(2014) 11 MAD CK 0519

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 2896 of 2014 and M.P. No. 1 of 2014

Artemis Hr Services Cbe (P) Ltd. APPELLANT

Vs

The Customs, Excise And Service Tax Appellate Tribunal RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:
Finance Act, 1994 — Section 68, 73, 73(1), 73(2), 73(A)

Citation : (2014) 11 MAD CK 0519

Hon'ble Judges : R. Sudhakar, J;R. Karuppiah, J

Bench : Division Bench

Judgement

R. Sudhakar, J.

1. This Civil Miscellaneous Appeal is filed against the order dated 28.7.2014 made in Miscellaneous Order No. 41237 of 2014 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai raising the following substantial questions of law:

"1. Whether the Tribunal was correct in overlooking the fact that the service tax demand had been made against us with improper quantification of service tax. The demand had been made under two Sections, namely Section 73 and Section 73-A of the Finance Act, 1994. The demand is not sustainable?

2. Whether the Tribunal is correct in overlooking the fact that Section 73(1) empowers the Government to demand the service tax not levied or paid or short levied or short paid or erroneously refunded within one year in the normal course or within 5 years in the case of suppression, fraud, etc. Section 73(A)(3) empowers the Government to issue notice to such persons in the case of non-payment of service tax even after collecting the same by the provider of service tax. Therefore, these two provisions are independent and cannot be clubbed together. However, the adjudicating authority has chosen to club these two provisions and proceeded with the confirmation of demand proposed as per the show cause notice. When the provisions of Section 73-A(3) were invoked to

demand an amount due from a person, then the provisions of Section 73(2) is inapplicable. The order confirming amount on both sections is self contradictory and is liable to be set aside?

3. Whether the Tribunal is correct in passing orders without considering for a demand confirmed under Section 73A(4), there can be no imposition of penalty. The amount representing service tax has been collected from their clients by the appellant and had not been paid in to the exchequer, during the material time. But subsequently the appellant had remitted the amount. The provisions of Section 73 are attracted only when there is a non levy and non payment and short levy and short payment. In the instant case the service tax already been levied and collected from the clients. Hence, only the provisions of Section 73(A) of the Finance Act, 1994 alone are attracted. Once, it is concluded that provisions of section 73(A) are attracted there could be no imposition of penalty under Section 78, as the penalty would be attracted only in case where the service tax had been determined under Section 73(2) of the Finance Act, 1994?

4. Whether the Tribunal has erred in not considering the fact the judgment in 2002 (142) E.L.T. 157 (Tri-Del) that ratio of law laid down in the above case is squarely applicable to the instant case and hence no penalty can be imposed on the appellant, as the provisions of Section 73A are pari-materia to Section 11D?

5. Whether the Tribunal is correct in not considering the decision rendered in the case of 2005 (98) ECC 771 and M/s. Bhoruka Aluminium Ltd. Vs CCE reported in 2008 (11) STR - 163 (Tri.Bang.)wherein, it has been held that when there is a bonafide belief about the levy, then there exists reasonable cause on their part not depositing the service tax in time, therefore the appellants are entitled for the benefits of Section 80 of the Finance Act, 1994. This ratio is squarely applicable to the present case?

6. Whether the Honourable Tribunal while ordering the pre-deposit is correct in not considering the judgment of the Honourable Supreme Court of India in 2008 (12) STR 104 (SC)?

7. The order of the Tribunal without considering the Cenvat Credit which will substantially wipe out the tax liability of the appellant can be sustained?"

2. The brief facts are as follows:

The appellant is a registered Man Power Recruitment Agency and business support service. Alleging that they have contravened the provisions of Rule 6 of the Service Tax Rules, 1994 read with Section 68 of the Finance Act and they have failed to pay service tax for the period January 2009 to March 2010, a show cause notice was issued on 14.10.2010 in SL.No. 28 of 2010 Commr. In response to that, a reply was submitted by the assessee by letter dated 19.12.2011 inter alia contending that the reason for non-payment of service tax is due to financial crisis; non-payment by the overseas companies etc. The Commissioner, who adjudicated the case, by order dated 30.3.2012 in Order-in-original in SL.No.

02/2012-Commnr., based on the oral and documentary evidence and the reply to the show cause notice, came to the conclusion that there is a clear case of liability, that the assessee does not dispute the service rendered and the returns filed by them and therefore, they are liable to pay service tax. The assessee has received the consideration from the concerned banks and financial institutions along with the service tax payable on the basis of invoices raised, but have not chosen to pay the service tax to the Government during the period in question. In fact, there is a clear finding in Paragraph 14(d) of the order that there is no dispute on the service tax payable. In paragraph 14(e) of the order, it has been recorded that the reason for non-payment of service tax according to the assessee is that the global recession and sudden financial meltdown, the financial crisis in the United States of America forced one of their clients, viz., Rank Investments, to default payment and therefore, they are in financial distress. This plea was not accepted by the Commissioner and in paragraph Nos. 18.1 and 18.2, a specific finding has been given that the appellant service provider has collected amounts representing service tax from their clients, but they have failed to pay the same to the credit of the Government. For better clarity, paragraph 18.1 and 18.2 of the order of the Commissioner reads as follows:

"18.1 The present notice which is before me for decision is the demand for subsequent period, i.e., from January 2009 to March 2010. Here, I find that the service provider has filed the statutory returns for the period from January, 2009 to March, 2010 as explained above. They have also declared in the said returns the taxable value and the tax liability thereon payable by them. These facts lead me to the conclusion that there is no suppression or wilful misstatement attributable on the part of the service provider, albeit, notwithstanding their filing of return and declaration of their tax liability, they have certainly failed to pay the appropriate service tax payable by them at the appropriate time. This has also not been disputed by the service provider. In fact, the demand raised in the show cause notice is also based on the taxable value as declared by the service provider in their returns.

18.2. it is also an admitted fact that though the service provider has collected amounts representing service tax from their clients, they have failed to pay the same to the credit of the Government."

Consequently, the Adjudicating Authority confirmed the demand along with interest and penalty.

3. Aggrieved by the order of the Adjudicating Authority, the appellant has preferred an appeal along with an application for stay of the order of the Commissioner before the Customs, Excise and Service Tax Appellate Tribunal contenting that they have paid the entire tax amount in the first case at Rs.2,59,20,009/- and insofar as the second case, a sum of Rs.1,65,67,868/- was paid out of Rs.2,52,41,055/- and the balance of Rs.97.00 lakhs may be waived pending appeal due to the financial hardship. The Department representative strongly objected stating that the appellant had already collected the amount

from the customer.

4. The Tribunal by order dated 28.7.2014 in Miscellaneous order Nos. 41236 and 41237 of 2014 taking note of the total demand of Rs.2,59,20,009/- and Rs.2,52,41,055/- along with interest and penalty and also taking note of the plea of the appellant that they have paid the entire tax amount in the first case and insofar as the second case, a sum of Rs.1,65,67,868/- was paid out of Rs.2,52,41,055/- and the balance of Rs.97.00 lakhs may be waived pending appeal due to the financial hardship, held that the appellant should deposit a sum of Rs.50.00 lakhs within a period of 8 weeks and report compliance on 07.10.2014.

5. Aggrieved by the order of the Tribunal, the appellant is before this Court raising the above-mentioned substantial questions of law.

6. Taking note of the above factual scenario, we find that prima facie there is a finding by the Original Authority that the appellant had admitted that service tax has been collected and not paid over to the credit of the Government. In another matter, the appellant is claiming Cenvat Credit and that issue, as already pointed out by the Tribunal, should be gone into at the time of final hearing. For the purpose of pre-deposit, prima facie case as well as the balance of convenience should be considered. In this case except stating that certain amount is due from the bank investments from USA, the appellant has not chosen to file any document in support of his submission. The mere statement or affidavit without any supporting document will be no avail.

7. In the circumstances, we find that the order of the Tribunal requires no modification. However, taking note of the plea of the appellant seeking further time for making payment, we are inclined to grant extension of time. Accordingly, we pass the following order:

i) The order of the Tribunal dated 28.7.2014 with regard pre-deposit stands confirmed;

ii) The time for making such payment alone stands extended till 19.01.2015;

iii) The appellant shall file an affidavit of undertaking, undertaking to pay the pre-deposit ordered by the Tribunal on or before 19.01.2015;

iv) Such affidavit shall be filed before the Tribunal on or before 21.11.2014.

v) If the appellant fails to make such an affidavit, this order shall stand vacated and the Tribunal is at liberty to proceed further as per law.

In the result, this Civil Miscellaneous Appeal stands disposed of. No costs. Consequently, M.P.No. 1 of 2014 is closed.