

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.01.2016

CORAM:

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

Civil Miscellaneous Appeal Nos.2805 and 2806 of 2015
& 58, 59 of 2016 and
M.P.Nos.1 and 1 of 2015

M/s. United Cargo Transport Services,
No.76, G-Floor, Venkateshan Street,
Adjacent to Angalaparameshwari Kovil,
Chinthathripet,
Chennai - 600 002 .. Appellant in all CMAs

vs.

1. The Customs, Excise and Service Tax
Appellate Tribunal (South Zonal Bench),
Shastri Bhavan, Annexe Building,
Nungambakkam Chennai - 600 006
2. The Commissioner of Service Tax,
Chennai .. Respondents in all CMAs

Civil Miscellaneous Appeals filed under Section 83 of the Finance Act, 1994, read with Section 35G of The Central Excise Act, 1944, against the Final Orders passed by the first respondent in Final Order Nos.40606 of 2015, made in ST/341-342/2012, dated 01.06.2015; 40607 of 2015, made in ST/341-342/2012, dated 01.06.2015; Final Order Nos.41045 of 2014, made in ST/341-342/2012, dated 26.06.2014 and Final Order Nos.41046 of 2014, made in ST/341-342/2012, dated 26.06.2014, respectively.

For Appellant in all CMAs : Mr. K.Jayachandran
For Respondents in all CMAs : Mr. V.Sundareswaran

C O M M O N J U D G M E N T

(Judgment of the Court was delivered by S.Vimala, J.,)

Civil Miscellaneous Appeal Nos.2805 and 2806 of 2015, 58 and 59 of 2016 have been filed by the Assessee / appellant herein, challenging the orders passed by the first respondent / CESTAT, in the Final Order Nos.40606 and 40607 of 2015, dated 01.06.2015 and Final Order Nos.41045 and 41046 of 2014, dated 26.06.2014, respectively.

Brief facts:-

<https://hcservices.ecourts.gov.in/hcservices/>

2. The appellant is a proprietry firm, engaged in providing transport facility (air, train and road) to various customers. The main activity of the firm is transporting of goods from one place to another. In all cases of transport facility provided to the customers, there is no clause on price / charges for loading and unloading, but the clause was only with reference to freight charges on weight basis. In respect of the transportation of goods, there is no liability to pay service tax. The appellant is liable to pay service tax only in cases, where the appellant had charged for loading or unloading activities to the customers.

2.1. Based upon the balance sheet and profit and loss account filed for Income Tax purposes, the Department issued: (a) show cause notice No.186/2010, dated 15.04.2010, covering the period 2004-2005 to 2008-2009 and (b) show cause notice No.103/2010, dated 20.10.2010, covering the period 2009-2010.

2.2. The contention of the learned counsel for the Revenue was that the appellant did not include Booking and Forwarding Charges, Loading and Unloading charges, clearing charges, freight charges and vehicle charges in the taxable value and thus, the returns filed are incorrect.

2.3. The appellant filed a detailed reply, dated 23.07.2010, submitting that: (a) the appellant had done only transportation of goods for which they are not liable to pay service tax; and (b) even assuming that they are liable to pay tax, the proposal to demand tax for 2004-2005 is time barred.

2.4. Without considering the documents and the written submission, by the adjudication order, dated 21.03.2012, the demand made in the show cause notices was confirmed and the details of tax are as under:-

"For the period from 2004-05 to 2008-09:

Service Tax demanded - Rs.1,89,72,702/-

Amount (already paid) to be appropriated - Rs.29,03,409/-

Service Tax payable - Rs.1,60,69,273/-.

Equal amount of penalty payable - Rs.1,89,72,702/-
(along with interest)

For the period from 2009-10:

Service Tax demanded - Rs.97,417/-

Penalty at Rs.200/- per day or 2% per month plus interest.

Further penalty - Rs.5,000/-"

2.5. As against the Adjudication Order, dated 21.03.2012, the appellant filed an appeal before the CESTAT, along with an application for waiver of pre-deposit of the amount demanded. The first respondent / CESTAT / Tribunal, while considering the Application for Stay, by order in Miscellaneous Order

Nos.41045-41048 of 2014, dated 26.06.2014, directed the appellant to pre-deposit Rs.1,25,00,000/-, within a period of eight weeks and further directed that an amount of Rs.74,41,994/- already made by the appellant would be taken into account for this deposit, subject to verification by the Service Tax Department. The Assessee wrote a letter, dated 05.08.2014, to the Assistant Commissioner of Central Excise, for verification of the deposit of Rs.74,41,994.00, as referred to in the order of stay. A request was also made by the assessee to adjust the CENVAT credit of * **Rs.70,38,252/-**, as against the order of pre-deposit. The Revenue commented that the conduct of the assessee in taking belated steps for verification of the deposit is not praise-worthy, but, however, granted eight weeks further time for compliance of the earlier order alone. The assessee was directed to produce a Verification Report from the Department and to deposit the balance amount.

2.6. On a subsequent occasion, the Authorised Representative of the Revenue placed the Verification Report, dated 24.09.2014, and clarified that the claim of the appellant that they have already paid an amount of Rs.74,41,994/- is not correct and that these payments were made towards their regular service tax payments for the period 2005-2009.

2.7. Therefore, a notice of dismissal was issued on 11.02.2015, asking the appellant to show cause, as to why the appeal should not be dismissed for non-compliance of the conditional order of stay. The learned counsel for the assessee had sent a Fax message, dated 01.06.2015, seeking for an adjournment of the case. But, the Tribunal felt that sufficient time has already been granted and therefore, passed the Final Order Nos.40606-40607 of 2015, dated 01.06.2015, dismissing the appeal for non-compliance of the conditional order of the stay. Challenging the same, C.M.A.Nos.2805 and 2806 of 2015 have been filed.

2.8. During the hearing of the appeals in C.M.A.No.2805 and 2806 of 2015 before this Court, the learned counsel for the assessee submitted that the earlier orders passed by the Tribunal, in Miscellaneous Order Nos.41045-41046 of 2014, dated 26.06.2014, have to be challenged for better adjudication and thereafter, challenging the same, C.M.A.Nos.58 and 59 of 2016 have been filed.

3. As the substantial question of law raised, in all these appeals, are inter-linked and common, common judgment is pronounced.

4. The contention of the learned counsel for the appellant, in all these appeals, is that the Tribunal is not justified in directing the appellant to pre-deposit a sum of Rs.1,25,00,000/-, when: (a) the demand for the year 2004-05 is

barred by limitation; (b) the appellant had already paid a sum of Rs.29,03,409/-; (c) the CENVAT credit of ***70,38,252/-** was available with the Department. It is further contended by the appellant that the Tribunal is not justified in passing the impugned order, when, prima facie, the demand itself is not justified, by virtue of the Board's Circular, dated 06.08.2008.

5. It is pointed out by the learned counsel for the appellant, in all these appeals that, as per the mandatory requirement of Section 35F of the Central Excise Act, 1944 (as made applicable to Service Tax), the Tribunal is expected to consider the prima facie case, balance of convenience, irreparable loss and injury and financial hardship and the order of the Tribunal, ordering pre-deposit without taking into account all the parameters, mentioned above, is arbitrary and unsustainable.

6. At the outset, it has to be pointed out that the liability to pay service tax and the issue of limitation with regard to the demand made are all matters to be agitated only before the first respondent / CESTAT.

7. The only issue to be decided in these appeals is, whether the first respondent is justified in dismissing the appeals for non-compliance of the conditional order of stay.

8. The learned counsel for the Department would submit that there cannot be a total waiver of pre-deposit and the amount of Rs.29,03,409/- have already been ordered to be appropriated by the Assessing Officer, by the order, dated 21.03.2012.

9. It was the claim of the assessee that the CENVAT credit available with the Department ought to have been adjusted as against the order of pre-deposit.

10. Despite the request being made, seeking modification of the order of stay, the Tribunal did not consider the same, but only extended the time. When the CENVAT credit was available with the Revenue, which would safeguard the interest, insistence upon the further deposit would cause undue hardship to the appellant and as such, the appellant has established a prima facie case for their claim of waiver of pre-deposit. Though complete waiver cannot be granted, having regard to the demand made by the Department, the Tribunal should have considered the reduction of pre-deposit already ordered, having regard to the availability of CENVAT credit to the extent of ***Rs.70,38,252/-**. But that has not been done.

*** The amount of Rs.70,38,252/- is ordered to be adjusted against the duty payable by the appellant.**

11. Therefore, the Final Order Nos.40606-40607, dated 01.06.2015, stand set-aside. However, having regard to the

amount of demand involved, this Court feels it appropriate to direct the appellant to make a further deposit of Rs.10,00,000/- (Rupees ten lakhs only) before the second respondent towards pre-deposit. Accordingly, Miscellaneous Order Nos.41045-41048 of 2014, dated 26.06.2014 stands modified on the terms and conditions enumerated in the following paragraph of this judgment.

12. Accordingly, these Civil Miscellaneous Appeals are disposed of, subject to the following terms and conditions:-

(i) The appellant shall deposit a sum of Rs.10,00,000/- (Rupees ten lakhs only) to the credit of the second respondent within a period of four weeks from the date of receipt of a copy of this judgment;

(ii) on such deposit being made, the Tribunal shall take the appeal, (challenging the Order-in-Original Nos.14 and 15 of 2012, dated 21.03.2012, passed by the Commissioner of Central Excise, Chennai II Commissionerate), on file and dispose of the same, on merits and in accordance with law, as expeditiously as possible.

Consequently, the connected MPs are closed.

srk

Sd/-
Asst.Registrar(CCC)
Dated:25/1/2016

**Corrected as per the
order of this court dated
29.1.2016 made herein.**

Sd/-
Asst.Registrar (VI)
Dated:3/02/2016

/true copy/

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Sub Asst. Registrar

To

1. Customs, Excise and Service Tax
Appellate Tribunal (Southern Bench),
Shastry Bhavan, Annexe Building,
1st Floor, Haddows Road,
Chennai - 600 006

To be substituted
for the order
already despatched
on 27/1/2016

2. The Commissioner of Service Tax,
No.692 Anna Salai,
M.H.U.Complex, Nandanam,
Chennai - 600 035

+ 1 cc to Mr.V.Sundareswaran, Advocate Sr ***5824**
+ 1 cc to Mr. K.Jayachandran, Advocate Sr **5538**

C.M.A.Nos.2805 and 2806 of 2015
and 58, 59 of 2016 &
M.P.Nos.1 and 1 of 2015

KR/25/1/16

srg 03/02/2016



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