(2014) 04 AHC CK 0131

In the Allahabad High Court

Case No : Central Excise Appeal No. 70 of 2014

BSNL APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 11-04-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F, 35G
Finance Act, 1994 — Section 68, 69, 73, 75, 76

Citation : (2014) 27 GSTR 449 : (2014) 35 STR 706 : (2014) 73 VST 316

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J;Dilip Gupta, J

Bench : Division Bench

Advocate : A.P. Mathur, Advocate for the Appellant; B.K.S. Raghuvanshi, Advocate for the Respondent

Judgement

1. The present appeal which has been filed by Bharat Sanchar Nigam Ltd., Ballia u/s 35G of the Central Excise Act, 1944 arises from an order dated January 21, 2014 of the Customs, Excise and Service Tax Appellate Tribunal, New Delhi. The Tribunal dismissed the appeal as the appellant failed to comply with the interim directions issued by the Tribunal earlier on September 17, 2013 requiring the appellant to deposit Rs. 1,14,77,883 together with corresponding interest u/s 75 of the Finance Act, 1994. Though, a number of substantial questions of law have been framed, the following question would covers the controversy:

"Whether the Tribunal was justified in demanding the entire adjudicated amount along with interest and penalty in compliance of section 35F of the Central Excise Act, 1944?"

2. The appellant is registered u/s 69 of the Finance Act, 1994 with the Excise Department for providing telephone service. A demand-cum-show-cause notice dated October 10, 2007 was issued by the Commissioner, Central Excise, Allahabad. It was stated that the assessee had made a short-collection/payment of service tax in the amount of Rs. 1,14,77,883 during the period January, 2002 to December, 2006. This amount was, therefore, liable to be recovered from the

assessee along with interest as per the provisions of section 73 read with section 75 of the Act and the appellant was also liable to pay penalty u/s 78 of the Act. The appellant filed a reply dated December 7, 2007 denying wilful suppression of facts but accepted that ST-3 returns had not been submitted. The adjudicating officer passed the following order on February 14, 2008:

"1. I confirm the demand of service tax amounting to Rs. 1,14,77,883 (rupee one crore fourteen lakhs seventy seven thousand eight hundred eighty three only) to be recovered u/s 73 of the Act in accordance with the provisions of section 68 of the Act along with interest due as provided in section 75 of the Act from M/s. Bharat Sanchar Nigam Ltd., Ballia.

2. I order to appropriate the amount of Rs. 5,57,820 (rupees five lakhs fifty seven thousand eight hundred twenty only) paid under protest by the party in this regard.

3. I impose a penalty of Rs. 200 for every day delay up to April 18, 2006 thereafter two per cent per month of the service tax amount till the payment of outstanding amount is made subject to the maximum of service tax amount u/s 76 of the Act for violation of section 68 read with rule 6 of Rules on the party.

4. I impose a penalty of Rs. 1,14,77,883 (rupee one crore fourteen lakhs seventy seven thousand eight hundred eighty three only) on the said party u/s 78 of the Act."

3. The appellant preferred an appeal u/s 86 with a stay-cum-waiver application before the Tribunal.

4. The Tribunal by a detailed order dated September 17, 2013 disposed of the application for stay/waiver of pre-deposit of the amount assessed in the adjudication order dated February 14, 2008 with the following observations:

"3. Though the learned counsel for the petitioner argued that liability was assessed not on the basis of actual value received for the taxable services provided but on taking into account amounts which are receivable, on a careful scrutiny of the adjudication order we find that no clear basis for this contention. In the summary of ''discussions and findings'', the adjudicating authority had noted that the taxable service during the period January, 2002 to December, 2006 was correctly computed by deducting the amount of service tax payment for the particular month from the amount shown as taxable value including service tax and on that basis the recoverable amount of service tax was calculated as per the applicable rate. The adjudicating authority also concluded that the petitioner made short-collection of service tax against the amount actually recovered resulting in short-services of service tax. Later, in the order, the adjudicating authority also noted that the petitioner made short-collection from January, 2002 to December, 2006 to the extent confirmed. From the adjudication order, we not able to infer with any degree of certitude that amounts not received were also included in the received value of services provided. In the summary of the adjudication order, the authority records that if no revenue was collected, the assessee did not disclose the same in its chart and hence there is no question of outstanding amounts of service tax not received from defaulter subscribers. The adjudicating authority also records that the demand is arrived at on the basis of assessee''s reported figures of revenue collected including service tax deposited.

4. In the aforesaid circumstances, we are not inclined to grant waiver of pre-deposit in full. Since even if there be some error in the adjudication order with regard to determination of the quantum of the liability, considerable responsibility for such possible error is attributable to the assessee. However, duly considering the fact that the assessee is an instrumentality of the State, we grant waiver of pre-deposit and stay all further proceedings for recovery of the adjudicated liability as set out in the impugned order, on condition that the petitioner remits Rs. 1,14,77,883 plus the corresponding interest on this amount u/s 75 of the Act, within eight weeks from today and reports compliance by November 18, 2013. In default of either deposit or in reporting compliance within the time stipulated herein, the order of waiver shall stand rescinded and the appeal shall stand dismissed for failure of pre-deposit. Learned counsel for the appellant is present in the court, has noted this order and undertakes to communicate the obligations under this order to the assessee. This application is disposed of as above."

5. The appellant did not deposit the amount as was directed by the Tribunal. Accordingly, the Tribunal on January 21, 2014 passed an order that the appeal stands dismissed in terms of the order dated September 17, 2013 earlier passed by the Tribunal.

6. Learned counsel for the appellant submitted that though ST-III returns had not been submitted by the appellant but still there was no wilful suppression of facts as the appellant had submitted the entire relevant facts and had deposited the service tax received from the customers.

7. This plea was not accepted by the Commissioner, Central Excise who on an analysis recorded in the adjudication order that the demand of service tax for the period from April, 2002 to December, 2006 amounting to Rs. 1,14,77,883 had been arrived at on the basis of the documents submitted by the assessee relating to collection of revenue and the deposit of service tax.

8. The Appellate Tribunal, while considering the application for waiver of pre-deposit, has examined the contentions advanced by the appellant as is clear from the order quoted above. It has been observed that the Tribunal was not inclined to grant waiver of pre-deposit in full. However, taking into consideration the fact that the assessee was an instrumentality of the State, the Tribunal directed that further proceedings for recovery of the adjudicated liability shall remain stayed provided the appellant deposits an amount of Rs. 1,14,77,883 together with corresponding interest u/s 75 of the Finance Act within eight weeks and report

compliance by November 18, 2013.

9. We have considered the submissions advanced by learned counsel for the appellant. They basically relate to the merits of the appeal and have been considered by the Appellate Tribunal while disposing of the stay/waiver application filed by the appellant before the Tribunal. We do not wish to express any opinion at this stage as all these contentions will be examined by the Tribunal when it proceeds to decide the appeal. However, as the Bharat Sanchar Nigam Ltd. is a corporation which is owned and controlled by the Central Government and the appeal has been dismissed by the Appellate Tribunal as a consequence of a default in deposit of the amount directed by the Tribunal by the order dated September 17, 2013, it is considered appropriate, in the facts and circumstances of the case, that in the event the appellant now deposits half of the amount indicated by the Appellate Tribunal in its order dated September 17, 2013 within a period of eight weeks from today, further proceedings for recovery of the amount adjudicated by the Commissioner shall remain stayed and the Appellate Tribunal shall hear the appeal on the merits. However, on failure to deposit the said amount within the aforesaid period, the order of the Appellate Tribunal dismissing the appeal shall stand. The question of law is answered, accordingly, and the appeal is disposed of.