IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

STA-9-2018 (O&M)

Date of Decision: 6.3.2019

Principal Commissioner of Central Goods and Service Tax (Earlier known as Principal Commissioner of Central Excise and Service Tax), Jalandhar

...Appellant

Versus

M/s DSM Anti-Infectives India Ltd., Gurgaon

...Respondent

CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL.

PRESENT: Mr. Tajender K. Joshi, Sr. Standing Counsel for the appellant.

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AJAY KUMAR MITTAL, J.

1. This appeal has been preferred by the revenue under Section 35G of the Central Excise Act, 1944 (in short “the Act”) against the order dated 5.4.2017 (Annexure A-3) passed by the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (hereinafter referred to as “the Tribunal”) in Appeal No. ST/383 of 2012, claiming the following substantial questions of law:-

a) Whether the Notification issued by the CBEC dated 10.5.2009 and relied upon by the Tribunal was not clarificatory in nature?

b) Whether the impugned order is sustainable in the eyes of law when the Notification pertaining to associated enterprise issued on 10.5.2008 and referred to by the Tribunal was only clarificatory?

c) Whether any new liability was created by the above said Notification dated 10.5.2008 on account of Associated Enterprise?

d) Whether the Tribunal could set aside the whole demand when the demand included demand for normal period as per Section 73 of the Act and also for extended period?

e) Whether the impugned demand for the normal period of one year as per Section 73 of the Act could be set aside by the Tribunal even if the extended period could not be invoked?

f) Whether the impugned Final Order is sustainable in the eyes of law?

2. The facts, in brief, necessary for adjudication of the present appeal as narrated therein are that the respondent is providing services in Goods Transport Agency and Business Auxiliary vide notification dated 31.12.2004 and paying Commission to Overseas Commission Agents (OCA). During the course of audit, it was found that the respondent had paid short service tax for the period from 2004-05 to 2007-08. Accordingly, a show cause notice dated 21.4.2009 (Annexure A-1) was issued demanding service tax amounting to ₹ 1,26,99,109/- including Education Cess and S & Higher Education Cess and the amount of ₹ 62,88,346/- as service tax paid belatedly be not adjusted along with interest and penalty. The respondent filed reply to the said show cause notice. The adjudicating authority vide order dated 22.12.2011(Annexure A-2) confirmed the demand of service tax

of ₹ 1,19,45,400/- for the period from 18.4.2006 to 31.3.2008 after appropriation of amount of ₹ 62,88,346/- already deposited by the assessee as service tax along with interest and also imposed penalty of equal amount of ₹ 1,19,45,400/- under Section 78 of the Act and penalty of ₹ 1000/- under Section 77 of the Act against the respondent. However, the demand of ₹7,53,709/- for the period from 1.4.2005 to 17.4.2006 was dropped. Feeling aggrieved, the respondent filed an appeal before the Tribunal. The Tribunal vide order dated 5.4.2017 (Annexure A-3) allowed the appeal and set aside the demands raised by the department. Hence, the present appeal by the revenue.

3. We have heard the learned counsel for the appellant and perused the paper-book.

4. There is an overlap in the periods in the show cause notices. The first show cause notice was issued to the respondent on 17.8.2007 invoking the extended period of five years on the basis of commission paid to the OCA on account of export sales for the period 09.07.2004 to 31.03.2006. The second show cause notice dated 27.9.2007 was issued for the period May, 2006 to March, 2007. According to the respondent-assessee, the Department had asked them to submit the proof of associated enterprises without disclosing the basis on which the revenue had formed such an opinion. The present show cause notice dated 21.4.2009 had been issued for recovery of commission paid to the OCA by invoking the extended period relating to 2004-05 to 2007-08. In the said show cause notice, the concept of associated enterprises had been introduced by putting the burden upon the respondent to produce the documentary evidence without the appellant satisfying the initial onus of providing the basis how

the OCA and the respondent are associated enterprises. The Tribunal noticed that the notification regarding the associated enterprises was issued on 10.5.2008 and the entire period in the show cause notice dated 21.4.2009 was prior to that date. The department had no material to issue such a show cause notice alleging transaction between associated enterprises. Further, the show cause notice could not invoke the allegation of associated enterprises when the law at the time did not provide for the same and the notification was introduced on 10.5.2008 without it being made expressly retrospective. Since the payment of commission to the OCA were well within the knowledge of the department prior to the issuance of show cause notice dated 21.4.2009, the extended period could not have been invoked in the third show cause and the same is barred by time. The relevant findings recorded by the Tribunal read thus:-

> "7. We also note that the notification pertaining to associated enterprises was issued on 10.5.2008 and the entire period in the present show cause notice dt. 21.04.2009 is prior to that date. In that background, the Department had no support in law to issue such a show cause notice alleging transaction between associated enterprises. We, therefore, hold that the show cause notice dt. 21.04.2009 could not invoke the allegation of associated enterprises when the law at the time did not provide for the same and the relevant provision was introduced on 10.05.2008, without it being made expressly retrospective.
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> 8. As the facts about payment of commission to OCA

were well known to the Department prior to the show cause notice dated 21.04.2009, the extended period, therefore, could not have been invoked in the third show cause notice. Hence, we hold that the present show cause notice is completely barred by time in view of the Apex Court ruling in the case of **Nizam Sugar Factory Vs. CCE – 2006 (197) ELT 465 (SC).**"

5. No illegality or perversity could be pointed out by the learned counsel for the appellant in the aforesaid findings recorded by the Tribunal which may warrant interference by this Court. No question of law muchless a substantial question of law arises in this appeal. Accordingly, finding no merit in the instant appeal, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

March 6, 2019 **(MANJARI NEHRU KAUL)**
gbs **JUDGE**

Whether Speaking/Reasoned **Yes/No**

Whether Reportable **Yes/No**