(2009) 04 KL CK 0074

In the High Court Of Kerala

Case No : Writ Petition (C) No. 11948 of 2009

F. Louis APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 21-04-2009

Acts Referred:
Finance Act, 1994 — Section 75, 76, 77, 78

Citation : (2010) 25 STT 90

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : A. Kumar, for the Appellant; Thomas Mathew Nellimoottil, for the Respondent

Judgement

S. Siri Jagan, J.—The petitioner is challenging Ext. P7 order of the Commissioner of Central Excise, Customs and Service Tax (Appeals) passed in an application for waiver of pre-deposit of the disputed amount filed along with the appeal filed by the petitioner against Ext. P.4 order. The petitioner is engaged in the business of providing photography service to customers. On 17-10-2005 the premises of the petitioner''s business place was inspected by the Central Excise Authorities and certain documents were seized. Thereupon he was asked to show cause why the petitioner shall not be proceeded against for not including gross value of sale for the period from July, 2001 to September, 2005 insofar as the value of materials are not included in the gross amount. He was also directed to show cause why differential tax including educational cess, interest u/s 75 and penalty under sections 76, 77 and 78 of the Finance Act, 1994 should not be demanded from the petitioner. Despite detailed replies submitted by the petitioner, the 2nd respondent confirmed the demand by Ext. P4 order. That is under challenge in Ext. P5 appeal filed by the petitioner before the 1st respondent. In the appeal the petitioner moved the Appellate Authority for dispensing with pre-deposit of the duty demanded. Although the Appellate Authority found that decisions on the subject are in favour of the petitioner, directed the petitioner to deposit 25 per cent of the duty confirmed as a condition for waiver of pre-deposit of the duty demanded. That is under challenge in this writ petition.

2. The petitioner''s contention is that the Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Bangalore has earlier decided the very same issue as to whether providing of photography service attracts service tax and decided in favour of the assessee. That being so, the legal issue is covered in favour of the petitioner and, therefore, there is no justification for directing the petitioner to deposit 25 per cent of the duty.

3. The learned Senior Standing Counsel for Central Excise appearing for the respondent submits that the decision referred to by the petitioner is stayed by a Division Bench of this Court and therefore, that decision cannot be applied in favour of the petitioner. The senior standing counsel further points out that another Division Bench of this Court has also stayed similar orders of the Tribunal.

4. The stay granted by the Division Bench does not alter the position insofar as, as on today, the law is as laid down by the Tribunal. In any event, insofar as the petitioner has made out a very strong prima facie case in his favour, I am of the opinion that the Appellate Authority should have granted full waiver of pre-deposit of the entire duty in dispute. In the above circumstances the writ petition is allowed. Ext. P7 order is quashed. The 1st respondent shall grant unconditional waiver of pre-deposit of the amount disputed in the appeal and consider the appeal on merits without insisting on pre-deposit of any amount.