IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.07.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NO. 3067 OF 2009

M/s.A.S.Transport
rep. by its Partner
Mr. A.Chandrasekara Reddy
No.827/6, 1st Floor
Ramamurthy Nagar Main Road
Banaswadi Post
Bangalore 560 016. ... Appellant

- Vs -

1. The Customs, Excise & Service Tax Appellate Tribunal
No.26, Haddows Road
Shastri Bhavan
Chennai 600 006.

2. The Commissioner of Central Excise
No.1, Williams Road
Cantonment
Tiruchirappalli. ... Respondents

Appeal filed under Section 35-G of the Central Excise Act against the order dated 14.7.09 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.839/2009.

Against the Order dated 30.04.2007 made in Appeal No.28 of 2007 on the file of the Commissioner of Central Excise(Appeals), Trichy.

Against the Order dated 04.01.2007 made in Order No.1 of 2007 on the file of the Deputy Commissioner of Central Excise, Central Excise II Division, Trichy.

For Appellant : Mr. S.Muthu Venkataraman

For Respondents : Mr. T.Chandrasekar for R-2

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in dismissing the appeal filed by it, the appellant/assessee is before this Court by filing the present appeal. Though this Court, vide order dated 4.11.09, admitted the appeal, however, no question of law has been framed. However, in view of the order that is proposed to be passed by this Court, it is not necessary to frame any question of law for consideration.

2. The facts, in a nutshell, are as hereunder :-

The appellant, a partnership firm, was the successful bidder in the tender process conducted by the Steel Authority of India. The appellant was awarded the tender for handling of iron and steel materials. The appellant was under the bona fide belief that the nature of work did not involve cargo handling services within the meaning of the Finance Act, 1994 and, therefore, had not obtained any registration certificate in terms of the said Act.

3. The appellant was issued with a show cause notice dated 20.7.06, on the basis of intelligence, alleging that the appellant was rendering cargo handling services to M/s.SAIL in terms of Section 65 (23) of the Finance Act, 1994 for the period February, 2003 to April, 2004. Reply was submitted by the appellant/assessee stating that the work executed by them was mere material handling and does not qualify as cargo handling services and further the appellant sought time for filing final objections. However, without considering the same, the adjudicating authority proceeded to decide the matter and confirmed the proposal to levy tax on the premise that the activity carried on by the appellant constitutes cargo handling services as clarified by the Board vide Circular No.1 of 2002 dated 1.8.2002. Further finding was given by the adjudicating authority stating that no proof was submitted as to the exact nature of activity done by the appellant.

4. The appeal preferred by the assessee, aggrieved by the said order, before the Commissioner (Appeals), was dismissed confirming the order passed by the adjudicating authority, against which the assessee preferred further appeal to the Tribunal. The Tribunal, considering Section 65 (23) of Chapter V of the Finance Act, 1994,

more specifically, the term 'cargo handling services', held that the activity undertaken by the assessee relates to cargo handling services and, accordingly, rejected the appeal filed by the assessee. Aggrieved by the said order, the present appeal is filed by the assessee.

5. Learned counsel appearing for the appellant submitted that the entire proceedings is barred by limitation and, therefore, the appeal has to be allowed and the entire demand in terms of proviso to Section 73 (1) of Chapter V of the Finance Act, 1994 has to be set aside.

6. Per contra, learned standing counsel appearing for the Department submitted that the authorities below have concurrently held that the services rendered by the appellant related to cargo handling, which squarely falls under Section 65 (23) of Chapter V of the Finance Act. Further, it is submitted that the assessee has not submitted any proof to show that the services rendered by the assessee were not related to cargo handling services. It is further submitted that the contention of the assessee that the entire proceedings is barred by limitation has to be rejected, as no such plea was taken by the assessee before the Tribunal and, therefore, the assessee is estopped from canvassing the said plea for the first time before this Court. Hence, it prayed that no interference is called for with the order passed by the Tribunal.

7. Heard the learned counsel appearing for the appellant/assessee and the learned standing counsel appearing for the respondent/Revenue and perused the materials available on record as also the relevant provisions of the Act.

8. The assessee has not disputed the finding of the Tribunal insofar as it relates to activities undertaken by the assessee, which has been brought under Section 65 (23) of Chapter V of Finance Act, 1994. However, the main plea raised by the assessee before this Court is that entire proceedings is barred by limitation and, therefore, the appeal has to be allowed and the entire demand in terms of proviso to Section 73 (1) of Chapter V of the Finance Act, 1994 has to be set aside.

9. Though such a plea is raised by the assessee before this Court, this Court is not inclined to enter into the controversy raised by the appellant/assessee as we find that such a plea appears to have been not raised before the Tribunal, as is evident from the order passed by the Tribunal. Further, the grounds of appeal before the Tribunal has also not been made available in the typed set of papers so as to enable this Court to entertain the above plea of

limitation raised before this Court. That being the case, we do not find any justification to entertain the appeal on the plea that merely because the original order has not invoked the provisions for imposing the penalty, automatically the plea of no tax invoking proviso to Section 73 (1) would apply. This plea of the appellant appears to be on a wrong premise, as we find from the order of the Tribunal that what has been agitated is the fact that the nature of services provided by the assessee does not fall within the service tax net, which the original authority, the appellate authority as also the Tribunal, have concurrently held against the appellant holding that the activity performed by the appellant would fall squarely within the provisions of Section 65 (23) of Chapter 5 of Finance Act, 1994, viz., 'cargo handling services'. We find no error in the order of the adjudicating authority as confirmed by the appellate authority and further confirmed by the Tribunal. In the absence of material pleading before the competent authority, we are unable to countenance the argument advanced by the appellant in regard to limitation. For the reasons stated above, this Court is not inclined to entertain the appeal by framing any questions of law for consideration, as no question of law, much less substantial question of law arises for consideration in this appeal.

10. Accordingly, the appeal fails and the same is dismissed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Customs, Excise & Service
Tax Appellate Tribunal
No.26, Haddows Road
Shastri Bhavan
Chennai 600 006.

2. The Commissioner of Central Excise
No.1, Williams Road
Cantonment
Tiruchirappalli.

3. The Deputy Commissioner
of Central Excise,
Central Excise II Division, Trichy.

+1cc to Mr.T.Chandrasekaran, Advocate, S.R.No.34918
+1cc to Mr.K.Magesh, Advocate, S.R.No.34887

C.M.A. NO. 3067 OF 2009

GP(CO)
CA(30/09/2015)