IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20-11-2015

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MRS.JUSTICE S.VIMALA

W.P.No.13262 of 2015
and
W.A.No.744 of 2015

W.P.No.13262 of 2015:

M/s.Premier Garment Processing,
Rep. By its Prop; Ebrahim Sha,
No.29, Govindan Street,
T.Nagar, Chennai-600 017. ... Petitioner

Versus

1. The Union of India
   Rep. By its Secretary to Govt.,
   Department of Revenue
   Ministry of Finance,
   North Block, New Delhi.

2. The Commissioner of Service Tax,
   Chennai.

3. The Additional Commissioner of Service Tax,
   Service Tax Commissionerate,
   MHU Complex, 692, Anna Salai,
   Chennai-600 034.

4. The Assistant Commissioner of Service Tax,
   III Division, Newry Towers, II Avenue,
   Anna Nagar, Chennai-600 040. ... Respondents

Prayer in W.P.No.13262 of 2015: Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus to call for and quash the proceedings of the fourth respondent, dated 9.10.2013, issued under Section 87 of the Finance Act, 1944, and to forbear the respondents from demanding or recovering any amount as service tax, in so far as it relates to the period October, 2007 to March, 2010, pursuant to the order passed by the respondents in order in Original Nos.5 to 7 of 2011, dated 27.1.2011, passed by the third respondent for the period from September 2007 to 2010.

For Petitioner : Mr.K.Jayachandran
For Respondents : Mr.V.Sundareswaran

W.A.No.744 of 2015

M/s.Premier Garment Processing,
Rep. By its Prop; Ebrahim Sha,
No.29, Govindan Street,
T.Nagar, Chennai-600 017. ... Appellant

Versus

1. The Union of India
   Rep. By its Secretary to Govt.,
   Department of Revenue
   Ministry of Finance,
   North Block, New Delhi.

2. The Commissioner of Service Tax (Appeals-II)
   26/1, Mahatma Gandhi Road, Nungambakkam,
   Chennai-600 034.

3. The Additional Commissioner of Service Tax,
   Service Tax Commissionerate,
   MHU Complex, 692, Anna Salai,
   Chennai-600 034. ... Respondents

Prayer in W.A.No.744 of 2015: Appeal filed against the order passed by the learned single Judge of this Court, dated 18.3.2015, made in W.P.No.6608 of 2015 therein.

For Appellant : Mr.K.Jayachandran
For Respondents : Mr.V.Sundareswaran

COMMON ORDER

The Writ Petition, in W.P.No.13262 of 2015, had been filed praying that this Court may be pleased to issue a Writ of Certiorarified Mandamus to call for and quash the proceedings of the fourth respondent, dated 9.10.2013, issued under Section 87 of the Finance Act, 1994, and to forbear the respondents from demanding or recovering any amount, as service tax, in so far as it relates to the period from October, 2007 to March, 2010, pursuant to the order passed by the respondents, in order-in-Original Nos.5 to 7 of 2011, dated 27.1.2011, passed by the third respondent, for the period from September 2007 to 2010.

2. The Writ Appeal, in W.A.No.744 of 2015, had been filed against the order passed by the learned single Judge of this Court, dated 18.3.2015, made in W.P.No.6608 of 2015.

3. As certain common issues have arisen in the Writ Petition and in the Writ Appeal they are taken up together and a common order is being passed.

4. The learned counsel appearing on behalf of the assessee had raised various grounds stating that the impugned order in Order-in-Original Nos.5 to 7 of 2011, dated 27.1.2011, passed by the third respondent in the Writ Petition, is arbitrary, illegal and void. He had submitted that the service tax levied on the assessee is not recoverable, as it has been exempted by virtue of Section 99 of the Indian Railways Act, as amended by the Finance Act, 2013.

5. He had further submitted that there has been no real delay in the filing of the appeal, before the Commissioner Service Tax (Appeals)-II, as the assessee had received the impugned order only along with the order of the department, dated 2.12.2013. The dismissal of the appeal, by the Commissioner of Appeals, as time barred is erroneous and therefore, it is liable to be set aside.

6. On the contrary the claim of the learned counsel appearing on behalf of the respondents is that the assessee had received and acknowledged the receipt of the impugned order, dated 27.1.2011, on 10.2.2011.

7. The learned counsel appearing on behalf of the respondents had further submitted that, as per Section 85(3) of the Finance Act, 1994, as it stood upto 27.5.2012, the appeal to the Commissioner (Appeals), ought to have been filed, within three months from the date of the communication of the Order-in-Original. In the present case, the time limit of three months had expired, on 10.5.2011. As per the proviso to Section 85(3) of the Finance Act, 1994, where sufficient cause was shown, an appeal could be allowed to be presented, within a further period of three months. Such extended period had also expired on 10.8.2011. As the assessee had filed the appeal before the

Commissioner (Appeals), on 17.1.2014, it was beyond the condonable period. In such a case, the Commissioner of Appeal has no power to condone the delay, as held by the Supreme Court, in Singh Enterprises vs. CCE, Jamshedpur [2008 (221) ELT 163]. The proviso to Section 85 of the Finance Act, 1994, and Section 35 of the Central Excise Act, 1944, which was the subject matter of the said case are pari materia. Hence, the Commissioner (Appeals) was right in dismissing the appeal filed by the assessee, the petitioner in the Writ Petition, in W.P.No.13262 of 2015 and the appellant in the Writ Appeal, in W.A.No.744 of 2015.

8. At this stage of the hearing of the above matters, the learned counsel appearing on behalf of the assessee had submitted that the assessee may be permitted to file an appeal before the Customs, Excise and Service Tax Appellate Tribunal, under Section 86 of the Finance Act, 1994, on depositing 10% of the service tax demanded by the department, leaving it open to the assessee to show that in fact, there was no delay in the filing of the appeal before the Commissioner (Appeals), while challenging the Order-in-Original, dated 27.1.2011.

9. The learned counsel appearing on behalf of the respondents has no serious objection for this court passing such an order. However, he had submitted that the assessee ought to comply with the conditions imposed by this court and to prove, by way of evidence, that the appeal filed by the assessee, before the Commissioner (Appeals), is within the limitation period prescribed by the relevant provisions of law.

10. In view of the submissions made by the learned counsels appearing on behalf of the parties concerned and on a perusal of the records available, this court finds it appropriate to permit the assessee to prefer an appeal against the order of the Commissioner of Appeals, dated 27.1.2011, before the Customs, Excise and Service Tax Appellate Tribunal, within 15 days from the date of the receipt of a copy of this order. The assessee shall deposit 10% of the service tax demanded by the department, before the filing of the said appeal. It would be open to the assessee to prove, by sufficient evidence, before the Appellate Tribunal, that the appeal filed by the assessee, before the Commissioner of Appeals, was within the time limit prescribed by the relevant provisions of law.

11. On the Appellate Tribunal being convinced regarding the claim of the assessee, with regard to the aspect of delay, it

may proceed with the hearing of the appeal and pass appropriate orders thereon, on merits and in accordance with law. However, it is made clear that, if the Appellate Tribunal is not convinced with the reasons adduced by the assessee, with regard to the delay in the filing of the appeal before the Commissioner of Appeals, it need not traverse into the merits of the matter, while passing its orders. On the assessee filing the appeal, the Appellate Tribunal shall pass appropriate orders, in view of the directions issued by this court, as expeditiously as possible. Consequently, the Writ Petition, in W.P.No.13262 of 2015 and the Writ Appeal, in W.A.No.744 of 2015, are disposed of with the above directions. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy// Sub Assistant Registrar

csh
To

1. The Secretary to Govt., Union of India,
   Department of Revenue, Ministry of Finance,
   North Block, New Delhi.

2. The Commissioner of Service Tax, Chennai.

3. The Additional Commissioner of Service Tax,
   Service Tax Commissionerate,
   MHU Complex, 692, Anna Salai,
   Chennai-600 034.

4. The Assistant Commissioner of Service Tax,
   III Division, Newry Towers, II Avenue,
   Anna Nagar, Chennai-600 040.

+ 1 cc to Mr.K.Jayachandran, Advocate Sr 62973 (01/2/16)

W.P.No.13262 of 2015
and
W.A.No.744 of 2015

AD(CO)
CA(14/12/2015)