IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.10.2017

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR. JUSTICE R.SURESH KUMAR

C.M.A.No.2637 of 2017

Commissioner of Central Excise,
Puducherry Commissionarate,
Goubert Avenue, Beach Road,
Pondicherry 605 001.
... Appellant

vs.

1. The Customs, Excise and Service
Tax Appellate Tribunal,
Chennai, South Regional Bench,
Chennai 600 006.

2. M/s.PSL Ltd.,
No.22, Vaiyavoor Village,
Malai Vaiyavoor (PO),
Madhuranthakam,
Kancheepuram 603 308.
... Respondents

Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1944, against the judgment and decree, made in Final Order No.885 of 2008, dated 19.08.2008, on the file of the CESTAT, Chennai.

For Appellant : Mr.A.P.Srinivas

JUDGMENT

(Judgement of this Court was made by Justice S.MANIKUMAR)

Challenge in this appeal is to an order made in Final Order No.885 of 2008, dated 19.08.2008, on the file of the CESTAT, Chennai, by which, the CESTAT, Chennai, while setting aside the adjudication order, granted the consequential relief of refund to the assessee, 2nd respondent herein.

2. The 2nd respondent herein, manufactures of pipes, had utilised the service of Goods Transport Operators, during the period from 16.11.1997 to 01.06.1998 and failed to pay service tax thereon. The department has issued a show cause notice on 03.06.2002, by invoking the extended period of limitation, under Section 73 of the Finance Act, 1994, demanding tax with interest, and proposed to impose penalty for the delay in payment. The 2nd respondent-assessee resisted the demand of tax, on merits, as well as on the ground of limitation. Accepting the contentions of the assessee, the adjudicating authority has dropped further proceedings, vide Order-in-Original, dated 06.07.2004. However, the Revisional Authority, Commissioner of Central Excise, Puducherry, proposed to hold that the assessee, liable to pay service tax, in view of the retrospective amendments, brought to the Finance Act, 1994, by the Finance Act, 2003. Accordingly, the Commissioner has issued a show cause notice, dated 27.10.2005, to the assessee, which was also contested and the revisional authority, vide Order-in-Revision No.1 of 2005, dated 30.11.2005, held that the assessee is liable to pay service tax of Rs.8,15,650/-, on the freight charges paid by them, from 16.11.1997 to 01.06.1998. The said decision has been challenged by the 2nd respondent-assessee, in Appeal No.S/103/2006, before the CESTAT, Chennai.

3. On the strength of the decision of the Tribunal in L.H.Sugar Factories Limited Vs. CCE, Meerut-II 2004 reported in 2004 (165) ELT 61 (T), Tribunal, Delhi, on 13.07.2004, the 2nd respondent-assessee has filed a refund claim. On the basis of Order-in-Revision No.1 of 2005, dated 30.11.2005, the Deputy Commissioner has rejected the claim. Aggrieved by the same, the 2nd respondent-assessee has preferred an appeal and the Commissioner (Appeals), vide Order-in-Appeal No.75 of 2006, dated 05.09.2006, has set aside the order of the Deputy Commissioner, against which, the department has preferred an appeal in S/273/2006, before the CESTAT, Chennai.

4. Both the appeals, directing liability to pay tax and direction to refund, have taken up together and vide Final Order Nos.885 and 886 of 2008, dated 19.08.2008, held as follows:

> "3. After hearing the learned counsel for the assessee and the learned Jt. CDR for the Revenue, I find that the view taken by this Tribunal in L.H.Sugar Factories case vide 2004 (165) ELT 161 (Tribunal) on service tax liability on recipients of GTO service for the aforesaid period was affirmed by the apex Court vide Commissioner v. L.H.Sugar Factories Ltd., - 2006 (3) STR 715 (SC). The

retrospective amendments brought to the relevant provisions of the Finance Act, 1994 by the Finance Act, 2000 and the Finance Act, 2003 were considered in L.H.Sugar Factories case and it was held that, as the class of persons coming under Section 71A of the Finance Act, 1994 was not brought under Section 73 of the said Act, service tax was not recoverable under Section 73 from a recipient of GTO service for the aforesaid period. Jt. CDR has relied on the Supreme Court's judgment in Gujarat Ambuja Cements Ltd., v. Union of India - 2005 (182) ELT 33 (SC). In the cited case, it was held that service tax was leviable on GTA service for the period from 16.11.1997 to 02.06.1998 and further that the liability to pay interest on tax or to pay penalty would arise only if the tax dues were not paid within the period of two weeks from 17.11.2003. I note that the question whether Section 73 could be invoked to recover such tax was not examined in Gujarat Ambuja Cements case. This question was examined by a coordinate Bench of the apex Court in the later case of L.H.Sugar Factories Ltd. Therefore, the apex Court's decision in L.H.Sugar Factories (supra) would govern the instant case and accordingly, as rightly held by the Commissioner (Appeals), the assessee had no liability to pay service tax under Section 73 of the Finance Act, 1994. The contra decision taken by the Commissioner (Revisional Authority) is set aside and the assessee's appeal is allowed.

4. When the assessee's appeal stands allowed, they are entitled to the consequential relief of refund as held in Kothari Phytochemicals International v. Commissioner - 2005 (185) ELT 325 (Tri. - Chennai) and Fenner (India) Ltd., v. Commissioner - 2006 (1) STR 129 (Tri. - Chennai). This right of the assessee also flows from the Apex Court's decision in L.H.Sugar Factories case (supra) and the same cannot be contested on the ground that, after the said decision of the apex Court, certain civil appeals filed by the Department on identical issue were admitted by the apex Court. Therefore, the order of the lower appellate authority to grant of the consequential relief of refund to the assessee is sustained and the revenue's appeal is dismissed."

5. Being aggrieved by the said order of the CESTAT, Chennai, the present appeal has been filed, on the following substantial questions of law,

(i) Whether the first respondent is justified in observing that service tax was not recoverable under Section 73 of the Finance Act, 1994 from a recipient of GTO service for the aforesaid period inasmuch as the show cause notice issued for the category of persons mentioned under Section 71A is rightly covered under Section 73 as explained above?

(ii) Whether the first respondent is justified in holding that the assessee had no liability to pay service tax, under Section 73 of the Finance Act, 1994, by following the apex Court's decision in the case of L.H.Sugar Factories (supra) inasmuch as the liability is cast on the assessee, in terms of the amended provisions of Finance Act, 2000 & 2003 and the constitutionality of such amendments of the Finance Act, was upheld by the Apex Court in the case of Gujarat Ambuja Cement Ltd., (supra) and with reference to various case laws cited above?"

Heard Mr.A.P.Srinivas, learned counsel appearing for the appellant and perused the materials available on record.

6. In The Commissioner of Central Excise, Puducherry Commissionerate, Pondicherry v. TEbma Shipyards Ltd., [C.M.A.Nos.3186 of 2008, 1066 of 2010, 3558 of 2008 and 660 of 2010, dated 24.10.2013], one of the orders challenged by the Commissioner of Central Excise, relates to the Final Order No.886 of 2008, dated 19.08.2008, on the file of the CESTAT, Chennai, in the matter of M/s.PSL Ltd, Madhuranthakam, Kancheepuram, the 2nd respondent herein. C.M.A.No.1066 of 2010 has been filed against the said order of the CESTAT, Chennai, wherein, the correctness of the adjudication order was tested. Substantial questions of law, framed therein, are extracted hereunder:

"(a) Whether the Tribunal is correct in overlooking the provisions of Section 71A read with proviso to Sub Section 1 of Section 68(1) of the Finance Act, 1994?;

(b) Whether the Tribunal is correct in holding a different view that a demand under Section 73 cannot be raised against a person covered by Section 71A, whereas terms of provisions contained in Finance Act 2003, the said tax is recoverable from service availer and that the provisions of Section 73 do apply to such cases?"

7. The above substantial questions of law, were answered in negative, as against the revenue. While setting aside the adjudication order, a Hon'ble Division Bench of this Court, vide order, dated 24.10.2013, held as follows:

"6. We have heard the learned Standing counsel appearing for the Department and the learned counsel appearing for the respondents/assessees.

7. Section 71A of the Finance Bill, 2003

received the President assent on 14.05.2003 and accordingly for utilising the services, the service recipients have to file the return in respect of service tax for the respective period and service specified therein to the Central Excise Officer within six months from the day on which the Finance Bill, 2003 received the assent of the President viz., on 14.05.2003. Therefore, the last date for filing the return for the assessees for utilising the Goods Transport Operators viz., the service recipients under Section 71A of the Finance Act, 1994 falls on 12.11.2003.

8. As per the Finance Act, 2004, Section 73(1)(a) of the Finance Act was amended with effect from 10.09.2004 validating the notice issued to Goods Transport Operators Service recipients by removing the clause " the persons liable to file the returns under Section 70" from erstwhile Section 73 of the Finance Act. Therefore, the plea of the Department is that the show cause notices issued between 10.09.2004 and 13.11.2004 would be covered under Section 73(a)(a) of Finance Act, 1994. The learned Standing Counsel appearing for the Department submitted that show cause notices in respect of this period viz., 10.09.2004 and 13.11.2004, is valid.

9. As noticed above, the show cause notices in the present cases viz., C.M.A.No. 3186 of 2008 was issued on 10.01.2003, in C.M.A.No.3558/2008 was issued on 09.07.2002, in C.M.A.No.660/2010 was issued on 12.08.2002 and 09.04.2004 and in C.M.A.No.1066/2010, it was issued on 03.06.2002. Out of the above said Civil Miscellaneous Appeal cases, the Department accepted the legal position and dropped the demand in respect of C.M.A.No.3558 of 2009 and C.M.A.1066 of 2010.

10. In the light of the above legal position, the very initiation of proceedings by issuance of show cause notice is bad in law. Accordingly, the order passed by the Customs, Excise and Service Tax Appellate Tribunal is justified. There is no ground to interfere with the order. Accordingly, the Civil Miscellaneous Appeals filed by the Department fails and the same are dismissed."

8. In the instant Civil Miscellaneous Appeal, the Commissioner of Central Excise, Puducherry Commissionerate, Pondicherry, appellant herein has challenged the order of refund.

9. On the earlier occasion, when the instant appeal came up for hearing, based on the amendment to the Finance Act, 1994, Mr.A.P.Srinivas, learned counsel for the

appellant sought time to raise additional grounds. However, while reverting, in the light of the decision of this Court in The Commissioner of Central Excise, Puducherry Commissionerate, Pondicherry v. TEbma Shipyards Ltd., [C.M.A.Nos.3186 of 2008, 1066 of 2010, 3558 of 2008 and 660 of 2010, dated 24.10.2013], he fairly submitted that the abovesaid decision would apply to the case on hand. When the adjudication itself has been set aside, the 2nd respondent is entitled for refund.

10. In the light of the above discussion and decision, substantial questions of law raised in the instant appeal are answered in negative.

11. In the result, the Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

skm

To

The Customs, Excise and Service
Tax Appellate Tribunal,
Chennai, South Regional Bench,
Chennai 600 006.

gmr(co)
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