IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 17.10.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

CMA.No.1219 of 2018
and
CMP.Nos.15432 of 2022 & 9915 of 2018

M/s. Cholamandalam MS General Insurance Co. Ltd.,
General Insurance Co. Ltd.,
Dare House, 2nd Floor,
No.2, NSC Bose Road,
Chennai – 600 001.

...Appellant

Vs.

1.Assistant Commissioner of Goods and Service Tax & Central Excise,
Egmore Division : North Commissionerate
Newry Towers, Plot No.2054, 1st Block, 12th Main Road,
Second Avenue, Anna Nagar,
Chennai – 600 040.

2.The Customs, Central Excise and Service Tax Appellate Tribunal,
No.26, Haddows Road, Chennai – 600 006.

... Respondents

Prayer: Appeal filed under Section 83 of the Finance Act, 1994 read with Section 35 G of the Central Excise Act, 1944 to set aside the order passed by the CESTAT (Respondent No.2) in Final Order No.42719/2017 dated 03.11.2017 in Appeal No.ST/41976/2016-SM.

For Appellant : M/s.Lakshmi Kumaran

For Respondent : Mr.S.Gurumoorthy
Sr. Standing Counsel

JUDGMENT

(Delivered by **C.SARAVANAN, J.**)

This Civil Miscellaneous Appeal has been filed under **Section 83** of the **Finance Act, 1994** read with **Section 35 G** of the **Central Excise Act, 1944**, is directed against final order **No.42719/2017** dated **03.11.2017** in Appeal **No.ST/41976/2016-SM**, passed by the Customs, Central Excise and Service Tax Appellate Tribunal at Chennai.

2. This appeal was admitted on **14.06.2018**. Following substantial questions of law were framed:-

1. *Whether in the facts and circumstances of the case, the Hon'ble Tribunal has erred in upholding invocation of extended period of limitation in terms of proviso to Section 73 of the Finance Act, 1994 when none of the ingredients stipulated therein have been satisfied?*
2. *Whether the Hon'ble Tribunal was right in holding that every case of short-payment or short-expungement in statutory returns leads to an inevitable conclusion of malafide intent to evade payment of tax?*
3. *Whether in facts and circumstances of this case, the Hon'ble Tribunal was right in*

holding that the Appellant had malafide intention even though the short-payment and short-expungment in the present case is attributable to genuine clerical errors?

4. *Whether in facts and circumstances of this case, the Hon'ble Tribunal was right in upholding imposition of penalty under Section 78 of the Finance Act, 1994 and Rule 15 (3) of the Credit Rules even in a case where there is no positive finding of suppression?*
5. *Whether in the facts and circumstances of this case, the Hon'ble Tribunal has erred in not extending the benefit of Section 80 of the Finance Act, 1994 even though the Appellant had a reasonable cause for short-payment of service tax and short-expungement of Credit?*

3. By the impugned order, the Tribunal has dismissed the appeal of the appellant against order in appeal **No.44/2016** dated **25.07.2016** confirming the decision of the Additional Commissioner in Order-in-Original **No.LTUC/41/2015-ADC** dated **05.02.2015**, operative portion of the impugned order reads as under:-

> *"After hearing both sides, I find that appellants are not disputing the confirmation of differntial demand of service tax, which has essentially arisen on account of discrepancies in the figures in the value of the services as shown in their audit records and as reflected in their returns. No explanation is being forwarded by the appellants to justify such differentiation. They*

have also not contested the demand and have deposited the differential duty along with interest.”

4. The dispute relates to a purported failure of the appellant to pay tax in respect of certain taxable events in the returns filed by the appellant for the period between **01.04.2008 – 31.03.2012**. These short comings were noticed during statutory special audit conducted by the Department during February – March 2012.

5. The appellant paid the tax pointed out by the audit team on **24.12.2012**, partly from the CENVAT Account and partly paid in cash by remitting the same through Challan payments. Long after, the appellant paid the amount, the respondent, the Assistant Commissioner of Service Tax issued show cause notice bearing **No.LTUC/279/2014-ADC** dated **05.08.2014**, alleging suppression of fact to justify invocation of proviso to **Section 73 (1)** of the **Finance Act, 1994** and penalty under **Rule 15 (3)** of the **CENVAT Credit Rules, 2004** read with **Section 78** of the **Finance Act, 1994**.

6. The Assistant Commissioner vide Order-in-Original **No.LTUC/41/2015-ADC** dated **05.02.2015**, confirmed the proposal, in show

cause notice dated **05.08.2014** and imposed 100 % penalty under **Section 73 (1)** read with **Section 78** of the **Finance Act, 1994**.

7. The specific case of the appellant is that the appellant is not liable to pay penalty under **Section 73 (1)** of the **Finance Act, 1994**, as there was no deliberate attempt of the appellant to evade tax during the period in dispute between **01.04.2008 – 31.03.2012**.

8. The learned counsel for the appellant would draw attention to **sub-Section 3** to **Section 73** of the **Finance Act, 1994**, as per which if tax is paid by a person on his own ascertainment or on the basis tax ascertained by the Chief Executive Officer, no notice shall be issued.

9. It is submitted that **sub-Section 4** to **Section 73** of the **Finance Act, 1994** is not applicable to the facts of the case as there was no deliberate attempt on the part of the appellant to evade tax. Although, the short-fall for the payment of tax came to the light, during the course of statutory special audit conducted during February - March, 2012.

10. Learned counsel for the appellant would draw attention to the following decisions particularly:-

I. **Uniworth Textiles Ltd.** Vs. **Commissioner of Central Excise, Raipur 2013** [(288) E.T.T.161 (SC)];

II. **Hindustan Steel Ltd.** Vs. **State of Orissa;** [1978 (2) ELT (J159) SC];

III. **CCE & ST, Banglore** Vs. **Adecco Flexione Workforce Solutions Ltd.,** [2012(26) S.T.R.3 (Kar.)]

IV. **Cosmic Dye Chemical** Vs. **Collector of Central Excise, Bombay** [1995 (75) E.L.T. 721 (SC)]

And a decision of Division Bench of this Court in **Commissioner of C.Ex., Chennai-I** Vs.**Tamil Nadu Petro Products Ltd,** [2017 (353) E.L.T.454 (Mad)], wherein one of those was a companion judge namely the Hon'ble Justice Mr.R.Suresh Kumar.

11. On the other hand, learned counsel for the respondent would submit that the impugned order does not warrant any interference as it is well-reasoned order and is passed strictly in accordance with the scheme of the **Finance Act, 1994**.

12. We have considered the arguments advanced by the learned counsel for the appellant and learned counsel for the respondent.

13. The law on this subject has been clarified by the Hon'ble Supreme Court in the above cited decisions by the learned counsel for the appellant. The decision of the Hon'ble Supreme Court in **Uniworth Textiles Ltd.** Vs. **Commissioner of Central Excise, Raipur 2013** [(288) E.T.T.161 (SC)] has examined the issue in the light of **Section 28** of the **Customs Act, 1962** which is *para-materia* with **Section 11 A** of the **Central Excise Act, 1944** and **Section 78** of the **Finance Act, 1994**.

14. The decision of the Hon'ble Supreme Court in **Pushpam Pharmaceuticals Company** Vs. **Collector of Central Excise, Bombay** [1995 Supp (3) SCC 462], while dealing with **Section 11 A** of the **Central Excise Act, 1944**, the Court held as under:-

> *"4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The*

> *meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."*

15. The other decisions which were cited by the learned counsel for the appellant in **Cosmic Dye Chemical** Vs. **Collector of Central Excise, Bombay** [1995 (75) E.L.T. 721 (SC)] also covers the issue.

16. That apart, all the other decisions of the Hon'ble Supreme Court which were cited above by the appellant in **Uniworth Textiles Ltd.** Vs. **Commissioner of Central Excise, Raipur 2013** [(288) E.T.T.161 (SC)] also answered the issue in the light of the decision of the Hon'ble Supreme Court in **Pushpam Pharmaceuticals Company** Vs. **Collector of Central Excise, Bombay** [1995 Supp (3) SCC 462].

17. We find that, barring a bald reference in the show cause notice bearing **No.LTUC/279/2014-ADC** dated **05.08.2014** that the appellant's conduct attracted the proviso to **Section 73** of the **Finance Act, 1994,** there was

no other material to come to conclusion that there was willful suppression of the fact by the appellant. The question of imposition of penalty under **Section 78** of the **Finance Act, 1994** and under **Rule 15 (3)** of the **CENVAT Credit Rules, 2004** read with **Section 73 of the Finance Act, 1994** will arise only when there is deliberate attempt on the part of the person to mislead the department to evade payment of tax.

18. In this case, the show cause notice not to have issued to the appellant in view of **sub Section 3** of **Section 73** of the **Finance Act, 1994**. In our view, the case of the petitioner was not governed by proviso to **Section 73** or **sub-Section 4** of **Section 73** of the **Finance Act, 1994**. Under these circumstances, the substantial questions of law are answered in favour of the appellant and against the Respondent Department. The reference in the impugned order passed by the Appellate Tribunal is liable to be set aside.

19. With the above observations, this Civil Miscellaneous Appeal stands allowed. No Costs. Connected Miscellaneous Petitions are closed.

[R.S.K., J.] **[C.S.N., J.]**

17.10.2024

Index : Yes/No
Speaking Order/Non Speaking Order
Neutral Citation Case : Yes/No

NST

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