



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CENTRAL EXCISE APPEAL NO.5 OF 2023

Commissioner of Customs, Central Excise
and Service Tax, Aurangabad,
N-5, Town Centre, CIDCO,
Aurangabad – 431 003.

... Appellant

... Versus ...

M/s. Shyam Electrical Stores,
Station Road, Parli (Vaijnath),
Dist. Beed.

... Respondent

...

Mr. D.S. Ladda, Advocate for appellant
Mr. Alok Sharma, Advocate for sole respondent

...

WITH

CENTRAL EXCISE APPEAL NO.4 OF 2023

Commissioner of Customs, Central Excise
and Service Tax, Aurangabad,
N-5, Town Centre, CIDCO,
Aurangabad – 431 003.

... Appellant

... Versus ...

M/s. Pratibha Electrical Engineers,
7, Mondha Road, Ambajogai,
Dist. Beed.

... Respondent

...

Mr. D.S. Ladda, Advocate for appellant

Mr. Alok Sharma, Advocate for sole respondent

...

**CORAM : SMT. VIBHA KANKANWADI &
S.G. CHAPALGAONKAR, JJ.**

DATE : 25th JANUARY, 2024

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 **Central Excise Appeal No.5 of 2023** has been filed by the Department aggrieved by the Judgment and order dated 23.07.2020 passed by Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in CESTAT Appeal No.ST/87239/2015 vide CESTAT Final Order No.A/85805-85814/2020 and Order dated 09.06.2015 passed by the Commissioner (Appeals) Central Excise, Customs and Service Tax, Aurangabad vide Order No.21/ST/COMMR/2015; and **Central Excise Appeal No.4 of 2023** has been filed by the Department aggrieved by the Judgment and order dated 23.07.2020 passed by Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in CESTAT Appeal No.ST/87238/2015 vide CESTAT Final Order No.A/85805-85814/2020 and Order dated 09.06.2015 passed by the Commissioner (Appeals) Central Excise, Customs and Service Tax, Aurangabad vide Order

No.20/ST/COMMR/2015.

2 The respondent is engaged in providing erection, commissioning and installation services to M/s. M.S.E.D.C.L. and the assessee had filed VCES Declaration on 26.12.2013 in VCES-1 in terms of Section 107(1) of the Service Tax Voluntary Compliance Encourage Scheme, 2013 for availing benefits under the said scheme for the period between October, 2007 to December, 2012. The tax dues were declared at Rs.49,05,633/- and Rs.88,35,008/- respectively. According to the assessee, the service tax liability under VCES was substantially false and, therefore, show cause notices came to be issued on 15.12.2014 and 10.12.2014 respectively and demand of service tax of Rs.1,49,72,282/- and Rs.2,65,45,515/- respectively came to be issued. Those show cause notices were challenged by the respondents by filing Original No.21/ST/COMMR/2015 dated 09.06.2015 and Original No.20/ST/COMMR/2015 dated 09.06.2015 respectively. However, adjudicating authority held that the VCES Declaration filed by the respondent assessee is true and correct. The notices were directed to be withdrawn. The appellants had then preferred the appeals before the Appellate Tribunal. The Appellate Tribunal has also dismissed the appeals and upheld the declaration by the assessee. Hence, the present appeals.

3 It appears that some point in respect of maintainability came to be raised by the respondents themselves, however, the said issue has been settled in **Asean Cables Private Limited vs. Commissioner of Customs** [2022 SCC OnLine SC 1640]. The question that was considered in the Special Leave Petition by the Hon'ble Supreme Court was – Whether against the order passed by the CESTAT impugned before the High Court the appeal would be maintainable before the High Court under Section 130(1) of the Act or the appeal before Hon'ble Supreme Court would be maintainable under Section 130E(b) of the Act ? It was just held that the said appeal was maintainable. In Three Judge Bench decision of the Hon'ble Supreme Court in **Commissioner of Customs, Bangalore-1 vs. Motorola India Limited** [(2019) 9 SCC 563] also the said ratio has been laid down. It appears that the department has filed appeal under Section 35G of Central Excise Tax Act. Before the Full Bench of this Court in **Commissioner of Central Excise Mumbai vs. M/s. Reliance Media Works Limited (formerly known as M/s. Adlabs Film Limited), Mumbai** [(2020) 2 AIR BomR 520] the points for reference were as under :

“a) Whether the question of taxability or excisability of goods is an issue of rate of duty arising from orders of the Tribunal which are appealable only to the Supreme Court in terms of Section 35L(2) of the Act applies even to appeals from order of the Tribunal passed

prior to 6th August, 2014 (i.e. the date of insertion of sub-section (2) to Section 35L of the Act) ?

b) Whether the amendment made to Section 35L of the Act on 6th August, 2014 by insertion of sub-section (2) therein, is clarificatory or prospective in nature ?”

While answering to the points for reference, the Full Bench in paragraph No.9 has held as under :

“9. In view of our above discussion, we now answer the questions posed in the reference for our opinion as under :

Regarding question (a) – Appeals from orders of the Tribunal relating to taxability or excisability passed prior to 6th August, 2014 i.e. the date of insertion of sub-section (2) to Section 35L of the Act being a rate of duty issue would be appealable only to the Hon’ble Supreme Court and not the High Court.

Regarding question (b) – The amendment made to Section 35L of the Act is clarificatory in nature and, therefore, retrospective in operation.”

Here, in the present case, the show cause notices were issued on the ground that under the voluntary scheme the declaration is not properly given. In fact, both the Courts below were against the department. In view of the fact that there were certain Government Resolutions, on the basis of which it was held that the respondent was not liable to pay the tax amount, but it was exempted. As regards to whatever period the respondent was held

liable to pay in respect of the said calculation he has already deposited the said amount. Therefore, it was the interpretation of the contents in the scheme and also whether the exemption has been rightly claimed or not. Therefore, the subject is squarely covered in the ratio laid down in **Motorola India Limited** (supra). Whether the assessee had violated the conditions of the exemption Notification and, therefore, was liable to pay the duty, interest and penalty was involved and, therefore, it is held that the appeal *qua* violation of conditions of exemption Notification by assessee is maintainable before High Court.

4 Now, turning towards the fact of the case, unless it is shown that the present appeals involved substantial question of law, no question of granting any relief or even admitting the appeals arises. The learned Advocate for the respondent has placed on record copy of certain resolutions in respect of exemption to services provided for transmission of electricity. By Notification dated 27.02.2010 the taxable service provided to any person, by any other person for transmission of electricity, from the whole of service tax levy was exempted from 27.02.2010. Even the person was also held exempted from taxable service provided for the distribution of electricity and it was with effect from 22.06.2010. Further, by Notification dated 20.07.2010 retrospective exemption for transmission till 26.02.2010 and

distribution of electricity till 21.06.2010 was granted. However, by Notification dated 20.06.2012 the Central Government rescinded the Notifications dated 27.02.2010 and 22.06.2010. It appears that in both the matters the service tax liability was shown in the notices as Rs.1,49,72,282/- and Rs.2,65,45,515/- respectively. Both the authorities below have then taken note of various Notifications issued by the Government and held that the demand of service tax under VCES, 2013 pertaining to period from 01.10.2007 to 30.06.2012 is not sustainable. Rather it was found that the respondent has paid more amount than liable, but in view of Section 109 of the Finance Act, 2013 detailing provisions of VCES, 2013 stipulated that "Any amount paid in pursuance of a declaration made under sub-section (1) of Section 107 shall not be refundable under any circumstances."; the petitioner is not entitled to get back the excess amount. The wordings of the exemption granted under the Notification is certainly binding on the appellant department and, therefore, the competent authority below were justified in withdrawing the show cause notices. There is absolutely no merit in the appeals. Accordingly, both the appeals stand dismissed at the threshold, as there is no substantial question of law raised.

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

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