IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 7.12.2016

Coram:

THE HONOURABLE MR. JUSTICE HULUVADI G. RAMESH
AND

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.A.No.1485 of 2016

Southern Investments Private Ltd.,
represented by its Finance Director
Mr.Joseph Sundararaj Gerard,
No.65, Montieth Road, Egmore,
Chennai 600 008. .. Appellant

Versus

1. The Commissioner of Service Tax (Appeals-I),
Newry Towers, 2nd Floor, Plot no.2054,
I Block, II Avenue, Anna Nagar,
Chennai 600 040.

2. The Assistant Commissioner of
Service Tax, Division-V,
Service Tax Commissionerate,
Chennai 600 040. .. Respondents

For Appellant :Mr.Joseph Prabakar

For Respondent :Mrs.Hema Muralikrishnan
Standing Counsel

WA.Prayer : Writ Appeal filed under Clause 15 of letters patent Act against one order dated 7.9.2016 passed in WP.No.31167/2016 for writ of certiorari to call for the records relating to file C.No.IV/16/178/2012 in order in Original No.41/2013, dated 18.11.2013 passed by the second Respondent and the consequential order in Appeal No.272/2016 (STA-1) in Appeal No.42/2014 (MST), dated 28.04.2016, passed by the first respondent and quash the same as arbitrary and illegal.

JUDGMENT

(Judgment of this Court was delivered by HULUVADI G. RAMESH, J.)

By consent, the matter is taken up for final hearing at the stage of admission itself and disposed of .

2. This Writ Appeal is filed against the order of the learned Single Judge, dismissing the Writ Petition vide order dated 7.9.2016 on the ground of maintainability.

3. The learned Single Judge while dismissing the Writ Petition on the ground of maintainability referred to the judgment of the Apex Court reported in Aircel Ltd Vs. Commercial Tax Officer (2016 TIOL 90 (SC)) and concluded that the judgment relied upon by the assessee would not come to the aid of the appellant. In paragraph 20 of the order impugned, it has been clearly stated that the willful misstatement or suppression of facts or contravention of the provisions of the Act or the Cenvat Credit Rules with intent to evade payment of Service tax is essentially and purely a question of fact, which has to be agitated before the Tribunal.

4. The learned Single Judge further referred to the decision of the Apex Court in Uniworth Textiles Ltd Vs. Commissioner of Central Excise, Raipur, (2013 (288) E.L.T. 161 (SC)), where the Apex Court construed proviso under section 28 (1) of the Customs Act and held that it is in pari materia with the proviso under section 73(1) of the Act.

5. We have noted that in the above case, the Supreme Court has held that the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant therein as fit for the applicability of the proviso.

6. Referring to the above proviso, we thus observe that the High Court cannot straight away interfere by upholding this view under writ jurisdiction, since it is a disputed question of fact to be examined while considering the validity and correctness of the impugned order and the petitioner would have to avail the appeal remedy under the Act and there is nothing to justify the appellant's conduct in bypassing the remedy before the CESTAT.

7. We are thus confirming the order of the learned Single

Judge. The appellant may file an appeal before the CESTAT, if so advised and we leave all contentions open to be raised by the appellant in appeal before the CESTAT. The appeal shall be filed before the CESTAT within a period of 30 days from the date of receipt of a copy of this order. This Writ Appeal is disposed of in the above terms. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

1. The Commissioner of Service Tax (Appeals-I),
   Newry Towers, 2nd Floor, Plot no.2054,
   I Block, II Avenue, Anna Nagar,
   Chennai 600 040.

2. The Assistant Commissioner of
   Service Tax, Division-V,
   Service Tax Commissionerate,
   Chennai 600 040.

+1cc to Mr.Joseph Prabakar, Advocate, S.R.No.72098

sk(CO)
md(22/02/2017)

W.A.No.1485 of 2016