

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.06.2019

CORAM

THE HONOURABLE DR. JUSTICE VINEET KOTHARI
and
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.No.3236 of 2012
and
M.P.No.1 of 2012

M/s.Fairline Worldwide Express,
S.S.Apartments Ground Floor,
83, Savari Rayalu Street,
Pondicherry 605 001. ...Appellant/Respondent

vs

Commissioner of Central Excise,
(Service Tax),
No.14, Municipal Street, Azeez Nagar,
Reddiarpalayam, Pondicherry-10. ...Respondent/Appellant

Prayer: Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1994, to set aside the order dated 17.07.2012 made in ST/MISC/350/2012 in S/284/2007 passed by the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, allowing the appeal.

For Appellant : M/s.M.Meenakshi
for Mr.P.Anbarasan

For Respondent: Mrs.Hema Muralikrishnan

J U D G M E N T

(Judgment of the Court was delivered by Dr.Vineet Kothari,J.)

The Assessee, M/s.Fairline Worldwide Express, Pondicherry, has filed the present appeal aggrieved by the order of the learned CESTAT dated 17.07.2012, whereby the learned Tribunal rejected its Rectification Application filed beyond a period of limitation of six months under Section 35C(2) of the Central Excise Act, 1944.

2. The said Rectification Petition was filed by the Assessee against the previous order of the learned Tribunal

dated 19.02.2010, whereby the learned Tribunal held against the Assessee that for the brief period from 15.03.2005 to 15.06.2005, the Assessee, who were rendering courier service outside India, were not entitled to for exemption because the Assessee did not receive the convertible foreign exchange for such services found to be taxable under the relevant Service tax law.

3. The Assessee seems to have approached this court also by way of another appeal against the order dated 16.06.2011. The Assessee filed the earlier appeal against the aforesaid order dated 16.06.2011, which came to be disposed of by the Division Bench of this Court on 08.12.2011, by which, the impugned order of CESTAT dated 16.06.2011 was set aside and the appeal was restored to the learned Tribunal to consider the application of the Assessee filed under Section 35C(2) of the Act. Upon such directions, the learned Tribunal again passed the order on 17.07.2012, dismissing the rectification application filed by the Assessee, as barred by limitation.

4. The findings of the learned Tribunal, as contained in paragraph 4 of the said order, are quoted below for ready reference:

"In this case, the final order was passed by this Tribunal on 19.02.2010 and the application for ROM was filed by the applicant on 23.03.2011. In that view, the application for ROM itself has been filed beyond the period of six months prescribed in Section 35C(2) of the Central Excise Act, 1944. Further, the applicant relied upon the following case laws, (i) Sree Ayyanar Spinning & Weaving Mills Ltd. vs Commissioner of Income Tax reported in 2008 (229) E.L.T. 164 (S.C.) and (ii) J.K.Tyre and Industries Ltd. vs Assistant Commissioner of Central Excise, Mysore-II reported in 2011 (266) E.L.T. 163 (Kar) in support of their case. However, the reliance made by the application for ROM was filed within six months of the order and both the High Court as well as the Hon'ble apex Court has held that if the application is filed within the period prescribed, then the Tribunal has the power to dispose of the application beyond the period of six months. So, admittedly in this case, the application for ROM has been filed beyond the prescribed time provided in the statute book. Therefore, we reject the application ROM on the ground of limitation. Application is disposed of in the above terms."

5. The substantial questions of law, on which the appeal

was admitted are hereunder, from the order dated 07.12.2012:

"1. Whether the Customs, Excise and Service Tax Appellate Tribunal, Chennai is correct in holding that there is no express statutory provision for filing application for rectification in orders in service tax appeals disposed of by the Tribunal, especially when Section 35-C(2) of Central Excise Act, 1944 empowers the Appellate Tribunal to rectify the mistake, as held by the Karnataka High Court reported in 2011 (266) E.L.T.163 (Kar.) and the CESTAT, WEST ZONAL BENCH, MUMBAI reported in 2010 (262) E.L.T.507 (Tri-Mumbai) and the CESTAT, SOUTH ZONAL BENCH, Bangalore reported in 2007(7) S.t.R.142 (Tri-Bang)?

2. Whether the Customs, Excise and Service Tax Appellate Tribunal, Chennai is correct in holding that the service tax for the period from 15.3.2005 to 15.6.2005 is payable by the appellant by applying the amended provision of Rule 3(2) of Export of Service Rules 2005 which is applicable only from 15.6.2005?

3. Whether the Customs, Excise and Service Tax Appellate Tribunal, Chennai is correct in not taking into consideration of the point that the appellant alone has been discriminately treated by the respondent when in the entire Union Territory of Pondicherry the appellant alone has been singled out and demanded service tax which was not collected by him, which amounts to violation of Article 14 of the Constitution of India?"

6. Learned counsel appearing for the Appellant/Assessee, Ms.M.Meenakshi, has submitted that the learned Tribunal has erred in rejecting the application as barred by limitation because the period of limitation would apply only if the learned Tribunal undertakes the rectification proceedings suo-motu and not when the Assessee moves such application for rectification.

7. On the other hand, the learned counsel for the Revenue Mrs.Hema Muralikrishnan, supported the impugned order.

8. Having heard the learned counsel for the parties, we are of the opinion that there is no merit in the present appeal filed by the Assessee. Sub Section (2) of Section 35C of the Act, which is quoted below, does not envisage any such distinction of the rectification application being made by the party or rectification proceedings undertaken by the Tribunal suo-motu on its own. The said provision reads as under :

"35-C. Orders of Appellate Tribunal:-

(2) The Appellate Tribunal may, at any time within [six months] from the date of the order, with a view to rectifying any mistake apparent from the

record, amend any order passed by it under sub-section (1) and shall make such amendments if the mistake is brought to its notice by the [Principal Commissioner of Central Excise or Commissioner of Central Excise] or the other party to the appeal."

9. The period of limitation of six months was substituted for a period of four years by the Finance Act 2002 with effect from 11.05.2002. We are concerned with this post amendment limitation of six months only. The application for rectification apparently can be filed either by Revenue Authority or by the other party to the appeal (the Assessee concerned). The provision does not even provide for a suo-motu rectification by the learned Tribunal. Therefore, restricting the application of a period of limitation only if the learned Tribunal itself undertakes such rectification proceedings cannot be applied, as contended by the learned counsel for the Assessee. The limitation period of six months applies to both the parties intending to seek the rectification of mistake apparent on the face of the record. Admittedly, in the present case, the orders sought to be rectified was passed on 19.02.2010, for which the application for rectification by the Assessee was filed beyond the period of limitation but no date of filing of such rectification application was given by the Assessee.

10. We wonder as to how the question of limitation is found being sought to be raised without disclosing the other relevant viz., date of filing of rectification application by the Assessee. Be that as it may, since the learned Tribunal has rejected the application on the ground of limitation and apparently, there is no material before us to arrive at a different conclusion, we do not find any merit in the contention raised by the learned counsel for the Assessee that the period of limitation cannot be applied, where the application filed by the Assessee. The questions on which the present appeal was admitted by the Coordinate Bench of this Court on 07.12.2012, are answered against the Assessee and in favour of the Revenue. The civil miscellaneous appeal is devoid of merit and the same is dismissed. No costs. The connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CCC)

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Sub Assistant Registrar

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To

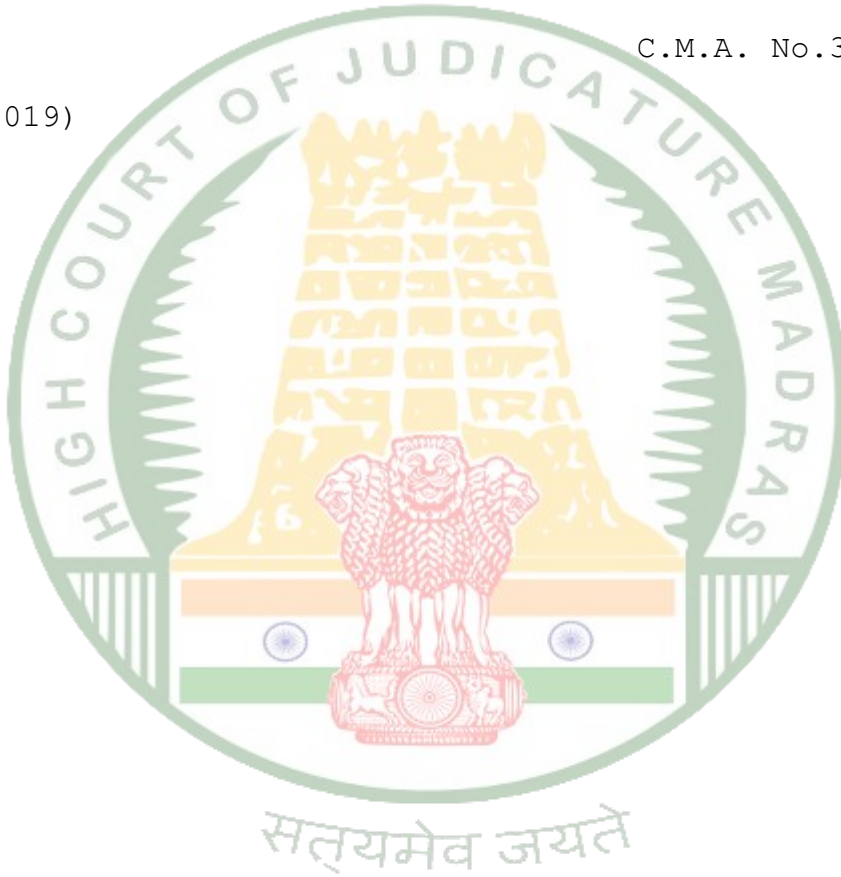
Commissioner of Central Excise,
(Service Tax),
No.14, Municipal Street, Azeez Nagar,
Reddiarpalayam, Pondicherry-10.

+lcc to Mr.Hema Muralikrishnan, Advocate, S.R.No. 51909

+lcc to Mr.P.Anbarasan, Advocate, S.R.No.51946 (26/08/2019)

VG II(CO)
GN(26/07/2019)

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