

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27.02.2015

CORAM

**THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH**

**C.M.A. NOS. 164 & 165 OF 2015
AND
M.P. NOS. 1 OF 2015**

M/s.Premier Garment Processing
Old No.4, New No.29
Govindan Street
T.Nagar, Chennai 600 017.

.. Appellant

- Vs -

1. The Customs, Excise & Service
Tax Appellate Tribunal
South Regional Bench
Shastri Bhavan Annexe
Nungambakkam, Chennai 600 006.

2. The Commissioner of Service Tax
Chennai.

.. Respondents

Appeal filed under Section 35-G of the Central Excise Act against the order dated 27.6.2014 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Regional Bench, Chennai, made in Final Order Nos.40568 & 40569 of 2014.

For Appellant : Mr.Vikram Ramakrishnan

For Respondents : Mr.V.Sundareswaran for R-2

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the appeals filed by it, the appellant/assessee is before this Court by filing the present appeals.

2. The appellant, a garment processing unit, engaged in the hiring of bed rolls, was awarded with a contract by the Southern Railway. Pursuant to the investigation carried out by the Directorate General of Central Excise Intelligence, a show cause notice dated 27.12.06 was issued demanding service tax on hire charges paid by the railways to the appellant treating the charges as consideration towards rendering of "customer care service" falling under the category of "Business Auxiliary Service". The said demand pertains to the period from July, 2003 to September, 2006. A detailed reply was filed by the appellant. However, the 2nd respondent confirmed the proposal and demanded a sum of Rs.74,35,664/= by invoking the extended period of limitation and also levied interest and imposed equal amount of penalty.

3. Against the said order of the Commissioner dated 30.4.07, the appellant preferred appeal to the Tribunal along with an application for waiver of pre-deposit of the amount demanded. The Tribunal vide order

dated 26.9.07, directed the appellant to deposit a sum of Rs.20 Lakhs. Against the said order, the appellant filed writ petition in W.P. No.36541/07 and this Court, vide order dated 7.12.07, initially granted stay. However, the writ petition itself was finally disposed of by this Court on 24.2.12 with a direction to the Tribunal to dispose of the appeal within sixty days from the date of receipt of the copy of the order without insisting on any pre-deposit as a pre-condition to hear the appeals.

4. In the interregnum, the Department issued two show cause notices for the subsequent period making similar demand. Though the appellant brought to the notice of the Department about the order of this Court for the previous period and the direction to the Tribunal, the concerned adjudicating authorities passed separate adjudication orders against which the appellant filed appeals before the Commissioner (Appeals). Though the order of this Court was placed before the Commissioner (Appeals), however, order was passed directing the appellant to pay 25% of the service tax demanded as pre-deposit. In spite of several reminders and requests, the order passed by the Commissioner (Appeals) was not modified, against which the appellant preferred appeals before the Tribunal.

5. In the appeals, the appellant filed applications for waiver of pre-deposit and also for linking the present appeals along with appeal

No.S/157/2007, which was remanded back to the Tribunal by this Court, which is also on the same issue. However, when the stay applications were taken up for consideration, based on the written submissions filed on behalf of the Revenue, the Tribunal, without considering the facts and circumstances of the case, based on the objections of the Revenue, rejected the appeals as time barred without going into the merits of the matter, on the premise that the orders were served on the appellant on 9.5.11, stated to have been dispatched by speed post. Against the said order of the Tribunal, the appellant has filed the present appeals.

6. Heard the learned counsel appearing for the appellant and the learned standing counsel appearing for the 2nd respondent and also perused the materials placed in the typed set of documents.

7. The question of law that arise for consideration in the present appeals is :-

"Whether the Tribunal was justified in dismissing the appeal on the ground of delay, when the Department has not complied with the statutory norms as contemplated under Section 37C (1) (a) of the Central Excise Act?"

8. As evident from the records, the order in this case, was passed by the Commissioner (Appeals) on 25.4.2011 (however, wrongly typed as

2010), which is stated to have been dispatched by speed post on 9.5.11, as is evident from the letter written by the Superintendent (Appeals) to the appellant. Based on the said letter as also the written submissions of the Department, the appeals preferred by the appellant/assessee were rejected by the Tribunal stating that there is a delay in filing the appeals and, consequently, the assessee is before us by filing these two appeals.

9. The primary contention raised by the learned counsel appearing for the appellant is that Section 37C (1) (a) of the Central Excise Act, as it stood then, does not speak about service of notice through 'speed post'. Further, it is submitted that proof of dispatch cannot be a proof of receipt and limitation should be reckoned only from the date of receipt of order. In the case on hand, it is seen from the letter written by the Superintendent (Appeals) that the order of the Commissioner (Appeals) was dispatched on 9.5.11 by speed post. However, there is no proof as to when the same was received by the appellant. It is the stand of the appellant that he received a copy of the order only on 23.12.11, whereinafter the appellant preferred the appeals before the Tribunal. Reckoning the limitation from 23.12.11, the appeals filed by the appellant on 4.1.12 is well within time. The further contention of the counsel for the appellant/assessee is that prior to 10.5.13, service through speed post was not one of the approved/recognised modes of service, as is evident from Section 37C (1) (a) of the Act and, therefore,

if such notice had been sent by speed post, the same cannot form the basis for the Tribunal to reject the appeals filed by the appellant as time barred, as the statutory prescription for service of notice has not been complied with by the Department.

9. Section 37C (1) (a) of the Central Excise Act, which provides for service of decisions, orders, summons, etc., is the subject matter of the present appeals. For better clarity, the said section is quoted hereinbelow:-

"37C. Service of decisions, orders, summons, etc. - (1)

Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, -

(a) by tendering the decision, order, summons or notice, or sending it by registered post with acknowledgment due, to the person for whom it is intended or his authorized agent, if any;

(b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;

(c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder,

shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in sub-section (1)."

10. It is evident from Section 37C (1) (a) of the Act, prior to 10.5.13, service through speed post was not one of the modes of service of orders, decisions, summons, etc. On and from 10.5.13, speed post was made as one of the modes of service for orders, decisions, summons, etc., provided it is supported by proof of delivery. Therefore, it is clear that proof of service is mandatory for the service effected through speed post on and after 10.5.13, but prior to 10.5.13, service through speed post not being a recognised/approved mode of service as per the provisions of the Act, any service effected through speed post is not binding on the appellant/assessee.

11. It is trite law that limitation has to be reckoned only from the date when the actual service has been effected, subject to fulfilling the mandatory requirement of showing proof of delivery. In the case on hand, the service of notice was effected on the appellant only on 23.12.2011 and there is nothing on the record to show that it was served on 9.5.11. Further, the order has been dispatched through speed post on 9.5.11, as is evident from the letter of the Superintendent (Appeals). However, prior to

10.5.13, service through speed post having not been a recognised/approved mode of service, it cannot be treated as service for reckoning the period of limitation. For the sake argument, even if the order is said to have been delivered by RPAD on 9.5.11, which apparently has not happened in this case, no proof having been filed to support such delivery, which is the mandatory requirement as per Section 37C (1) (a) of the Act, it is clear that the service of notice in the manner as prescribed under Section 37C (1) (a) has not been effected.

12. Further, it appears that the appellant was informed vide letter of the Superintendent (Appeals) dated 22.12.11, wherein he was informed about the order dated 25.4.11. Only thereafter, the appellant preferred the appeals, on 4.1.12. In such circumstances, the appeals filed is very much in time. Therefore, in such view of the matter, this Court is of the considered opinion that question of delay does not arise in this case, as the filing of the appeals are well within time. Accordingly, the ***substantial question of law is answered in favour of the appellant/assessee and against the respondent/Revenue.***

13. In the result, the order of the Tribunal is set aside and the appeals are allowed. The Tribunal is directed to take up the appeals and stay petitions on file and dispose of the same on merits and in accordance with

law at an early date. Consequently, connected miscellaneous petitions are closed. However, in the circumstances of the case, there shall be no order as to costs.

(R.S.J.) (R.K.J.)

27.02.2015

Index : Yes/No

Internet : Yes/No

GLN

To

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