

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.03.2019

CORAM :

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

Writ Appeal No. 814 of 2019
and
C.M.P.No.6436 of 2019

M/s.Popular Maruthi Painting Works,
Rep by its Partner M.S.Kanchana
having its Office at No.7,
Selvaganapathy Koil Street, Chennai-91.

...Appellant

-Vs-

1. The Additional Commissioner of GST & Central Excise, Chennai South Commissionerate, 692, M.H.U Complex, Nandanam, Chennai - 35.
2. The Commissioner of GST & Central Excise (Appeals-II), Newry Towers, No.2054-I, 2nd Avenue, 12th Main Road, Anna Nagar, Chennai - 40.

...Respondents

Writ Appeal filed under Clause 15 of Letters Patent against the order passed by this Court in W.P.No.754 of 2019 dated 09.01.2019.

Prayer in W.P.No.754 of 2019:- Petition under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records pertaining to the Order in Appeal No. 466/2018 (CTA II) dated 28.9.2018 passed by the 2nd respondent confirming and enhancing the Order in Original No.1/2018 dated 22.1.2018 and quash the same.

For appellant : Mr.Joseph Prabakar

For Respondents: Mr.K.S.Rama Swamy
Standing Counsel

JUDGMENT

(JUDGMENT OF THE COURT WAS DELIVERED BY T.S.SIVAGNANAM, J.)

This Appeal by the writ petitioner is directed against the order in W.P.No. 754 of 2019 dated 09.01.2009.

2. The appellant filed the writ petition challenging the order in appeal passed by the Commissioner (Appeals II) dated 28.09.2018 in an appeal filed by the Revenue questioning the correctness of the order in original dated 22.10.2012. The respondent/department issued show cause notice dated 12.10.2012 alleging that the appellant/assessee has not paid service tax in the year 2007-08 inspite of the turnover of Rs.52,00,000/-. It is not in dispute that the assessee registered themselves with the department under the head "Business Auxiliary Services" and have been remitting service tax from 2008 onwards. The show cause notice called upon the assessee to pay service tax to the tune of Rs.6,46,595/- for the financial year 2007-08 and also proposed levy of interest and penalty. The assessee filed their reply contending that they were under the bonafide impression that they should pay service tax only after registration and that they have been doing so after March, 2008. They have deducted minimum exemption limit of Rs.8,00,000/- from the total turnover and paid balance service tax of Rs.78,207/- on the balance amount of Rs.6,32,743/- for March, 2008.

3. Further they stated that the service tax payment will be made only if input credit is allowed. Considering the fact that the said company namely Hyundai Motors India was a large organization, the assessee was of the bonafide belief that the service tax was not payable. Infact the said company agreed to give a letter to the said effect and therefore they requested the Original Authority to grant them 30 days time. Further they stated that there is no suppression of information or facts and they have acted with utmost bonafides. The Original Authority did not agree to the contentions raised by the assessee and by order dated 24.03.2014, confirmed the proposal in the show cause notice and demanded service tax of Rs.6,46,595/- directed the payment of interest under Section 75 of the Finance Act, 1994 (for brevity 'the Act') imposed penalty of Rs.5,000/- under Section 77(2) of the Act and imposed equivalent penalty to that of the service tax under Section 78 of the Act.

4. Aggrieved by the same, assessee filed an appeal before the Commissioner (Appeals-I). The Appellate Authority agreed with the assessee that they are entitled to claim exemption upto Rs.8,00,000/- and by order dated 28.07.2016 set aside the order

passed by the Adjudicating Authority to the said extent and remanded the matter for fresh consideration with regard to the computation of the service tax payable. With regard to the interest and penalty which has been imposed under Section 78 of the Act, the appellate authority held that the sum requires to be re-quantified after the adjudicating authority takes a fresh decision on remand. The penalty of Rs.5,000/- under Section 77 (2) of the Act was set aside. Pursuant to the remand, the Adjudicating Authority accepted the stand of the assessee and passed the order in original dated 22.01.2018. In the said order, the Adjudicating Authority held that the assessee was liable to pay service tax of Rs.1,58,803/- and appropriated the amount of Rs.1,50,130/- already paid by the assessee on 16.11.2017. The demand for interest on the said amount under Section 75 of the Act was confirmed and whatever already been paid was appropriated. The penalty of Rs.1,58,803/- equivalent to that of the service tax payable was imposed.

5. The order in original is dated 22.01.2018. The assessee accepted the computation and whatever was the deficit payable, the assessee have remitted the same towards the service tax liability. In so far as the penalty is concerned, the assessee took shelter under Section 78 of Finance Act and in terms of Clause 2 in the second proviso in Section 78, the assessee paid 25% of the penalty payable under the Act. It is not in dispute that the said payment was made well within the 30 days time limit. In this regard it is relevant to note that the differential service tax amounting to Rs.8,673/- and 25% of the penalty under Section 78 on Rs.1,58,803/- amounting to Rs.39,701/- was paid by the assessee on 28.02.2018.

6. Thereafter, the Revenue filed appeal before the Commissioner (Appeals-II) challenging the order in original dated 22.01.2018. We find that the appeal is not on the merits of the decision taken by the Original Authority since the department concedes that the Original Authority considered the directions of the Appellate Authority in its order dated 28.02.2016 and correctly arrived at re-quantified taxable value. However, the appeal was on the ground that while demanding service tax instead of demanding Rs.4,77,542/-, the department demanded Rs.1,58,803/-. The assessee objected to the appeal petition on several grounds that the showcause notice dated 12.10.2018 has not specified the classification of taxable service under which the demand is proposed and in the absence of valid ground to sustain the levy of service tax, the imposition of penalty under Section 78 would be wholly illegal and arbitrary and requested for setting aside the penalty.

7. The Appellate Authority rejected the contentions raised by the assessee demanded service tax of Rs.4,77,542/- and also

imposed equivalent penalty under Section 78. As against such order, the assessee has an alternative remedy by filing appeal before the CESTAT. Nevertheless, appellant chose to file a writ petition primarily on the ground that the show cause notice is defective and the defect is incurable and the defect has occurred on the very threshold and all subsequent proceedings are a nullity. Further it is contended that after the assessee had remitted 25% of the penalty in terms of Clause 2 of the second Proviso to Section 78 of the Act the question of enhancing the penalty would not arise.

8. Furthermore, it was contended that the effect of alternative remedy is a self imposed restriction and each case has to be decided on the facts raised therein and since a question of law has been raised by the assessee the same could be decided in a writ petition. In respect of the said contention the assessee relied upon the decision of Hon'ble Supreme Court in the case of Aircel Ltd., & another Vs. Commercial Tax Officer and the decision of the Hon'ble Division Bench of this Court in the case of National Oxygen Ltd., Vs. Commissioner of Customs, Chennai [reported in 2008 (231) E.L.T. 410. The learned Writ Court held that the correctness of the order passed by the Appellate Authority cannot be tested in a writ petition. Furthermore, the appellant was non-suited on the ground that assessee had accepted the order in original dated 22.01.2018.

9. We have heard Mr. Joseph Prabakar, learned counsel for the appellant and Mr. K. S. Ramaswamy, learned standing counsel for the respondent and with the consent of either side, the appeal is taken up for disposal.

10. It is true that the appellant had an effective alternative remedy by way of an appeal before the CESTAT as against the order passed by the First Appellate Authority dated 28.09.2018. But the assessee chose to file a writ petition challenging the manner in which the show cause notice was issued and contending that there is a serious flaw which would render all subsequent proceedings as untenable.

11. In our considered view, the learned Single Bench was right to an extent that such a plea could not be raised by the assessee at this distance off time especially when the assessee accepted the order in appeal dated 28.07.2016, participated in the de novo proceedings which resulted in order in original dated 22.01.2018. Admittedly, the assessee did not challenge the order in original dated 28.02.2016. It is the Revenue which went on appeal before the First Appellate Authority against the said order. As noticed above, the appeal was not on the merits of the matter but on technical ground that there was a computation error.

12. Infact, in the grounds raised before the First Appellate Authority, the Revenue admits that the adjudicating authority has correctly arrived at the re-quantified taxable value. Therefore, at best it could have been a case for rectification. Nevertheless, that could not have been done because the assessee accepted the quantification in the order in the original dated 22.01.2018 paid the differential tax and also 25% of the penalty as quantified within the time limit prescribed under Section 78 of the second proviso. Thus, the order in original dated 22.01.2018 has worked itself out. Therefore, even assuming that the First Appellate Authority can rectify the computation error, it cannot be a case where the penalty can also be reduced more particularly when the order in original dated 22.01.2018 was accepted by the assessee and 25% of the penalty was paid within 30 days period thereby giving a protection to the assessee in terms of Clause 2 of second proviso. Therefore, considering the peculiar facts and circumstances of the case, we are of the opinion that the writ petition is untenable. It is needless to state that the finding should not be treated as precedent but had been rendered based on peculiar facts and circumstances of the case.

13. Furthermore, the enhanced demand of service tax confirmed by the Appellate Authority vide order dated 28.09.2018 has been accepted by the assessee and the same was confirmed.

14. Thus, for the above reasons, we are of the considered view, that the enhanced penalty cannot be demanded from the appellant/assessee. Though the appellant had filed the writ petition challenging the order in appeal dated 28.09.2018 in its entirety, we restrict the relief only to that of penalty as quantified in the said order to the tune of Rs. 4,77,542/- and the said penalty stands deleted. In all other aspects, the order in appeal dated 28.09.2018 stands confirmed.

15. In the result, the writ appeal is allowed to the extent indicated above. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1. The Additional Commissioner of GST
& Central Excise, Chennai South
Commissionerate, 692, M.H.U Complex,
Nandanam, Chennai - 35.

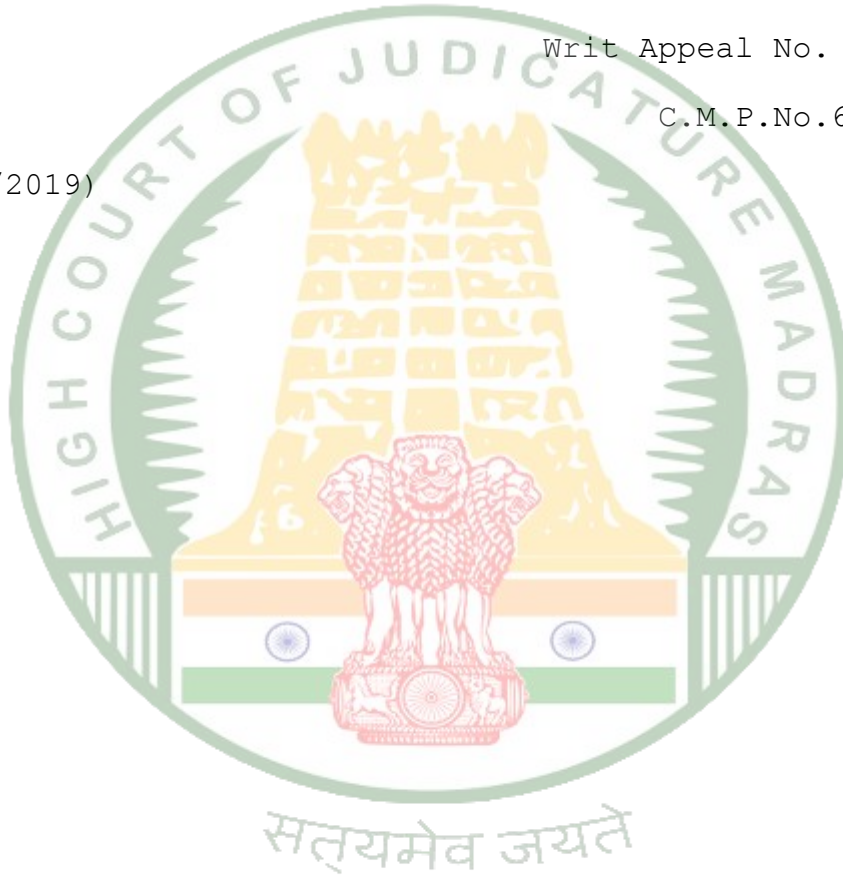
2. The Commissioner of GST & Central Excise
(Appeals-II),
Newry Towers, No.2054-I, 2nd Avenue,
12th Main Road, Anna Nagar, Chennai - 40.

+1cc to Mr.Joseph Prabakar, Advocate, SR.No.25797

+1cc to Mr.K.S.Ramasamy, Advocate, Sr.No.24538

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Kak (25/04/2019)



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