(2012) 09 BOM CK 0063

In the Bombay High Court

Case No : Central Excise Appeal No''s. 5-7 of 2012

Godavari Khore Cane Transport Co. APPELLANT

Vs

Commr. of Central Excise RESPONDENT

Date of Decision : 05-09-2012

Acts Referred:

Citation : (2013) 19 GSTR 427 : (2013) 29 STR 31 : (2013) 38 STT 586 : (2013) 59 VST 447

Hon'ble Judges : R.D. Dhanuka, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : V. Sridharan with Prakash Shah and Prasad Paranjape, instructed by PDS Legal, for the Appellant; S.I. Shah with Shri J.B. Mishra, for the Respondent

Judgement

1. The basic question raised in these three appeals is, whether the CESTAT was justified in upholding the service tax demand confirmed by the adjudicating authority with interest and penalty solely on the basis of the statement of the employee of the assessee without considering the specific plea of the assessee that service tax is not leviable based on certain documents produced before the CESTAT. Admittedly the service tax demand confirmed by the adjudicating authority has now been collected by the appellant-assessee and paid to the Revenue Counsel for the appellant-assessee states that the assessee is agitating the issue of leviability of service tax not with a view to seek refund of the tax paid but with a view to agitate the levy of interest and penalty Counsel for the appellant-assessee, on instructions, states that if on merits levy of service tax is held not leviable and consequently it is held that interest and penalty is not leviable, then, the assessee would not claim refund of service tax already collected and paid to the Revenue. The statement is accepted.

2. It is not in dispute that although the employee of the assessee during the course of recording statement had admitted and expressed willingness to pay service tax, in the affidavit-in-reply to the show-cause notice, the liability to pay service tax was specifically denied and even before the adjudicating authority it

was contended that service tax was not leviable. Though documentary evidence in that behalf were not produced before the adjudicating authority, the same was produced before the CESTAT and argued that the levy of service tax for the period involved herein is unjustified However, the CESTAT based on the statement of the employee of the assessee has upheld the levy of service tax without considering the merits of the case and without considering the documents furnished by the assessee. It is well established in law that it is open to the assessee to demonstrate on the basis of the documentary evidence that the statement recorded is erroneous. In these circumstances, in our opinion, it would be just and proper to set aside the impugned order of the CESTAT dated 28th April 2011 2012 (26) S.T.R. 310 and restore the appeals to the file of the CESTAT for fresh decision on merits Accordingly, the impugned order of CESTAT in so far as it relates to confirming the duty, interest and penalty is quashed and set aside and the matter is restored to the file of CESTAT for fresh decision on merits.

3. It is made clear that if on remand the CESTAT comes to the conclusion that the service tax is not leviable for the disputed period and consequently interest and penalty is not leviable, then and in that event the assessee shall not claim refund of service tax already collected and paid to the Revenue. It is further made clear that the order of the Tribunal in deleting the penalty in one appeal being not disturbed, the same would attain finality All contentions of both the parties are kept open and the Tribunal shall not confirm the interest and penalty in the remaining two appeals merely because the assessee has subsequent to the initiation of proceedings collected and paid the service tax to the Revenue. All the appeals are disposed of accordingly with no order as to costs.

