Petitioner Vs. Respondents

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Court : Chennai

Decided On : Nov-03-2016

Judge : T.S. Sivagnanam

Appeal No. : Writ Petition No. 38178 of 2016 & WMP. No. 32711 of 2016

Appellant : Petitioner

Respondent : Respondents

Judgement :

T.S. Sivagnanam, J

1. Heard Mr.Arvind P.Datar, learned Senior Counsel, assisted by Mr.K.Vaitheeswaran, learned counsel on record for the petitioner.

2. The learned Senior Counsel has prefaced his submission by contending that he is conscious of the fact that as against the impugned order, an appeal lies to the Customs, Excise and Service Tax Appellate Tribunal. But, the reason for the petitioner to bypass the said remedy and to file this writ petition is purely on a legal question without venturing into the factual scenario.

3. It is pointed by the learned Senior Counsel that the Commissioner, who adjudicated the show cause notice dated 22.10.2015, had come to the conclusion that the contract entered into by the petitioner is a composite contract and that the petitioner has artificially vivisected such composite contract to classify the service

portion alone as erection, commission or installation services, which are not in line with the relevant statutory provisions. The other factual findings also stem out of this interpretation given by the first respondent.

4. It is further pointed out that the basis for arriving at such a conclusion is by referring to the decision of the Hon'ble Supreme Court in the case of State of A.P. Vs. M/s.Kone Elevators (India) Limited [reported in (2005) 181 ELT 156]. However, this decision was not referred to in the show cause notice. But, the show cause notice purely proceeded on the factual matrix, for which, the petitioner submitted their reply on 19.12.2013 and during the course of personal hearing, they produced documents to substantiate their stand. However, only when the impugned order was passed on 31.8.2016 and communicated to the petitioner, the petitioner came to know that what was weighed in the mind of the Commissioner was the decision of the Supreme Court in M/s.Kone Elevators (India) Limited (cited supra) and that the said decision could not have been relied upon, since, on the date when the impugned order was passed, the said decision was overruled by the Larger Bench of the Hon'ble Supreme Court in the case of Kone Elevator India Limited Vs. State of Tamil Nadu [reported in (2014) 34 STR 641], as the same was rendered on 6.5.2014, much prior to the passing of the impugned order.

5. Therefore, it is submitted that if this legal aspect is taken into consideration, then the impugned order would require interference and the matter has to be sent back to the Commissioner for fresh adjudication. The learned Senior Counsel referred to the three sample agreements to substantiate that they are distinct agreements and the first respondent applied the theory of predominance test and came to the conclusion that the petitioner artificially vivisected a composite contract.

6. It is also submitted that the petitioner company has been in existence for several decades and entered into contracts with various public sector undertakings and each of the contracts is distinct and separate, as they relate to supply of material, which may be procured locally or imported, civil works, erection works, etc., and that therefore, the conclusion arrived at by the Adjudicating Authority stating that the petitioner artificially vivisected the composite contract is incorrect

and the reliance, placed on the decision, which has been overruled, is not sustainable.

7. Mr.K.Ravi, learned Central Government Standing Counsel accepts notice for the respondents and submits that all the issues raised by the petitioner are factual issues and have to be agitated by the petitioner before the Appellate Authority. Referring to the show cause notice dated 22.10.2013, he has submitted that the proposal made in the show cause notice clearly spells out as to why the Authority proposed to levy service tax on the composite contract and that the Commissioner, while adjudicating the show case notice, recorded a specific finding that in spite of an opportunity, the petitioner did not produce necessary documents. Furthermore, it is submitted that the petitioner had an effective opportunity before the Adjudicating Authority and their Finance Manager along with their counsel had appeared and they had given written submissions. While taking into consideration the records, the order has been passed and if the petitioner is so aggrieved, they should file an appeal before the Tribunal.

8. The existence of an alternate remedy is not disputed by the petitioner. Nevertheless, what is to be seen is as to whether the reliance placed on the overruled decision of the Supreme Court has impacted the impugned proceedings. It is prima facie established that the said overruled decision of the Hon'ble Supreme Court has had an impact on the proceedings. Thus, prima facie, this Court is of the view that the matter requires to be reconsidered.

9. In the light of the above submissions, the learned Central Government Standing Counsel is directed to get instructions in the matter and advance arguments on the next hearing date. List on 18.11.2016.