

(2017) 02 AHC CK 0015

In the Allahabad High Court

Case No : Central Excise Appeal No. 82 of 2014

Commissioner of Central Excise Customs and Service Tax

APPELLANT

Vs

M/s. Suvidha Engineers India Ltd.

RESPONDENT

Date of Decision : 08-02-2017

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 73(1), Section 83

Citation : (2017) 5 ADJ 24

Hon'ble Judges : Bharati Sapru and Vinod Kumar Misra, JJ.

Bench : Division Bench

Advocate : Krishna Agarwal and Prateek Chandra, Advocates, for the Appellant;
Aditya Singh Parihar, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard Sri Prateek Chandra learned counsel for the department and Sri S.D. Singh learned senior counsel assisted by Sri Aditya Singh Parihar learned counsel for the assessee.

2. This appeal is being decided with the consent of parties at the stage of admission.

3. This is an appeal filed by the department under section 35-G of Central Excise Act, 1944 read with section 83 of the Finance Act, 1994 against an order of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), New Delhi dated 5.7.23013.

4. The questions of law sought to be answered read as under:

"(1) Whether on the facts and in the circumstances of the case, the CESTAT, New Delhi has committed an error of law in holding that show cause notice was time barred by taking the cognizance of respondents letter dated 5.9.05 through which the respondent only submitted details of monthly payments received from their customers which was not adequate and sufficient for the purposes of

arriving at the correct taxable value and correct taxable amount of Service Tax?

(2) Whether on the facts and in the circumstances of the case, the CESTAT, New Delhi have gravely erred in interpreting the provisions of proviso to section 73 (1) of the Finance Act, 1994 even though there was sufficient evidence that the party has wilfully with intent to evade service tax, did not disclose the information that they were providing services of "commissioning and installation"/ erection, commissioning and installation" services and the aforesaid fact came to the notice of the department only during audit of their records by the audit party of the department?

(3) Whether on the facts and in the circumstances of the case, the CESTAT, New Delhi has committed an error of law while holding that the show cause notice as time barred even though it was held in para 6 of the impugned order that the activity of the respondents was taxable even prior to 16.6.2005, thereby depriving the department of a substantial amount of revenue?

(4) Whether on the facts and in the circumstances of the case, the CESTAT, New Delhi has erred in law in overlooking and important fact that the respondents failed to provide the requisite documents and necessary information sought from the respondents as such the show cause notice was issued on 30.10.2007?"

The main contention of the department is that it seeks the application of the proviso to section 73 (1) of the Finance Act, 1994 which reads as under:

"73 (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may within one year from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that 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 mis-statement; 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, the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "one year" the words "five years" had been substituted."

5. Under the above proviso, the extended period of limitation of five years can be applied where there is an allegation of fraud, collusion, wilful mis-statement; suppression of facts or contravention of any of the provisions of the Act.

6. The facts in this case are within the very narrow campus. The period for which the department is seeking the application of the extended period of limitation is 1.7.2003 to 15.6.2005.

7. According to the department which sent a notice to the assessee on 30.10.2007. The above period too was covered under section 65 (39A) of the Finance Act, 1994 which reads as hereunder:

"65 (39a) "erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to, -

(i) erection, commissioning or installation of plant, (machinery, equipment or structures, whether pre-fabricated or otherwise); or

(ii) installation of - (a) electrical and electronic devices, including wirings or fittings therefor; or (b) plumbing, drain laying or other installations for transport of fluids; or (c) heating, ventilation or air-conditioning including related pipe work, ductwork and sheet metal work; or (d) thermal insulation, sound insulation, fire proofing or water proofing; or (e) lift and escalator, fire escape staircases or travelators; or (f) such other similar services;"

An amendment was made in the Act on 16.6.2005. Prior to the substitution clause (39a) read as under:

"(39a) "erection, commissioning or installation" means any service provided by a commissioning and installation agency in relation to erection, commissioning or installation of plant, machinery or equipment;"

8. The tax which spells from the record are that the assessee applied for registration with effect from 16.6.2005 as it understood that it became liable to pay service tax under the amended provision with effect from 16.6.2005.

9. The department took a view that even prior to the amendment, the assessee was liable to pay tax. It has come on record that the department gained knowledge of this fact that the assessee was liable to pay tax on 5.8.2005. Nevertheless they did not give notice until 30.10.2007 which was much beyond a period of one year under the said proviso for availing the benefits of extended period of five years of limitation.

10. Without going into the questions on the merits as to when the date of liability to service tax became effective for the assessee, the moot question in this case is as to whether the proviso to section 73 (1) of the Finance Act, 1994 would apply.

11. Learned counsel for the assessee has sought to argue that in the abeyance of any allegation of fraud, collusion, wilful mis-statement or wilful default, the provisions of proviso would not apply.

12. In support of his point, the learned counsel for the assessee has relied on the decision of the Hon"ble Apex Court in the case of Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay, reported in 1995 Supp (3) SCC 462 wherein the Hon"ble Apex Court, while interpreting a similar provision for extended limitation, has held that when strong words such as fraud, collusion or wilful default are used in a Statute, then such words must be strictly construed.

It further holds that such words indicate that the act must be deliberate and that disclosure were not made deliberately in order to escape tax but where the facts are known to both the parties as it was in the present case, it cannot be said that it would amount to suppression or that it would lead to infer that the proviso for extended limitation could or would apply.

13. Having heard learned counsel for both sides at length and having perused the entire facts on record and the judgement of the tribunal, we are of the opinion that the tribunal too has taken a similar view wherein it records in para 7 that the assessee through their letter dated 5.9.2005 had submitted month-wise details of all payment received by them against HVAC works for the period from 1.7.2003 to 15.6.2005. Once the details of the value of taxable services were available to the department on 5.9.2005, the tribunal came to the conclusion that there was no reason to invoke the extended period under the proviso to section 73 (1) of the Finance Act, 1994.

14. The tribunal has therefore rightly rejected the plea of the department for extension of limitation and application of the proviso to section 73 (1) of the Finance Act, 1994.

15. In view of the above, we therefore uphold the impugned order of tribunal and answer the questions in favour of the assessee and against the department.

16. The appeal is thus dismissed. No costs.