(2011) 10 BOM CK 0167

In the Bombay High Court

Case No : Central Excise Service Tax Appeal No. 122 of 2011

Master Marine Services P. Ltd. APPELLANT

Vs

Commr. of Service Tax, Mumbai RESPONDENT

Date of Decision : 18-10-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Finance Act, 1994 — Section 73(1A), 75, 78, 80, 83

Citation : (2012) 25 STR 227

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Manoj Sanklecha, instructed by Mint and Conferrers, for the Appellant; Suresh S. Pakale with Ms. Suchitra Kamble, for the Respondent

Judgement

1. This appeal arises out of an order passed by the Customs, Excise & Service Tax Appellate Tribunal on 1st August 2011 on an application for waiver of pre-deposit u/s 83 of the Finance Act, 1994 read with Section 35F of the Central Excise Act, 1944. The appeal is admitted on the following substantial questions of law :

4.1 Whether in the facts and circumstances of the case, the CESTAT was justified in directing Appellant to deposit a sum of Rs. 50 lakhs towards penalty u/s 83 of the said Act read with 35F of the Central Excise Act, 1944?

4.2 Whether in the facts and circumstances of the case, CESTAT was justified in directing further deposit of Rs. 50 lakhs for the purposes of entertaining the Appellant''s appeal on merits even though admittedly 99% of the service tax demand had been paid by the Appellant?

4.3 Whether in the facts and circumstances of the case, CESTAT was correct in ignoring Section 80 of the said Act (which provides no penalty be imposed if there was a reasonable cause for breach of any provisions) and holding that they are not concerned with the reason for the delay in payment of service tax in time?

The Appellants engage in the activity of storage and warehousing of containers, survey of ship/cargo/containers and other ancillary services in relation to export cargo. The Appellants were registered with the Service tax Authorities under the following categories :

"Storage and warehousing service"

"Cargo handling service", and

"Technical inspection service".

2. A notice to show cause was issued to the Appellants on 24th October 2008 demanding service tax dues in the amount of Rs. 5.85 crores; interest therein and to explain as to why penalty should not be imposed. The show cause notice as a matter of fact recorded that an amount of Rs. 5.57 crores was paid by ''"he Appellants towards service tax for the period between April 2003 to March 2007. The notice required the Appellants to show cause as to why the amount should not be appropriated towards the liability.

3. Before the Commissioner, during the course of adjudication proceedings, the Appellants submitted that an amount of Rs. 5.57 crores was admittedly paid towards service charge dues out of the total dues of Rs. 5.85 crores. Of this, Rs. 1 crore was paid before the investigating Officer visited the office of the Appellants while an amount of Rs. 2.51 crores was regular payment for Financial Year 2006-07. According to the Appellant, the total dues which ought to have been demanded was only Rs. 28.64 lakhs being the difference between the total amount due of Rs. 5.85 crores and Rs. 5.57 crores which was the service tax admittedly paid. According to the Appellants if the amount due was only Rs. 28.64 lakhs, the adjudication would have to be before the Additional Commissioner of Central Excise under the rele ant notification and they would have been entitled to a right of appeal before the Commissioner. The Appellants, however, stated that they did not desire to litigate the matter any further. Accordingly, they sought to avail of the benefit u/s 73(1A) of the Finance Act, 1994, in order to do so, the Appellants stated that they had paid the entire amount of Rs. 28.64 lakhs together with interest in the amount of Rs. 8.06 lacs by challans dated 19th November 2008 and 20 November 2008 and the penalty representing 25% of the total dues in the amount of Rs. 7.19 lakhs on 20th November 2008 and 29th November 2011 within thirty days from the receipt of the notice. The Appellants stated that the payment of interest of Rs. 5.06 lakhs was effected beyond the period of thirty days as a result of the fact that on 26th and 27th November 2008 City of Mumbai had been paralyzed due to terror attacks.

4. The submission was rejected by the Commissioner observing that the Appellants had made payment belatedly from time to time. The Commissioner by his order confirmed the demand of Rs. 5.85 crores, appropriated the amount of Rs. 5.70 crores which is paid by the Appellants and confirmed the demand for payment of interest. A penalty of Rs. 6 crores was imposed u/s 78.

5. The Appellant moved an application for waiver of a pre-deposit before the Tribunal. The Tribunal observed that the Appellants ought to have paid the service tax within time and should have filed periodical returns. The Tribunal observed that it was not concerned whether the Appellants had or not charged/ collected service tax since it was their duty to file returns and pay service tax on time. The Tribunal did take notice of the fact that the Appellants had admitted their service tax liability of almost Rs. 5.71 crores. Taking note of the fact that the Appellants had paid an amount of Rs, 7 lakhs towards penalty, they were further directed to pay Rs. 50 lakhs towards the penalty.

6. Learned Counsel appearing on behalf of the Appellants submitted that the Appellants were entitled to the benefit of Section 73(1A) and had in fact complied with the statutory provision. Learned Counsel submitted that the Appellants paid almost 99% of the service tax dues besides 25% of the penalty and interest as required in law. In these circumstances, he submitted that the Appellant ought to have been granted waiver from the requirement of depositing a sum of Rs. 50 lakhs.

7. On the other hand, learned Counsel appearing on behalf of the Respondents sought to place reliance on the order of the Tribunal and submitted that no case for waiver is made out.

8. The notice to show cause that was issued to the Appellants contains a recital of the fact that out of the total service tax dues of Rs. 5.85 crores, the Appellants had paid an amount of Rs. 5.57 crores. The Appellants sought the benefit of the provisions of Section 73(1A) which provides as follows :

[(1A) Where any service tax has not been levied or paid or has been short levied or short-paid or erroneously refunded, by reason of fraud collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Chapter or the rules made thereunder, with intent to evade payment of service tax, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, such person or agent may pay service tax in full or in part as may be accepted by him, and the interest payable thereon u/s 75 and penalty equal to twenty-five per cent of the service tax specified in the notice or the service tax so accepted by such person within thirty days of the receipt of the notice.]

According to the Appellants, an amount of Rs. 3.51 crores was paid even before the issuance of the notice to show cause dated 24th October 2008 comprising of an amount of Rs. 1 crore which was paid before the visit of the investigating officer and Rs. 2.51 crores being the regular payment for Financial Year 2007-08. The Appellants did not dispute the liability to pay service tax dues. While seeking the benefit of Section 73(1A), the Appellants claim to have paid duty in the amount of Rs. 78.64 lakhs, 25% of the penalty payable on the aforesaid amount and interest. Whether the Appellant has in fact fulfilled the requirement of Section 73(1A) is a matter which will fall for determination before the Tribunal in the pending appeal. From the record before the Court, it appears from the order of the Tribunal that the Appellants had by their stay application sought a waiver of a pre-deposit of an amount of Rs. 14,61,843/- being the balance amount payable towards Service tax and of the penalty. The Tribunal has directed the Appellants to deposit an amount of Rs. 50 lakhs. We are of the view that having regard to the fact that the Appellants had admitted their liability to pay service tax and had paid an amount initially of Rs. 5.57 crores and, thereafter a further amount of Rs. 28.64 lakhs, these factors should weigh in the determination of the total amount which they must now be called upon to deposit. We are of the view that the ends of justice would be met if in addition to the amount of Rs. 14.61 lakhs which is claimed towards service tax dues, the Appellant is directed to pay an additional amount so as to make up a total deposit of Rs. 25 lakhs. We accordingly, modify the order of the Tribunal by directing that the Appellant shall deposit an amount of Rs. 25 lakhs within a period of four weeks from today instead and in substitution of the direction issued by the Tribunal. In the event the Appellant fails to make deposit as directed, necessary consequences under the law shall ensue.

9. In the circumstances, the questions of law would stand answered in terms of the aforesaid directions. The Appeal is accordingly disposed off. There shall be no order as to costs.

