(2015) 06 KAR CK 0321

In the Karnataka High Court

Case No : CEA No. 4 of 2008

Commissioner of Central Excise — APPELLANT

Vs

Dharwad Co-operative Milk Producers Societies Union Ltd. — RESPONDENT

Date of Decision : 08-06-2015

Acts Referred:
Finance Act, 1994 — Section 65, 75
Finance Act, 2003 — Section 158

Citation : (2015) 39 STR 989

Hon'ble Judges : Ravi V. Malimath, J;P.S. Dinesh Kumar, J

Bench : Division Bench

Advocate : S.N. Rajendra, for the Appellant; Anvar Ali, Advocates for the Respondent

Judgement

P.S. Dinesh Kumar, J—The revenue has preferred this appeal on substantial questions of law as to whether the appellant was entitled to invoke Section 71A of the Finance Act 2003 and whether the case of LH Sugar Factor v. CEE Meerut (187) ELT 5 SC is applicable particularly when similar issue was pending in Civil Appeal Nos. 16185/2005 and 7144/2005.

2. Briefly stated the facts of the case are as under: The respondent - assessee had received service from Goods Transport Operator during the period 16.11.1997 to 01.06.1998. In terms of retrospective amendment of Section 65 in Chapter V of Finance Act, 1994 and amendment to Finance Act, 2003 vide Section 158 a new Section 71A was inserted requiring the service receiver in case of GTO service, to pay the service tax and to file return within six months from the date on which Finance Act came into effect. The Adjudicating Authority vide order dated 17.03.2005 in OIO No. 02/2005 confirming the assessment appropriated the amount paid by the assessee and demanded interest under Section 75 of the Finance Act 1994. In compliance thereof the assessee paid a service tax of Rs. 5,76,257/- vide T.R.6. challan on different date ending with 27.11.2004 along with interest of Rs. 55,490/- vide T.R.6. No. 01/2005-06 dated

22.04.2005 and filed returns. The said order in original having been challenged by the assessee, the Commissioner Central Excise (Appeal) set aside the same in OIA No. 237/2005 CE. After the appeal having been allowed, the assessee filed a refund claim of Rs. 6,31,713/- paid by them for the period 16.11.1997 to 01.06.1998. The Revenue issued a show cause notice dated 03.02.2004 in C. No. IV/9/346/98 B6 ST and called upon the assessee to show cause as to why service tax should not be demanded for the period 16.11.1997 to 01.06.1998 under Section 73 of the Service Tax Act and the interest thereon should not be demanded. On receipt of notice, the assessee submitted a reply dated 18/20.03.2006 and requested for refunds of the amount deposited by them. The Assessing Authority namely the Assistant Commissioner vide OIO dated 17.05.2006 rejected the refunds claim while holding thus:

"17. In view of the fore goings the Order - in -Appeal No. 237/2005 CE dated 25.10.2005 passed by the Commissioner (Appeals) setting aside the very levy of service tax despite being validated by the Act and upheld by the Supreme Court in the case of Gujrat Ambuja Cement, is not maintainable."

3. Being aggrieved, the assessee challenged the said order passed by the Assistant Commissioner of Central Excise, who vide OIA No. 237/2006 CE dated 27.07.2006 rejected the appeal. The order passed by the Appellate Authority was challenged before the CESTAT in ST No. 293/2006 which came to be allowed vide order dated 14.06.2007.

4. Being aggrieved by the order passed by the CESTAT, revenue has preferred this appeal by framing following substantial questions of law.

"14. Whether the Revenue was entitled to invoke Section 71A of the Finance Act, 2003, which has been made operational retrospectively?

15. Whether the case of LH Sugar Factory v. CCE Meerut (187) EFT 5 SC is applicable to the facts of the case, more so particularly when similar issue is pending in Civil Appeal 16185/2005 and 7144/2005 which is pending for consideration?

16. Whether the Respondent is absolved from liability to pay Service Tax a receiver of the services in view of the judgment in the case of Gujrat Ambuja Cements Ltd., reported in 2005 (182) EFT 33 SC?"

5. We have heard Sri. Rajendra, learned counsel appearing for the revenue and Sri. Anvar All, learned counsel for the respondent-assessee and perused the records.

6. The issue involved in this case is refund claim put-forth by the assessee for refund of service tax and the interest deposited by the assessee after their appeal in OIA No. 237/2006 was allowed by the Commissioner of Central Excise (Appeals), Mangalore. It is not in dispute that the assessees have received service from Goods Transport Operator during the period 16.11.1997 to 01.06.1998. It is also not in dispute that in terms of retrospective amendment of

the Finance Act, the assessee have paid the service tax under various T.R.6. Challans which was adjudicated in OIO No. 2/2005 ST dated 17.03.2005. The Adjudicating Authority appropriated the amount and demanded interest of Rs. 55,490/- which has also been deposited by the assessee. After complying with the requirement of law after amendment of Section 65 of Finance Act by paying a service tax of Rs. 5,76,257/- and filing returns in ST-3B, the assessee also paid the interest of Rs. 55,490/-, as demanded by Adjudicated Authority. Subsequently the assessee challenged the said OIA before Commissioner Central Excise (Appeals) who allowed the appeal in 237/2005. While dealing with the application for refund, the Assistant Commissioner of Central Excise has held that the Commissioner (Appeals) has erred in allowing the appeals of the assessee and rejected the claim of the assessee by his order dated 17.05.2006. The appeal filed against the order of the Assistant Commissioner was rejected on the ground of unjust enrichment. The CESTAT has reversed the findings of the Assistant Commissioner and allowed the appeal by the impugned order.

7. Thus, if the revenue was aggrieved by the OIA No. 237/2005 CE, it ought to have taken such further action in accordance with law. It is trite law that once the appeal is allowed in favour of the assessee, the assessee must be entitled to all the benefit flowing there from. The Assistant Commissioner while dealing with the application for refund was not justified in sitting in judgment over the findings of Commissioner (Appeals), firstly because the Commissioner (Appeals) had passed the appellate order in a different jurisdiction and secondly because the Commissioner (Appeals) is a superior to the Assistant Commissioner. By recording a finding extracted supra, the Assistant Commissioner has clearly traversed beyond his jurisdiction. Similarly, the Appellate Authority was also not justified in rejecting the appeal filed against the order passed by the Assistant Commissioner. Thus, no exception can be taken to the order passed by the CESTAT by allowing the appeal. No substantial questions of law arises for consideration of this case. Appeal fails and stands dismissed. Ordered accordingly.