In the High Court of Judicature at Madras

Dated : 05.12.2017

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.31462 of 2017 & WMP.No.34567 of 2017

M/s.Aluminium and Glazing, rep.
by Mr.M.A.Albin Dhas, Proprietor ...Petitioner

Vs

The Commissioner (Appeals-I),
O/o the Commissioner of Service
Tax (Appeals-I), Newry Towers,
III Floor, Plot No.2054, I Block,
II Avenue, Anna Nagar, Chennai-40. ...Respondent

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari to call for the records on the file of the respondent in proceedings - Order in Appeal No.719/2016 (STA-I) dated 29.12.2016 in A.No.150/2015-(STA-I)/(ST-I)/Old No.473/2012 (M-ST) and quash the same.

For Petitioner : Mr.Joseph Prabakar
For Respondent : Mr.K.Ravi, SPC

ORDER

Mr.K.Ravi, learned Senior Panel Counsel accepts notice for the respondent. Heard both. Since the issue involved in this writ petition lies in a very narrow compass, the writ petition itself is taken up for final disposal without following the procedure of directing the respondent to file counter.

2. The petitioner is a proprietaryship concern registered with the Service Tax Department under the category 'Commercial or Industrial Construction Services and Construction of Residential Complex Services'. The petitioner is stated to be engaged in the business of Structural Glazing and Cladding. The petitioner claims that the activity would fall under the category 'Erection, Commissioning or Installation Services' as per Section 65(39a) of the Finance Act, 1994. The petitioner availed abatement under Notification No.1/2006 dated 01.3.2006 and paid service tax on 33% of the total contract value. The reason for availing the benefit of the said Notification is on the ground that the activity done by them is covered under the category 'Erection and Installation Services'. The petitioner

also claimed abatement (deduction) under Notification No.12/2003 dated 20.6.2003 to the extent of the value of the goods involved in the execution of the contract. Therefore, the petitioner would state that the service tax paid by them was sufficient as per law.

3. However, the Department did not agree with the petitioner's stand and sought to deny the benefit of abatement under Notification No.1/2006 dated 01.3.2006 on the ground that the activity of the petitioner was covered under 'Completion and Finishing Service' under the category 'Commercial or Industrial Construction Services' and to that effect, a show cause notice dated 19.8.2009 was issued to the petitioner for the period from April 2006 to March 2008 demanding service tax at 10% on the total contract value. The Original Adjudicating Authority confirmed the demand made in the show cause notice and passed an order to that effect by Order-in-Original dated 28.3.2012. Against such an order, the petitioner preferred an appeal before the Commissioner (Appeals), in which, a direction was issued on 18.1.2013 to pre-deposit a sum of Rs.19.50 lakhs on or before 08.2.2013.

4. The petitioner challenged the order dated 18.1.2013 by filing W.P. No.3119 of 2013 and it was dismissed by order dated 12.2.2013, against which, the petitioner preferred an appeal in W.A.No.717 of 2013, which was allowed by judgment dated 16.4.2013 by observing that the representative of the petitioner should be heard and accordingly fixed a date for the hearing. In other words, the matter was sent back to the Appellate Authority for a fresh consideration, pursuant to which, a speaking order was passed by the Commissioner (Appeals) dated 26.4.2013 in the stay petition pending appeal, directing the petitioner to pay pre-deposit of 50% of the service tax as confirmed in the Order-in-Original and on such compliance, the pre-deposit of the balances dues has been stayed. However, the petitioner did not comply with the condition of pre-deposit

5. Thereafter, the main appeal was taken up for hearing by the Commissioner (Appeals), who, by Order-in-Appeal dated 10.6.2013, dismissed the same on account of non compliance of the conditional order dated 26.4.2013. Again, the order dated 10.6.2013 was put to challenge before the Customs, Excise and Service Tax Appellate Tribunal, which, by order dated 06.1.2015, disposed of the matter by remanding the matter to the Commissioner (Appeals). The reasons assigned by the Tribunal in the order dated 06.1.2015 are as follows :

> "Considering the argument as above, to grant fair opportunity of hearing to appellant to raise all questions of law and fact as well as evidence before the learned Commissioner (Appeals), appellant is

> directed to make deposit of Rs.8,00,000/- (Rupees eight lakhs only) within four weeks from today and produce the challan before learned Commissioner (Appeals) for fixation of date of hearing. The appellant shall make an application to that authority fairly stating compliance with this order passed today for fixation of hearing. On that date of fixation, without taking any adjournment, appellant shall cause appearance and explain its case both on facts and law. Learned Commissioner (Appeals) considering the question of law, facts and evidence including the law laid down in Uniworth Textiles Ltd. Vs. CCE, Raipur - 2013 (288) ELT 161 (SC) shall pass appropriate order."

6. In terms of the directions issued by the Tribunal, the petitioner effected the pre-deposit of Rs.8 lakhs. Thus, as per the directions of the Tribunal, the Commissioner (Appeals) was required to consider the questions of law, facts and evidence including the law laid down in the case of Uniworth Textiles Ltd. Vs. CCE, Raipur [reported in (2013) 288 ELT 161 (SC)] and shall pass appropriate orders. Thus, the directions issued by the Tribunal are mandatory in nature for the Commissioner (Appeals) to comply with the same scrupulously.

7. Pursuant to that, the petitioner filed additional written submissions before the Commissioner (Appeals), which have been acknowledged by the Commissioner (Appeals). In the additional written submissions, the petitioner contended that the Order-in-Original dated 28.3.2012 does not contain any specific averment about the suppression of fact. In this regard, the petitioner placed reliance on the decision of the Hon'ble Supeme Court in the case of Uniworth Textiles Ltd. and that the provisions of Section 28 of the Customs Act, 1962 and Section 78 of the finance Act, 1994 are pari materia, that therefore, the principles laid down by the Hon'ble Supreme Court would squarely apply to the case of the petitioner and that similarly, the observation made by the Hon'ble Supreme Court with reference to show cause notice in Uniworth Textiles Ltd. would apply equally to Order-in-Original as well. The petitioner also relied upon the decision of the Kerala High Court in the case of A.V.Joy @ Joy Alukkas Vs. CESTAT [reported in 2015-TIOL-1196-HC-Kerala-ST]. Thus, it was contended that there is no specific and explicit averment about the suppression of fact or any fraudulent intention on the part of the petitioner and in the absence of such allegation, larger period cannot be invoked and that the demand for the period beyond one year would be time barred.

8. Thus, the Commissioner (Appeals), on remand, was required to take a decision bearing in mind the directives issued by the Tribunal dated 06.1.2015 and the additional written submissions filed by the petitioner. However, this Court finds that the Commissioner (Appeals), while taking note of the submissions made by the petitioner, in paragraph 3 of his order, did not go into the plea that the demand for the period beyond one year would be time barred. Apart from that, the Commissioner (Appeals) has not taken into consideration the decision of the Hon'ble Supreme Court in the case of Uniworth Textiles Ltd., though in paragraph 5 of his order, the Commissioner (Appeals) extracted the order passed by the Tribunal.

9. It is to be noted that though the order passed by the Tribunal was arising out an order passed in an interlocutory application, the Tribunal issued a specific direction to the Commissioner (Appeals) to consider the question of law, facts and evidence including the law laid down in the decision in the case of Uniworth Textiles Ltd.

10. Useful reference can be made to the decision of the Hon'ble Supreme Court in the case of Union of India Vs. Kamalakshi Finance Corporation [reported in (1991) 55 ELT 433] wherein it has been held that directives of the Superior Authorities are binding on the Lower Authorities. In the light of the above dictum, the Commissioner (Appeals) is bound by the directions issued by the Tribunal and is required to consider the submissions made by the petitioner. Thus, this Court is satisfied that the impugned order is not in terms of the directions issued by the Tribunal in the appeal filed by the petitioner. The additional written submissions having not been considered, this is a fit case where the matter should be remanded to the Commissioner (Appeals) for a fresh consideration.

11. Accordingly, the writ petition is allowed, the impugned order is set aside and the matter is remitted back to the respondent for a fresh consideration with a direction to take up the appeal at an early date, consider the fact that the show cause notice was issued in the year 2009 and endeavour to decide the matter after affording an opportunity of personal hearing to the petitioner preferably within a period of 30 days from the date of receipt of a copy of this order. No costs. Consequently, the connected WMP is closed.

12. As rightly pointed out by the learned Senior Panel Counsel appearing for the respondent, if the petitioner proposes to rely upon any Notification seeking the benefit of abatement, etc., the petitioner shall clearly establish as to which part of the Notification they seek to rely upon and there cannot be a vague plea.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

RS

To
The Commissioner (Appeals-I),
O/o the Commissioner of Service Tax (Appeals-I),
Newry Towers, III Floor, Plot No.2054, I Block,
II Avenue, Anna Nagar, Chennai-40.

+1 cc to Mr.Joseph Prabakar advocate sr 86607
+1 cc to Mr.Ravi Advocate sr 86502

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