 that except the copy of the show cause notice and the reply dated 27.03.2023, no other record or documents have been placed on record. It is in this circumstance that the concerned authority concluded that it is the noticee who has to prove exemption and unless such exemption is proved, there can be no exemption in favour of the noticee. Based on such a conclusion, the operative order was passed below Paragraph No. 34, which is reproduced above.

7. The appeal is preferred by the Petitioner firm through the widow under section 85 of the Finance Act, 1994. The said appeal is still pending and the same is not yet decided.

8. The learned Advocate for the Petitioner submits that in similar circumstances, in a matter pertaining to the CGST and Central Excise, this Court (Coram : K.R.Shriram and Jitendra Jain, JJ.) has passed an order dated 24.06.2024, in **WP No.2876/2021 and 2891/2021 (Sanjeev Suresh Desai Vs. Union of India and Others)**. On perusal of the said order, we find that the Petitioner had preferred an

appeal and the Appellate Authority had rejected the appeal on the ground that the Appeal ought to have been filed within the limitation prescribed. The Appeal was filed belatedly and there was no provision under the Law to condone the delay.

9. In the present case as well, the learned Advocate for the GST Department submits that under the provisions of the GST Act, there is no provision for condonation of delay in a belatedly filed appeal and the pending appeal of the Petitioner is bound to be rejected. He submits that the Appellate Authority, in the absence of any provision, cannot and will not condone the delay and simply dismiss the Appeal of the petitioner.

10. The learned Advocate for the Petitioner, therefore, submits that this Petition challenging the first order of the Respondent No.3 Authority, may be dealt with on the presumption that the Appeal is as good as rejected. He submits that this Court may observe in this order that the Appeal is disposed off and the challenge to the first order passed by Respondent No.3, may be entertained.

11. In Sanjeev Desai (supra), this Court has recorded in paragraph No.11 that the concerned Appellate Authority cannot be blamed since it did not have the power to condone the delay. It was also recorded in paragraph No.5, that the Court was inclined to exercise it's jurisdiction under Article 226 of the Constitution of India particularly in view of Article 300A of the Constitution of India. We deem it appropriate to adopt the same course.

12. We record the statement of the Petitioner that the pending appeal be declared as disposed off as the delay cannot be condoned. The Appellate Authority shall, therefore, dispose off the said Appeal as rejected.

13. We find that the Petitioner's case stands on a better footing in comparison to the facts emerging in Sanjeev Desai (supra). The Petitioner was totally unconnected with the proprietary firm, which was operated by her husband. After he committed suicide, the Petitioner was in complete disarray and in a state of shock. The circumstances in which her husband passed away, created mental agony and she was not able to maintain her sanity for quite some time. After

she noticed certain documents, which were received in the name of her deceased husband, since the Department was also oblivious of the demise of the Proprietor, that she submitted a reply to the notice. This led to the passing of the impugned order. On legal advise, she preferred an Appeal.

14. On the merits of the impugned order dated 28.08.2023, passed by Respondent No.3, as recorded below paragraph Nos. 3 and 4 hereinabove, it is obvious that Respondent No.3 dismissed the claim of the deceased on the sole ground that adequate documents were not placed on record to indicate that the said Proprietory firm was eligible for an exemption under Clause 12 of the Notification dated 20.06.2012, reproduced above. It is also recorded in the impugned order that had the Noticee produced the documents in support of the claim for exemption, the matter could have been looked at from that point of view. It was also recorded that the onus of placing such documents on record, lay on the claimant. It was finally recorded that as the relevant documents were not before the said Authority, the claim was rejected.

15. The learned Advocate for the Department submits on the

basis of the documents placed before the Court and in the light of Clause 12 of the Notification dated 20.06.2012, that it would be the noticee who will have to canvass these points before Respondent No.3 to convince the Authority that the Petitioner has an arguable case. This is a matter, which can be looked into by the concerned Authority. He submits that this court may not exercise jurisdiction for deciding the said issue since the concerned Authority has rejected the claim of the Petitioner only on the ground that the documents were not placed before the concerned Authority. He prays, in the alternative, that if this Court is inclined to entertain this Petition and set aside the impugned order, all contentions of the parties be left open to be considered by the Competent Authority.

16. In view of the above and in the light of the view taken by this Court in Sanjeev Desai (supra), this Petition, in the peculiar facts and circumstances of the case, is partly allowed with the following directions :-

[a] The pending appeal, belatedly filed by the Petitioner on 30.05.2024, shall stand disposed off from the file of the Appellate Court.

[b] The impugned order is quashed and set aside by granting liberty to the Petitioner to place all such documents before Respondent No.3, as the Petitioner may desire, on or before 31.07.2024.

[c] The hearing in the matter shall be listed on 12.08.2024, at 11.00 a.m. If required, the Petitioner is at liberty to take legal assistance for addressing Respondent No.3.

[d] Let Respondent No.3 pass a reasoned order on the merits of the case, on or before 31.08.2024.

[e] It is made clear that we have not expressed any view on the merits or the Petitioner's contention thereon and it is only in the peculiar facts and circumstances of this case, relying on the view taken in Sanjeev Desai (supra), that the impugned order has been set aside.

[f] All the contentions of the litigating parties are kept open, to be considered by Respondent No.3 / Authority.

(Y.G.KHOBRAGADE, J.) **(RAVINDRA V. GHUGE, J.)**