IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 20.03.2019

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

C.M.A Nos. 1936 & 1937 of 2019
&
C.M.P.No.6762 of 2019

MatlanB Construction Engineers Pvt. Ltd.,
No.1, Nanda Nagar, Singanallur,
Coimbatore - 641 005.
... Appellant in both the appeals

-Vs-

The Commissioner of Central Excise,
Customs & Service Tax,
No.6/7, ATD Street, Race Course Road,
Coimbatore - 641 018.
...Respondent in both the appeals

Common Prayer: Civil Miscellaneous Appeals filed under Section 35G of the Central Excise Act, 1944 to set aside the impugned miscellaneous order No.40787 of 2018 and 40788 of 2018 dated 20.11.2018 and 43455 - 43446 of 2017 dated 20.12.2017 passed by the Customs, Excise and Service Tax Appellate Tribunals South Zonal Bench, Chennai respectively and grant appropriate relief.

For appellant : Mr. Derrick Sam (in both appeals)

For Respondent: Mr.K.S.Ramaswamy (in both appeals)

COMMON JUDGMENT

[Judgement of this Court was delivered by T.S.SIVAGNANAM.,J]

These Appeals have been preferred by the assessee under Section 35G of the Central Excise Act, 1944 as made applicable to the Finance Act, 1994. The appellant challenged the orders passed by CESTAT dated 20.11.2018 and 20.12.2017 passed in an application filed by the assessee for rectification of mistake in final order dated 20.12.2017.

2. These appeals have been filed raising the following Substantial Questions of Law:

"(i) Whether the tribunal had erred in stating that "a hospital charging a fee for treatment by different amount makes it a commercial establishment to make the building as a commercial building" even though the hospitals in issue were charitable trust hospitals with no profit motive.

(ii) Whether the Tribunal erred in not following the decision of the coordinate bench in the case of M/s.Mukesh Kalway Vs. CCE reported in 2017 (3) GSTL 183 (Tri).

(iii) Whether the Tribunal had erred by not favourably considering the application for rectification of mistake?"

3. We have heard Mr.G.Derrick Sam, learned counsel for the appellant in both the cases and Mr.K.S.Ramaswamy, learned counsel who is accepting notice for the respondents.

4. The core issue to be considered is whether the appellant who is rendering service to hospitals situated in Coimbatore would be liable to pay service tax under the category cleaning services in terms of Section 65(24b) of the Finance Act, 1994. The assessee's case is that hospitals for which they render these cleaning services are charitable organizations either they are trusts or societies which are running the hospitals for purposes of charity. The Tribunal while passing the order dated 20.12.2017, agreed with the submission of the assessee that the factual details require to be re-examined by the original authority based on supporting evidence and that the assessee was under the bonafide belief that the hospital buildings are not covered by the tax entry cleaning services. The assessee approached the Tribunal by way of rectification application stating that in paragraph 6.1 of the final order passed by the Tribunal dated 20.12.2017, the Tribunal instead of making an observation that the hospital charging the fee for treatment would not always make it a commercial establishment but the order states that when they charge a fee, the hospital becomes a commercial establishment. This prayer for rectification was rejected by the Tribunal by order dated 20.11.2018. Therefore, the appellant is before us raising the above mentioned substantial questions of law.

5. In our considered view, no substantial question of law arises for consideration in these appeals more particularly when the matter has been remanded to the original authority for reconsideration in terms of the order passed by the Tribunal dated 20.12.2017 as the Tribunal felt that the factual details require to be re-examined based on supporting evidence on the legal aspect as to whether in all cases where a hospital charges fee will it become a commercial establishment. In our view, the said question is entirely factual. A charitable Trust might have established a hospital for affording free treatment.

Nevertheless, there is one section of patients who could afford payment from which the Trust/hospital would charge a fee for consultation or treatment. Whether such collection of fee from a section of patients would make a establishment a commercial establishment, there can be no universal test on this issue. The matter requires to be decided on case to case basis. Therefore, while confirming the order of remand to the original authority for fresh consideration, we observe that merely because a section of patients have been charged by hospital for treatment or consultation will not always make the hospital as a commercial establishment in all cases. Therefore, the original authority while re-examining the issue as directed by the Tribunal should examine the supporting evidence placed by the assessee and find out as to whether they would fall within the ambit of Section 64(24b) of the Finance Act, 1994. In other words, the original authority is required to decide as to whether the cleaning activity done by the assessee is for a commercial or industrial building and premises there of.

6. This is required to be decided based on the documents that the assessee may produce. With the above clarification, we affirm the order passed by the Tribunal with an observation that the original authority shall re-determine the matter in terms of the directions issued by the Tribunal bearing in mind the observations made by us in this judgement.

7. In the result, these civil miscellaneous appeals are dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

mrm

To

The Commissioner of Central Excise,
Customs & Service Tax,
No.6/7, ATD Street, Race Course Road,
Coimbatore - 641 018.

+1cc to Mr.K.S.Ramasamy, Advocate, S.R.No.27055

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& C.M.P.No.6762 of 2019

RR(CO)

RRS(01/07/2019)