A M/S. SHOELINE

v.

COMMISSIONER OF SERVICE TAX AND ORS.

(Civil Appeal No. 10214 of 2017)

B AUGUST 10, 2017

[A.K. SIKRI AND ASHOK BHUSHAN, JJ.]

Equity – Legality of service tax was to be determined for period July 9, 2004 to March 31, 2006 – The validity of demand C *was confirmed by the Joint Commissioner of service tax – No statutory appeal filed by the appellant against the order – Further, appellant made payments of service tax – However, appellant was aware that there were numerous other litigations pending against service tax – In those other litigations, it was held that service tax was not payable in absence of appropriate provision at the relevant* D *time and it became payable only w.e.f. April 18, 2006, when section 66A was inserted – Pursuant thereto, writ Petition was filed by the appellant and same was dismissed as barred by delay and laches – Held: The legal position which is settled is that this service tax was not payable for the period in question inasmuch as such a liability* E *arose w.e.f. April 18, 2006 – This legal position is not confined to only those who approached the Court but is a declaration of law – It can be treated as judgment* in rem *– In instant case, equities would be balanced by not insisting on payment of penalty and interest – Appellant approached belatedly, thus may not be entitled to refund of service tax already paid but at the same time, the appellant should* F *not be called upon to pay any interest and penalty levied on a tax which was not payable in law – Finance Act, 1994 – s.66A.*

Delay/Laches – Validity of demand of service tax challenged after four years – Appellant received a show cause notice for non-payment of service tax – Appellant contested the said show cause G *notice and challenged the legality of service tax – Validity of demand was confirmed by the Joint Commissioner of service tax – No statutory appeal filed by the appellant against the order – Appellant was aware that there were numerous other litigations pending – In those other litigations, it was held that service tax was not payable – Pursuant thereto writ Petition filed by the appellant, but was* H

dismissed as barred by delay and laches of four years – Division Bench also concurred, thereby affirming the order – Held: After, Joint Commissioner had passed the order, no statutory appeal was preferred by the appellant challenging the order – When appellant had not challenged the demand and was merely watching the proceedings in other similar cases, the decision in those cases cannot furnish any cause of action to the appellant to file the writ petition – Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent – Constitution of India – Art.226.

Partly allowing the appeal, the Court

HELD: 1. The Joint Commissioner of service tax had confirmed the validity of demand of service tax vide order dated February, 2008. No statutory appeal was preferred by the appellant challenging that order. The writ petition was filed only in March, 2012. During this period, the appellant was also making payment towards service tax demanded by the respondents without challenging the order. The appellant now wants to take advantage of other litigation pending in respect of same subject matter. When the appellant had not challenged the demand and was merely sitting on the fence, watching the proceedings in other similar cases, the decision in those cases cannot furnish any cause of action to the appellant to file the writ petition. Law on this behalf is crystal clear. [Paras 1 and 9] [585-C; 587-G-H; 588-A-B]

2. In the instant case, though the service tax levied for the period in question was to the tune of Rs.11,62,728/- which stands paid by the appellant, liability on account of penalty and interest is also fastened upon the appellant. The legal position which is settled is that this service tax was not payable for the period in question i.e. July 9, 2004 to March 31, 2006 inasmuch as such a liability arises only w.e.f. April 18, 2006 after the insertion of the relevant charging Section 66A in the Finance Act, 1994. This legal position is not confined to only those who approached the Court but is a declaration of law. It can be treated as judgment *in rem*. [Para 20] [592-D-E]

A **3. In a case like this, equities would be balanced by not insisting on payment of penalty and interest. Thus, when the appellant approached belatedly, it may not be entitled to refund of service tax already paid but at the same time, the appellant should not be called upon to pay any interest and penalty levied on a tax which was not payable at all in law. [Para 21] [593-G-H; 594-A]**

B

State of Uttar Pradesh & Ors. v. Arvind Kumar Srivastava & Ors. **(2015) 1 SCC 347 : [2014] 12 SCR 193**; *Rup Diamonds & Ors. v. Union of India & Ors.* **(1989) 2 SCC 356 : [1989] 1 SCR 13**; *Harwindra Kumar v. Chief Engineer, Karmik & Ors.* **[2005] 5 Suppl. SCR 317 – relied on.**

C

Haryana State Handloom & Handicrafts Corporation Ltd. & Anr. v. Jain School Society **(2003) 12 SCC 538**; *U.P. Jal Nigam & Anr. v. Jaswant Singh & Anr.* **(2006) 11 SCC 464: [2006] 8 Suppl. SCR 916**; *M/s. D. Cawasji & Co. & Ors. v. State of Mysore & Anr.* **(1975) 1 SCC 636 : [1975] 2 SCR 511 – referred to.**

D

Halsbury's Laws of England – **referred to.**

E

Case Law Reference

[2014] 12 SCR 193	**relied on**	**Para 10**
[1989] 1 SCR 13	**relied on**	**Para 11**
(2003) 12 SCC 538	**referred to**	**Para 12**
[2006] 8 Suppl. SCR 916	**referred to**	**Para 14**
[2005] 5 Suppl. SCR 317	**relied on**	**Para 15**
[1975] 2 SCR 511	**referred to**	**Para 18**

F

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10214 of 2017.

G

From the final Order dated 22.06.2016 passed by the High Court of Judicature at Madras in W.A. No.790 of 2013.

G.V. Rao, A.K. Upadhyay, Devendra Singh, Advs. for the Appellant.

H

Yashyank Andhyaru, Sr. Adv., Tara Chandra Sharma, Ms. Sunita Rani Singh, B. Krishna Prasad, Advs. for the Respondents. A

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. By way of this appeal, correctness of the order dated June 22, 2016 passed by the Division Bench of the High Court is questioned. Vide the said order, Division Bench affirmed the order of the learned single Judge passed in the writ petition filed by the appellant herein and, thus, dismissed the writ appeal. Writ petition was filed in the High Court by the appellant challenging the validity of demand which was confirmed by the Joint Commissioner of service tax vide order dated February 27, 2008. Writ petition was, in fact, not considered on merits and was dismissed as barred by delay and laches of four years. The Division Bench has also concurred with the single bench thereby affirming its order. B C

2. Show cause notice dated August 23, 2007 was received by the appellant for non-payment of service tax on 'commission paid to overseas agents' under 'Business Auxiliary Service'. The appellant contested the said show cause notice by filing his reply. However, rejecting the objections raised by the appellant, the Joint Commissioner confirmed the demand vide order dated August 27, 2008. Writ petition was filed in the High Court in March, 2012. As it was filed four years after the demand was confirmed, for this reason, writ petition and writ appeal of the appellant have been dismissed. D E

3. If one goes by the aforesaid facts alone, it may not be wrong to form an opinion that the challenge laid to the demand was belated. However, the question is as to whether the appellant had duly and satisfactorily explained the delay in approaching the Court after a period of four years. Entire focus of the arguments of the learned counsel for the appellant was on this aspect with the submission that the High Court totally overlooked and ignored the explanations given which furnished sufficient cause for approaching the Court in March, 2012. F

4. In this behalf, the learned counsel referred to the following facts about which there is no dispute. As aforesaid, the show cause notice was issued to the appellant for non-payment of service tax on 'commission paid to overseas agent'. It was for the period from July 9, 2004 to March 31, 2006 during which period the appellant was paying G

H

A commission to the overseas agent. The Commission was being paid for the outsourcing of business of export of shoe- uppers for soliciting orders by the overseas agents on behalf of the appellant in foreign exchange. Simply put, the overseas agent was appointed by the appellant for securing export orders of shoe-uppers. On the orders which were so procured by the overseas agent and were given to the appellant, the appellant B could make exports of shoe uppers. It is on these orders the appellant had paid commission to the foreign party. As per the respondent department, service tax was payable on the said commission as the said activity would come within the sweep of 'Business Auxiliary Service'. That was a reason for issuing show cause notice and demand service C tax from the appellant who was supposed to deduct the same on the payments made to a foreign agent.

5. The appellant had resisted the show cause notice by submitting its reply dated January 2, 2008 and stating that the liability of payment of service tax, on amounts being remitted to overseas agent, would not fall D on the payment prior to June 16, 2005 in view of the inapplicability of The Finance Act, 1994. However, after the passing of the order by the Joint Commissioner on February 27, 2008 rejecting the aforesaid contention and confirming the demand of service tax, the said demand was not challenged immediately by filing statutory appeal which was available. Not only this, when the amount as confirmed vide order dated E February 27, 2008 was not paid and the appellant was threatened with coercive action stating that his bank accounts would be attached, the appellant started making payments and paid the entire service tax in five instalments. Some of these instalments were paid in the year 2011 and one instalment was paid late i.e. on September 17, 2016 (which it appears F was made after the appeal was dismissed by the High Court vide impugned judgment dated June 22, 2016). In this manner, though the appellant has paid the amount of service tax in the sum of Rs. 11,62,728/- as demanded. However, no amount is paid towards penalty and interest though that was also adjudicated upon.

G 6. Coming to the explanation given for delayed approach to the Court, it is stated by the appellant that it was aware that there were numerous other litigations pending from 2007 onwards by various parties who were under genuine and the bonafide belief that they were not liable to pay the service tax. However, the appellant themselves were

H

unable to file a statutory appeal before the Departmental Appellate Authorities, since the file had been misplaced due to a change of managerial set-up in the organisation as the partnership firm was in the process of dissolution and the concern was being converted into a sole proprietorship which took place on January 24, 2009. In other litigations, it was held that service tax was not payable in the absence of appropriate provision at the relevant time and it became payable only w.e.f. April 18, 2006 when Section 66A was inserted in the Finance Act, as a charging section. On that basis, on September 26, 2011, the Ministry of Finance issued a circular bearing No. F. No. 276/8/2009-CX8A which stated that the service tax liability on any taxable service provided a non-resident or a person located outside India to a recipient in India stating that the service tax liability on any taxable service provided by a non resident or a person located outside India, to a recipient in India, would arise w.e.f. April 18, 2006 i.e. the date of insertion of the relevant charging section 66A of the Finance Act, 1994. This circular was issued by the Ministry of Finance, Department of Revenue after this Court had dismissed the Special Leave Petitions filed by the Department, challenging the orders of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) on applicability of service tax prior to April 18, 2006.

7. It is thereafter that the appellant filed the writ petition in March, 2012. Learned counsel for the appellant submitted that the aforesaid reasons were genuine and provided due explanation for approaching the Court in March, 2012. It was also submitted that in the counter affidavit filed by the respondents in the High Court, respondents have admitted that service tax was not applicable to pending disputes.

8. The respondents, however, had contended that the case of the appellant would not be covered as it would not constitute a pending dispute because of the reason that the case of the appellant stood resolved on February 27, 2008 when the Joint Commissioner had passed the orders which had attained finality, in the absence of any statutory appeal preferred by the appellant.

9. From the aforesaid narration of facts, one thing is clear. The Joint Commissioner had passed the orders on February 27, 2008. No statutory appeal was preferred by the appellant challenging that order. The writ petition was filed only in March, 2012. During this period, the appellant was also making payment towards service tax demanded by

A the respondents without challenging the order. The appellant now wants to take advantage of other litigation pending in respect of same subject matter. When the appellant had not challenged the demand and was merely sitting on the fence, watching the proceedings in other similar cases, the decision in those cases cannot furnish any cause of action to the appellant to file the writ petition. Law on this behalf is crystal clear.
B

10. In ***State of Uttar Pradesh & Ors.*** v. ***Arvind Kumar Srivastava & Ors.***[1], the moot question which requires determination is as to whether in the given case, approach of the Tribunal and the High Court was correct in extending the benefit of earlier judgment of the Tribunal, which had attained finality as it was affirmed till the Supreme
C Court. This Court held that:

> "23. ... The respondents before us did not challenge these cancellation orders till the year 1996 i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding
D that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined service nor working like the employees who
E succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only was there unexplained delay and laches in filing the claim petition after a period of 9 years, it would be totally unjust to direct the appellants to give them appointment as of today i.e. after a period of 27 years when most of these respondents
F would be almost 50 years of age or above.

11. In ***Rup Diamonds & Ors.*** v. ***Union of India & Ors.***[2], the petitioner, a recognized Export House for the purposes of EXIM Policy, 1982-83 was not granted facility of import of certain items even though it had discharged export obligation. The petitioners, however, did nothing
G and claimed the above facility more than four years after discharge of the export obligation and after five years of the expiry of the license. Since in similar cases, such facility was granted pursuant to the orders passed by the High Court of Bombay that the petitioners made an

[1](2015) 1 SCC 347

H [2](1989) 2 SCC 356

application in the year 1986, which was rejected by the department. The petitioners thereafter approached the Supreme Court under Article 32 of the Constitution after one year of rejection. Dismissing the petition, this Court observed:

> "8. ... Petitioners are re-agitating claims which they had not pursued for several years. Petitioners were not vigilant but were content to be dormant and chose to sit on the fence till somebody else's case came to be decided. Their case cannot be considered on the analogy of one where a law had been declared unconstitutional and void by a court, so as to enable persons to recover monies paid under the compulsion of a law later so declared void."

12. In ***Haryana State Handloom & Handicrafts Corporation Ltd. & Anr.*** v. ***Jain School Society***[3], land acquisition proceedings were challenged after about two decades. The delay was sought to be explained on the grounds that some other party had challenged the acquisition and had obtained stay order from the court and hence the petition could be filed only after disposal of those proceedings. This Court dismissed the petition observing that pendency of other proceedings would not be good ground or challenging the acquisition.

13. Halsbury's Laws of England states as follows:

> "In determining whether there has been such delay as to amount to laches, the chief points to be considered are:
>
> (i) acquiescence on the claimant's part; and
>
> (ii) any change of position that has occurred on the defendant's part.
>
> Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in

[3] (2003) 12 SCC 538

A which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are most material. Upon these considerations rests the doctrine of laches."

14. In ***U.P. Jal Nigam & Anr.*** v. ***Jaswant Singh & Anr.***[4], the B issue pertained to entitlement of the employees of U.P. Jal Nigam to continue in service up to the age of 60 years.

15. In ***Harwindra Kumar*** v. ***Chief Engineer, Karmik & Ors.*****[2005] Suppl. 5 SCR 317**, this Court had earlier held that these employees were in fact entitled to continue in service up to the age of 60 C years. After the aforesaid decision, a spat of writ petitions came to be filed in the High Court by those who had retired long back. The question that arose for consideration was as to whether the employees who did not wake up to challenge their retirement orders, and accepted the same, and had collected their post retirement benefits as well, could be given relief in the light of the decision delivered in ***Harwindra Kumar*** (supra). D The Court refused to extend benefit applying the principle of delay and laches. It was held that an important factor in exercise of discretionary relief under Article 226 of the Constitution of India is laches and delay. When a person who is not vigilant of his rights and acquiesces into the situation, his writ petition cannot be heard after a couple of years on the E ground that the same relief should be granted to him as was granted to the persons similarly situated who were vigilant about their rights and challenged their retirement. The Court held that:

"In view of the statement of law as summarized above, the respondents are guilty since the respondents have acquiesced in F accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the G incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudicated if the relief is granted. In the present case, if the respondents would have

H [4] (2006) 11 SCC 464

challenged their retirement being violative of the provisions of the Act; perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are guilty of waiver and acquiescence?"

16. Of course, the Ministry of Finance had issued a circular dated September 26, 2011 after the legality of such a demand of service tax was determined. However, in such a scenario, the appellant can succeed only if its case gets covered by the four corners of such circular. A reading of this circular reveals that after the judgment of Bombay High Court holding that service tax would not apply to such cases, which was upheld by this Court on dismissal of special leave petitions, the Central Board of Excise and Customs in the Department of Revenue, Ministry of Finance, Government of India has issued this circular dated September 26, 2011stating that such a liability would arise w.e.f. April 18, 2006. Relevant portion of the said order reads as under:

"2. In view of the aforementioned judgments of the Hon'ble Supreme Court, the service tax liability on any taxable service provided by a non resident or a person located outside India, to a recipient in India, would arise w.e.f. 18.4.2006, i.e., the date of enactment of section 66A of the Finance Act, 1994. The Board has accepted this position. Accordingly, the instruction F No. 275/7/201 0-CX8A, dated 30.6.2010 stands rescinded.

3. Appropriate action may please be taken accordingly in the pending disputes."

17. It is clear from the aforesaid circular that in 'pending disputes', the Government decided not to press for payment of service tax in such cases. Intention was clear, namely, this circular would not apply to those cases which were already over and were not pending on that date. Otherwise, all those persons who had already paid the demand earlier without protesting the same would start claiming refund of those

A payments. Therefore, this circular would not come to the aid of the appellant.

18. Learned counsel for the appellant had relied upon the judgment of this Court in ***M/s. D. Cawasji & Co. & Ors.*** v. ***State of Mysore & Anr.***[5]. We have gone through the said judgment minutely. There is no B need to discuss the facts of that case in detail. Suffice is to mention that in that case, claim for refund of the tax paid was made which tax was paid by mistake under legislation and was subsequently held to be void. The writ petitions were dismissed on the ground of delay and the Supreme Court upheld the decision of the High Court. We, therefore, fail to understand how this judgment helps the appellant. If at all, ratio of that C judgment goes against the appellant.

19. As pointed out above, insofar as present case is concerned, the appellant never challenged adjudicating orders dated February 27, 2008 and woke up only after the issue was settled in other cases.

D 20. Having said so, we find one peculiar thing in the instant case. Though the service tax levied for the period in question was to the tune of Rs.11,62,728/- which stands paid by the appellant, liability on account of penalty and interest is also fastened upon the appellant. The legal position which is settled is that this service tax was not payable for the period in question i.e. July 9, 2004 to March 31, 2006 inasmuch as such E a liability arises only w.e.f. April 18, 2006 after the insertion of the relevant charging Section 66A in the Finance Act, 1994. This legal position is not confined to only those who approached the Court but is a declaration of law. It can be treated as judgment in *rem*. We may reproduce following observations from the case of ***Arvind Kumar Srivastava & Ors.***:

F "22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under.

"22.1. The The normal rule is that when a particular set of employees is given relief by the court, all other identically situated G persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service

H [5](1975) 1 SCC 636

jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently. A

22.2. However, this principle is subject to well-recognised exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim. B C

22.3. However, this exception may not apply in those cases where the judgment pronounced by the court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated persons. Such a situation can occur when the subject-matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see *K.C. Sharma* v. *Union of India* [*K.C. Sharma* v. *Union of India*, (1997) 6 SCC 721 : 1998 SCC (L&S) 226]). On the other hand, if the judgment of the court was in personam holding that benefit of the said judgment shall accrue to the parties before the court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence. D E F G

21. In a case like this, equities would be balanced by not insisting on payment of penalty and interest. Thus, when the appellant approached belatedly, it may not be entitled to refund of service tax already paid but at the same time, the appellant should not be called upon to pay any

H

A interest and penalty levied on a tax which was not payable at all in law. The High Court, to this extent, committed an error by not dealing with this aspect of the matter and dismissing the writ petition in its entirety.

22. As a result, this appeal is partly allowed by setting aside the demand *qua* interest and penalty.

B No costs.

Ankit Gyan Appeal partly allowed.