(2010) 06 KAR CK 0074

In the Karnataka High Court

Case No : C.E.A. No. 95 of 2007

Commr. of S.T. APPELLANT

Vs

Yokogawa Blue Star Ltd. RESPONDENT

Date of Decision : 09-06-2010

Acts Referred:
Central Excise Act, 1944 — Section 11 B, 35 G

Citation : (2010) 19 STR 482

Hon'ble Judges : N.K. Patil, J;Aravind Kumar, J

Bench : Division Bench

Advocate : Y. Hari Prasad, for the Appellant; Jamuna Rani, for K. Parameshwaran, for the Respondent

Judgement

Aravind Kumar, J.—The Revenue is in appeal challenging the order passed by the Tribunal (CESTAT) in appeal No. ST/40/2004 vide final order dated 28-12-2006.

2. The facts leading to the filing of this appeal are as under:

2.1 The respondent is engaged in the services imparting training to their customers in operating the machines namely Distribution Control System manufactured and sold by them. According to the appellant, respondent would fall within the taxable category of "Consulting Engineering Service" and had obtained service tax registration. It is contended that respondent has filed a refund claim on 24-6-2003 claiming the refund of service tax amount in a sum of Rs. 42,65,937/- which had been paid under protest. The said refund claim came to be processed and it was found by the appellant that it was not admissible. Hence a show-cause notice was issued as to why the said refund claim should not be rejected u/s 11B of Central Excise Act read with Section 83 of Service Tax (sic). After considering the objections and hearing the respondents, the Deputy Commissioner by Order-in-Original No. 55/2003, dated 22-9-2003 confirmed the demand made in the show cause notice.

2.2 Aggrieved by the same, respondent filed an appeal in OIA No. 24/2004 before the Commissioners (Appeals) who by order dated 27-2-2004 allowed the appeal, set aside the order of the Deputy Commissioner and ordered for refund of the said amount. Aggrieved by the same, the revenue filed an appeal before the CESTAT South Zone Bench, in Appeal No. ST 40/2004 vide its final order No. 41/2007. The Tribunal by its order dated 28-12-2006 rejected the appeal on the ground that the issue has been dealt by the Tribunal in 2008 (11) S.T.R. 108 . Aggrieved by the same the revenue is in further appeal before this Court u/s 35G of Central Excise Act questioning the correctness and legality of the order passed by the Tribunal by raising the following substantial questions of law:

(i) Whether in the facts and circumstances of case, the CESTAT, was legal and correct in upholding grant of refund, without passing any order on taxability of activities under Consulting Engineer Service?

(ii) Whether, CESTAT was legal and correct in setting aside appeal when the issue involved in the appeal was not decided?

(iii) Whether, CESTAT was legal and correct in applying the ratio of the cited decisions when the issue in the appeal related to taxability of service under Consulting Engineer service and refund matter was merely consequential to the aforesaid issue?

3. This appeal having admitted on 5-12-2007 for consideration, the matter was heard at length. Though elaborate arguments were addressed by both sides, it is seen from the perusal of the order dated 28-12-2006 passed by CESTAT that Tribunal has not proceeded to consider the appeal on merits namely as to the taxability of the respondent as "Consulting Engineer" or otherwise at relevant point of time though urged by Revenue. The copy of appeal memorandum filed before the Tribunal was made available by the learned Counsel for the revenue before this Court during the course of his submission and having perused the same it is seen that a specific ground has been raised with regard to the taxability in so far as the services rendered by the respondent. This being the factual position, the tribunal without dwelling upon this core issue has disposed of the appeal by its order of rejection dated 28-12-2006, only on the ground that the issue in question had been dealt in jindal Vijayanagar Steel Limited which again is the subject matter for consideration in the appeal filed by the revenue before this Court. In view of non-consideration of the ground urged by the revenue before the Tribunal about taxability or otherwise of the services of respondent at relevant point of time and this appeal having been admitted way back in the year 5-12-2007, this Court is of the considered view that tribunal committed an error in not considering the ground urged by the appellant before it and as such the order of the Tribunal cannot be sustained and accordingly it is set aside. The questions formulated by us herein above is answered in favour of the revenue and the matter stands remitted to the Tribunal for consideration and disposal of the same on merits in accordance with law after affording opportunity to the parties. All the contentions of both the parties are kept open to be urged before the Tribunal.

4. It is also noticed by us that Section 35D of the Central Excise Act contemplates the procedure to be followed by the Tribunal whereunder the provisions of the Customs Act u/s 129C(1)(2)(5) and (6) have been made applicable whereunder a duty is cast on the Tribunal to consider grounds urged by the parties and same has to be adjudicated. In view of the fact that grounds urged by the appellant having not been considered, we are of the considered view that the matter requires consideration afresh on merits by the Tribunal and accordingly the matter is remitted to CESTAT for disposal of Appeal on merits and in accordance with law. The Tribunal shall dispose of the matter as expeditiously as possible but not later than 4 months from the date of receipt of a copy of the order.