

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.10.2017

CORAM:

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

C.M.A.Nos.2996 and 2997 of 2017

Commissioner of Service Tax, Chennai-III,
Chennai.

... Appellant in both CMAs/Appellant

versus

M/s.RMC Ready Mix India Pvt. Ltd.,
AC-26, SIDCO Industrial Estate,
Thirumudivakkam, Chennai-44.

.. Respondent in both CMAs/Respondent

Civil Miscellaneous Appeals are filed under Section 35G of Central Excise Act, 1944, against the Final Order No.40130 of 2014, dated 11.02.2014 (C.M.A.No.2996 of 2017) and Miscellaneous Order No.40352 of 2015, dated 13.02.2015 (C.M.A.No.2997 of 2017), passed by the CESTAT, Chennai.

For Appellant : Mr.A.P.Srinivas
For Respondent : Mr.V.S.Manoj

COMMON JUDGMENT

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

Civil Miscellaneous Appeals are directed against the orders of the Customs Excise and Service Tax Appellate Tribunal, Chennai, in Final Order No.40130 of 2014, dated 11.02.2014 and Miscellaneous Order No.40352 of 2015, dated 13.02.2015, respectively.

2. As facts and submissions MADE in the instant Civil Miscellaneous Appeals are common, they are taken up together and disposed of, by a common order.

3. The respondent is a manufacturer of ready mix concrete, registered with the department for rendering services under the category, "Goods Transport Service". They supplied such item, by taking ready mix concrete, in vehicles specially designed for

transportation of the item and supplied the same at the site, where construction took place. The vehicles used for this purpose had facility for pumping ready mix concrete from the container, on the vehicle, to the work site and the material was so supplied by pumping, for which, pumping charges were collected. Since service tax liability was attracted on "pumping charges", under the category, "Transportation of goods through pipeline or conduit", as defined in Section 65(105)(zzz) of the Finance Act, 1994, proceedings were initiated against the respondent, demanding service tax, amounting to Rs.23,27,306/-, for a period from 16.06.2005 to 31.12.2006, apart from interest and penalty.

4. Against the demand, the respondent has filed appeal with the Additional Commissioner of Service Tax, Chennai and vide Order-in-Original No.84 of 2007, dated 16.07.2007, the authority has confirmed the demand of tax. However, while considering the fact that the disputed service was newly brought into tax net and that there was confusion about the scope of the relevant entry, dropped the penal proceedings.

5. Against the order, confirming the demand of tax, the respondent filed an appeal with the Commissioner of Service Tax (Appeals), Chennai. The Commissioner of Service Tax (Appeals), vide Order-in-Original No.32/2009 (MST), dated 27.07.2009, set aside the demand for tax, on the grounds that the said activity was not covered by the said entry.

6. In the mean time, finding that the order of the adjudicating authority was erroneous in not having imposed penalty, despite there being a clear finding that there was deliberate suppression of facts, the appellant, exercising revisionary jurisdiction, under erstwhile Section 84 of the Finance Act, 1994, issued a show cause notice, to the respondent, seeking to impose penalty, under Sections 76, 77 and 78 of the Finance Act, 1994. The said proceedings resulted in Revision Order No.35 of 2009, dated 27.03.2009, imposing penalty of Rs.25,00,000/-, under Section 78 of the Act. Penalty came to be challenged by the respondent, in Appeal No.ST/383/2009, before the CESTAT, Chennai.

7. It is the case of the appellant that erroneously observing that the department has not filed any appeal against Order-in-Original No.32/09 (MST), dated 27.07.2009, setting aside the demand of tax, vide order, dated 11.02.2014, in Final Order No.40130 of 2014, CESTAT, Chennai, held that when the demand for tax itself is not sustainable, there cannot be any penalty imposed on the same matter. Saying so, CESTAT, Chennai, allowed the appeal filed by the respondent, setting aside the order of penalty, imposed in Revision Order No.35 of 2009, dated

27.03.2009.

8. Being aggrieved by the same, the Commissioner of Service Tax, Chennai, filed rectification Miscellaneous Petition in ST/ROM/41171/2014 in ST/383/2009, contending inter alia that the CESTAT, Chennai, has committed a mistake in holding that no appeal against the order of Commissioner (Appeals), in Order-in-Original No.32/09 (MST), dated 27.07.2009, has been filed. In the rectification petition, the Commissioner of Service Tax (Appeals), contended that an appeal has been filed. Therefore, he prayed to re-call the abovesaid order, dated 11.02.2014 and rectify the error. Taking note of the error pointed out, in Miscellaneous Order No.40352 of 2015, CESTAT, Chennai, vide order, dated 13.02.2015, corrected the mistake, as follows:

"3. I have carefully examined the ROM and submissions of both sides and perused the records and this Tribunal's Final Order dated 11/02/2014 wherein the Tribunal allowed the appeal filed by the appellant and set aside the penalty imposed by the Revision Authority. I find that the adjudicating authority in his OIO dated 16/07/2007 confirmed the demand of service tax and dropped all the penalty proceedings under section 76,77 and 78 of the Finance ACT, 1994. Against this order the appellant preferred appeal against the demand of service tax and the Commissioner (Appeals) vide OIA No. 32/2009 dated 27/07/2009 allowed their appeal by setting aside the demand. It is noticed that the jurisdictional Commissioner reviewed the OIO and issued revision notice 3/2008 dated 28/02/2008 in terms of powers vested under Section 84 of the Finance Act, 1994, against dropping of all penalties under Section 76,77 and 78 of the Act by the adjudicating authority. The Commissioner in his revision order dated 27/03/2009 imposed penalty of Rs.25,00,000/- under Section 78 of the Act. Appellant filed the present appeal against the revision order. Tribunal in Final Order dated 11/02/2014 allowed the appeal by setting aside the impugned order.

4. On perusal of Final Order, I find neither the appellant nor the Revenue has brought out this fact before the Tribunal that appeal filed by the Revenue against the OIA dated 27/07/2009. Therefore, this Tribunal at para-2 while discussing the facts of the case stated that the Department has

not filed any appeal against this order of Commissioner (Appeals). As seen from the records that appeal No.ST/505/09 is still pending for disposal. Therefore, Tribunal while recording the facts at para-2 that there is no appeal filed against the order of the Commissioner (Appeals) is appear to be an omission.

5. However, I hold that by correcting the mistake the order of the Tribunal cannot be altered as it would amount to reviewing its own order. There are series of Apex Courts, High Courts judgments wherein it has been held that Tribunal has no power to review its own order. Further, I find that the revenue appeal and the appellant appeal are two independent proceedings against two different order passed by two different authorities under different provisions of the Act. Accordingly, the rectification is limited to the correction of facts appearing at para-2 of the order. The last sentence at para-2 instead of "The department has not filed any appeal against this order of the Commissioner (Appeals)" should be read as "Department filed appeal against OIA No. 32/2009 dated 27.07.2009".

9. Orders passed in Final Order Nos.40130 of 2014, dated 11.02.2014 (Appeal No.ST/383/2009), is challenged in C.M.A.No.2996 of 2017, on the following substantial question of law,

"Whether, in the facts and circumstances of the case, the decision of CESTAT in allowing the appeal filed by the respondent was correct in law?"

10. Orders passed in Miscellaneous Order No.40352 of 2015, dated 13.02.2015 (Revision No.ST/ROM/41171/2014 in ST/383/2009), is challenged in C.M.A.No.2997 of 2017, on the following substantial question of law,

"Whether, in the facts and circumstances of the case, the decision of CESTAT in refusing to recall the Final Order for purpose of hearing the appeals together was correct in law even after admitting and correcting the mistake?"

11. On this day, when the appeals came up for hearing, Mr.A.P.Srinivas, learned counsel for the appellant, in both the

appeals, submitted that subsequently, CESTAT, Chennai, has passed Final Order No.41563 of 2017 in Appeal No.ST/505/2009, dated 09.08.2017, filed by the appellant, against the Order-in-Appeal No.32/2009 (MST), dated 27.07.2009, confirming the order of the Commissioner of Central Excise (Appeals), Chennai, setting aside the demand of tax.

12. Having regard to the above subsequent development, we are of the view that there is no need to advert to the substantial questions of law, raised in the instant Civil Miscellaneous Appeals and at the same time, reserve the rights of the appellant to raise all tenable grounds and substantial questions of law, on the merits of the case, if any, appeal is filed, against Final Order No.41563 of 2017 in Appeal No.ST/505/2009, dated 09.08.2017.

13. Thus, reserving the rights of the appellant in both the appeals, as stated supra, instant Civil Miscellaneous Appeals are dismissed. Substantial question of law, raised in both the appeals, are left upon. No costs.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

skm

To

The Customs, Excise and Service
Tax Appellate Tribunal,
South Zonal Bench, Chennai.

+1cc to Mr.K.Vaitheswaran, Advocate SR.No.76454

+1cc to Mr.A.P.Srinivas, Advocate SR.No.76521

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SR(CO)
GN(04/12/2017)