(2014) 11 RAJ CK 0083

In the Rajasthan High Court

Case No : DB Excise Appeal No. 8/2013

Khandelwal Construction Co. APPELLANT

Vs

Commissioner Customs and Central Excise RESPONDENT

Date of Decision : 03-11-2014

Acts Referred:
Finance Act, 1994 — Section 54, 65, 73(1)

Citation : (2015) 37 STR 989

Hon'ble Judges : J.K. Ranka, J;Ajay Rastogi, J

Bench : Division Bench

Advocate : R.L. Agarwal, Advocate for the Appellant; T.P. Sharma, Advocate for the Respondent

Judgement

Ajay Rastogi, J.—Instant appeal is directed against the order of the Custom Excise, And Service Tax Appellate Tribunal dt. 29.8.2012 dismissing the appeal of the appellant being barred by limitation and the reason assigned was not found to be satisfactory denying right of appeal being heard on merit available to the appellant.

2. The assessee is a registered firm under the provisions of Finance Act, 1944 for payment of service tax and as alleged primarily doing the business of providing "Cargo Handling Service".

3. The Govt. of India introduced the concept of service tax, i.e. tax on the services for the first time in the year 1994. The Finance Act, 1944 provides the method of levy of service tax, taxable services and their valuation procedure and the rules. Certain provisions of the Central Excise Act, 1944 also applies to the service tax. The Act of 1944 provides for imposition of service tax by Section 54. Section 65 of the Finance Act, 1994 provides and defines various services on which service tax is levied. The Central Government decided to bring "cargo handling service" also in the sweep of service tax and, therefore, clause (20) was inserted vide Finance Act, 2002 with effect from 16.8.2002. The said clause was renumbered as Clause (23) vide the Finance Act, 2003. Clause (23) of Sec. 65

reads as follows-

"Cargo handling services means loading, uploading, packing or unpacking of cargo and includes cargo handling services provided for freight in special containers or for non-containerized freight, services provided by a container freight terminal or any other freight terminal, for all modes of transport and cargo handling services, incidental to freight but does not include handling of export cargo or passenger baggage or mere transportation of goods",

4. A show cause notice dt. 14.10.2007 was served upon the appellant assessee for recovery of Rs. 80,343/- as Service Tax along with interest payable for Service of Cargo Handling Service.

5. The assessee was providing Cargo Handling Service to M/s. Shri Ram Fertilizers and Chemicals Kota (a unit of M/s. DSCL Kota) and the period in question for which service tax was due & as alleged is for 16.8.2002 to 30.6.2003.

6. In response to the show cause notice, reply was filed by the appellant and the defence was that the appellant assessee has already deposited entire service tax dues of Rs. 3,53,189 vide challan of Rs. 380058/- on 31.3.2006. Rs. 26,869/- is paid in excess by mistake which was to be adjusted against future service tax on Cargo Handling Services and submitted Calculation sheet along with copy of challan. It was also stated that the assessee already deposited interest on delayed deposition of service tax i.e. Rs. 81,579/- on 26.7.2007.

7. Apart from the defence which was raised by the assessee regarding exemption from payment of service tax under the Finance Act, 2002 which came into force w.e.f. 16.8.2002, indisputably, the assessee had deposited entire service tax of Rs. 3,53,189 vide challan dt. 31.3.06 and also deposited entire service tax of Rs. 81,579/- vide challan dt. 26.7.2007 before issue of Show Cause Notice dt. 24.10.2007.

8. The assessee submitted statement of Service Tax along with interest to show that they had deposited Service Tax of Rs. 80,162/- and interest of Rs. 31,691/- for the period 19.8.2002 to 16.6.2003. However, as per show cause notice, it was alleged that the assessee had short paid service tax of Rs. 80,343/- along with interest during the period 16.8.2002 to 30.6.2003.

9. After going through the records, it was finally observed that there was short payment of service tax of Rs. 181/- along with interest during the period 16.8.2002 to 30.6.2003 and apart from short payment of service tax, the adjudicating authority vide its order dt. 26.3.2010 imposed penalty of Rs. 100/- for every day during which, such failure continues upto 17.4.2006, subject to not exceeding the amount of Service tax payable of Rs. 80,343/- u/s. 76 of the Finance Act, 1944. In addition to it, the authority further imposed penalty of Rs. 80,343/- u/s. 78 of the Finance Act, 1944.

10. The order of the adjudicating authority dt. 26.3.2010 came to be challenged

by the assessee in appeal before the Commissioner Customs & Central Excise (Appeals-I), Jaipur. However, the appeal came to be dismissed vide order dt. 28.1.2001 and copy of which was served on 31.1.2011. However, further appeal was preferred on 19.1.2012 and Limitation for filing appeal is 90 days before the Customs Excise And Service Tax Tribunal from the order impugned being served on the assessee.

11. Along with appeal, the appellant also filed an application seeking condonation of delay. The delay as noticed by the Tribunal was 290 days but apparently the period of limitation starts from the date of order being served and as such appeal came to be preferred within 260 days whereas 290 days was noticed by the Tribunal. However, explanation was furnished by the appellant and which was noticed by the Tribunal in para 2 of the order impugned that counsel Shri K.C. Jain, Chartered Accountant who personally appeared before the Commissioner (Appeals), Jaipur, I, Jaipur, had undergone heart surgery and was not attending his office regularly and even Ms. Iti, (CA) who was looking into all the legal matters of the family also left her services and one Mr. Ravi Khandelwal, family member, who was looking after the matter for assessee also met with major accident and he lost his legs and accordingly it was prayed that at least delay in filing appeal may be condoned. However, the ld. Tribunal taking note of justification offered by the appellant seeking condonation of delay observed that as regard the Chartered Accountant Shri KC Jain is concerned, there is no documentary evidence placed on record in support thereof that he had undergone heart surgery and was not attending his office and as regard Ms. Iti is concerned as it was observed that she left service on 30.6.2011 and the limitation expired prior thereto and as regard the accident suffered by Ravi Khandelwal who was looking after the matters, the Tribunal was of the view that no documentary evidence has been placed on record and it was not considered sufficient cause which could satisfy the conscience of the Tribunal condoning delay as prayed by the appellant and on account of rejection of their application seeking condonation of delay, the appeal became incompetent and accordingly dismissed under order impugned dt. 29.8.2012 which came to be challenged by filing appeal in this Court.

12. Counsel for respondent has placed reliance on S.S. Rathore Vs. State of Madhya Pradesh, .

13. It was a case where service dispute arose and the govt. servant was dismissed on 13.1.1966. Departmental appeal was preferred and that came to be dismissed on 31.8.1966 and it was communicated to the employee on 19.9.1966. However, civil suit came to be filed on 30.9.1969 asking for a declaration that the order of dismissal was inoperative and be continued in service. In the facts & circumstances, the suit came to be dismissed and the matter traveled upto the Apex Court and the Apex Court taking note of the submission finally arrived to the conclusion that the suit was within time but as we have already noticed that delay has to be examined in the facts of each case

and there cannot be any straight jacket formula. The facts of the case not even remotely related to the facts which have come for our consideration.

14. At the outset, it will be noticed that we are not examining the issue on merits and is yet to be considered by the Tribunal and as regard justification shown by the appellant regarding delay in filing appeal is concerned, in our considered view, in absence of any counter in rebuttal filed by the respondent, the reasons shown by the appellant in their application seeking condonation of delay prima facie appears to be bona fide and we are satisfied that there was sufficient cause on record which could enable the appellant to make submission on merits. It is true that each case has to be examined on its own merit and the sufficient cause should be such as it would persuade the Court, in exercise of its judicial discretion, to treat the delay as an excusable one.

15. In the instant case, the appellant has shown sufficient reasons that their Chartered Accountant, Shri KC Jain, who appeared before the Commissioner (Appeals), Jaipur, I, Jaipur, had undergone heart surgery and was not attending his office regularly and even Ms. Iti, (CA) who was looking into the legal matters of the family also left her services and Mr. Ravi Khandelwal who was looking after the matter also met with major accident and he lost his legs which has to be considered on its face value and in our considered view there was reasonable justification offered by the appellant to meet out sufficient cause in seeking condonation of delay and merely because no documentary evidence was placed on record in support thereof the reason assigned could not have been brushed aside in totality in absence of their being any counter or objection raised by the department.

16. Apart from it, the delay as such in no manner defeats the right of any third party and besides it, the service tax was introduced for the assessees who are carrying "cargo handling service" for the first time by inserting Clause 20 of Finance Act, w.e.f. 16.8.2002 and the period in question is 16.8.2002 to 30.6.2003 and the service tax and interest was deposited by the assessee indisputably before the show cause notice was served and short payment against service tax of only Rs. 181/- remain outstanding under the provisions of Sec. 73(1) of the Finance Act, 1994 and penalty u/s. 76 & 78 of the Finance Act, 1944. At the same time, assessee''s grievance that whether transportation of goods is covered in the category of "cargo handling services" is yet to be examined, if the appeal in the facts & circumstances is heard on merits by the Tribunal. In our considered view, the appeal preferred by the appellant before the Tribunal deserves indulgence to be heard on merits.

17. Consequently, the appeal stands allowed. The order passed by the Tribunal dt. 29.8.2012 is accordingly quashed and set aside and while considering the appeal to be in limitation filed by the appellant be restored and the appeal may be processed further in accordance with law.

18. Let the parties may appear before the Tribunal dt. 24.11.2014.

