

***HON'BLE SRI JUSTICE G.CHANDRAIAH**
&
HONOURABLE SRI JUSTICE CHALLA KODANDA
RAM

+C.E.A. No. 46 of 2015

%16-06-2015

Commissioner of Central Excise Appellant

Vs.

\$ M/s.Vijaya Consultants Respondent

!Counsel for the Appellant: SC for Customs & Central
Excise

Counsel for Respondent: Sri Laxmi Kumar and Sridharan

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>Head Note:

? Cases referred:

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JUDGMENT:- (per Hon'ble Sri Justice Challa Kodanda Ram)

This Central Excise Appeal under Section 35G of the Central Excise Act, 1944 as substituted by the Finance Act, 2003 (for brevity "the Act") is filed at the instance of the Department against the Final Order No. 558 / 2007, dated 08.05.2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (for short "CESTAT") by raising the following questions of law for adjudication.

- i) Whether the Honourable CESTAT is justified in setting aside the Speaking Order dated 05.12.2002 passed by the competent adjudicating authority and confirmed by appellate authority, on the short ground of non-issuance of show cause notice when the respondent was suitably put on notice vide letter dated 17.08.2001 about the correct classification of the services provided by him and payment of service tax @ 5% for the period specified therein (from 07.07.1997 to 30.06.2001) and respondent filed 20 page explanation and fully utilized opportunity of personal hearing in view of the judgment of the Honourable High Court of Bombay in the case of M/s.Devidayal Rolling & Refineries Pvt. Ltd. vs. A.V. Borkar, Superintendent, Central Excise & Others reported in 1983(12) ELT 338 (Bom), "though the notice does not in so many terms describe it as a show cause notice, contents of the said notice is eloquent enough to indicate nothing but that"
- ii) Whether the Honourable CESTAT is justified in setting

aside the order in appeal passed by the Commissioner (A) and the speaking order passed by the original adjudicating authority on the short question that there was no show cause notice on record even though there was a lot of detailed correspondence between the department and the respondent relating to category of service and also tax liability, penal provisions and interest under various sections of Finance Act followed by a speaking order observing all principles of natural justice?

- iii) Whether the Honourable CESTAT is justified in ignoring the decision of the CESTAT, New Delhi in the case of M/s.Cenlub Industries Ltd. vs. Commissioner of Customs reported in 2001 (132) ELT 206 (Trib) wherein the Tribunal held that the plea of non-issuance of show cause notice has no force since the applicant was afforded an opportunity of personal hearing before the case is decided and thus principles of natural justice were fully complied with, more so when respondent has not raised the issue before original adjudicating authority and appellate authority?

The respondent is a partnership firm consisting of a Diploma holder, a Graduate in Arts and one Mechanical Engineer. The respondent approached the Department seeking for issuance of Form ST-1 for registration in the category of Technocrats –Technical Consultancy under Section 69 of the Finance Act, 1994. The Superintendent, Technical from the Office of the Deputy Commissioner of Central Excise, Vijayawada Division issuing a reply stating that respondent-firm could not be given registration as a scientific or technical consultancy services and suggested that their services would fall under the category of Consulting Engineer. The superintendent also advised the respondent to obtain registration as a consulting engineer for the services under the category of “Consulting Engineer”. In their anxiety, the respondent tried to justify

with the authorities how their services cannot be termed as Consulting Engineer. The Deputy Commissioner of Customs and Central Excise issued an order to the respondent demanding service tax for the period from 07.07.1997 to 30.06.2001. The appeal before the Commissioner of Customs and Central Excise challenging the order of the Deputy Commissioner ended up in dismissal confirming the order of the Deputy Commissioner. The CESTAT, on consideration of the arguments of the respondent and perusal of the record, found that the respondent was never issued a show cause notice as required under Section 73 of the Finance Act, 1994 which came into effect from 16.10.1998. Section 73(1)(a)(b) and 2 of the Act reads as under:

“73. Value of taxable services escaping assessment:- (1) If –

- a) the Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise has reason to believe that by reason of omission or failure on the part of the assessee, to make a return under Section 70 for any prescribed period or to disclose wholly or truly all material facts required for verification of the assessment under Section 71, the value of taxable service has escaped assessment or has been under assessed or service tax has not been paid or has been short paid or any sum has erroneously been refunded, or
- b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise has in consequence of information in his possession, reason to believe that the value of any taxable service assessable in any prescribed period has escaped assessment or has been under-assessed or service tax has not been paid or has been short-paid or any sum has erroneously been refunded.

he may, in cases falling under clause (a), at any time within five

years, and in cases falling under clause (b), at any time within one year, from the relevant date, serve notice on the person chargeable with the service tax which has escaped assessment or has been under-assessed or has not been paid or has been short-paid, or to whom any sum has been erroneously refunded, requiring him to show cause why he should not pay the amount specified in the notice.

Explanation:- Where the service of the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing the aforesaid period of five years or one year; as the case may be.

(2) The Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise shall, after considering the representation, if any, made by the person on whom notice is served under sub-section(1), determine the amount of service tax due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.”

The learned Standing Counsel for Customs and Central Excise appearing for the appellant while admitting that no show cause notice was issued as required under Section 73 of the Finance Act, submits that the respondent had submitted a detailed explanation and it was considered and rejected quantifying the amount payable by the respondent, as such, there is a substantial compliance on the part of the department and the non-issuance of show cause notice is only a technical breach on their part.

On the other hand, the learned counsel for the respondent submits that there is a categorical finding of the Tribunal that there was fundamental breach of compliance of the statutory provision which is the basic requirement to initiate the very proceedings under the statutory provisions of Service Tax and the Rules and procedural Regulations made therein, as such, the order of the Tribunal is

unassailable and does not call for any interference by this Court.

A perusal of the material placed on record reveals that it is an undisputed fact that the Tribunal had categorically recorded that no show cause notice was issued at any point of time and the order of the Commissioner was set aside on that ground. A perusal of Section 73 of the Finance Act which is extracted above leaves no manner of doubt that there is a requirement of issuance of notice by an authority who is not below the rank of Assistant Commissioner / Deputy Commissioner. The notice is required to state whether the noticee falls within the category of Section 73(1)(a) or 1(b) of the Act and further specify the amount of service tax that is payable. In the present case, admittedly, no notice was issued to the respondent. Reliance is placed on the letter dated 17.08.2001 which was issued by the Superintendent who is not authorized to issue such notice and he is only a subordinate officer to the Deputy / Assistant Commissioner. Further, the letter dated 17.08.2001 does not satisfy the requirements of the notice as there is no allegation that a specified amount is required to be paid as service tax and even no period is mentioned therein. By no stretch of imagination, the letter dated 17.08.2001 could be treated as a show cause notice satisfying the requirement of Section 73 of the Act. As a matter of fact, this letter was issued only as a clarification to the query raised by the appellant to the

respondent seeking that they are required to be registered as technocrats for the services of scientific or technical consultancy. The said letter is more in the nature of providing advice to the appellant. The procedural requirement of issuance of notice and calling for explanation cannot be dispensed with as otherwise the demand of money in the name of tax is in violation of the very procedure prescribed under the Act, thus violating the safeguard provided under Article 265 of the Constitution of India. In the circumstances, we see no reason to entertain this appeal.

We also find that the order of the Tribunal is dated 08.05.2007 and the appeal itself came to be filed in the year 2012 and it was numbered in the year 2015, hence, we do not find any justification at this length of time to entertain this appeal. Though Section 35® of the Act as made applicable to Service Tax appeals came into statute book with effect from 20.10.2010 by virtue of Section 69 of the Finance Act, 2011, the spirit of the provision can be taken into consideration. It is admitted by the learned counsel for both the parties that there is a prohibition contained in the Circular issued in exercise of the power under Section 35 ® of the Act. In the present case, the tax demand is only Rs.7.00 lakhs and the prescribed limit is Rs.10.00 lakhs and inasmuch as the tax demand being within the prescribed limit, we do not see any merit to entertain the appeal even on this ground.

Hence, the appeal is devoid of merits and

accordingly dismissed. No order as to costs.

As a sequel to dismissal of the appeal, Miscellaneous Petitions, if any pending, shall stand disposed of as infructuous.

G. CHANDRAIAH, J

16.06.2015

CHALLA KODANDA

RAM,J

Note: L.R. Copy to be marked

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