

Mithlaj. P., vs the Commissioner of Central Tax & Central Excise (Appeals),

Mithlaj. P., vs the Commissioner of Central Tax & Central Excise (Appeals),

SooperKanoon Citation : sooperkanoon.com/1336952

Court : Kerala

Decided On : Nov-08-2023

Judge : Honourable Mr. Justice D. K. Singh

Appeal No. : WP(C)/4079/2023

Appellant : Mithlaj. P.,

Respondent : The Commissioner of Central Tax & Central Excise (Appeals),

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
WEDNESDAY, THE 8TH DAY OF NOVEMBER 2023 / 17TH
KARTHIKA, 1945 WP(C) NO. 4079 OF 2023 PETITIONER/S: MITHLAJ.
P., AGED 40 YEARS, S/O SAIDALAVI, PORUTHIYIL HOUSE, P.O.
VALARA, ADIMALI, PIN - 685561 BY ADVS. ANIL SIVARAMAN RAJI
VINCENT SREELEKHA. P JOTHISHA K.A. RESPONDENT/S: 1 THE
COMMISSIONER OF CENTRAL TAX & CENTRAL EXCISE (APPEALS
) , CENTRAL REVENUE BUILDING, I.S.PRESS ROAD, COCHIN, PIN -
682018 2 ASSISTANT COMMISSIONER CENTRAL TAX & CENTRAL
EXCISE, IDUKKI DIVISION, K.P.VARKEY'S MALL, 2ND FLOOR,
ROTARY JUNCTION, THODUPUZHA, PIN - 685584 3

SUPERINTENDENT OF CENTRAL GST & CENTRAL EXCISE
MUNNAR RANGE, TOP STATION ROAD, MUNNAR, PIN - 685612 BY
ADV P.R.SREEJITH THIS WRIT PETITION (CIVIL) HAVING COME UP
FOR ADMISSION ON 08.11.2023, THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING: -2-

JUDGMENT

The present writ petition under Article 226 of the Constitution of India has been filed by the petitioner impugning Exts.P6 and P8 orders passed by the 2nd respondent.

2. The petitioner is engaged in providing services by

way of right to admission to the private spice garden and services by way of joy rides, such as elephant rides. On the basis of the information received from a third party, CBDT, it was noticed that the value of the service provided by the petitioner, as declared in the Income Tax Returns filed by the petitioner for the Financial Year 2016-17, was Rs.2,42,62,747/- The petitioner was, however, not registered under the provisions of the Finance Act regarding service tax, and the petitioner did not file the return under the provisions of the service tax.

2.1 The petitioner was put to notice regarding the data made available by the CBDT in respect of his income, and the -3-

petitioner was directed to submit month-wise details of services provided by the petitioner for the Financial Years from 2016-17 to 2017-18 (up to June 2017), including exemption/ abatement notices availed and month-wise details of payments received for the services provided by the petitioner. The petitioner was also directed to furnish the balance sheet, Profit and Loss Account, and Income Tax returns along with Annexures and 26AS for the Financial Years 2016-17 and 2017-18. The petitioner, thereafter, was issued a show cause notice in Ext.P4 dated 12.04.2021 to show cause as to why the services rendered by the petitioner in respect of which the petitioner had received consideration from April 2016 to June 2017 should not be classified as Other taxable services - Other than the 119

listed in terms of Sections 65B(44) and 65B(51) of Chapter V of the Finance Act 1994 and in turn why services rendered by the petitioner were not liable to service tax under Section 66B of the Act read with Section

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174(2) of CGST Act 2017. The petitioner was also asked to show cause as to why the service tax, along with Cess amounting to Rs.36,19,736/-, should not be demanded and recovered from the petitioner under the provisions of Section 73(1) of Chapter V of the Finance Act 1994 read with Section 174(2) of the CGST Act 2017, along with interest, penalty etc.

3. The petitioner filed a reply to the said show cause

notice in Ext.P5. The petitioner took the stand that the petitioner had disclosed this amount of consideration as income from business in the Income Tax Returns submitted for the Financial Years 2016-17 and 2017-18, and due income tax was paid on such receipts. The petitioner also said that several persons are carrying out similar activities, but no one is paying service tax as no one has registered for the payment of service tax. The Income Tax Department did not reject the income tax returns submitted by the petitioner, and the tax remitted by the petitioner, including the amounts earned by way of the

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sale of tickets for spice garden visits or elephant rides, was accepted without any demur by the Income Tax Department. It is said that as the Income Tax Department had accepted returns and the treatment given to the receipts as business income, the stand of the Department that the amount received by the petitioner, which is business income, is liable to be taxed as service tax, would not hold good. The petitioner also made other submissions.

4. The reply of the petitioner was considered. The petitioner was also afforded an opportunity for hearing by the Assistant Commissioner, the 2nd respondent. Vide impugned

order (Ext.P6), the demand of service tax amounting to

Rs.33,96,785/- together with Swacch Bharat Cess and Krishi Kalyan Cess totalling Rs.36,19,736/- has been confirmed in respect of the alleged services rendered by the petitioner from 01.04.2016 to 30.06.2017 under the proviso to Section 73(2) of the Finance Act 1994 read with Section 174(2) of the CGST Act -6-

2017. A penalty of the equal amount was also imposed under

Section 78 of the Finance Act 1994 read with Section 174(2) of the CGST Act 2017, and a penalty of Rs.10,000/- under the provisions of Section 77 of the Finance Act 1994 read with Section 174(2) of the CGST Act 2017 were imposed. It was also observed that in case the petitioner pays the service tax and interest within a period of thirty days from the date of receipt of the order, the penalty payable under Section 78 shall be 25% of the service tax so determined, instead of 100%.

5. The petitioner did not pay the service tax as

determined by the Ext.P6 order. The petitioner was thereafter issued notice dated 27.11.2022 in Ext.P7 requesting him to inform whether the petitioner had filed any appeal against the

order in Ext.P6 and if an appeal has been filed, the copy of the

appeal along with the copy of challans regarding the pre- deposits shall be submitted before the Superintendent. It was also said that if the petitioner had not filed any appeal, he -7- should pay the tax as confirmed and the penalty imposed in Order-in-Original (Ext.P6).

6. The petitioner neither filed an appeal nor paid the

tax and penalty as determined, and therefore, notice under Section 87(b) of Chapter V of the Finance Act 1994 came to be issued for freezing the bank account of the petitioner. It was also said that the total amount outstanding was Rs.1,05,73,062/-.

7. The petitioner neither made use of the statutory

remedy of appeal within the time prescribed as per Section 85(3A) of the Finance Act 1994 nor did he reply to the notice issued in Ext.P7 and after the expiry of the maximum period of appeal of three months, the petitioner approached this Court by filing this writ petition. 7.1 This Court does not exercise the appellate jurisdiction against the Order-in-Original. It also cannot be said that the Order-in-Original is without jurisdiction or that -8- there has been a violation of the principle of natural justice. Considering the fact that the petitioner failed to exercise the right of appeal within the limitation period prescribed under the Statute, this Court is not in a position to extend the limitation period for filing the appeal. 7.2 Since the order does not appear to be without jurisdiction, nor has there been a violation of Article 14 of the Constitution of India inasmuch as the petitioner was issued show cause notice, he filed a reply, and he was also granted an opportunity of hearing, I do not find any ground to interfere with the impugned order and notice in Exts. P6 and P8.

The present writ petition, therefore, fails, which is hereby dismissed, however, without costs. Interim order, if any, stands vacated. Sd/- DINESH KUMAR SINGH JUDGE jjj -9- APPENDIX OF WP(C) 4079/2023 PETITIONER EXHIBITS Exhibit P1 A TRUE COPY OF THIS COMMUNICATION NO. O.C.NO. PETITIONER DATED 1.06.2020 Exhibit P2 TRUE COPY OF THE LETTER NO. O.C.NO. 250/2020 ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER DATED 4.9.2020 Exhibit P3 A TRUE COPY OF THE LETTER ADDRESSED TO THE 3RD RESPONDENT DATED 15.09.2020 Exhibit P4 A TRUE COPY OF THIS SHOW CAUSE NOTICE DATED 12.04.2021 ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER Exhibit P5 TRUE COPY OF THE REPLY SUBMITTED BY THE PETITIONER BEFORE THE 2ND RESPONDENT DATED 28.4.2021 Exhibit P6 TRUE COPY OF THE ORDER NO.38/2022-ST DATED 31.08.2022 ISSUED BY THE 2ND RESPONDENT Exhibit P7 TRUE COPY OF THE NOTICE ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER DATED 27.11.2022 Exhibit P8 A TRUE COPY OF THE NOTICE NO. IV/ST/30/02/2021- ST.ADJ DATED 19.01.2023