(2010) 07 GUJ CK 0124

In the Gujarat High Court

Case No : Tax Appeal No. 1365 of 2009

Commissioner of C. Ex. and Cus. APPELLANT

Vs

Eimco Elecon Ltd. RESPONDENT

Date of Decision : 01-07-2010

Acts Referred:

Finance Act, 1994 — Section 68, 71A, 73, 75, 75A
Finance Act, 2003 — Section 71A

Citation : (2010) 20 STR 603

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—Appellant-revenue has challenged order dated 4.11.2008 made by Customs Excise and Service Tax Appellate Tribunal (the Tribunal) by proposing following four questions originally:

(A) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in holding that show cause notice dated 11.11.2004 is barred by limitation?

(B) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in applying decision of the Hon''ble Apex Court in case of CCE Vadodara v. Gujarat Carbon & Industries Ltd. reported in 2008 TIOL 151. : 2008 (12) S.T.R. 3 for allowing appeal of the Respondent?

(C) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in applying decision in case of M/s. L.H. Sugar Factories Ltd. [2006 (3) S.T.R. 715 : 2005 (187) E.L.T. 5 (S.C.) to hold that the Respondent is not recipient of services of goods transport operator?

(D) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in allowing appeal of the Respondent with consequential reliefs to the Respondent?

At the time of hearing one more question has been proposed, which reads as under :

2(E) Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law by passing cryptic order, which is against the law laid down by this Hon''ble Court in case of The Commissioner of Central Excise and Customs Vs. Chandubhau Shiroya, as well as the law laid down by the Apex Court in the case ofJoint Commissioner of Income Tax, Surat v. Saheli Leasing and Industries Ltd. reported in 2010 (253) E.L.T. 705 (S.C.)

2. The case of the Appellant-revenue as propounded by learned Counsel for the Appellant is that the Respondent-Assessee availed services of Goods Transporter Operator between period from 16.7.1997 to 2.6.1998. Respondent-Assessee was liable to pay Service Tax as recipient of such services. The adjudicating authority, after issuing show cause notice made an order on 28.2.2005 ordering recovery of Service Tax amounting of Rs. 95,695/- in terms of provisions of Sections 68 and 73 of the Finance Act, 1994 read together and also demanded interest and penalty imposed under Sections 75, 76, 77, 78 and 75-A of the Finance Act, 1994. The appeal filed by the Assessee before Commissioner (Appeals) failed and hence, second appeal was preferred before the Tribunal. The Assessee succeeded before the Tribunal on the basis of two Apex Court decisions referred to by the Tribunal in the impugned order.

3. According to learned Counsel, considering the fact that provisions of Section 73 stood amended by Finance (No. 2) Act, 2004 w.e.f. 10.9.2004, the show cause notice issued on 11.11.2004 could not be treated to be barred by limitation and Tribunal had committed an error in recording such a finding without recording complete facts in this regard. It was further submitted that once Section 73 stood amended, the ratio of the Apex Court judgments would not be applicable. In the circumstances, strong reliance has been placed on the two judgments referred to in proposed question No. 5 to contend that the Tribunal having passed a cryptic non-speaking order, matter is required to be restored to the file of the Tribunal. Alternatively, it was submitted that on merits also no case was made out for interference by the Tribunal and the Assessee had rightly been called upon to discharge liability of Service Tax along with interest and penalties for late filing of return, late payment of tax, etc.

4. It is not in dispute that till Finance Act, 2003 introduced a Proviso under Sub-section (1) of Section 68 of the Finance Act, 1994 the liability to pay Service Tax was on the person providing taxable service, and not on the recipient. Simultaneously Section 71A came to be introduced by the Finance Act, 2003 casting the liability on the service recipient to file a return within six months from the date on which the Finance Bill, 2003 receives assent of the President. However, even after this amendment, the Apex Court has noted that in absence

of Section 71A of the Finance Act 1994 (which has retrospectively been introduced w.e.f. 16.7.1997) appearing in Section 73 of the Finance Act, 1994 no levy of any short duty or non-levy could have been demanded.

5. Thus, it is apparent that till the point of time Section 73 of the Finance Act, 1994 came to be substituted w.e.f. 10.9.2004 provisions of the said section could not be made applicable despite retrospective amendment in Sections 68 and 71A of the Finance Act, 1994. In these circumstances, admittedly, the Assessee could not be faulted with for not having filed a return after getting himself '' registered. More particularly, when one considers the language employed in the Proviso below Sub-section (1) of Section 68 and the provisions of Section 71A of the Finance Act, 1994, it is not possible to state that the language of the Statute is so clear that any default can be fastened on the Respondent-Assessee.

6. In the circumstances, in absence of any infirmity in the impugned order of the Tribunal, the impugned order of Tribunal does not merit interference. No substantial question of law can be said to arise out of the impugned order of the Tribunal. The appeal is accordingly dismissed.