IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.09.2024

CORAM

THE HONOURABLE MR.JUSTICE **C.SARAVANAN**

W.P.No.9562 of 2022
and W.M.P.No.9293 of 2022

1.V.S.Ekambaram
2.V.E.Gayathri ... Petitioners

vs.

The Assistant Commissioner of GST and
Central Excise,
Office of the Assistant Commissioner of GST and
Central Excise,
Maraimalai Nagar Division,
Plot No.40, Ranga Colony, Rajakilkpakkam,
Chennai 60 073. .. Respondent

Prayer : Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records in proceedings C.No.V/18/106/2020-ST RF in Order in Original No.8/2022 dated 24.02.2022, passed by the respondent and to quash the same.

For Petitioners : Mr.Joseph Prabkar

For Respondent : Mr.T.Ramesh Kutty
Senior Standing Counsel
Assisted by Mr.B.Sivaraman
Junior Panel Counsel

O R D E R

The petitioners are before this Court against the impugned Order in Original No.8/2022 dated 24.02.2022. By the impugned order, the proposals in the Show Cause notice, which preceded the impugned order has been confirmed. Operative portion of the impugned order reads as under:-

> "*5.6. The lessors have submitted that two of their tenants M/s.Sundaram BNP Paribas and M/s.Source HOV did not pay them service tax and hence the rent received from them should be considered as cum tax value and the service tax dues should be worked out accordingly. In this connection it is seen that the Show Cause Notice does not allege that the lessors have charged and collected service tax and did not discharge the same. Further, from the email received by the lessor from M/s.Source HOV it is evident that they have refused to pay service tax on rent for the past period (copy of correspondence produced by the lessors). In r/o. M/s.Sundaram BNP Paribas Ltd they have vide letter dated 10.02.2022 declared that they have not paid the service tax for the period June 2010 to December 2013. As per Section 67(2) of the Finance Act, 1994.*
>
> *'(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such*

amount as, with the addition of tax payable, is equal to the gross amount charged'.

In judgments by various Courts it has been held that where the assessee has not collected service tax from their customers then amount collected need to be taken as cum-tax value and correspondingly the service is required to be recomputed.

Hence, I accept this contention of the assessee that the rent collected is to considered as cum tax value in r/o rent received from M/s.Source HOV and M/s.Sundaram BNP Paribas."

2. The dispute had arisen on account of levy of service tax on renting of immovable property. The petitioners failed to discharge the service tax liability after collecting the same from the lessee as is evident from the operative portion of the impugned order which stands extracted above. By the impugned order penalty has been imposed under Section 77 of the Act, for a sum of Rs.10,000/- on each of the petitioners and 100% penalty under Section 78 of the Finance Act, 1994. It appears that the petitioners had also earlier challenged the Show Cause Notice in W.P.No.26356 of 2014. The writ court had dismissed the same vide order dated 10.2.2021.

3. Aggrieved by the same, the petitioners had filed W.A.No.1837 of 2021. By an order dated 20.10.2021, the said writ appeal was dismissed holding that the Court was not inclined to interfere with the order of the learned Single Judge of this Court dated 10.02.2021, pursuant to which the impugned order was passed.

4. The learned counsel for the respondent would submit that the writ petition is devoid of merits as the petitioners have an alternate remedy.

5. The learned counsel for the respondent further states that the petitioners delayed adjudication of the Show Cause Notice by filing a writ petition before this Court in W.P.No.26356 of 2014, which was eventually dismissed by this Court on 10.02.2021 .

6. It is submitted that even though the respective petitioners had deposited the disputed tax there is no embargo on the department to levy penalty under Section 78 of the Finance Act, 1994.

7. The only dispute that arises for consideration is whether the petitioners can be subjected to penalty under Section 78 of the Finance Act, 1994?

8. As there have been multiple challenges to the levy of service tax on renting out of immovable property before various High Courts. High Courts have dismissed the writ petitions filed challenging the provisions of the Finance Act, 1994 seeking to levy service tax on renting of immovable property.

9. The issue is now pending before the Hon'ble Supreme Court. The Hon'ble Supreme Court has granted interim stay of all recovery proceedings subjected the lessees depositing 50% of the tax.

10. Heard the learned counsel for the petitioners and the learned Senior Counsel for the respondent.

11. This Court is inclined to confirm the payment of service tax and appropriation of the same vide impugned order. Since the vires of

levy of service tax on renting of immovable property is still pending before the Hon'ble Supreme Court and temporary relief has been granted to various lessee subject to deposit 50% of the service tax due demand, the Court is inclined to set aside the impugned order in so far as imposition of penalty under Sections 77 and 78 of the Finance Act, 1994 and remits the case back to the respondent to await for the orders of the Hon'ble Supreme Court and pass orders on merits in so far as penalty and adjudicate the same in terms of Section 78 of the Finance Act, 1994.

12. This writ petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

13.09.2024

Index : Yes/ No
Internet : Yes/No
Neutral Citation : Yes/No
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C.SARAVANAN, J.

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To

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