IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 13.02.2018

CORAM:
THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.3506 of 2017
C.M.P.Nos.22299 & 22300 of 2017

The Principal Commissioner of GST & Central Excise,
Chennai North Commissionerate,
21/6, Uthamar Gandhi Salai,
Chennai : 600034 ... Appellant

vs.

M/s.Spencer's Travel Services Ltd.,
No.27, Sudarshan Building,
6th floor, 27, Whites Road,
Chennai : 600014 ... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 35G of the Central Excise Act, 1944, against the Final Order No.40678 of 2017, dated 08.05.2017, on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : M/s.Aparna Nandakumar

For Respondent : Mr.S.Muthu Venkatraman

JUDGMENT

(Judgment of the Court was made by S.MANIKUMAR, J)

Being aggrieved by the Final Order No.40678 of 2017, dated 08.05.2017, setting aside the Order-in-Revision No.2/2007, dated 06.07.2007 on the file of the Commissioner of Service Tax, Chennai, instant Civil Miscellaneous Appeal has been filed by the Principal Commissioner of GST & Central Excise, Chennai North Commissionerate, Chennai, on the following substantial questions of law:-

"(i) Whether the contrary view taken by CESTAT in the Final Order without any justification, which is against their view taken with due discussion in the Miscellaneous Order passed earlier, is legally sustainable;

(ii) Whether the bar imposed by Section 84(4) of the Finance Act, 1994 would apply to the facts and circumstances of the present case when the issue raised by the assessee in appeal before Commissioner (Appeals) is different from the issue taken up for Revision by Revisionary Authority, even though such Appeal as well as Revision proceedings arose out of same Order-in-Original;

(iii) Whether the assessee is permitted to rake up the issue of taxability before Commissioner (Appeals) after the Notice of Revision has been served on him, even when original proceedings against him were dropped on limitation, and no demand has been made against him."

2. Facts leading to the appeal are that M/s.Spencer's Travel Services Limited, respondent herein, is a Sales Agent, to various Airlines, which according to the department, attracted Service Tax, under the category of business auxiliary service, with effect from 01.07.2003.

3. Investigation was conducted by the Officers of Directorate General of Central Excise Intelligence, Chennai Zonal Unit, for non-payment of Service Tax. Consequently, a Show Cause Notice No.75/2006, dated 24.08.2006, proposing to demand service tax of Rs.46,90,610/-, on the sales commission, for the period from July 2003 to August 2004, was issued. The respondent/assessee submitted a reply dated 29.10.2006, denying liability, to pay service tax.

4. After considering the rival submissions and material on record, vide Order-in-Original No.08/2006, dated 28.12.2006, the Additional Commissioner of Service Tax, Chennai, dropped the proceedings, on the grounds that on the facts and circumstances of the case, extended period cannot be invoked, as there was no suppression, fraud or intention to evade tax.

5. On the facts and circumstances of the case, the Additional Commissioner of Service Tax, Chennai, held that the amount is receivable from M/s.Spencer's Travel Services Ltd., Chennai, on the ground that overriding commission is classifiable, as auxiliary service, with effect from 01.07.2003.

6. Additional Commissioner of Service Tax, Chennai, has declined to accept the contention of M/s.Spencer's Travel Services Ltd., that overriding Commission, portion of the amount received for GSA service, represented only the value of the services done, on behalf of the Airlines.

7. However, on scrutiny of the Order-in-Original, the Jurisdictional Commissioner of Service Tax and the materials on record, the appellate authority has opined that the order passed

by the adjudicating authority was not valid, and legal, and therefore opined it was a fit case for revision, envisaged under erstwhile Section 84 of the Finance Act, 1994.

8. Thus, the Commissioner (Appeals), in exercise of powers, under Section 84 of the Finance Act, issued a notice dated 20.03.2007, proposing to revise the Order-in-Original No.08/2006, dated 28.12.2006, passed by the Commissioner of Service Tax, Chennai.

9. On receipt of the said Show cause Notice dated 20.03.2007, proposing to revise the order in original No.08/2006, M/s.Spencer's Travel Services Ltd., Chennai, respondent herein, has filed an appeal, dated 16.01.2007, before the Commissioner (Appeals), Chennai, against the finding of the Adjudicating Authority, Additional Commissioner of Services Tax, wherein the assessee was held liable to pay service tax.

10. According to the Principal Commissioner of GST & Central Excise, Chennai North Commissionerate, Chennai, appellant herein, even though, no tax liability was confirmed, in the order in original No.08/2006, dated 28.12.2006, M/s.Spencer's Travel Services Ltd., Chennai, has preferred an appeal to the Commissioner (Appeals), Chennai.

11. During the course of the revision proceedings, M/s.Spencer's Travel Services Ltd., Chennai, respondent herein, has contended that the appeal against the tax liability was pending before the Commissioner (Appeals), Chennai, in terms of Section 84(4) of the Act, and therefore, no revision proceedings can be taken up. But the Commissioner of Service Tax, Chennai, has passed an order in original No.2/2007, dated 06.07.2007, which is erroneous.

12. Being aggrieved by the abovesaid order, dated 06.07.2007, M/s.Spencers Travel Services Ltd/respondent herein, has filed an appeal under Section 84 of the Finance Act, 1994 in S.T.A.No.222 of 2007, before the CESTAT, South Zonal Bench, Chennai.

13. Learned counsel for the respondent contended that a show cause notice, under Section 84 of the Finance Act, 1994, invoking the revisionary powers has been issued to the respondent-assessee, requiring them to show cause, as to why, the order passed by Additional Commissioner of Service Tax should not be revised, and service tax to the tune of Rs.46,90,610/- should not be recovered along with interest, besides proposing for penalties.

14. He further submitted that it was brought to the notice of the revisionary authority that an appeal is pending against

the order passed, observing that the respondent are liable to pay service tax under the category of Business Auxiliary Service with effect from 1.7.2003.

15. He therefore contended that as per sub-section (4) of section 84, the revisionary authority ought not to have proceeded with the revisionary proceedings during the pendency of the appeal.

16. After considering the facts and circumstances of the case, the CESTAT, Chennai, vide order dated 08.05.2017 in Final Order No.40678 of 2017, held has follows:-

> "On perusal of Sub-Section (4) of Section 84, it is clearly stated that no order under the said Section shall be passed by the Commissioner in respect of any issue if an appeal against such issue is pending before the Commissioner (Appeals). By letter dated 24.4.2007, the appellants have informed the said fact to the Revisionary Authority. Taking into consideration that the appeal filed by the appellant was pending before the Commissioner (Appeals), the impugned order passed by the revisionary authority confirming the demand of service tax is not sustainable. Therefore, the impugned order is set aside and the appeal is allowed with consequential relief, if any."

17. Being aggrieved by the appellant filed the instant Civil Miscellaneous Appeal on the following grounds,

(a) The CESTAT, Chennai, has passed a Miscellaneous Order No.115/2007, dated 22.11.2007, while disposing the Stay petition in the same Appeal, wherein it was discussed that the issue agitated by respondent in appeal before Commissioner (Appeals) was on 'taxability', which was different from the issue of 'limitation' dealt by Commissioner of Service Tax (Revision Authority); and therefore, the mischief of Section 84(4) was not invited, since it only barred revision on the same issue. Whereas in the Final Order, the Tribunal held a contrary view without any discussion on how the mischief of Section 84(4) was now invited, when no additional facts or evidence has been introduced during the proceedings in CESTAT to change the earlier opinion in the Final Order.

(b) The erstwhile Section 84(4) of the Act barred taking up of Revision proceedings when an appeal is ending on any issue arising out of the same Order-in-Original. During relevant period, the said provision read as follows:

> "4. No order under this section shall be passed by the Commissioner of Central Excise in respect of

any issue if an Appeal against such issue is pending before the Commissioner of Central Excise (Appeal)”, In the Miscellaneous Order No.1150/2007, CESTAT gave a clear finding to the effect that the issues dealt by Commissioner (Appeals) and Commissioner (Revisionary Authority) were different. In the circumstances, in the absence of any discussion on the issue as to why a contrary view was now taken, setting aside the Order-in-Revision No.2/2007 passed by the Revisionary Authority appears to be without any legal basis.

(c) From the chronology of events, the CESTAT has observed that only after issue of Notice dated 20.03.2007 proposing Revision of Order-in-Original, the respondent herein chose to file an appeal before Commissioner (Appeals) on 16.04.2007. This Appeal against Order-in-Original No.8/2006 passed by Additional Authority had dropped the entire proceedings on limitation and there was no demand at all for the period from July, 2003 to August, 2004. There appears to be no reason for any agitation on 'taxability' issue fearing future implications, since from 10.09.2004 onwards the respondent themselves admitted tax liability and was paying service tax on commission received from various Airlines. Thus, the circumstances point out that Appeal raising the issue of taxability has been preferred before Commissioner (Appeals) only to subvert Revision Proceedings already initiated under Section 84 and to take refuge under Section 84(4) of the Act.

(d) During the relevant period, the department had only revision mechanism to set right the errors of adjudication, which was also done following principles of natural justice. During relevant period, no appeal mechanism was available to the Department as is now available. Therefore, the revision proceedings taken up by the Revision Authority on the issue of Limitation, which was different from the issue raised by the respondent-assessee before Commissioner (Appeals) i.e. taxability, ought not to have been struck down by the CESTAT under erstwhile Section 84 (4) of the Act.

(e) Even while disposing the appeal by the respondent-assessee, vide Order-in-Appeal No.104/2012 dated 25.09.2012, Commissioner (Appeals) also restricted his findings only on the issue of Taxability and not on any other issues. Commissioner (Appeals) held that the services attracted Service Tax.

Heard the learned counsel appearing for both parties and perused the materials available on record.

18. Section 84 of the Finance Act 1994 deals with revision of orders by the Commissioner of Central Excise and the said Section is extracted hereunder:

> 84. Revision of orders by the Commissioner of Central Excise.-
>
> (1) The Commissioner of Central Excise may call for the record of a proceeding under this Chapter in which an adjudicating authority subordinate to him has passed any decision or order subordinate to him and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Chapter, pass such order thereon as he thinks fit.
>
> (2) No order which is prejudicial to the assessee shall be passed under this section unless the assessee has been given an opportunity of being heard.
>
> (3) The Commissioner of Central Excise shall communicate the order passed by him under sub-section (1) to the assessee, such adjudicating authority and the Board.
>
> (4) No order under this section shall be passed by the Commissioner of Central Excise in respect of any issue if an appeal against such issue is pending before the Commissioner of Central Excise (Appeals).
>
> (5) No order under this Section shall be passed after the expiry of two years from the date on which the order sought to be revised has been passed."

19. Provision under Section 84(4) of the abovesaid Act, restricts the Commissioner from passing any order in respect of any issue, if an appeal against such issue is pending before the Commissioner (Appeals). On the facts and circumstances of the case on hand, we are of the view that there is no manifest illegality or irregularity, warranting this Court to interfere with the reasoning of the order impugned, as perverse or in our opinion, to be considered as perverse or as violative of the principles of natural justice, to invoke the extraordinary jurisdiction of this Court to invoke the powers, under Article 226 of the Constitution of India, to set aside the order impugned.

20. In the result, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

skm

To

1.The Customs, Excise and Service
  Tax Appellate Tribunal, Chennai.

2.The Principal Commissioner of GST & Central Excise,
  Chennai North Commissionate,
  21/6, Uthamar Gandhi Road,
  Chennai - 34.

+1cc to Mrs.Aparna Nandakumar, Advocate, S.R.No.10835
+1cc to Mr.Mithuvenkataraman, Advocate, S.R.No.10908

C.M.A.No.3506 of 2017
and
C.M.P.Nos.22299 & 22300 of 2017

KS(CO)

rrs 25/01/2019