IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.12.2018

CORAM:

THE HONOURABLE MR. JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

C.M.A.No.2950 of 2018

The Commissioner of G.S.T. and Central Excise
Formerly known as the Commissioner of Customs,
Central Excise and Service Tax,
Office of the Commissioner of G.S.T. & Central Excise
No.1, Foulks Compound,
Anaimedu, Salem- 636 001 ...Appellant

Vs.

M/s Thiagarajar Polytechnic College,
Continuing Education Centre,
Post Box No.523,
Junction Main Road,
Salem - 636 005, Tamil Nadu. ...Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 35(G) of Central Excise Act, 1944 against the final order No. 43104 of 2017 dated 06.12.2017 passed by Customs Excise and Service Tax Appellate Tribunal, Chennai Bench.

For Appellant: Mr.Rajnish Pathiyil
Senior Standing Counsel

J U D G M E N T
(Delivered by T.S.SIVAGNANAM.J.,)

This appeal by the Revenue has been filed under Section 35 (G) of the Central Excise Act, 1944 against the Final Order No.43104 of 2017 dated 06.12.2017 passed by Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, raising the following substantial questions of law:-

> "1. Has not the Hon'ble CESTAT fallen in error in holding that the respondent is not a commercial concern ignoring the explanation inserted to Section 65(105)(zzc)?
> 2. Has not the Hon'ble CESTAT fallen in error in ignoring the judgment of the Larger Bench of CESTAT in the case of Great Lakes

Institute of Management Ltd. V. Commissioner of S.T., Chennai [reported in 2013 (32) S.T.R. 305 (Tri.LB)?

3. Has not the Hon'ble CESTAT erred in holding the courses of the respondent as recognized by law on the basis of the Government Orders relied upon by the respondent?”

2. The appellant/department issued show cause notices dated 05.02.2008 and 13.10.2008. In the show cause notice dated 05.02.2008, the Department proposed as to why service tax amounting to Rs.31,93,546/- along with other CESS should not be demanded from the respondent/assessee, by invoking the extended period of limitation by applying the proviso to sub-section (1) of Section 73 of Chapter V of the Finance Act, 1994; why interest should not be imposed and penalty should not levied. This notice pertained to the period from 01.07.2003 to 30.03.2003. The show cause notice dated 13.10.2008 was for the period from 01.04.2007 to 31.07.2008, in which similar proposal was made. The respondent institution filed their reply to the show cause notice. The matter was taken up for adjudication and by Order-in-original dated 04.12.2008, the proposals in the show cause notices were confirmed.

3. Aggrieved by the same, the respondent institution preferred first appeal before the Commissioner of Customs and Central Excise (Appeals), Salem. The appeal filed by the respondent institution was allowed and the demand of service tax, interest and penalty were set aside. The Revenue carried out the matter on appeal before the Tribunal. The Tribunal by the impugned order has dismissed the appeal filed by the Revenue. Aggrieved by the same, the present appeal has been filed.

4. We have elaborately heard Mr.Rajnish Pathiyil, learned Senior Standing Counsel appearing for the appellant/Revenue.

5. Firstly, we have pointed out that no Substantial Question of Law arises for consideration in the instant case. The reliance placed on the larger Bench decision of the CESTAT in the case of Great Lakes Institute of Management Ltd. V. Commissioner of S.T., Chennai reported in [2013 (32) S.T.R. 305 (Tri. LB)] is wholly inapplicable to the facts and circumstances of this case.

6. We need to remember that the respondent is a Government Aided Polytechnic College and the courses which have been conducted are part of an initiative under the Canada-India Institutional Cooperation Project. This project was conceived for the purpose of upliftment of the downtrodden, the have-nots

and to provide them a source of livelihood. In our considered view, the Commissioner carefully considered the factual position, the circular of CBE&C bearing Circular No.107/1/2009 S.T. dated 28.01.2009, Circular No.137/1/2006 CX dated 01.11.2006, the decision of the CESTAT, Bangalore in the case of Centre for Development of Advanced Computing Vs. CCE(Appeals-II) Hyderabad, as well as the decision of Great Lakes Institute of Management Ltd. (supra) and set aside the order passed by the Adjudicating Authority. The First Appellate Authority noted that the courses conducted are with the approval of All India Council for Technical Education (AICTE).

7. The Government of Tamil Nadu has empowered the Director of Technical Education to take decision in all matters in connection with the Canada-India Institutional Cooperation Project. The project is recognized and approved by the State Government and AICTE and therefore, the First Appellate Authority rightly held that the services rendered are for the benefit of poor students aiming at widening the scope of employment. Thus, the Tribunal rightly dismissed the appeal filed by the Revenue. One more issue which was not noticed by the Tribunal is whether the Department could have invoked extended period by applying proviso to sub-section (1) of Section 73 of Chapter V of the Finance Act, 1994.

8. We have perused the allegation in the show cause notice dated 05.02.2008 and more particularly, paragraph 7, wherein, the officer states about the applicability of the extended period of limitation. Section 73 deals with recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. Sub-section (1) of Section 73 states that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer within one year from the relevant date, serve notice on the person chargeable with service tax. The period stipulated under Section 73(1) viz., "one year" was substituted by eighteen months by Finance Act, 2012 dated 28.05.2012. The period in dispute in the instant case falls prior to the amendment. Therefore, if the Department was of the view that service tax has not been levied or paid by the respondent, they could have invoked Section 73(1) within one year from the relevant date.

9. Admittedly, this was not done and the Department seeks to invoke proviso to Section 73(1) of the Act. The proviso provides for an extended period, whereby, the word one year in Section 73 (1) was substituted by the word "five years". The proviso will come into play only if the service tax has not been paid by the respondent by reason of fraud; or collusion; or willful mis-statement; or suppression of facts; or contravention of any of

the provisions of Chapter 5 of the Finance Act or of the Rules made thereunder with intent to evade payment of service tax.

10. Admittedly, there is no such allegation of fraud or collusion etc., which is not the only requirement, but there should be intention to evade payment of tax. Thus, mere non-payment will not be a ground to invoke proviso to Section 73(1) of the Act. That apart, the assessee had an explanation that they had produced Government records, approval from AICTE, Project Director of the Canada-India Institutional Cooperation Project, who had also given a statement clearly stating that they are Government aided Institution and Government directed such courses to be conducted.

11. Thus, we are of the clear view that proviso to Section 73(1) of the Finance Act could not have been invoked, as there was no material against the respondent for invoking the extended period. Thus, for the above reasons, we find that the Revenue has not made out any ground to interfere with the order passed by the Tribunal as also the independent reasons assigned by us.

12. In the result, the appeal is dismissed and the Substantial Questions of Law are answered against the Revenue. No costs.

-s/d-
Assistant Registrar(CS-IV)

True Copy

Sub-Assistant Registrar

ska/svki
To

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

+1 CC to Mr. Rajanish Pathiyil, Advocate sr 85372.

C.M.A.No.2950 of 2018

SS(CO)
SP(28/01/2019)