(2015) 02 BOM CK 0349

In the Bombay High Court

Case No : Central Excise Appeal No. 54 of 2014

Commissioner of Service Tax-I — APPELLANT

Vs

Ambe International — RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35B
Finance Act, 1994 — Section 73, 83, 83A, 84, 85

Citation : (2015) 52 GST 513 : (2015) 40 STR 441

Hon'ble Judges : S.C. Dharmadhikari and N.W. Sambre, JJ.

Bench : Division Bench

Advocate : Pradeep S. Jetty and Suchitra Kamble, for the Appellant; Rajendra G. Sheth, for the Respondent

Judgement

1. Having heard both sides and the issue of jurisdiction of the Tribunal falling for our interpretation that we entertain this Appeal. Since the provision in respect of power of Appeal has to be interpreted and construed, the Appeal raises a substantial question of law. It is admitted on the following substantial question of law:-

"Whether the CESTAT is right in law in holding that no appeal lies to it in respect of rebate claims made under the Finance Act, 1994?"

With the consent of both sides, we dispose of this Appeal finally.

2. By the impugned order dated 30th April, 2013 [, 2015 (40) S.T.R. 311 (Tri. - WZB)], the Tribunal held that the Appeal filed by the Revenue is incompetent and not maintainable. That was on the understanding of the legal provisions by the Tribunal. The Commissioner of Central Excise (Appeals), Mumbai, Zone-I, on 15th December, 2010 set aside the order-in-original. The Revenue was of the view that this order requires an appeal being filed, that is how it approached the Tribunal.

3. The respondent-assessee holds a Service Tax registration. It is engaged inter

alia in providing services under manpower recruitment and supply agency. A claim for rebate in the sum of Rs. 10,75,254/- on the services exported out of India was lodged and the competent authority held that the Assessee has not submitted complete information/documents in support of its claim. A notice to show cause cum-demand was issued on 4th June, 2008. A personal hearing was granted to the Assessee and the adjudicating authority, namely, the Assistant Commissioner, Service Tax, Division-I, Mumbai passed the order-in-original dated 30th September, 2008 rejecting the rebate claim.

4. Aggrieved and dissatisfied with this order, the Assessee preferred an Appeal before the Commissioner of Central Excise (Appeals) and it was allowed on 15th December, 2010.

5. The Revenue, aggrieved by this order, preferred Appeal to the Tribunal. In the view of the Tribunal, such an Appeal was incompetent, because Section 35B of the Central Excise Act states that no Appeal shall lie to the Appellate Tribunal and it shall have no jurisdiction to decide any Appeal in respect of any order passed by the Commissioner (Appeals) in a case of rebate of duty of excise on goods exported to any country or territory outside India or on excisable material used in manufacturing goods, which have been exported to country or territory outside India. Borrowing that section and applying it to the instant claim, the Tribunal was of the view that even if the rebate arises out of the service tax, that claim was granted, but the Appeal was incompetent.

6. In reaching this conclusion, the Tribunal found that it has the same powers as provided under the Central Excise Act, 1944 regarding hearing of Appeals under the Finance Act, 1994 and in respect of rebate claim, no Appeal will lie to it against the order of the Commissioner (Appeals).

7. We have perused, with the assistance of the learned Counsel appearing for both sides, the relevant statutory provisions.

8. The Finance Act, which enacts certain provisions and particularly dealing with Appeals, states in Section 83 that the following sections of the Central Excise Act, 1944 (1 of 1944), as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:-

"9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 14AA, 15, 33A, 34A, 35F, 35FF to 35-0 (both inclusive), 35Q, 35R, 36, 36A, 36B, 37A, 37B, 37C, 37D, 38A and 40."

9. The power of adjudication under Section 83A is on par with the Central Excise Officer and who derives it from the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963). The Appeals to Commissioner of Central Excise (Appeals) are provided by Section 84 and then Section 85 states that any person aggrieved by any decision or order passed by an adjudicating authority subordinate to the Commissioner of Central Excise, may appeal to the Commissioner of Central Excise (Appeals). Thus, by

the prior section, the Commissioner of Central Excise can suo motu call for and examine the record and proceedings, in which an adjudicating authority subordinate to him has passed any decision or order under the Chapter for the purposes satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct him'' or such authority subordinate to him to apply to the Commissioner of Central Excise (Appeals) for the determination of such point arising out of the decision or order, as may be specified by the Commissioner in his order.

10. The substantive right of Appeal is conferred by Section 85 and the manner in which the appeal has to be filed, the period within which it has to be filed and the power of the Commissioner in that regard are incorporated in Section 85 .

11. Then comes the Appeals to the Tribunal and Section 86(1) states that any assessee aggrieved by an order passed by the Commissioner of Central Excise under Section 73 or Section 83A or an order passed by the Commissioner of Central Excise under Section 85 , may appeal to the Appellate Tribunal against such order. By sub-section (2), the Committee of Chief Commissioners of Central Excise may, if it objects to the order of the Commissioner of Central Excise under Section 73 or Section 83A , direct the Commissioner of Central Excise to appeal to the Appellate Tribunal against the order. Similarly, by an amendment brought in and by substitution of sub-section (2A) w.e.f. 11th May, 2007 and now providing for a power in the Committee of Commissioners if it objects to the order passed by the Commissioner of Central Excise (Appeals) under Section 85 to direct any Central Excise Officer to file appeal on his behalf to the Appellate Tribunal against the order. The proviso thereto deals with the cases of difference of opinion between the Committee of Commissioners. We are not concerned with such a situation.

12. Then, various sub-sections of Section 86 would enable the Appellate Tribunal to deal with the Appeal and what the Tribunal has noted in this case is only sub-section (7) of Section 86 . That is enabling it to apply the same provisions of the Central Excise Act, 1944 while dealing with the appeals under Section 86 . Thus, the same powers and the same procedure as is provided in Central Excise Act, 1944 while dealing with appeals may be followed by the Tribunal. The Tribunal, thus, has the same powers and can follow identical procedure as is found in Central Excise Act, 1944. To our mind, this was not the provision which could have enabled the Tribunal in this case to rely on the issue of maintainability or competency of the appeal.

13. The Tribunal has clearly missed and omitted from consideration sub-section (2A) of Section 86 . In this case, it is the Committee of Commissioners which objected to the order passed by the Commissioner of Central Excise (Appeals) and directed the Central Excise Officer to appeal on its behalf to the Appellate Tribunal against that order. This appeal was clearly maintainable and should have been entertained and decided on merits. The subject appeal therefore, could not have been dismissed for want of jurisdiction.

14. The appeal being competent and maintainable, we set aside the impugned order. We restore, to the Tribunal''s file, the Appeal of the Revenue and for being disposed of on its own merits and in accordance with law. We are supported in the view taken by a Judgment of the High Court of Delhi in the case of M/s. Glyph International Limited Vs. Union of India, , which has been brought to our notice very fairly by Mr. Sheth appearing for the Assessee. The view taken by the High Court of Delhi is identical and we respectfully concur with the same. The appeal is allowed in the above terms. The substantial question of law is answered in favour of the Revenue and against the assessee. However, we clarify that our order only deals with the point of maintainability of the appeal and the jurisdiction of the Tribunal to entertain it. Beyond that, on merits, we have not expressed any opinion. The Tribunal shall dispose of this appeal expeditiously.

