In the High Court of Judicature at Madras

Dated : 29.11.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mr.Justice N.SATHISH KUMAR

(Service Tax)

Civil Miscellaneous Appeal Nos.2734 & 2735 of 2018

M/s.Madeena Constructions,
No.19,Arunachalam Road,
Dasarathapuram, Saligraman,
Chennai-93 ...Appellant in both Appeals

Vs

The Commissioner of GST & Central
Excise, Chennai South Commissionerate,
MHU Complex, No.692, Anna Salai,
Nandanam, Chennai-35 ...Respondent in both Appeals

APPEALS under Section 35G of the Central Excise Act, 1944 as made applicable under Section 83 of the Finance Act, 1994 to set aside final order Nos.40572 and 40573/2018 dated 16.7.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.K.Jayachandran

For Respondent : Mr.Syed Noorullah Sheriff, SSC



COMMON JUDGMENT

(Judgment was delivered by T.S.SIVAGNANAM,J)

These appeals are filed by the appellant under Section 35G of the Central Excise Act, 1944 as made applicable under Section 83 of the Finance Act, 1994 to set aside final order Nos.40572 and 40573/2018 dated 16.7.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

2. The above appeals are filed raising the following substantial questions of law :

"CMA.No.2734 of 2018 :

i. Whether, in the facts and

circumstances of the case, the Tribunal is justified in holding that the application praying for restoration of appeal was made with a delay of about 5 years, when the appellant established that the original order of the Tribunal was not served on the appellant, but served on 22.3.2018 when requested by the appellant through RTI application ? and

ii. Whether the Tribunal is justified in rejecting the restoration application filed by the appellant on mere assumption without going into the merits of the claim that the demand is contrary to the instructions of the Board dated 17.9.2004?

CMA.No.2735 of 2018 :

i. Whether the Tribunal is justified in dismissing the appeal for non compliance of stay order without going into the merits of the case, which, according to the appellant, is covered by decision of the Delhi High Court reported in (2016) 43 STR 3 and the instructions of the Board's Circular No.108/02/2009-ST dated 29.1.2009 ? and

ii. Whether dismissal of appeal for non compliance of stay order takes away the statutory right of appeal provided under the Act ?”

3. The challenge is to the order passed by the Customs, Excise and Service Tax Appellate Tribunal (hereinafter called the Tribunal) dated 16.7.2018 stated to have been made in two miscellaneous applications.

4. The appellant filed an appeal before the Tribunal against the Order-in-Original dated 30.4.2010. By the said order, the Adjudicating Authority demanded service tax from the appellant for the period from 10.9.2004 to 31.3.2008 under the Proviso to Section 73(1) read with Section 73(2) of the Finance Act, 1994; appropriated a sum of Rs.1 lakh paid by the appellant on 27.8.2008 towards the service tax demanded; demanded interest under Section 75 of the Finance Act, 1994; imposed penalty of Rs.60 lakhs under Section 78 of the Finance Act, 1994 by further indicating that this penalty would be reduced to 25% of the service tax demanded, if only the service tax and interest determined are paid along with reduced penalty within 30 days from the date of receipt of the order dated 30.4.2010 in terms of the Proviso to Section 78 of the Finance Act, 1994.

5. As against the Order-in-Original dated 30.4.2010, the appellant preferred an appeal before the Tribunal. Along with the appeal, the appellant filed a miscellaneous application for stay. The Tribunal, by order dated 15.1.2013, found that the appellant made out a prima facie case, as they placed reliance on the decision of the Tribunal in the case of LCS City Makers Private Limited Vs. CCE [reported in (2012-TIOL-618-CESTAT-Mad.] and directed the appellant to make a pre-deposit of 50% of the service tax demanded within a period of six weeks from the date of receipt of a copy of the said order dated 15.1.2013. The matter was directed to be listed on 04.3.2013 for reporting compliance.

6. Admittedly, the appellant did not comply with the condition within the time stipulated, but deposited only a sum of Rs.7 lakhs in bits and pieces as against the condition of pre-deposit of Rs.28.90 lakhs. The appellant also filed an application for extension of time, which was considered by the Tribunal and by order dated 03.4.2013, time was extended upto 25.3.2013. Even thereafter, the appellant did not comply with the condition in full and consequently, on 07.6.2013, the appeal stood dismissed for non compliance of the pre-deposit condition.

7. Thereafter, the appellant moved two applications for restoration of the appeal and to modify the order dated 15.1.2013. In the application for modification, the appellant placed reliance on the decision of the Division Bench of the Delhi High Court in the case of Sureshkumar Bansal Vs. Union of India [reported in (2016) 43 STR 3] and the decision of the Division Bench of the High Court of Andhra Pradesh and Telungana in the case of Vijaya Casting Works Vs. Union of India [reported in MANU/ AP/0382/2017]. The said decisions were quoted to support their contention that the pre-deposit relating to appeals filed prior to 06.8.2014 requires only deposit of 7.5% and 10% of the disputed tax.

8. The appellant further contended before the Tribunal that construction of residential complex by a builder was subjected to service tax only from 01.7.2010 by way of the Explanation brought into Section 65(105)(zzzh) of the Finance Act and if this provision is applied, 90% of the demand made in the Order-in-Original dated 30.4.2010 would not survive.

9. The Tribunal heard both the miscellaneous applications and dismissed the application for restoration by order dated 16.7.2018, which is impugned before us in one of the appeals without rendering any finding in the modification application.

10. We have heard Mr.K.Jayachandran, learned counsel for the appellant and Mr.Syed Noorullah Sheriff, learned Senior

Standing Counsel accepting notice for the Revenue.

11. Considering the fact that though the Tribunal noticed that the appellant filed two miscellaneous applications, one of them is with a prayer to modify the stay order passed by the Tribunal dated 15.1.2013 directing pre-deposit of Rs.28.90 lakhs and another for restoration of the appeal, the Tribunal, in the impugned order, has not specifically dealt with the prayer made by the appellant for modification in the light of the contentions advanced by the appellant in that application.

12. In our considered view, if the legal position wipes out substantial liability or entire liability, as, according to the appellant, construction of residential complex by a builder was subjected to service tax only from 01.7.2010, this vital point has to be considered by the Tribunal and if this plea is acceptable, it goes without saying that the appellant made out a strong prima facie case. Hence, we are constrained to interfere with the impugned order, however, subject to a condition.

13. Accordingly, the civil miscellaneous appeals are allowed and the order passed by the Tribunal dated 16.7.2018 is set aside subject to the condition that the appellant shall deposit a further sum of Rs.7,00,000/- (Rupees seven lakhs only) within a period of three weeks from the date of receipt of a copy of this judgment. To be noted that the appellant had already pre-deposited Rs.7 lakhs. If the appellant complies with this condition within the time stipulated by us in this judgment, then the two miscellaneous applications shall stand automatically restored to the file of the Tribunal and the Tribunal shall take a fresh decision in both the applications and more particularly in the application for modification of the stay order. If the appellant fails to comply with the condition imposed by us in this judgment within the time permitted, the benefit of this order will not enure to the appellant and the appeals shall stand automatically dismissed without any further reference to this Court. No costs.

Sd/-
Assistant Registrar



//True copy//

Sub Assistant Registrar

RS

To

1.The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.
2.The Commissioner of GST & Central Excise, Chennai South Commissionerate, MHU Complex, No.692, Anna Salai, Nandanam, Chennai-35

Copy To : The Section Officer, VR Section, High Court, Madras.

+1cc to Mr.G.M.Syed Nurullah Sheriff, Advocate SR.No.81794

+1cc to Mr.K.Jayachandran, Advocate SR.No.81682

CMA.Nos.2734 & 2735 of 2018

RJI(CO)
GMY(07/01/2019)