IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.02.2019

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A. No. 1462 of 2019

P.S.Vinod ...Appellant/ Appellant

-vs-

The Commissioner of Service Tax,
(Chennai South Commissionerate)
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 600 034. ...Respondent/ Respondent

Civil Miscellaneous Appeal filed by the assessee under Section 35G of the Central Excise Act, 1994 as made applicable under Section 83 of the Finance Act, 1994 set aside the final order no.43020/18 dated 22.11.2018 passed by the tribunal against the order passed by the Customs Excise and Service Tax Appellate Tribunal in appeal No.ST/124/2011.

For appellant : M/s.K.Jayachandran

For Respondent : Mr.A.P.Srinivas
Senior Standing Counsel

JUDGMENT

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

This Civil Miscellaneous Appeal filed by the assessee under Section 35G of the Central Excise Act, 1994 as made applicable under Section 83 of the Finance Act, 1994 is directed against the order passed by the Customs Excise and Service Tax Appellate Tribunal in Appeal No.ST/124/2011 dated 22.11.2018.

2. This appeal has been filed raising the following substantial questions of law:

> "(i) Whether in the facts and circumstances of the case, the Tribunal is justified in holding that the demand raised as well as interest is legal and proper without considering or discussing, the plea of correctness of invocation of larger period raised before it?
>
> (ii) Whether larger period of limitation is invokable in the case, when there is a bonafide belief about the taxability of the service, which has been accepted while deleting the penalty and consequently, the demand is barred by limitation?"

3. We have heard M/s.K.Jayachandran, learned counsel for the appellant and Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondent.

4. Two issues are canvassed before us. Firstly, the assessee being the individual professional photographer cannot be stated to render taxable service in terms of Section 65(105)(zb) of the Finance Act. The second contention raised before us is that the extended period of limitation could not have been invoked since assessee was of the bonafide belief that being a individual photographer whatever assignments done by him will not become taxable service.

5. The period in question is between October, 2002 and September, 2006. At the relevant point of time, the period within which the show cause notice could have been issued, is one year and beyond that unless there is a clear case of suppression, the extended period of limitation should not be invoked. The admitted fact is that the assessee registered himself with the department in October, 2005 and he has paid service tax for the services rendered by him till September, 2006. This fact has been noted by the First Appellate Authority. After the appellant registered himself under the category photography services, the respondent department conducted an audit and on scrutiny of the Ledger accounts along with Income Tax returns for the period 2002-03 to 2005-06, it came to light that the assessee rendered photography services and realized a taxable service of Rs.1,41,18,840/- on which service tax and Education Cess is payable at Rs.11,41,608/-.

6. Show cause notice dated 13.03.2008 was issued to the assessee. The assessee submitted his reply on 01.05.2008 stating that he is an individual, who offers skill and labour to the film producing companies, he does not own any infrastructure or equipment to provide any service to any person much less an organization, he does not have an office or seal or persons to provide service, he is not a photographer in commercial trade parlance. There is no suppression on his part since department is aware of the appellant's activities since the year 2005 onwards and the extended time limit cannot be invoked to demand tax. Further, the assessee stated that he is not liable to pay service tax on the activities indulged by him and the registration shown is liable to be cancelled and the tax paid by him till date be refunded with interest.

7. The assessee filed his written arguments before the Joint Commissioner of Service Tax, who by order dated 22.07.2008, after affording opportunity of personal hearing, rejected the stand taken be the assessee and confirmed the demand notice dated 13.03.2008. Further a penalty equivalent to the demand of service tax was also imposed. Challenging the said order, assessee filed an appeal before the Commissioner of Central Excise (Appeals) which was dismissed. The assessee filed further appeal to the Tribunal, the Tribunal after considering factual position has dismissed the appeal insofar as it relates to demand of service tax, but granted relief to the assessee by deleting the penalty.

8. The question would be whether the assessee would fall within the scope of Section 65(105)(zb). It is the contention of the learned counsel for the assessee that to come within the tax net, the assessee should be a photography studio and only in case of such a photography studio or an agency in relation to photography, then only it can be termed as a taxable service.

9. We have heard Mr.A.P.Srinivas, learned Senior Standing Counsel on the above submissions. Section 65(79) of the Finance Act, 1994 states that photography studio or agency means any professional photographer or a commercial concern engaged in the business of rendering services relating to photography. The assessee cannot dispute the fact that he is a professional photographer. Therefore, the assessee would fall within the definition of Section 65(79) of the Finance Act. In such an event, it should be seen as

to whether the provisions of Section 65(105)(zb) of the Finance Act could be made applicable as per the assessee stand, he does not own a photography studio or even does not own a camera, which is very hard to believe.

10. However, Section 65(105)(zb) of the Act not only restricts the definition to photography studio alone but also to an agency. The assessee is an individual, a proprietary and he is an agency in the legal sense of the terms. Therefore, Section 65(105)(zb) of the Finance Act would stand attracted and the assessee is liable to pay service tax. With regard to invoking extended period of limitation, the assessee in the year 2005 voluntarily registered himself with the department and it will not lie in the mouth of the assessee to now state that the registration itself should be cancelled and whatever tax paid by him for the period between October, 2005 to September, 2006 should be refunded. Upon registration with the department, an audit was conducted, documents were scrutinized and it was found that the assessee did not get himself registered prior to October, 2005, when he ought to have done, when he was realizing taxable service. Thus, the facts clearly disclose that the assessee failed to get himself registered with the department and consequently would fall within the scope of suppression and extended period of limitation could be invoked.

11. The learned counsel for the assessee relied on the decision in the case of Principal Commissioner of GST Vs. C.Kamalakannan [reported in (2018) 18 GSTL 589 (Madras)] dated 23.08.2018, by relying on the said decision, it is submitted that the extended period cannot be invoked by the respondent department. In the said decision, we find that there were two views within the department itself on the taxability of the services and in such an event it was held that there can be no allegation of fraud/suppression or wilful misstatement against the assessee. Thus, we are of the considered view that the decision in the case of C.Kamalakannan is clearly upheld and cannot be made applicable to the facts of the case on hand. The Tribunal rightly deleted the penalty levied on the assessee and the Revenue has not filed any appeal against the said portion of the order was passed by the Tribunal.

12. Thus, for the above reasons, both the substantial questions of law raised for consideration are answered against the assessee and consequently, the appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

mrm/ssb

To

The Commissioner of Service Tax,
(Chennai South Commissionerate)
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 600 034.

2.The Commissioner of Central Excise(appeals),
Chennai.

+1cc to M/s.K.Jayachandran , Advocate SR.No. 15630
+1cc to Mr.A.P.Srinivas , Advocate SR.No. 15003

C.M.A. No. 1462 of 2019

A.SK(03/04/2019)