(2015) 05 CESTAT CK 0014

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Stay Application No.53460 Of 2014, Service Tax Appeal No. 53085 Of 2014

M/s. Mahaveer Transport — APPELLANT

Vs

C.C.E. Raipur — RESPONDENT

Date of Decision : 25-05-2015

Acts Referred:
Central Excise Appeals Rules 2001 — Rule 5
Finance Act, 1994 — Section 65, 65(68), 76, 77, 78

Citation : (2015) 05 CESTAT CK 0014

Hon'ble Judges : Ashok Jindal, J;R. K. Singh, Technical Member

Bench : Division Bench

Advocate : Amresh Jain

Final Decision : Allowed

Judgement

1. Appellant is in appeal against the impugned order wherein their appeal has been dismissed by the Ld. Commissioner (A) that the appellant has not

followed rule 5 of the Central Excise Appeals Rules 2001. Therefore, appeal was dismissed.

2. On perusal of the impugned order we find that appeal itself can be disposed of at this stage. Therefore, after waiving the requirement of pre

deposit, appeal is taken up for final disposal with the consent of the Ld. AR.

3. The appellant has challenged the adjudication order before the Id. Commissioner (A) on the following grounds:

3.1 That the Learned Assistant Commissioner has levied tax incorrectly considering clause (68) of Section 65.

The clause (68) of Section 65 of Finance Act 1994 read as follows:-

â??manpower recruitment or supply agency"" means any person engaged in providing any service, directly or indirectly, in any manner for

recruitment or supply of manpower, temporarily or otherwise, to any other person"".

whereas the Assistant Commissioner has considered clause (68) of Section 65 as follows :-

Goods Transport Agency to mean any person engaged in providing any service, directly or indirectly. in any manner for transport of

goods by road, temporarily or otherwise. to a client"".

3.2 That the Learned Assistant Commissioner has not considered Service Tax Rules, 1994 while levying tax on M/s Mahaveer Transport.

The Rule 2(l)(d) of Service Tax Rules, 1994 provides for ""person liable for paying service tax"" means (v)""In relation to taxable services

provided by a goods transport agency, where the consignor or consignee of goods is, -

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(a) any factory registered under or governed by the factories Act, 1948 (63 of 1948);

(b) any company formed or registered under the Companies Act, 1956(1 of 1956);

(c) any corporation established by or under any law:

(d) any society registered under the Societies Registration Act 1860 (21 of 1860) or under any law corresponding to that Act in force in any

part of India;

(e) any co-operative society established by or under any law;

(f) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made there under; or

(g) any body corporate established, or a partnership firm registered by or under any law, any person who pays or is liable to pay freight

either himself or through his agent for the transportation of such goods by road in a goods carriage;

As the M/s Mahaveer Transport has provided services to M/s Anand Construction which is registered partnership firm covered in seven

categories of person and also registered under Finance Act, 1994 read with Service Tax Rules, 1994, so as per reverse charge mechanism provided inlthe Finance Act, 1994 and Service Tax Rules, 1994 the person who pays freight is liable for paying tax.

3.3 That the order passed by Assistant Commissioner failed to justify the extended period of limitation.

Mere allegation that assessee has not disclose their own that they have not provided above mentioned services for invoking the extended

period of five years on suppression of the facts with intent to evade payment of service tax is not sufficient.

The Hon'ble Supreme Court in the case of Pushpam Pharmaceuticals Company V Collector of C.Ex Bombay 1995 (78) ELT 401 (SC)held

that the word 'Suppression' as Appeal Before Commissioner (Appeals), Excise, Customs & Service Tax, Raipur (C.G) M/s Mahaveer

Transport used in the company of words like 'fraud, collusion or willful default' has to be strictly construed and thus the suppression has to

be deliberate. Mere 'omission will not come within the ambit of Sec 11A of the Central Excise Act.

Therefore extended period assumed by the learned Assistant Commissioner is not correct and against the natural justice, and order passed

by the learned Assistant Commissioner is bad in law so it is requested to drop the order.

3.4 That the Assistant Commissioner has erred in levying penalty under section 76, 77 & 78 of Finance Act, 1994.

Penalty cannot be imposed when appellant has in bonafide belief that he is not liable to pay service tax as the service tax is payable by

consignor or consignee of goods whoever makes the payment of freight Therefore penalty may kindly be deleted.

4. Instead of deciding the said issue the Ld. Commissioner (A) held that appellant has not followed the procedure laid down under Rule 5 of Central

Excise Appeal Rules 2001. Therefore, the appellant is not entitled to raise new grounds before him for deciding the appeal.

5. We have examined the grounds raised by the appellant in appeal filed before the Ld. Commissioner (A) are legal in nature and same can be raised

at any point of time. Therefore, the Id. Commissioner (A) is required to answer the issue raised by the appellant on merits which Ld. Commissioner

has failed to do In these circumstances, we do not find any merits with the impugned order. Same is set aside and matter is remanded back to the Ld.

Commissioner (A) to decide the issues raised by the appellant in their appeal on merits.

6. With these terms, appeal is allowed by way of remand. The stay application is also disposed off in the same terms.

(Dictated and pronounced in the open court)

