(2013) 07 AHC CK 0122

In the Allahabad High Court

Case No : Central Excise Appeal Defective No. 13 of 2013

Commissioner, Customs and Central Excise — APPELLANT

Vs

M/s. Hindalco Industries Ltd. — RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 68, 69, 70, 71, 73

Citation : (2014) 24 GSTR 618 : (2014) 33 STR 366

Hon'ble Judges : Surya Prakash Kesarwani, J;Sunil Ambwani, J

Bench : Division Bench

Advocate : Ramesh Chandra Shukla, for the Appellant; Nishant Misra, for the Respondent

Judgement

1. This Central Excise Appeal u/s 35-G of Central Excise Act, 1944 is reported to be delayed by 19 days. Notices were issued on the delay condonation application. Shri Nishant Misra and Shri Aditya Bhattacharya have put appearance on behalf of the respondent. They do not propose to file counter affidavit to the delay condonation application. We find that the delay of 19 days has been sufficiently explained. The delay is accordingly condoned. The appeal will be given regular number.

2. We have heard Shri R.C. Shukla, learned counsel appearing for the department. Shri Nishant Misra and Shri Aditya Bhattacharya appear for the respondent.

3. The Central Excise Department has preferred the appeal on the following substantial question of law:-

(i) Whether non-addition of Section 71-A in the Finance Act, 1994 and also in its non insertion in erstwhile Section 73 of the Finance Act, 1994 invalidates the substantial liability of service tax based on the show cause notice dated 11.10.2002 issued for realization in respect of clearing & forwarding agent services during 16.7.1997 to 31.8.1999 when the legislative intention was for realization of service tax and show cause notice although not revised but adjudicated after amendment of the provisions of the erstwhile Section 73?

4. The Customs Excise & Service Tax Appellate Tribunal found that the matter relates to service tax demanded from Hindalco for the services of clearing and forwarding agents received by Hindalco under provisions of Rule 2(1) (d) (xii) of the Service Tax Rules. The show cause notice was issued on 11.10.2002. The Commissioner confirmed the service tax along with interest and imposed penalty u/s 76 of Finance Act equal to Rs. 200/- per day from the date of default to date of payment, penalty u/s 77 and Section 75-A.

5. M/s. Hindalco Industries Ltd filed an appeal challenging the tax, interest and penalties. The revenue also filed an appeal on the ground that the penalty imposed u/s 76 should have been at the rate of 2% of the tax for every month instead of Rs. 200/- per day imposed by the adjudicating officer.

6. The Tribunal found that the show cause notice in this case was issued after the retrospective amendment made by the Finance Act, 2000, but before the amendment made by Finance Act, 2003 and 2004. The retrospective amendment by Finance Act, 2000 has raised a question as to whether the amendment was good enough to issue demands u/s 73 of Finance Act, 1994 on persons, who had not paid tax during the said period as per Rule 2 (1) (d). The dispute relating to the period when the transport service recipients were not required to file any return u/s 70 nor they were required to disclose any information because they were not assessees within the meaning of the word u/s 70 and 71.

7. Section 73 of the Finance Act as it stood prior to its amendment on 10.9.2004 provided as follows:-

73. Value of Taxable Services Escaping Assessment.-If -

(a) the Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise has reason to believe that by reason of omission or failure on the part of the assessee, to make a return u/s 70 for any prescribed period or to disclose wholly or truly all material facts required for verification of the assessment u/s 71, the value of taxable service has escaped assessment or has been under-assessed or any sum has erroneously been refunded, or;

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assistant Commissioner of Central Excise or, as the case may be, Deputy Commissioner of Central Excise has, in consequence of information in his possession, reason to believe that the value of any taxable service assessable in any prescribed period has escaped assessment or has been under assessed, or any sum has erroneously been refunded, he may, in cases falling under clause (a), at any time within five years, and in cases falling under clause (b), at any time within six months from the date for filing the return, serve on the assessee a notice and proceed to assess or reassess the value of taxable service.

Explanation: Where the services for the notice is stayed by an order of a Court, the period of such stay shall be excluded in computing aforesaid period of five years or six months, as the case may be.

8. The Finance Act 1994 was amended again by Finance Act, 2003 to insert a clause 71A retrospectively from 16.7.1997 and ending with 16.10.1998 as follows:-

71A. Filing of return by certain customers.-Notwithstanding anything contained in the provisions of sections 69 and 70, the provisions thereof shall not apply to a person referred to in the proviso to sub-section (1) of section 68 for the filing of return in respect of service tax for the respective period and service specified therein and such person shall furnish return to the Central Excise Officer within six months from the day on which the Finance Bill, 2003 receives the assent of the President in the prescribed manner on the basis of the self assessment of the service tax and the provisions of section 71 shall apply accordingly.

9. The Tribunal was of the opinion supported by the decisions of Delhi High Court in 2004 (93) ECC 224 which was affirmed by the Apex Court in 2005 (187) ELT 5 (SC) in favour of the service recipients. It further relied upon judgments of High Courts in Commissioner of C. Ex. and Cus. Vs. Eimco Elecon Ltd., and CCE vs. Hiran Aluminium Ltd 2010 TIOL 682 HC Ahm ST that the demand issued in the year 2002 for the period from 16.11.1997 to 6.2.1998 u/s 73 of the Finance Act was not sustainable.

10. Shri Nishant Misra has relied on the opinion of Apex Court in Commissioner of Central Excise, Vadodara-I Vs. Gujarat Carbon and Industries Ltd., in which it was held relying upon Commissioner of Central Excise, Meerut-II Vs. L.H. Sugar Factories Ltd., that the amended Section 73 takes in only the case of assessees, who are liable to file return u/s 70. The liability to file return is cast on the appellants only u/s 71A, which was introduced in the Finance Bill, 2003. The class of persons, who come u/s 71A is not brought under the net of Section 73 and thus a show cause notice invoking Section 73 is not maintainable. In Commissioner of Central Excise, Meerut-II Vs. L.H. Sugar Factories Ltd., the conclusions drawn by the Tribunal were upheld. In the said case the Tribunal had held:-

The above would show that even the amended Section 73 takes in only the case of assesses who are liable to file return u/s 70. Admittedly, the liability to file return is cast on the appellants only u/s 71A. The class of persons who come u/s 71A is not brought under the net of Section 73. The above being the position show cause notices issued to the appellants invoking section 73 are not maintainable.

11. In the present case it is not denied that the respondent was not required to

file the return nor any show cause notice or demand was issued or was outstanding when the amendment in the Act came into force.

12. In view of the above discussion and the judgment of the Apex Court we do not find any error in the judgment of the Tribunal. The question on the facts and circumstances of the case decided against the revenue and in favour of the assessee. The Central Excise Appeal is dismissed.