IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : NAGPUR

CENTRAL EXCISE APPEAL NO. 20 OF 2013.

(Commissioner of Central Excise & Customs, Nagpur .vs. M/s. Ador Fontech Limited & another)

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

Mr. Firdos Mirza, Advocate for appellant,
Mr. Neerav Mainkar, Advocate with Mr. Rahul Dharmadhikari, Advocate for respondent no. 1.

CORAM : B.R. GAVAI & P.N. DESHMUKH, JJ.

DATED : FEBRUARY 3, 2016.

1] The appeal challenges the order passed by the learned Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as “the CESTAT”), thereby partly allowing the appeal of the assessee and partly dismissing the appeal.

2] The proceedings were initiated against the respondent no.1 by the Revenue by issuing a show-cause notice dated 7.10.2008 demanding service tax for the period between July, 2003 to March, 2008. The Adjudicating Authority confirmed the demand and imposed penalties. Since the order-in-original was passed by the Commissioner, an appeal came to be preferred by the assessee before the learned CESTAT.

3] The learned Tribunal vide the impugned order rejected the contention of the assessee that the value of material is not to be taken up for consideration for purpose of service tax. However, in so far as invoking a larger period of limitation as provided under the proviso to sub-section (1) of Section 73 of Chapter V of the Finance Act, 1994 is concerned, the learned Tribunal held that it cannot be said that there was any suppression by the assessee to invoke a larger period of limitation and as such, set aside the demand beyond the normal period of limitation and also set aside the penalties. Being aggrieved thereby, the present appeal has been filed.

4] Shri Firdos Mirza, learned Counsel for the appellant/Revenue, submits that the perusal of proviso to sub-section (1) of Section 73 of the Finance Act would reveal that when a case of fraud, collusion, wilful misstatement, suppression of fact or contravention of any of the provisions of the Chapter or the Rules made thereunder with intent to evade payment of service tax is made out, the Revenue is entitled to invoke larger period of limitation than ordinary period of limitation of one year.

The learned Counsel submits that in the present case, since the assessment was by way of self assessment, it was the duty of the assessee to do the assessment on the basis of correct factual scenario. It is submitted that if the assessee has done the said assessment by suppressing material facts and has also not kept the relevant record, same would come within the ambit of suppression of material facts and as such, the Revenue is entitled to a larger period of limitation.

5] Mr. Neerav Mainkar, learned Counsel for respondent no. 1 assessee, on the contrary submits that there is no suppression of any nature. He submits that taking into consideration the nature of the activities carried out by the assessee, on implementation of Value Added Tax with effect from 1.4.2005, the assessee had exercised the option of Maharashtra Value Added Tax Scheme under which the assessee was paying 80% VAT on the value of the contract and 20% Service Tax on the value of the contract. He submits that under the said Scheme, the material cost is defined as 80% of the contract and balance 20% as labour charges. The learned Counsel submits that as such the assessee had specifically sought a clarification from the Revenue on 25.10.2005 as to whether there was any deviation on paying the service tax and as to what other option was available to it in the circumstances. He, therefore, submits that by no stretch of imagination it can be said that there was any suppression, so as to entitle the Revenue to invoke a longer period of limitation.

6] The nature of the job undertaken by the assessee is job work of cement plants, steel plants and thermal power plants. It could thus be seen that the nature of the job involves use of material as well as rendering of the services. It further appears that under the M. VAT Scheme, the State had provided that 80% of the value shall be taken for payment of VAT as a value of materials and 20% would be considered as a value of labour. The assessee having opted for the said scheme was regularly paying VAT to the State Government on 80% of the contract amount being the value of materials and 20% to the Central Government being value of the services rendered. The assessee had specifically sought a guidance from the authorities as to whether there was any deviation on payment of the service tax on the aforesaid principle and as to what option was available to him. Though the Revenue had duly received the said communication, no reply of whatsoever nature has been given to the assessee. Though Shri Mirza submits that there is no obligation on the department to give reply to such a communication and it is for the assessee to make the assessment correctly, we are not inclined to accept the said submission.

7] When an assessee bonafide on the basis of M. VAT Scheme makes a payment to the State Government on 80% of the contract value being the cost of material under the M. VAT Scheme and also makes payment to the Central Government on 20% of the contract value being the value of the services rendered and also seeks a clarification from the Competent Authority as to whether he is committing any deviation, in our considered view, it cannot be said to be amounting to suppression. The assessee himself had genuine doubts and, therefore, thought it necessary to seek a clarification from the Revenue. For the reasons best known, the Competent Authority did not find it necessary to reply to the communication by the assessee. For the first time in the year 2008, the Revenue appears to have realized that the assessment of the appellant was not in accordance with the notification No. 12/03.

8] The learned Tribunal, therefore, held that in so far as the assessment period which came within a normal limitation period, no error could be found with the view of the Revenue, inasmuch as the contention in that regard of the assessee was not in consonance with the notification dated 12/03. However, in so far as extended period of limitation is concerned, the learned Tribunal found that there was no case of suppression made out and as such, allowed the appeal to that extent.

9] We do not find that the learned CESTAT has committed any error in passing the impugned order. In any case, as to whether a case of suppression is made out or not is a pure question of fact which has to be decided on the basis of the material placed on record by the rival parties and it cannot be said to be a question of law, leave aside a substantial question of law.

10] In that view of the matter, we do not find that there is any merit in the appeal. The appeal is rejected.

<u>Judge</u> **<u>Judge</u>**

J.