BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **16.07.2024**

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.(MD) No.1840 of 2020
and
W.M.P.(MD)No.1555 of 2020

M/s.Diamond Shipping Agency Private Limited,
Represented by its Joint Managing Director P.Sivakumar. ... Petitioner

Vs.

1.The Commissioner of GST & Central Excise,
Central Revenue Buildings,
Bibikulam, Madurai – 625 002.

2.The Union of India,
Represented by the Secretary to Government of India,
Ministry of Finance,
Department of Revenue,
North Block, New Delhi. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari to call for the records pertaining to order in original No.05/2019 dated 18.09.2019 passed by the first respondent herein and quash the same holding the same to have been passed without jurisdiction, contrary to law and violative of the principles of law.

For petitioner : Mr.N.Viswanathan

For respondent : Mr.N.Dilip Kumar
Senior Standing Counsel

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ORDER

The petitioner is before this Court against the impugned Order-in-Original No.MDU-ST-COM-05-2019 dated 18.09.2019.

2. By the impugned order, the first respondent has confirmed the demand proposed in show cause notice bearing reference in SCN Sl.No.01/2019 ST-COMMR-TVL dated 03.01.2019. The operative portion of the impugned order reads as under:

ORDER

(i) I confirm the demand of Rs.3,84,46,496/- (Rupees three crore eighty four lakh forty six thousand four hundred and ninety six only) being non/short payment of service tax by M/s Diamond Shipping Agencies Pvt. Ltd., Tuticorin during the period from 2012-13 to 2014-15 under section 73 (2) of Finance Act, 1994.

(ii) I order appropriation of an amount of Rs.7,80,465/- (Rupees seven lakh eighty thousand four hundred and sixty five only) already paid by M/s Diamond Shipping Agencies Pvt. Ltd. Tuticorin against the demand in (i)

(iii) I demand interest at the appropriate rates M/s. Diamond Shipping Agencies Pvt. Ltd., Tuticorin under Section 75 of the Act read with Rule 14 of CCR 2004 for the service tax demanded at Sl.No. (i)

(iv) I order appropriation of interest of Rs. 3,31,669/- (Rupees three lakh thirty one thousand six hundred and sixty nine only) already paid by M/s. Diamond Shipping Agencies Pvt. Ltd. Tuticorin against the demand in (iii) of this order.

(v) I impose Penalty of Rs.10,000/- (Rupees Ten thousand only) on M/s. Diamond Shipping Agencies Pvt. Ltd., Tuticorin under Section 77 (2) of the Finance Act, 1994 read with Rule 15 of CCR 2004 for their failure to assess themselves and discharge their service tax liability and failed to furnish the relevant details in the ST-3 returns filed by them;

(vi) I impose Penalty of Rs. 3,84,46,496/- (Rupees three crore eighty four lakh forty six thousand four hundred and ninety six only) on M/s. Diamond Shipping Agencies Pvt. Ltd.,Tuticorin under Section 78 read with Rule 15 of CCR 2004 of the Finance Act, 1994 for suppressing the fact of providing the said services and not discharging the service tax liability, with intent to evade payment of service tax.

(vi) As penalty under Section 78 has been upheld I find that there is no necessity to impose penalty under Section 76 of the Finance Act, 1994 and so I drop the propose for imposing penalty under Section 76 of the Finance Act, 1994.

(vii) M/s. Diamond Shipping Agencies Pvt. Ltd., Tuticorin are informed that as per proviso (ii) to Section 78 of the Finance Act, 1994, the penalty gets reduced to 25% of the service tax confirmed, if the service tax confirmed as in Sl.No.(i) and the interest confirmed as in Sl.No.(iii) above, are paid within 30 days from the date of communication of this order, provided the reduced penalty is also paid within such period.

3. The demand pertains to the following issues:

Sl. No	Description	Appears liable					
		Service Tax	ECess	SHE Cess	SB Cess	KK Cess	Total Amount
1	Non payment of service tax on membership fee paid to abroad	51563	308	154	1263	644	53962
2	Non payment of service tax on Ocean freight for import of goods	21075705	0	0	784647	784647	23645300
3	Non payment of service tax on manpower recruitment / security service	1478272	7394	3952	38661	15021	1547630
4	Non payment of amount on Cenvat credit under Rule 6 (3)	12266131	0	0	0	0	12266131
5	Wrong availment of cenvat credit on servicing of motor vehicles	70823	20	10	2494	1901	75151
6	Wrong availment of cenvat credit on civil construction	1480311	5314	2607	23517	22230	1534179
7	Non-payment of service tax for insurance claim	169123	0	0	5004	0	174127
8	Short payment of service tax on reconciliation of ST3 and P&L Accounts	11014	0	0	394	243	11651
	Grand Total	37521645	13646	6823	857230	828785	39228430

4. The learned Senior Standing Counsel for the respondents, submits that this Writ Petition is devoid of merits as the petitioner has an alternative remedy. It is submitted that even if the law has been settled and nothing precluded, the petitioner for working out the remedy before the Appellate Forum.

5. That apart, it is submitted that there is no scope of interference and Article 226 of the Constitution of India as Court is concerned only the decision making process and not to the decision made in the impugned order. Hence, prays for dismissal of this Writ Petition.

6. It is noticed that as far as the demand Nos.1 and 2 are concerned, the issues have now been answered in favour of the petitioner by the Hon'ble Supreme Court in the case of ***State of West Bengal vs. Culcutta Club Limited reported in 2019 (29) GSTL 545 (SC)*** and in terms of the decision of the Hon'ble Division Bench of this Court in the case of ***M/s.KTV Health Food Private Limited vs. Union of India rendered in W.P.Nos.10330 of 2020 and batch, dated 29.09.2022.*** Therefore, *prima facie,* the demand at serial Nos. 1 and 2 are not sustainable.

7. As far as the demand No.3 is concerned, it is noticed that the demand has been made on the service provided by the man power recruitment/security agencies.

8. The learned counsel for the petitioner submits that there is no proper discussion in the impugned order. According to the petitioner, to the extent that the service was provided by the Company, the service tax had been paid by the service provider and in so far as the service received from the proprietary-cum-partnership concern, the petitioner has paid the same on the reverse charges in terms of the Notification No.30/2012-ST dated 20.06.2012.

9. The petitioner appears to have a reasonable case. Therefore, this aspect would require re-verification.

10. Similarly, the demand No.4 regarding the non payment of amount on account of the common inputs under Section 6(3) of Cenvat Credit Rules, 2004 is concerned, it is noticed that the petitioner has availed Input Tax Credit of Rs.18,41,719/- for rendering service which are liable to be taxable and exempted. It appears that the petitioner has not maintained separate account as is contemplated under Rule 6(3) of the Cenvat Credit Rules, 2004. However, there is a concession that is available to the petitioner in terms of Rule 6(3AA) of the Cenvat Credit Rules, 2004. The first respondent has denied the same on the ground that the petitioner has not followed the procedure. This aspect can be re-

examined as the impugned order does not give a clear reasoning. If the denial of the benefit of Rule 6(3AA) of the Cenvat Credit Rules, 2004 are purely on account of procedural irregularity, same can be condoned.

11. As far as the demand Nos.5 and 8 is concerned, the petitioner is not contesting the dispute and has paid the claim amount. However, there is no clear indication as to whether the amount paid by the petitioner has been appropriated in the impugned order. This also needs a verification.

12. As far as the demand No.6 is concerned, the Court is of the view that the matter can be remitted back for re-verification for passing fresh orders.

13. As far as the demand No.7 regarding the non-payment of service tax for the insurance claim is concerned, it appears that the petitioner had engaged the service of Surveyor for surveying the damaged goods, which were lost during the flood in 2015. The petitioner has, thereafter, received insurance claim from the insurance company.

14. *Prima facie*, the petitioner cannot be said to have been provided service for processing. It is a compensation paid by the insurance company for the loss suffered by the petitioner due to flood during November 2015. The conclusion in the impugned order therefore appears to be flawed and therefore, this aspect also would require re-examination.

15. That apart, it is noticed that the impugned order also appropriated and a sum of Rs.7,80,465/-, which was paid by the petitioner over the demand No.1, which issue now stands covered in favour of the petitioner. There are several appropriations made in the impugned order. Since the demand as far as the payment of service tax on club membership fee and the Ocean freight charges for import of goods are not sustainable. The appropriation made by the first respondent also require refund or adjustment towards other tax liabilities after verification.

16. Heard learned counsel for the petitioner and learned Senior Standing Counsel for the respondents.

17. Considering the fact that the petitioner may have a case on merits, the Court is of the view that the impugned order is set aside and the matter is remitted back to the first respondent. The first respondent shall also examine in the light of the development whether any case was made out against the petitioner for invoking extended period of limitation.

This Writ Petition is disposed of, with above directions. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No
Internet : Yes / No
apd

<u>C.SARAVANAN, J.</u>

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