(2015) 03 P&H CK 0425

In the Punjab And Haryana At Chandigarh

Case No : STA No. 15 of 2014 (OandM) and C.M. No. 26099-CII of 2014

Kumar Builders APPELLANT

Vs

CESTAT RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 73(1)

Citation : (2015) 40 STR 455

Hon'ble Judges : S.J. Vazifdar, Actg. C.J. and Gurmeet Singh Sandhawalia, J.

Bench : Division Bench

Advocate : Jagmohan Bansal, Advocate, for the Appellant; Sukhdev Sharma, Advocate, for the Respondent

Judgement

Gurmeet Singh Sandhawalia, J.—C.M. No. 26099-CII of 2014 : Application for placing on record Annexure A-9 is allowed, subject to all just exceptions. Said document is taken on record. Office to tag the same at appropriate place. STA No. 15 of 2014. The appeal, filed under Section 35G of the Central Excise Act, 1944 (for short, the ''Act'') is directed against the order dated 2-9-2013 (Annexure A-6), passed by the Customs, Excise & Service Tax Appellate Tribunal (for short, the ''Tribunal''), vide which, the appeal had been dismissed on account of the failure to pre-deposit as per the earlier order dated 6-5-2013 (Annexure A-4).

2. The substantial question of law that arises is whether the Tribunal was justified in dismissing the appeal on account of the failure of the appellant to deposit the amount of Rs. 50 lacs in spite of the fact that sufficient cause had been shown that the appellant was not undertaking any cleaning service and was only lifting the fly ash for M/s. National Fertilisers Ltd. (for short, the ''NFL'').

3. The case of the appellant is that it had been undertaking construction activity for NFL, Naya Nangal, Bathinda and Indian Railways and for the removal of ash from NFL. Show cause notice was issued to it on 24-1-2011 (Annexure A-1),

demanding Service Tax to the tune of Rs. 74,88,396/- under Section 73(1) of the Finance Act, 1994 on the ground that the services provided were taxable. The demand was on the basis of four different heads, which reads as under:

4. The said notice was contested by filing a detailed reply and vide order dated 13-1-2012 (Annexure A-2), the Commissioner, Central Excise, Chandigarh-II (for short, the ''C.C.E.'') confirmed the demand of Rs. 74,88,396/- under Section 73(1) of the Finance Act and also ordered recovery of interest and penalty.

5. The appeal was filed before the Tribunal which, vide order dated 6-5-2013, did not accept the reasoning of the CCE regarding the demand on account of the construction of the complex in respect of the dwelling unit executed at the instance of the Northern Railways for its employees. However, regarding the cleaning service, the management and maintenance, the contention for stay was declined. The appellant-Company was, thereafter, directed to deposit a sum of Rs. 50 lacs in total within 8 weeks and report compliance by 10-7-2013. A condition was imposed that in case the amount is not deposited, the stay granted would stand dissolved and the appeal would also stand dismissed without further reference to the Tribunal.

6. An application was, thereafter, filed that in similar circumstances, the Eastern Bench of the Tribunal at Kolkata had allowed the stay on similar grounds that the process of removing the fly ash by mechanical means would not amount to a cleaning service in the case of Purba Medinipur Zilla Parishad v. Commissioner of C. EX, Haldia - , 2010 (20) S.T.R. 355 . It was, accordingly, contended that the claim of Rs. 29,60,791/-, which had been raised on account of the cleaning service was not leviable and a prayer was made for reducing the amount of pre-deposit. The Tribunal has, however, dismissed the application on the ground that the application, in substance, is seeking review of the order dated 6-5-2013 and there is no power of review or rectification of an interlocutory order, under Section 25-F of the Act. Resultantly, the application as well as the appeal were dismissed, on account of non-compliance of the earlier order.

7. Counsel for the petitioner, accordingly, submitted that if the amount of Rs. 29,60,791/- is deleted along with the penalty which has been imposed, the amount demanded would be reduced by almost Rs. 60 lacs and therefore, it would condone the major element and the condition to deposit Rs. 50 lacs would, thus, be on the higher side.

8. After hearing counsel for the parties and keeping in view the fact that the total demand of Service Tax of Rs. 74,88,396/- raised, the Tribunal itself has given benefit of Rs. 21,49,623/- and therefore, the penalty element also would not be payable. Similarly, keeping in view the fact that a Co-ordinate Bench of the Tribunal has prima facie held, in similar circumstances, that the mechanical process of removing fly ash does not fall within the ambit of Service Tax, the appellant is not liable to deposit Rs. 29,60,791/- on the said head along with the penalty which has been levied.

9. Accordingly, keeping in view the said fact, this Court is of the opinion that the appeal was not liable to be dismissed on account of non-compliance of the earlier order dated 6-5-2013. Accordingly, the stay order dated 2-9-2013 (Annexure A-6) is set aside. The Tribunal shall hear the appeal without asking the appellant to pre-deposit the amount against the heading of cleaning service and the equivalent penalty levied on it. It is, however, made clear that against the heading of ''management, maintenance or repair'' and the penalty element, the appellant will have to deposit the amount, which it claims to have already done so. With the above observations, the present appeal stands allowed.