

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.03.2013

C O R A M

THE HONOURABLE MR.JUSTICE V.DHANAPALAN

Writ Petition No. 32176 of 2012
and
M.P. Nos. 1 and 2 of 2012

The Commissioner
Salem Municipal Corporation
Salem. .. Petitioner

Vs.

The Commissioner of Central Excise
O/o. Commissioner of Central Excise
No.1, Foulks Compound
Anai Road, Salem 636 001. .. Respondent

Writ Petition filed under Article 226 of the Constitution of India, praying for issuance of a Writ of Certiorari to call for the records of the respondent relating to the order dated 21.8.2012 bearing No. C.No. V/RIP/15/18/2011-ST-ADJ/Order Sl.No.03/2012(ST) and quash the same.

For Petitioner : Mr.P.H.Arvind Pandian,
Addl. Advocate General
for Ms.V.M.Velumani

For Respondent : Mr.N.Senthilkumar, CGSC.

O R D E R

The Order-in-Original passed by the Commissioner of Central Excise in C.No.No.V/RIP/15/18/2011-ST.ADJ/Order Sl. No. 03/2012 (ST), dated 21.8.2012 has been called in question in this writ petition, seeking to quash the same.

2. The petitioner-Salem Municipal Corporation is a statutory body and owns number of properties both movable and immovable, vacant land, markets, chandais, etc. and it has leased or given on licence the properties on monthly or annual basis for one year or for three years by tender-cum-public auction and the same will be renewed as per the

prevailing Government Orders and the lease amount or licence fee would be paid to the Corporation. While so, Service Tax was introduced on renting of immovable property service with effect from 01.6.2007 by the amendment of Finance Act, 1994 by Finance Act, 2007. Further by the amendment in the year 2010, certain other immovable properties were also included for payment of service tax with effect from 01.06.2007. The respondent informed the petitioner by his letters dated 01.6.2010 and 18.6.2010 that renting of immovable property service had become a taxable service with effect from 01.6.2007 and service tax has to be paid at the appropriate rate on the gross amount received for rendering such service. On such intimation, the petitioner took earnest efforts to collect service tax from the lessees/licencees. Since the new tax was extended to the service with retrospective effect and three years had lapsed from 01.06.2007, the petitioner found it very difficult to collect the service tax from the lessees/licencees. However, the petitioner collected the service tax for both the earlier period and for the current period and paid it to the respondent a total amount of Rs. 48,34,431/- as detailed below:

08.02.2012	:	Rs.10,31,796.00
11.09.2012	:	Rs. 9,80,442.00
31.10.2012	:	Rs. 5,82,823.00
05.11.2012	:	Rs.22,39,370.00

3. According to the petitioner, the respondent has wrongly interpreted Section 11(A)(1) of the Central Excise Act and Section 73(1) of the Finance Act in invoking the extended period for demanding tax and also wrongly concluded that by not registering and paying service tax in time, the petitioner has an intention to evade the payment of tax, which is baseless, erroneous and arbitrary. Moreover, the respondent erred in imposing the penalty of Rs. 5,000/- for failure to apply for Registration within the prescribed time limit and imposing a further penalty of Rs. 1,06,05,791/- for delayed payment. According to the petitioner, as per the amount payable by the lessees and licencees the service tax payable by the petitioner is only Rs.48,34,321/- and the respondent did not have any material to demand service tax of Rs. 1,06,05,791/- and to impose a penalty equal to the said amount. Based on the income mentioned in the trial balance sheet as the income from the immovable properties rented out to various third parties, the respondent passed the impugned order. The income mentioned in the trial balance sheet include property tax and income from some of the immovable properties like toilet, etc., which are excluded from the purview of service tax on rent from immovable properties and therefore, the calculation made by the respondent is erroneous. According to the petitioner, the statutory appeal is not an effective remedy, as the impugned order is passed without jurisdiction and discloses non application of mind. Therefore, they have prayed for quashing the impugned order.

4. The respondent has filed counter-affidavit stating that the petitioner is a statutory body and a Government entity. As per Chapter V of the Finance Act, 1994 r/w Rule 4, 6 and 7 of Service Tax Rules, 1994, the petitioner had to register themselves with the Department by due date; failed to pay service tax due from them for the taxable services rendered under the category of "Renting of Immovable Property Service" during the period from 1st June 2007 to 31st March 2011 and failed to file mandatory half yearly returns in the Form of ST-3. An amount of Rs. 79,33,135/- and Rs. 26,72,656/- being the service tax on the service rendered by them during the period from June 2007 to March 2010 and from April 2010 to March 2011 respectively, is recoverable from them under Section 73(1) of the Finance Act, 1994 along with appropriate interest under Section 75 of the Act. Accordingly, the Superintendent of Central Excise vide his letters dated 01.6.2010 and 18.6.2010 had intimated the petitioner stating that 'renting of immovable property service' had become a taxable service with effect from 01.06.2007 and that the service tax had to be paid at the appropriate rate on the gross amount received for rendering such service. The respondent had also issued instructions to the concerned Assistant Commissioners to get the service providers registered for the services rendered under the impugned service and also to collect service tax from them. The details furnished by the petitioner had indicated that it had received huge amounts towards rent from the tenants, but not proof was furnished for the amounts so received.

5. It is further stated that as per Section 65(90a) of the Finance Act, 'renting of immovable property service' includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce, but does not include renting of immovable property by a religious body or to a religious body or renting of immovable property to an educational body, imparting skill or knowledge etc. According to the respondent, the petitioner have received a sum of Rs. 2,39,13,118/-, Rs.2,00,67,415/- and Rs. 2,42,44,087/- as rent from the tenants during the years 2007-08, 2008-09 and 2009-10 respectively and therefore, service tax payable works out to Rs.79,33,135/- for the period from 01.6.2007 to 31.3.2010. Accordingly, they have issued a show cause notice dated 18.4.2011 to the petitioner. Pursuant to the show cause notice, the petitioner has collected an amount of Rs. 2,59,48,122/- towards rent from April 2010 to March 2011 and Rs. 10,31,796/- towards service tax, but they have not credited the same into the Government account. Subsequently, the respondent issued another show cause notice dated 12.12.2011. It is also stated that during the personal hearing held on 09.02.2012, it was agreed that arrears of service tax will be cleared and promised to pay service tax regularly. It is further stated that the impugned order was passed based on the details furnished by the petitioner and the petitioner being a statutory body had failed to file statutory appeal under the Act before the Appellate authority within the limitation period and the petitioner has chosen to file the writ petition

only to overcome the filing of the appeal, which is not maintainable either in law or on facts.

6. Based on the above background pleadings, the learned counsel for the parties made their submissions. Mr. Arvind Pandiyan, learned Additional Advocate General assisted by Ms. V.M. Velumani, learned Special Government Pleader, would submit that the respondent demanded service tax without jurisdiction and without applying his mind and he has taken into account the income mentioned in the trial balance sheet as the income from the immovable properties rented out to various third parties, which includes property tax and income from some of the immovable properties, which are excluded from the purview of service tax on rent from immovable properties. He further submits that the respondent acted without jurisdiction and hence the statutory appeal has not been filed and therefore, the writ petition is maintainable.

7. Mr. N. Senthilkumar, learned Central Government Standing Counsel, would vehemently contend that in the impugned order-in-original in column no. 3, it is made clear that the appeal must be filed in the prescribed form within three months from the date on which the order sought to be appealed against is communicated to the party preferring appeal and the petitioner being a statutory authority should have filed an appeal before the appellate authority within the time prescribed, but, on the contrary the petitioner has filed the present writ petition invoking jurisdiction of this Court under Article 226 of the Constitution of India and therefore, the writ petition is not maintainable and the same is liable to be dismissed.

8. The circumspection of the facts would reveal that the petitioner-Salem Corporation is a statutory body and a Government entity. As per Chapter V of the Finance Act, 1994 r/w Rule 4, 6 and 7 of Service Tax Rules, 1994, the petitioner had to register themselves with the Department by due date; failed to pay service tax due from them for the taxable services rendered under the category of "Renting of Immovable Property Service" for the period in question. However, this claim has been adjudicated by the respondent as per the relevant provisions of the Act and the following order was passed:

(i) Proviso to Section 73(1) of the Finance Act, 1994 is rightly invoked to demand service tax during the period from June 2007 to March 2010 and from April 2010 to March 2011;

(ii) I confirm and demand an amount of Rs.79,33,135/- (Rupees seventy nine lakhs thirty three thousand one hundred and thirty five only) [Service Tax Rs. 77,02,073/-, Education Cess + Rs. 1,54,041/- and Second & Higher Education Cess + Rs.7,021/-] for the period from 01.6.2007 to 31.3.2010 and Rs.26,72,656/- (Rupees Twenty six lakhs seventy two thousand six hundred and fifty six only) [Service Tax +

Rs.25,94,812/- + Ed. Cess + Rs.51,896/- - SHE Cess + Rs.25,948/-] for the period from 01.04.2010 to 31.03.2011 from M/s.Salem Municipality, Suramangalam Ward, Salem, being the service tax for the services rendered under the category of "Renting of immovable property service" under Section 73(2) of the Finance Act, 1994;

(iii) I demand appropriate interest under Section 75 of the Finance Act, 1994 on the service tax amount demanded under Sl.No.(ii) above;

(iv) I order imposition of penalty of Rs. 5,000/- (Rupees five thousand only) under Section 77 of the Finance Act, 1994, for non filing of return and failure to apply for registration within the prescribed time limit;

(v) I impose a penalty of Rs. 1,06,05,791/- (Rupees one crore six lakh five thousand seven hundred and ninety one only) on M/s.Salem Corporation, Suramangalam Ward under Section 78 of the Finance Act, 1994. However, the amount of penalty liable to be paid shall be 25% of the service tax demanded in Sl. No. (ii) above, provided the service tax demanded and the interest payable thereon under Section 75 of the Finance Act, 1994, are paid within 30 days of communication of this Order. The benefit of reduced penalty shall be available only if the amount of reduced penalty is also paid within 30 days of communication of this Order;

(vi) I order collection of appropriate late fee for the delay in filing of ST3 return under Rule 7C of Service Tax Rules, 1994, at the time of filing the same."

Against the said order, there is an appeal remedy available to the petitioner. Learned counsel also pleaded that subsequent to the filing of the writ petition, the petitioner preferred an appeal on 28.12.2012 with a delay of 34 days before the appellate authority and the same is pending consideration. If the appeal is disposed of on merits, entire claim of the petitioner as put forth before this court would be redressed.

9. Law is well settled that in case of an order passed by an authority, who has no jurisdiction to pass such order, this Court can intervene and set right the things exercising the power conferred under Article 226. But, the case of the petitioner is that the respondent has wrongly calculated service tax based on the amount shown in the trial balance sheet and included the property tax and income from other sources, which are excluded from the purview of service tax and also imposed penalty equal to service tax and these are merits of matter, which can be looked into by the Appellate Authority and hence this writ petition is not maintainable in view of the effective alternate remedy available and the petitioner has also filed appeal. Accordingly, the writ petition is disposed of with a direction to the appellate authority to dispose of the appeal preferred by the petitioner on merits and both parties are at

liberty to raise all the points that are raised in the writ petition. No costs.
Consequently, M.P.Nos.1 and 2 of 2012 are closed.

ATR

To

The Commissioner of Central Excise
O/o. Commissioner of Central Excise
No. 1, Foulks Compound
Anai Road
Salem 636 001