IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CENTRAL EXCISE APPEAL (CEL) NO. 2 OF 2013

(Commissioner of Central Excise & Customs, Nagpur vs. M/s. H.T. Associates, Nagpur & Anr.)

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's Orders.	Court's or Judge's orders.

CORAM : B.P. DHARMADHIKARI &
P.N. DESHMUKH, JJ.
OCTOBER 13, 2015.

This Court while issuing notice in the matter on 25.06.2015 noted specific contention of the department that necessary documentary evidence was already on record and still CESTAT failed to look into it.

In the light of this order, we have heard Shri Firdos Mirza, learned counsel for the appellant and Shri Dawda with Shri Badar, learned counsel for respondent No. 1 – assessee. Service on Respondent No. 2 is dispensed with.

The service of show cause notice, submission of reply thereto, quantification of liability of assessee, are the facts which are not in dispute. After said initial quantification, the assessee approached the Commissioner of Sales Excise (Appeals) at Nagpur and the appellate Authority by order dated 30.11.2010 brought down the demand of service tax from Rs.37 lakh to Rs.20,000/-. It also held Respondent No. 1 liable to pay that tax. This finding was not assailed by Respondent No. 1. On the contrary only department approached the CESTAT in further appeal contending that the issue of abatement for Cenvat credit already taken on account of input/ input service was not properly addressed to. Thus, the department was not satisfied with the order of the Appellate Authority, which scaled down the liability of Respondent No.1.

By the impugned order dated 30.03.2012, the CESTAT has in para 6 observed that Respondent – assessee was not put to notice on the question whether they had claimed Cenvat credit for claiming the abatement and there is no documentary evidence on record to prove that they had accordingly availed the credit during the impugned period.

Shri Mirza, learned counsel submits that all documents are already on record.

This fact that the documents are already on record is not disputed by the assessee. Shri Dawda, learned counsel submits that there was no specific notice in this respect to the assessee. In addition he also points out that the appellant was duty bound to point out to CESTAT a notification dated 28.07.2010 which exempted a contractor engaged in a contract covered thereunder, from payment of service tax. The said notification came to the knowledge of the assessee later on and, therefore, the assessee did not and could not question the adverse finding of the Appellate Authority before the CESTAT.

According to him, the impact of said notification dated 28.07.2010 can still be examined by the CESTAT in the appeal preferred by the department. He is seeking support from the judgment of CESTAT at Kolkata reported at 2015-TIOL-739-CESTAT-KOL.

Shri Mirza, learned counsel submits that the liability to pay tax may also be kept open and effect of said judgment of CESTAT can be evaluated by the CESTAT while reconsidering the controversy.

In this situation, as we find the order dated 30.03.2012 unsustainable as the material available on record has not been perused, we set it aside. Appeal No. ST/347/11-MUM is restored back to file of CESTAT (West Zone), Mumbai, for its fresh consideration and for giving an opportunity to the respondent – assessee to demonstrate that in the light of notification dated 28.07.2010, it is not liable to pay any service tax.

Keeping all rival contentions in this respect open and with above directions, we partly allow the appeal and dispose of the same. No order as to costs.

JUDGE **JUDGE**

*GS.