THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

CENTRAL EXCISE APPEAL NO.47 OF 2016

J U D G M E N T
(*Per Sri Justice Sanjay Kumar)*

This appeal by the assessee under Section 35G of the Central Excise Act, 1944 (for brevity, 'the Act of 1944'), seeks to raise the following substantial questions of law for consideration:

(i) 'Whether, on the facts and in the circumstances of the case, the finding of the Appellate Tribunal that there is no material produced by the appellant that the services were rendered to SEZ units can be said to be based on material on record?

(ii) Whether, on the facts and in the circumstances of the case, the finding of the Appellate Tribunal that the services rendered in relation to housekeeping partakes the character of manpower supply is sustainable in law?

(iii) Whether on the facts and in the circumstances of the case, the Appellate Tribunal is justified in directing the appellant to deposit the entire amount of tax with interest as a condition precedent for grant of waiver for collection of penalty in spite of admitted financial position of the appellant presenting bleak position?'

This appeal arises out of the conditional order dated 30.12.2013 passed in Appeal No.ST/397/2012-DB requiring the assessee to deposit certain sums of money as a condition precedent for waiver of pre-deposit and stay and also the Final Order No.21282 of 2014 dated 06.08.2014 in the said appeal, passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench.

By the Order-in-Original No.51/2011 dated 31.10.2011, the Commissioner of Central Excise, Customs and Service Tax, Visakhapatnam-I, held that the service of providing security guards by the assessee was classifiable under 'Security Agency Services' under Section 65 (105(w)) read with Section 65A of Chapter V of the Finance Act, 1994. He accordingly determined that a sum of Rs.1,62,49,414/- was payable by the assessee towards service tax upon such Security Agency Services during the period 2004-05 to 2008-09. The Commissioner further held that the services of housekeeping provided by the assessee were classifiable under 'Manpower Supply Services' under Section 65 (105(k)) read with Section 65A of Chapter V of the Finance Act, 1994 and accordingly determined that a sum of Rs.24,01,237/- was payable by him towards service tax thereon for the period 2004-05 to 2008-09. He levied interest on the amounts aforestated and also demanded penalty at the rate of Rs.200/- for every day during which such failure continued starting with the first date after the due date. He also levied penalty separately under Sections 77 and 78 of the Finance Act, 1994 upon the assessee. This order was subjected to appeal before the Tribunal under Section 35B of the Act of 1944.

The contention of the assessee was that the Security Agency Services provided by him were in Special Economic Zones (SEZ) and therefore, the value received in the context thereof was liable to be excluded from the service tax net. By order dated 30.12.2013 passed in Application No.ST/STAY/00232/2012 in Appeal No.ST/00397/2012, the Tribunal took into account the financial stringency of the assessee and granted waiver of the penalty component only. The assessee was directed to remit the entire tax liability assessed and the corresponding interest liability thereon within a time frame and report compliance by 17.02.2014. Upon such deposit being made, the

Tribunal stayed all proceedings for realization of the balance liability. In default, the stay granted stood dissolved and the appeal was liable to be rejected for failure of pre-deposit. This order was passed by the Tribunal, being of the opinion that the assessee failed to produce any proof of the security guards provided by him being within a SEZ.

As the assessee failed to make the deposit in terms of the aforestated order, the Final Order dated 06.08.2014 was passed by the Tribunal rejecting the appeal.

Admittedly, the assessee used to provide security and manpower supply services to various organizations such as temples, educational institutions, residential apartments, hospitals, etc. It was his claim that he also provides such services in SEZ units and that the same were exempted from levy of service tax. Though the Commissioner looked into this aspect by taking up the instance of M/s. WS Industries, Madhavadhara, Visakhapatnam, he came to the conclusion that the assessee was providing security services not only for the unit of this industry in the Visakhapatnam Economic Zone but also at its guest house in Madhavadhara in Visakhapatnam city. The invoices however gave a different impression as they merely mentioned that services were provided in 'VSEZ Tax Exemption Zone'. The Commissioner therefore opined that in the absence of all the agreement copies, there is every possibility that the assessee may have provided services at places outside the SEZ in respect of other units also.

The Tribunal however recorded that it had analyzed some of the invoices produced by the assessee and that none of them indicated that the taxable service was provided within a SEZ.

Under Notification No.4 of 2004 dated 31.03.2004, taxable services of any description, as defined in Section 65(1)(90) of the Finance Act, 1994, provided to a developer of a SEZ or a unit of a SEZ by any service provider is exempted from the whole of the service tax leviable thereon, subject to conditions. When the Commissioner specifically noted that certain invoices were produced by the assessee but found the same to be inadequate to come to a positive conclusion in favour of the assessee, the bald finding of the Tribunal that none of the invoices indicated that taxable services were provided within a SEZ is opposed to the record. Sri S.Ravi, learned senior counsel appearing for Sri S.Vivek Chandrasekhar, learned counsel for the assessee, relied upon the additional documents filed in this appeal to demonstrate that the invoices which were produced before the Tribunal clearly indicated to the contrary.

Our attention was drawn to various invoices raised by the assessee, which clearly recorded that services were provided in a SEZ. Being the final fact finding authority, the Tribunal necessarily had to look into all the material produced by the assessee before coming to the conclusion that the Commissioner had rightly rejected his claim for exemption of security and house keeping services in a SEZ in so far as service tax is concerned. However, as pointed out *supra*, the Tribunal failed to note that the assessee produced invoices clearly indicating that the services provided by him were in a SEZ.

As the Tribunal did not take note of these factual aspects while considering the application filed by the assessee for waiver of the pre-deposit and stay and straight away directed deposit of the entire assessed liability as a condition precedent, consequent upon which the appeal itself came to be dismissed thereafter owing to his failure to do so, we are of the opinion that the orders under appeal cannot be sustained and the Tribunal necessarily has to examine the matter afresh by considering all the material produced by the assessee before taking a decision upon his application for waiver of pre-deposit and stay. The orders dated 30.12.2013 and 06.08.2014 passed in Appeal No.ST/397/2012 by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, are set aside and the appeal is restored to the file for consideration afresh of the assessee's Application No.ST/STAY/00232/2012 in Appeal No.ST/00397/2012 by looking into all the relevant factual aspects of the matter.

The appeal is accordingly allowed to the extent indicated above.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR,J

GUDISEVA SHYAM PRASAD,J

4th AUGUST, 2017

PGS