
(2014) 03 GUJ CK 0003
In the Gujarat High Court
Case No : Tax Appeal No. 246 of 2014

Commissioner

APPELLANT

Vs

Tejas Agency

RESPONDENT

Date of Decision : 27-03-2014

Acts Referred:

Finance Act, 1994 — Section 73, 73(3)

Citation : (2014) 34 STR 803

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : R.J. Oza, Advocate for the Appellant

Judgement

Akil Abdul Hamid Kureshi, J.—The Revenue is in appeal against the judgment of CESTAT dated 20-6-2013 raising following questions for our consideration: (a) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in quashing the penalty imposed upon the respondent by application of Section 73(3) of the Finance Act 1994?

(b) Whether in the facts and circumstances of the case, the impugned order passed by the Tribunal in accordance with law, more particularly, in absence of recording point of contentions raised by and on behalf the Department while opposing grant of relief in the appeal of the respondent before the Tribunal?

(c) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in hearing and passing impugned in the appeal of the respondent without considering and deciding the appeals filed by the Department even though both the appeals arise out of one order passed by the appellate Commissioner?

There is only one issue involved namely that of deleting the penalty on the respondent-assessee by the Tribunal, CIT (Appeals) had ruled partially in favour of the Tribunal upon which, the assessee had approached the Tribunal. The Tribunal deleted the penalty applying Section 73(3) of the Finance Act, 1994 and

following the decision of the Karnataka High Court in the case of Commissioner of Central Excise and Service Tax Vs. Adecco Flexione Workforce Solutions Ltd., .

2. This was on the premise that admittedly the assessee had paid the tax even before issuance of show cause notice. In terms of Section 73(3) of the Finance Act, 1994, he, therefore, contended that no penalty should be imposed. This contention was accepted by the Tribunal.

3. Counsel Shri Oza for the department, however, contended that the Tribunal overlooked the provision of sub-section (4) of Section 73 of the Finance Act, 1994, which provides that:

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of -

(a) fraud; or

(b) collusion; or

(c) wilful misstatement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

4. It is true that as per sub-section (4), penalty may still attach if there is non-payment of Service Tax by reason of fraud, collusion, wilful misstatement, suppression of facts or contravention of provisions of the statute with intent to evade payment of Service Tax. In the present case, the Tribunal noted that, "...Since the recipient company had claimed Cenvat credit on the service tax remitted by the assessee, eventually no liability was incurred by the service recipient and amount of service tax remitted by the assessee was also reimbursed by the recipient. Learned counsel would contend that in these circumstances there would be no reason for any wilful suppression of the liability nor contravention of provisions of the Act with an intent to evade tax, warranting invocation of provisions relating to penalty. Reliance is placed on decision of the Karnataka High Court in Commissioner of Central Excise and Service Tax Vs. Adecco Flexione Workforce Solutions Ltd., and in Commissioner of Service Tax Vs. C Ahead Info Technologies India Pvt. Ltd., . In these pronouncements, the Karnataka High Court enunciated the principle that where an assessee has paid both the Service Tax and interest before issuance of a show cause notice under the Act, sub-section (3) of Section 73 of the Act, prohibits initiation of proceedings for recovery of penalty".

5. When there is a finding of fact that this was not a case of nonpayment of Service Tax with intent to evade the payment of the same, question of applying sub-section (4) of Section 73 of the Finance Act, 1994 and resultantly exclusion of application of sub-section (3) thereof, would not arise. The question of law

otherwise raised by the Revenue would be gone into in a proper case involving the facts which may make sub-section (4) of Section 73 applicable. With above observation, the Tax Appeal is dismissed.