
(2014) 09 MAD CK 0167

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 1322 of 2009

Commissioner of Central Excise

APPELLANT

Vs

Customs, Excise and Service Tax Appellate Tribunal

RESPONDENT

Date of Decision : 04-09-2014

Acts Referred:

Citation : (2014) 48 GST 115

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—This appeal is directed against the Final Order No. 1159/2008, dated 14.10.2008 passed by the Customs, Excise and Service Tax Appellate Tribunal and the same was admitted on the following substantial questions of law:

"1. Whether or not the show-cause notice issued under Section 73 includes person falling under Section 71A in view of the Supreme Court laying down the law in the cases of Gujarat Ambuja Cements Ltd. and Another Vs. Union of India (UOI) and Another, and Commissioner of Central Excise, Meerut-II Vs. L.H. Sugar Factories Ltd., , without being apprised of the above aspects raised in the grounds of appeal?

2. Whether or not the show-cause notice issued under the amended Section 73 by the Finance Act, 2004 removing the clause "the persons liable to file returns under Section 70" is maintainable in law, especially such an amendment read with Section 71A has been confirmed by the Supreme Court vis-a-vis the legislative competence in terms of Section 68 of the Finance Act in Gujarat Ambuja Cements Ltd. and Another Vs. Union of India (UOI) and Another, levying service tax on the service recipient/service provider with retrospective effect for the period 16.11.1997 to 2.6.1998 and which was not the ratio decidendi before the Supreme Court in Commissioner of Central Excise, Meerut-II Vs. L.H. Sugar Factories Ltd., and Commissioner of Central Excise, Vadodara-I Vs. Gujarat Carbon and Industries Ltd., ?"

The issue raised in this appeal is no longer *res integra* in view of the decision of a Division Bench of this Court in *CCE v. Customs, Excise and Service Tax Appellate Tribunal* [2014] 44 GST 182/43 taxmann.com 13 and batch cases, wherein the Division Bench confirmed the demand made by the department, while deleting the penalty imposed on the assessee. The operative portion of the said decision reads as under:

"46. Learned counsel for the assessee further submitted that Section 71A is only a machinery section; as such, the amended provision of Section 73 of the Act could not be taken to confer them the jurisdiction to pass orders. We do not agree with the submissions made by the learned counsel for the assessee. As is evident from Section 71A of the Act, this is more of a self-assessment procedure, that notwithstanding anything contained in Sections 69 and 70 of the Act, the provisions thereof shall not apply to a person referred to in the proviso to Sub-section (1) of Section 68 of the Act for filing of return in respect of service tax for the respective period and service specified therein and such person shall furnish return within six months from the day on which the Finance Bill, 2003, receives assent of the President in the prescribed manner on the basis of the self-assessment of service tax and the provisions of Section 71 of the Act shall apply accordingly.

47. Considering the limited purpose for which Section 71A of the Act was introduced to cover the period of six months and in terms of Sub-section (1) of Section 73 of the Act where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the proper officer, within one year from the relevant date, is entitled to serve notice, requesting the assessee to show cause why he should not pay the amount specified in the notice. For the purposes of Section 73 of the Act, relevant date has been defined under Sub-section (6) of Section 73 of the Act. Therefore, the contention of the assessee that Section 71A of the Act is just a procedural provision and hence there could be no jurisdiction on the Authority to pass an assessment, is a plea to be stated only to be rejected.

48. Learned counsel appearing for the assessee submitted that Section 80 of the Act provides for penalty not to be imposed in certain cases. It states that notwithstanding anything contained in the provisions of Section 76, Section 77 and first proviso to Sub-section (1) of Section 78 of the Act, no penalty shall be imposable on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure. It is further submitted that in terms of Section 78 of the Act, penalty can be imposed for suppression of facts or fraud or collusion or willful mis-statement or contravention of any of the provisions of Chapter V of the Finance Act, 1994, or the Rules made thereunder with the intent to evade payment of Service Tax and since none of these elements are present in the cases of the assesseees, the imposition of penalty was not proper.

49. In order to levy penalty under Section 78 of the Act, it is necessary to

establish that Service Tax had not been paid by reason of fraud or collusion or willful misstatement or suppression of fact or contravention of any of the provisions of the Act, with an intent to evade payment of Service Tax. We have perused the order in original passed by the Assessing Authority and we find that there is no such finding against the assessee of it being guilty of willfully not paying tax by reason of any of the matters provided in clauses (a) to (e) of Section 78(1) of the Act. Further more, Section 80 of the Act, which starts with a non obstante clause, states that notwithstanding anything contained in the provisions of Sections 76, 77 and first proviso to Sub-section (1) of Section 78 of the Act, no penalty shall be imposable for any failure referred to in the said Provision viz., for failure to pay service tax, for contravention of Rules and Provisions of the Act, or for suppression of facts etc., if the assessee proves that there was reasonable cause for such failure.

50. From the facts noticed above, the entire dispute arose out of interpretation of the provisions of the Act, its successive amendments and insertion of new provisions. Therefore, it can hardly be said that there was willful evasion to pay tax or not to comply with the provisions of the Act. As may be seen from the preceding paragraphs, the assessee appeared to have been under the bona fide belief that they are not liable to pay Service Tax and in support of their claim, they relied on the decision of the Tribunal in the case of *Laghu Udyog Bharati* (supra), which was affirmed by the Hon'ble Supreme Court. Therefore, we are inclined to accept the case of the assessee and hold that there was no justification for imposition of penalty, especially when there was no allegation of fraud, misrepresentation, etc. Accordingly, the penalty imposed on the respondents/assessee shall stand deleted.

51. However, as far as the interest levied under Section 75 of the Act is concerned, it being for the delayed payment of service tax, we do not agree with the assessee's contention that a direction has to be given to delete the levy of interest by referring to Section 80 of the Act. The charging of interest and penalty are two separate provisions under the law.

52. The Supreme Court, in the case of *Pratibha Processors and others Vs. Union of India and others*, held that in fiscal statutes, the tax is the amount payable as a result of the charging provision and it is a compulsory extraction of money by a public authority for public purposes, the payment of which is enforced by law. Penalty is ordinarily levied on an assessee for some contumacious conduct or for a deliberate violation of the provisions of a particular statute. It was further pointed out that interest is compensatory in character and is imposed on the assessee who has withheld payment of any tax as and when it is due and payable; that the levy of interest is levied on the delay in payment of tax due and payable on the due date. Thus, the Apex Court pointed out that interest is essentially compensatory and different from penalty, which is penal in character. In terms of Section 75 of the Act, payment of interest is mandatory on every person who fails to deposit the Service Tax or any part thereof to the account of

the Central Government within the period prescribed. Therefore, the contention of the assessee that the levy of interest has to be cancelled cannot be accepted and such submission is rejected."

2. Following the abovesaid decision of the Division Bench of this Court, this appeal is disposed of, holding that the Revenue has necessary jurisdiction under Section 73 of the Finance Act, particularly with reference to the limitation prescribed thereunder and the show-cause notice issued on the second respondent/assessee is valid. However, the penalty imposed on the second respondent/assessee stands deleted and the prayer for cancelling the levy of interest stands rejected. The substantial questions of law raised are answered accordingly. No costs.