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IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.324 OF 2021

M/s Vainguinim Valley Resort
Unit of Britto Amusements Pvt Ltd
having its registered office at
184/189, Machado's Cove,
Vainguinim Valley, Dona Paula,
Goa 403 004 through its Director
Dr. William Britto aged 85 years. ... Petitioner.

Versus

1. The Union of India
(Through the Secretary)
Ministry of Finance,
Department of Revenue
North Block
New Delhi 110 001

2. The Commissioner
of Central Goods & Service Tax,
GST Bhavan, EDC Complex,
Patto Plaza, Panaji, Goa-403 001 ... Respondents.

Correction carried out as per order dated 20.12.2022
sd/-

Mr Mahesh Raichandani
~~Mr Bharat Raichandani~~ **with Mr Vibhav Amonkar and Mr Rishabh Prasad, Advocates** *for the Petitioner.*

Ms Priyanka Kamat, Standing Counsel *for Respondent Nos. 1 and 2.*

CORAM: **M.S. SONAK, J &**
BHARAT P. DESHPANDE, J.

DATED: **13 December, 2022**

ORAL ORDER: ***(Per Bharat P. Deshpande, J.)***

The Petitioner who is engaged in the business of Restaurant, Accommodation, Internet Cafe, Cab Operations, Health Club and Fitness Centre, Beauty Parlor, Dry Cleaning and Outdoor Catering, etc. preferred present petition thereby challenging the impugned order passed by Respondent No.2 claiming therein that such order is cryptic and non-speaking, violative of principles of natural justice and beyond jurisdiction.

2. The prayers in the petition are as under:-

> "*a) In the premises this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate writ, direction or order to call for records of the Petitioners' case to go into the legality and propriety thereof and to quash and set aside the impugned Order dated 27.04.2021 bearing No.GOA-EXCUS-000-COMMR-002-2021-22;*
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> *b) In the premises this Hon'ble Court may be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other appropriate writ, direction or order to call for records of the Petitioners' case to go into the legality and propriety thereof and to quash the show cause notice dated 03.02.2016 bearing No. CX-ST/SCN/Adj./25/15-16/Commr;*
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> *c) this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction ordering and directing the Respondent No.2 by himself, his subordinates, servants and agents to not take any coercive action / to not implement the impugned order and stay the operation of the impugned order till disposal of the present petition;*
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> *d) for interim and ad-interim relief in terms of prayer (a) and (b) above;*

e) such other and further order or orders as may be deemed just and proper in the facts and circumstances of the present case; &

f) For costs of this petition.

3. Vide order dated 25 October 2021, a coordinate Bench of this Court passed the following order granting interim relief to the Petitioner:-

"*Learned Counsel for the respondents seeks time to file affidavit in reply.*

2. Learned Counsel for the petitioner prays for interim relief. He submits that the two show cause notices issued earlier in 2013 and 2014 were quashed by the competent authority. He submits that in 2013, the joint venture agreement dated 05.04.2002 which was the very basis of issuing the earlier two show cause notices was terminated with effect from 01.04.2013 by Deed of Cancellation. He submits that the present show cause cum demand notice dated 03.02.2016 was issued on the basis of the earlier two previous show cause notices.

3. At the request of the learned Counsel for the respondents, stand over to 26.11.2021. Affidavit in reply to be filed in the registry and an advance copy to be served on the learned Counsel for the petitioner.

4. In the meantime, till the next date the respondent authority shall not take any coercive steps as against the petitioner."

4. On 6 January 2022, a coordinate Bench of this Court put the parties to the notice that the matter will be taken up for final disposal at the admission stage itself. Accordingly, the matter is taken up today for final disposal.

Correction carried out as per order dated 20.12.2022
sd/-

Mr Mahesh Raichandani

5. Heard learned Counsel ~~Mr Bharat Raichandani~~ appearing with Mr Vibhav Amonkar and Mr Rishabh Prasad for the Petitioner and Ms Priyanka Kamat, learned Standing Counsel for Respondent Nos. 1 and 2.

6. Learned Counsel for the Petitioner submits that impugned order is ex facie bad in law and made without considering the reply filed by the Petitioner. Similarly, the joint venture between the Petitioner and another partner was terminated in April 2013 itself and this fact was brought to the notice of Respondent No.2 in the reply as well as by producing the document itself. However, without considering such reply and the documents, Respondent No.2 proceeded on the premise that the joint venture continued. He then submitted that a show-cause notice was from the period from April 2013 to March 2015 when in fact joint venture was not in existence. The learned Counsel then would submit that the appellate Tribunal while deciding appeal No. ST/86171/2015 dated 5 March 2019 has clearly accepted that there was no relationship of service provider or service receiver between the parties to the joint venture agreement and this fact has been admitted by the department. Thus, the demand of service tax for the period from April 2013 to March 2015 is completely illegal and unwarranted.

7. The learned Counsel Ms P. Kamat appearing for the Revenue would submit that there was an amendment to Section 65-B of the Finance Act, 2012, Respondent No.2 has rightly considered existence of joint venture since at that time the joint venture between the Petitioner and the other member was very much in existence.

However, learned Counsel for the Respondent was unable to point out any reasons or discussion in the impugned order with regard to the reply filed by the Petitioner to the show-cause notice and specifically pointing out that joint venture was cancelled vide deed of cancellation dated 1 April 2013.

8. The rival contentions fall for our consideration.

9. The Petitioner who is engaged in the business of restaurant/ accommodation, etc. was registered with the Service Tax Department vide registration No.AABCB1813AST001. The Petitioner was paying service tax wherever applicable and also filing periodical ST-3 returns in terms of Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994. The Petitioner hereinafter referred as "BAPL" entered into a joint venture agreement with Goa Golf Club Pvt. Ltd. (hereinafter referred to as "GGCPL"). As per the said agreement, BAPL was required to provide infrastructure and ancillary facilities for the business of M/s GGCPL for the purpose of establishing its business i.e. operating and running casino at the premises of BAPL, Goa. In the said agreement, GGCPL expressed its inability to invest into the real estate or to manage the same and as such were looking for a joint venture partner for expanding their business, for which BAPL had expressed its willingness to invest in the business of M/s GGCPL by providing all infrastructure facilities for the propose of running of casino. BAPL also agreed for possessing necessary licence to run casino in their hotel. In the joint venture agreement, GGCPL and BAPL agreed to share Gross Win/Loss in the ratio of 55:45 respectively of the gross income received from their

guests who played on the machines/tables. The revenue sharing was to be done at the end of every financial year or during such interval as mutually agreed from time to time.

10. Respondent scrutinized the records of BAPL and it was found that BAPL had provided Support Services to M/s GGCPL and for which BAPL received the share of Gross Win. The show-cause notice dated 23 April 2013 was issued to BAPL by the Respondent for the period from 1 October 2007 to 31 March 2012 (Exh.D). By such show-cause notice, BAPL was called upon to show cause as to why the levy of service tax under the category of "Support Service of Business or Commerce" as defined under Section 65 of the Finance Act, 1994 should not be levied upon them. The Petitioner filed a detailed reply on 23 April 2013 and 21 March 2014 thereby refuting all allegations of the department. A personal hearing was given on 24 November 2014 to the Petitioner. The learned Commissioner vide order dated 30 December 2014 dropped the entire demand of the department by observing as under:-

> "*(i) The Joint Venture Company has not made any separate payments to either BAPL or to GGCPL towards any services. The only amount received by them was the profit sharing amount in the ratio of 45:55. Had BAPL charged any specific amount to GGCPL for providing infrastructure, then, they were liable to pay service tax. There is no such arrangement in the Agreement nor do the books of accounts show such payments. Investment in the form of infrastructure in the Joint Venture is not a service to the other member of the Joint Venture;*

(ii) The Board's Circular No. 109/03/2009 dated 23.02.2009 has clarified the issue. The ratio of the above circular is squarely applicable in this case;

(iii) The profit is shared between BAPL and GGCPL as per the Joint Venture Agreement and there is no service provider and service receiver relationship. The amount shared as per the Joint Venture Agreement cannot be considered as consideration for providing any taxable service;

(iv) Hence, the demand for the period from 01.10.07 to 30.06.12 i.e. prior to July, 2012 does not sustain; &

(v) As regards the demand for the period from July, 2012 it is observed that the CBEC Circular No. 179/5/2014-ST dated 24.09.2014 has clarified that with effect from 01.07.2012, the JV and the members of the JV are treated as distinct persons and therefore, taxable services provided for consideration, by the JV to its members or vice versa and between the members of the JV are taxable. However, the taxability of service would arise only when a consideration is received by a party for rendering a service. As there is no consideration received, hence, no service tax is leviable even from 01.07.2012."

11. The Respondent being aggrieved by the above order of the Commissioner, filed appeal before the Appellate Tribunal wherein Petitioner filed cross objection. The learned Tribunal vide order dated 5 March 2019 dismissed the appeal filed by the department by observing thus:-

"*On perusal of the impugned order, we find that the period in dispute was from October 2007 to March 2013. Upon analysis and scrutiny of the joint venture agreement, the adjudicating authority by relying on the board circular No. 109/03/2009 dated 23.02.2009 has held that there is no relationship of service*

provider or service receiver between the parties to joint venture agreement and there is no consideration received by either side for rendering the service. He has further held that the agreement specifically provides that the profit/loss arising out of the business should be shared by both sides. Thus, it transpires that there is no involvement of two parties, to execute the terms of the agreement; one is to be considered as service provider and the other to be service receiver. The department has not challenged the show cause notice issued for the entire period i.e. prior to introduction of the negative list and thereafter. Thus, it emerges that the department is not contesting specifically the findings of the Learned Commissioner that there is no relationship existing between the service provider and the service receiver and that no consideration has been received for providing any taxable service. Therefore, we are convinced with the impugned order passed by the adjudicating authority, wherein he has held that service tax liability cannot be fastened on the respondent.

4. In view of the above, we do not find any merits in the appeal filed by the revenue. Accordingly, the same is dismissed. The cross objection filed by the respondent is disposed of."

12. The joint venture agreement dated 5 April 2002 was terminated with effect from 1 April 2013 by executing a deed of cancellation (Exh.J).

13. Petitioner was then served with another show-cause notice dated 3 February 2016 for the period from April 2013 to March 2015 under the provisions of Section 73(1)(A) of Finance Act, 1994 (Exh.K). Perusal of this show-cause notice clearly goes to show that the grounds of SCN – non-payment of service tax on the amount received from joint venture of BAPL and GGCPL for providing of the

infrastructural facilities for the purpose of running a casino was calculated and the Petitioner was called upon to pay an amount of ₹4,50,15,294/- for the financial year 2013-14 and 2014-15. The Petitioner was also called upon to answer the said demand by attending the office of Commissioner of Central Excise and Service Tax, Goa.

14. On receipt of such demand notice, Petitioner filed there reply dated 20 June 2016 explained in paras 7 to 9 as under:-

> "7. *The earlier two SCNs dated 23.4.2013 and 21.3.2014 were dropped by your goodself vide OIO No. GOA-EXCUS-000-COM-014-2014-15 dated 30/12/2014. We are surprised to receive the current SCN when earlier two SCNs were dropped and when there is no issue at all in the current matter.*
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> *8. The subject SCN as detailed above is pending before your goodself for adjudication. However, we would like to point out that the issue does not exist anymore since w.e.f. 1/4/2015, the joint venture agreement dated 5/4/2002 which was the very basis for issuing earlier two SCNs as well as the current one, has been terminated w.e.f. 1/4/2013 vide Deed of Cancellation dated 1/4/2013 copy of which is enclosed as Exhibit II. Hence the issue of any service provider and service recipient kind of relationship between BAPL and GGCPL does not exist anymore. Hence question of providing any service by any of us does not arise by any stretch of imagination and question of recovering any Service Tax from us also does not arise. We are therefore not liable to pay any Service Tax and any interest under Section 75 nor any penalty under Section 76, 77 and 78 of Chapter V of the Finance Act, 1994.*
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> *9. In view of the foregoing, it is requested to drop the demand against us raised vide Show cause notice No.*

CX-ST/SCN/Adj./25/15-16/Commr. Dated 3.2.2016 issued vide F.No. CX-ST/SCN/Adj./18/V.V.R./2015-16/6425."

15. Petitioner also enclosed a deed of cancellation dated 1 April 2013 as Exh.2 along with their reply and requested the said authority to drop the demand raised in the said show-cause notice.

16. Respondent No.2 vide its order dated 27 April 2021 (impugned order) confirmed the demand of the service tax amounting to ₹4,50,15,294/- for the period from April 2013 to March 2015 raised under the provision of Section 73(1) of Finance Act, 1994 and ordered for recovery of the same. A penalty of ₹10,000/- is also imposed under Section 77 of the Finance Act, 1994 on the Petitioner.

17. The learned Counsel Mr Raichandani would submit that discussion and findings starting from para 6 onwards in the impugned order clearly goes to show that Respondent No.2 failed to take into account the reply dated 20 June 2016 filed by the Petitioner to the show-cause notice and the document attached to it. Similarly, in para No.8, Respondent No.2 considered earlier show-cause notice issued to the Petitioner and thereafter in para No.10 observed that infrastructure is provided by the Petitioner to the other member of the joint venture and therefore, it amounts to providing services to the joint venture.

18. The impugned order nowhere discusses about the reply and the document furnished by the Petitioner to the show-cause notice. Respondent No.2 proceeded on the premise that the joint venture exists and earlier show-cause notice was issued to the Petitioner

along with the joint venture and therefore, the demand made by the department is justified.

19. We are unable to accept the reasons disclosed by Respondent No.2 in the impugned order for the simple reason that there is no reference to the contents of the reply filed by the Petitioner to the show-cause notice and the document attached to it thereby specifically disclosing that the joint venture between BAPL and GGCPL was cancelled with effect from 1 April 2013. Thus, there was no service provider or service receiver contract between the parties justifying the levy of service tax. The impugned order further failed to take into account the order passed by the Appellate Tribunal dated 5 March 2019 (Exh.I) wherein a demand of the department for the earlier period from October 2007 to March 2013 was negated. It therefore clearly revealed that there is non-application of mind while passing the impugned order. Similarly, it is clear from the reasonings in the impugned order that Respondent No.2 failed to take into account reply and the document produced by the Petitioner to the show-cause notice, which now compelled us to quash and set aside the impugned order and to remand the matter for fresh consideration by taking into account the reply and the documents to the show-cause notice as well as the orders passed by the Appellate Tribunal with regard to the earlier show-cause notices.

20. The learned Counsel Ms. Kamat for the Respondent tried to justify the impugned order by saying that provisions of Section 65 were amended. We are not convinced with such submissions as the amendment came into effect in the year 2012 whereas the joint

venture between the parties was cancelled from 1 April 2013. Similarly, the period during which demand of the service tax was made is from April 2013 to March 2015, when admittedly the joint venture was not in existence.

21. The learned Counsel Mr Raichandani placed reliance on the decision in the case of ***Goregaon Sports Club v. Assistant Commissioner of Income Tax & Ors.***[1], decided on 13 December 2021 at the Principal Seat. In the said case, the argument was of breach of principles of natural justice and non-application of mind by the Assessing Officer while deciding the show-cause notice. It was observed that the concerned officer recorded in its impugned order that no reply was filed by the assessee, however, he failed to take into consideration that such reply was filed by the assessee much earlier which concerned Officer failed to take notice of. On these premises, it was observed that ignoring such reply and forcing the Petitioner to approach the Court is again adding to the docket of already burdened Court and hence a cost was imposed on the concerned Officer. While doing so, the assessment order was quashed and set aside and direction was given that a different Assessing Officer shall consider the submissions made by the Petitioner and pass assessment order within a stipulated period.

22. The learned Counsel Mr Raichandani would submit that in the present case also, Respondent No.2 failed to take into account reply filed by the Petitioner to the show-cause notice. We find that there is

1 W.P. (L) No.25507 of 2021

absolutely no mention in the entire order about the reply filed by the Petitioner to the show-cause notice or its contents.

23. Having said so, we quash and set aside the impugned order by remanding it to the said authority to decide it afresh by considering reply filed by the Petitioner to the show-cause notice, documents attached to it and also by giving personal hearing. The Rule is made absolute to this extent.

24. The said authority shall decide the matter as expeditiously as possible and within a period of four weeks from the date of placing authenticated copy of this order before it by the parties. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J. M.S. SONAK, J.