(2016) 07 KAR CK 0035

In the Karnataka High Court

Case No : W.P. NO. 13917 of 2016

M/s. Practive Strategic Communications India private Limited — APPELLANT

Vs

Commissioner of Service Tax, Banglore — RESPONDENT

Date of Decision : 04-07-2016

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35

Citation : (2016) ILRKarnataka 4493

Hon'ble Judges : Jayant Patel and B. Sreenivase Gowda, JJ.

Bench : Division Bench

Advocate : Sri N. Anand, Advocate, for the Petitioner; Sri Jeevan J. Neeralgi, Sr. CGSC, for the Respondent

Final Decision : Allowed

Judgement

Jayant Patel, J.—Leave to challenge the order dated 31-12-12 passed by the Commissioner of Service Tax.

2. Mr. Neeralgi, Learned Counsel takes notice for the respondent. With the consent of the Learned Counsel appearing for both the sides, appeal is finally heard.

3. The present appeal is directed against the order dated 31-12-12-Annexure ''F'' passed by the Commissioner of Service-Tax, as well as the order dated 22-7-15 passed by the CESTAT, whereby the Tribunal for the reasons recorded in the order has not interfered with the order of the First Appellate Authority, since the outer limit of limitation was over.

4. We have heard Mr. N. Anand, the Learned Counsel for the petitioner and Mr. Jeevan J. Neeralgi, the Learned Senior Central Government Standing Counsel for the respondent.

5. The facts of the case appear to be that the petitioner is a company providing management services. On 20th January, 2012, the Service Tax Department

issued show cause notice for the service tax liability from January, 2010 to September, 2011. Petitioner submitted reply to the said show cause notice on 20-12-12 seeking to drop the demand of tax. On 3-9-13, the petitioner addressed a letter to the Service Tax Department, informing that nothing has been ; intimated to the petitioner, in spite of attending of the hearing and requested the Department to grant copy of the adjudication order, if any. On 12-9-13, the Department wrote a letter to the petitioner informing that the order dated 31-12-12 was sent by Speed Post, which bore the rubber stamp of the petitioner-Company. On 30th September, 2013, the petitioner replied to the above letter and stated that, they or any responsible Officer of the Company are not in possession of the order and the petitioner came to know about the order only after the receipt of the letter of the Department dated 12-9-13. On 1-10-13, the Commissioner of Service Tax supplied certified copy of the order dated 31-12-12. The petitioner filed appeal on 9-10-13 before the First Appellate Authority i.e., the Commissioner (Appeals) against the above referred order dated 31-12-12. On 20-2-14, the Commissioner (Appeals), rejected the appeal filed by the petitioner as time barred. On 17-7-15, the petitioner preferred appeal before the Tribunal against the order of the First Appellate Authority, rejecting the appeal on the ground of limitation. Hence, the present petition.

6. We have heard Mr. N. Anand, the Learned Counsel for the petitioner and Mr. Jeevan J. Neeralgi, the Learned Senior Central Government Standing Counsel for the respondent.

7. The Learned Counsel for the petitioner mainly contended that the case of the petitioner is covered by the decision of Delhi High Court in the case of Intercontinental Consultants and Technocrats Pvt. Ltd. v. Union of India, 2013(29) S.T.R.9 (Del) whereby the Delhi High Court has found that by virtue of Rule 5(1), the expenses which are incurred by service provider for the service of the consumer cannot be said as valid ant the service tax cannot be levied on the said amount. He submitted that so far as the service tax on the amount charged by the petitions to his customer for the service provided, the tax is already paid and nothing is outstanding. He submitted that by reason of the amount reimbursed by the client towards expenses under the value of service the tax is assessed by the first authority. He submitted that, if the decision of the Delhi High Court is considered, the order of the original authority cannot stand in the eye of law. However, on the point of limitation, he submitted that, it is true that as per the Department, the order was communicated, but so far as petitioner is concerned, the order was not received and the delivery to the watchman or to non-responsible person was not within the knowledge of the petitioner It is only when the petitioner received the communication of the Department on 12-9-13, the petitioner came to know that the order dated 31-12-12 was passed. The petitioner preferred an appeal before the First Appellate Authority and thereafter also before the Tribunal However, the First Appellate Authority as well as the Tribunal rejected the appeal since the outer limit was over. It has been submitted that under these circumstances, this being an exceptional case and in view of the

contentions raised by the petitioner, there will not be any liability to pay tax, hence, this Court may exercise the power under Article 226 of the Constitution and may issue suitable direction either to remand the matter to the original authority or in the alternative the Appellate Authority, for examination of the matter on merits. It was submitted that, as such, there is no tax liability on the part of the petitioner in view of the above decision of the Delhi High Court. However, the petitioner shall abide by any terms and conditions which may be found appropriate by this Court. The Learned Counsel relied upon the decision of this Court in the case of Phoenix Plasts Company v. The Commissioner Of Central Excise (Appeal-I), 2016-TIOL-905-HC-KAR-CX(taxindiaonline.com).

8. Whereas, Mr. Neeralgi, Learned Counsel appearing for the respondent, while supporting the order passed by the First Appellate Authority as well as the Tribunal submitted that if the appeal was preferred beyond the outer limit provided under Section 35, the appeal is rightly dismissed by the Lower Appellate Authority. It was submitted that the order was forwarded by Speed Post and therefore, the ground of no knowledge on the part of the petitioner may not be accepted by this Court. He submitted that the decision of the Delhi High Court though is not considered by the original authority, but may not be applicable to the facts of the present case. However, we may record that when it was put to the Learned Counsel for the respondent as to whether any appeal is preferred against the decision of Delhi High Court or whether the view taken by the Delhi High Court is reversed by any higher forum or not, he submitted that nothing is brought to the notice by the Department whether the view of the Delhi High Court is reversed or not. He submitted that this is not an exceptional case, where this Court may exercise the power under Article 226 of the Constitution for interfering with the order of the Original Appellate Authority.

9. It may be recorded that, against the order passed by the CESTAT initially CA 49/15 was preferred, but the said appeal was withdrawn with a view to prefer writ petition under Articles 226 and 227 of the Constitution, in view of the decision of Full Bench of High Court of Gujarat in the case of Panoli Intermediate (India) (P) Ltd. v. Union of India, (2015) 51 GST 750/59. Hence, the present petition.

10. We may record that, this Court in the above decision in the case of Phoenix Plasts Company (Supra) had observed thus :

7. As such, in our view, the matter may arise for consideration by segregating it into two parts: one is the exercise of power by the statutory authority hearing appeal within the scope and ambit of the statute and the other is the exercise of power by this Court under Article 226 of the Constitution.

8. At this stage, we may refer to the decision of Full Bench of High Court of Gujarat (wherein, one of us Jayant Patel J., was a member) in the case of Panoli Intermediate (India) (P) Ltd. v. Union of India [(2015) 51 Gst 750/59 Taxmann.Com 248 (Gujarat) (LB)/. In the said decision, in view of the

disagreement expressed by a later Division Bench of the High Court of Gujarat, the matter was referred to the Larger Bench for considering the questions which are reproduced in the beginning of the judgment. For ready reference, the same are reproduced as under :-

"(1) Whether the period of limitation provided of 60 days, for filing an appeal under Section 35 of the Central Excise Act, 1944, could be extended only up to 30 days as provided by the proviso or the delay beyond the period of 90 days could also be condoned in filing an appeal?

(2) Where a statutory remedy or appeal is provided under Section 35 of the Central Excise Act, 1944 and the delay cannot be condoned under Section 35 beyond the period of 90 days, then whether Writ Petition under Article 226 of the Constitution of India would lie for the purpose of condoning the delay in filing the appeal?

(3) When if the statutory remedy or appeal under Section 35 is barred by the law of limitation whether in a Writ Petition under Article 226 of the Constitution of India, the order passed by the original adjudicating authority could be challenged on merits?"

2. As such, the background of the matters are that the petitioner of SC A No. 18542/14 had preferred appeal before the Customs, Central Excise & Service Tax Appellate Tribunal (Ahmedabad), against the order passed by the Commissioner of Central Excise (Appeals), which arose from the order passed by the adjudicating authority being Order in Original. In the said appeal there was delay of 118 days in preferring erring appeal and therefore, the Tribunal dismissed the appeal on the ground of delay since as per the Tribunal, there was no power to condone the delay beyond 30 days. Under the circumstances, the said petition. When the appeal came up for hearing before the Division Bench of this Court, the Division Bench noticed that since as per the provisions of section 35 of the Central Excise Act, 1934 (hereinafter referred to as the "Act") the delay cannot be condoned beyond the period of 90 days, i.e., 60 days being the prescribed period and further discretion to condone the delay in 30 days. But the learned counsel for the petitioner placed reliance upon the another decision of the Division Bench of this Court in the case of Amitara Industries Ltd. v. Union of India decided on 30.01.2013 passed in SC A No. 6069/11 and contended that as per the view taken in the said decision, the delay can be condoned beyond the period of 90 days provided there is a good case on merits and the learned counsel for the petitioner also relied upon other decisions of this Court including the decision in the case of Dr. Industries Ltd. v. Union of India 2008 taxmann.com 183. The Division bench hearing SCA No. 18542/14 found that the matter is required to be referred to the Larger Bench for decision. Hence, the aforesaid questions were formulated and the matter has been referred to the Larger Bench.

3. It may be recorded that when SCA No. 13530/14 came up before the another

Division Bench of this Court, it was brought to the notice of the said bench that the question involved in the petition for the period of limitation has been referred to the Larger Bench in SCA No. 18542/14. Under the circumstances, the said SCA No. 13530/14 has been listed before the larger bench simultaneously."

After considering various decisions, the questions have been answered by the Larger Bench of the High Court of Gujarat at Paragraph 31, which reads as under :-

"31. We may now proceed to answer the questions

(1) Question No. 1 is answered in negative by observing that the limitation provided under section 35 of the Act cannot be condoned in filing the appeal beyond the period of 30 days as provided by the proviso nor the appeal can be filed beyond the period of 90 days.

(2) The second question is answered in negative to the extent that the petition under Article 226 of the Constitution would not lie for the purpose of condonation of delay in filing the appeal.

(3) On the third question, the answer is in affirmative, but with the clarification that-

(A) The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that

(A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or

(A.2) Has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction, or

(A.3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.

(B) Resultantly, there is failure of justice or it has resulted into gross injustice.

We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the judge."

9. The aforesaid shows that insofar as exercise of power under Section 35 of the Act is concerned, the delay cannot be condoned beyond the outer limit of thirty days nor the appeal can be filed beyond the period of ninety days. Therefore, if one is to examine the exercise of power by the first appellate authority in the present case within the four corners of the statute, it can be said that statutory authority namely, the first appellate authority committed no wrong in returning the appeal as having been filed beyond the outer limit of ninety days.

10. However, on the second facet, though writ may not lie for condonation of delay in filing the appeal, since in exercise of the power under Article 226 of the Constitution, this Court would not compel the authority to exercise power otherwise than provided under the statute, but the power under Article 226 of the Constitution can be invoked for challenging the order passed by the original authority, under the aforesaid stipulated circumstances namely, as that of the order passed without jurisdiction or by assuming the jurisdiction which is not possessed or the exercise of power in excess of the jurisdiction or by crossing the limits of the jurisdiction or that there is flagrant disregard to the law or the rules of procedure or violation of principles of natural justice or there is failure of justice or the order has resulted into gross injustice. Therefore, while considering the second aspect, the writ power under Article 226 of the Constitution could be exercised subject to the aforesaid self imposed restriction in exercise of the power under Article 226 of the Constitution on a well guided principle.

11. We need to now further consider as to whether the present case would fall in any of the categories, which may call for exercise of power under Article 226 of the Constitution or not. The impugned Order-in-Original lacks consideration on two basic aspects; one, is that as per the provision prevailing prior to 20/11/2012, the language was "goods as such", whereas, after amendment, the liability with regard to the amount of cenvat credit is considered and reduced to 2.5% for each closure of the year or a part thereof even if the goods are removed after being used. Further, the said aspect has been considered by the Division Bench of this Court in case of Commissioner of Central Excise, Bangalore-II v. Solectron Centum Electronics Ltd., 2014 (309) ELT 479 (kar.) We may record that the relevant observations made by this Court in the above referred decision are from Paragraph Nos. 9 to 14, which reads as under :-

"9. The next question is whether the assessee was not liable to pay any duty when capital goods after it is being used was removed to the EOU unit.

10. Rule 3 sub-rule (4) of Cenvat Credit Rules, 2002 reads as under:

"(4) When inputs or capital goods, on which: CENVAT credit has been taken, are removed as such from the factory, the manufacturer of the final products shall pay an amount equal to the credit availed in respect of such inputs or capital goods and such removal shall be made under the cover of an invoice referred to in Rule 7."

11. The liability to pay duty on capital goods arises after the capital goods have been removed as such. The word "as such" is being the subject mutter of interpretation by the various Courts. Punjab and Haryana High Court in the case of Commissioner of Central Excise, Ludhiana v. Khalsa Cotspin (P) Ltd., reported in 2011 (270) E.L.T.349 (P & H) has held as under :

"The asses see having validly availed cenvat credit, same is required to be reversed only if goods were cleared in the same position without payment of excise duty. In the present case, it has been held by the Tribunal that goods were not cleared in the same position but after having been used and in such situation Rule 3(5) of the Rules will not apply."

12. Bombay High Court in the case of Cummins India Ltd. v. Commissioner of Central Excise, Pune-III reported in 2007 (219) E.L.T.911 (Tri-Mumbai) confirmed the order of the Appellate Tribunal which has held as under:

"The plain and simple meaning of expression "as such" would be that capital goods are removed without putting them to use. Admittedly, in the present case capital goods have been used for a period of more than 7 to 8 years. As such, interpretation given by the authorities below would lead to absurd results if an assessee is required to reverse the credit originally availed by them at the time of receipt of the capital goods, when the said capital goods are subsequently removed as old, damaged and unserviceable capital goods. This would defeat the very purpose of grant of facility of Modvat credit in respect of capital goods and would not be in accordance with the legislative intent."

13. The Delhi High Court in the matter of Harsh International (Khaini) Pvt.Ltd., v. Commissioner of Central Excise reported in 2012 (281) E.L.T. 714 (Del), after referring to the various judgments held as under:

"In the present case the appellant purchased the capital goods in the period between 2003 and 2005 and used them in its factory till they were sold to M/s. Harsha International (Khaini) Pvt. Ltd., in June and July, 2007. Thus the capital goods were used for a period of 2 to 4 years. They cannot, therefore, be stated to be sold "as such" capital goods. They were sold as used capital goods."

14. Therefore, it is clear, till the law was amended as on 13.11.2007 in respect of used capital goods, there was no liability to pay duty. In fact, this is evident from the fact that in Cenvat Credit Rides, 2004, the proviso was added making the position clear which was not there in the earlier orders. The proviso reads thus:

"If the capital goods, on which CENVAT Credit has been taken, are removed after being used, the manufacturer or provider of output service shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by 2.5 per cent for each quarter of a year or part thereof from the date of taking the Cenvat Credit."

This proviso was added by a Notification No.39/2007 dated 13.11.2007. Therefore, prior to 13.11.2007, there was no duty payable in respect of capital goods which was used before it is removed. In that view of the matter, second question of law is answered in favour of the assessee and against the Revenue."

12. In our view, if the aforesaid two aspects, one, regarding the case law prevailing earlier and two, interpretation of the. word "as such" and thereafter, the amendment and the decision of this Court, in case of Solectron Centum Electronics Ltd., (supra), would go to show that there was a substantial question to be considered even by the first authority. We do not propose to make any final observations on the ultimate merit of the demand, since we find that it might

prejudice the case of either side. But in our considered view, if the aforesaid vital defence is not to be considered by the first appellate authority, the resultant effect would be gross miscarriage of justice. Under these circumstances, we find that it would be an appropriate case to exercise power under Article 226 of the Constitution to interfere with the order of the first appellate authority and to direct the first appellate authority to consider the matter in light of the observations made by this Court in the present order as well as after giving opportunity of hearing the appellant herein.

13. In our considered view, as observed by us herein above, the absence of consideration of the case of the appellant by the first appellate authority has resulted in a failure of justice or gross miscarriage of justice, as per the view taken by the Full Bench of High Court of Gujarat in case of Panoli Intermediate (India) (P) Ltd., (supra). Hence, the petition under Article 226 of the Constitution could be maintained and it was a fit case to exercise power under Article 226 of the Constitution to interfere with the order of the first appellate authority and the interference not being made, has resulted in failure of justice. But at the same time, even if it becomes a case for exercise of the power under Article 226 of the Constitution, the Court may ensure that no litigant or the assessee takes any undue benefit of the power under Article 226 of the Constitution. If the case is considered in favour of invoking the appellate power, the requisite condition would be to deposit 7.5% of the duty demanded. Further, it cannot be said that the appellant was vigilant about its right to pursue the matter in time and there is delay also in filing this appeal. If the appellant has not pursued the remedy well in time, though we may keep in mind the real merits of the matter, the appellant cannot get away from paying appropriate cost, by way of compensation, by the delay caused in pursuing the litigation up to this Court. Hence, we find that even if the order of the first appellate authority is to be interfered with, it should be on a condition that the appellant deposits 7.5% of the demand of duty, plus pay the cost of Rs. . 25,000/-to the respondent.

14. In view of the aforesaid observations and discussions, the following direction are issued:-

1) The impugned order of the first appellate authority dated 02/04/2012 and the learned Single Judge are set-aside on condition that the appellant deposits the amount of 7.5% of the duty demanded and further pays the cost of Rs. 25,000/- to the respondent, within a period of one month from the date of receipt of the certified copy of the order;

2) After the aforesaid condition is complied with, the matter shall stand restored on the file of the Additional Commissioner of Central Excise, Bangalore -I, with a further direction that he shall consider the matter in light of the observations made by this Court in the present judgment and after giving an opportunity of hearing to all concerned, including appellant herein.

3) An appropriate order shall be passed, preferably within a period of three

months, from the date of compliance of the condition of deposit of the amount and payment of costs."

11. In view of the above referred decision of this Court, if this Court finds that the authority has passed the order without jurisdiction or has exercised the power in excess of the jurisdiction or by overstepping or crossing the limit of jurisdiction or that there is failure of justice, or it has resulted in gross injustice, it would be a case falling under the exceptional category for exercising the power under Article 226 of the Constitution and to interfere with the order of the original authority or the Appellate Authority, as the case may be. In order to find out as to whether the case is fit for exercising of the power under Article 226 of the Constitution, we may record that as per the decision of the Delhi High Court, Rule 5, on the basis of which the original authority has passed the order for levying of tax is held to be ultra vires to Section 67 of the Act. Further, the matter may fall in the realm of correct interpretation of Section 67 as to whether the expenses reimbursed by the consumer to the service provider, can be included for the purpose of computation of the service tax or not. We do not propose to express any further, view on the said aspects in view of the order which we may pass hereinafter, but suffice it to observe that in view of the decision of the Delhi High Court, there was a strong case on merits on the part of the petitioner to be considered by the taxing authority. Unfortunately the decision of the Delhi High Court though was specifically brought to the notice of the original authority in the reply to the show cause notice, in the impugned order of the original authority, there is no reference whatsoever. Under these circumstances, we find that the case may fall in the exceptional category for exercise of the power under Article 226 of the Constitution.

12. On the aspect of invoking of the appellate power, we find that same view as was taken by this Court in the above referred decision in the case of Phoenix Plasts Company case deserves to be taken for both purposes, namely one for the requisite tax demanded and for cost of Rs. 25,000/- to the respondent, particularly because, so far as the litigation is concerned, respondent cannot be faulted with, may be on account of non-communication to the petitioner by its staff, but the delay has occurred beyond the outer limit provided by the statute.

13. In view of the aforesaid, we find that directions issued hereunder shall meet the ends of justice.

14. The impugned order of the First Appellate Authority as well as the order of the Tribunal are set-aside, on condition that the petitioner deposits the amount of 7.5% of the duty demanded and further pays cost of Rs. 25,000/- to the respondent, within a period of one month from the date of receipt of certified copy of the order.

15. After the aforesaid condition is complied with, the matter shall stand restored on the file of the Commissioner (Appeals) with a further direction that he shall consider the appeal on merits in the light of the observations made by this Court

in the above judgment and after giving opportunity of hearing to all concerned.

16. It is made clear that the appeal shall be decided within a period of three months from the date of compliance of the condition of deposit of the amount and cost to the respondent. It is also observed that tire contentions of both the sides shall remain open to be considered before the Appellate Authority.

17. The petition is allowed in the above terms. Rule made absolute.

