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(2011) 04 KAR CK 0158

In the Karnataka High Court

Case No : C.E.A. No. 18 of 2008

Commr. of S.T., Bangalore — APPELLANT

Vs

Karnataka State Beverages Corpn. Ltd. — RESPONDENT

Date of Decision : 13-04-2011

Acts Referred:
Central Excise Act, 1944 — Section 35 G, 35 L
Finance Act, 1994 — Section 65 (102), 65 (105) (zza)

Citation : (2011) 24 STR 405

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : C. Shashikantha, for the Appellant; K.S. Ravishankar, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar. J.

1. The revenue has preferred this appeal challenging the order passed by the Tribunal (2008) 12 STJ 29 holding that the assessee is not liable to pay Service tax on the demurrage tax collected by it.

2. The assessee-M/s. Karnataka State Beverages Corporation Limited are engaged in purchase and sale of liquors from distilleries. They have taken on hire godowns from the Central Warehousing Corporation, Karnataka Warehousing Corporation and various private godowns for the purpose of storage of liquor before it is sold to the customers. If the customers who have purchased the liquor do not remove the liquor from these godowns, they charge demurrage charges for the delay in lifting the sold goods. A show cause notice was issued to the assessee calling upon them to show cause why they should not be levied service tax on the demurrage charges. The assessee offered his explanation and contended that they are not liable to pay any service tax on demurrage charges. Overruling the said objections, the Commissioner confirmed the amount of Rs. 65,47,829/- as service tax and also levied penalty. The assessee preferred an

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appeal against the said order to the Tribunal. The Tribunal held that the assessee-Corporation has been established for the distribution of liquor within the State of Karnataka by purchase and sale of liquor from various manufacturers and distilleries. Since the liquor is purchased by them, the same has to be stored also. Therefore, the assessee incurs various expenditure towards the storage of the liquor. Only when the liquor is not lifted within 90 days, the demurrage charges are levied from the supplier. The said charges collected for storage of the goods cannot be considered as lease rent. The ownership of the goods no longer vests with the manufacturer. Even if it is considered that the assessee are rendering the services of storage and warehousing, such service is only in respect of the goods owned by them for which no Service tax can be levied. From the bill of the Karnataka State Warehousing Corporation raised on the assessee they have charged service tax at the rate of 10% and education cess 2% in respect of the charges collected from them for hiring the storage bases to them. The assessees are only recipients of the services of storage and warehousing and it cannot be said that they are providing the services of storage and warehousing so that they would be liable to payment of service tax under that category in terms of the Finance Act, 1994. The fact that they record the charges collected as "storage charges" would alone be not a proper reason for treating them as storage charges in view of the decisions of the Apex Court holding that the substance of a transaction would prevail over the form and, therefore, they set aside the levy of service tax and allowed the appeal. Aggrieved by the said order, the revenue has preferred this appeal.

3. From the aforesaid facts it is clear that, the question that arise for our consideration in this appeal is, Whether the assessee is liable to pay service tax on demurrage charges collected by them?

4. In fact, the appeal came to be admitted to consider the following substantial question of law :-

Whether in the facts and circumstances of the case, the conclusion of the CESTAT that the assessee is not liable to pay service tax u/s 65(102) r/w Section 65(105)(zza) of the Finance Act, 1994 is legally a sound one?

5. The said question falls squarely within the exception carved out in Section 35G, an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment, and the High Court has no jurisdiction to adjudicate the said issue, as held by this Court in the case of Commissioner of Central Excise v. M/s. Mangalore Refineries and Petro Chemicals Limited, CEA No. 6/2007 D.D. 1-9-2010. The appeal lies to the Apex Court u/s 35L which alone has exclusive jurisdiction to decide the said question.

6. In that view of the matter, the appeal is rejected as not maintainable, reserving liberty to the Revenue to approach the Apex Court.

7. The High Court registry is directed to return the certified copies of the orders

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produced, to the Department, to prefer the appeal.

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