(2015) 07 AP CK 0007

In the Andhra Pradesh High Court

Case No : C.E.A. No. 49 of 2015

Phoenix Logistics Private Limited — APPELLANT

Vs

The Commissioner of Customs, Hyderabad — RESPONDENT

Date of Decision : 09-07-2015

Acts Referred:

Citation : (2015) 40 STR 459 : (2015) 86 VST 250

Hon'ble Judges : G. Chandraiah, J;Challa Kodanda Ram, J

Bench : Division Bench

Advocate : M.V.J.K. Kumar, for the Appellant; Jalakam Satyaram, Advocates for the Respondent

Judgement

Challa Kodanda Ram, J—The order dated 05.02.2015 passed by CESTAT, South Zonal Bench, Bangalore, in Appeal No. ST/26429/2013-DB is challenged before this Court, raising as many as five questions of law said to be arising from the order of the Tribunal.

2. We do not consider it necessary to refer to or consider any questions of law raised in the present appeal as the appeal itself can be disposed of considering the facts of the case.

3. Brief facts of the case are that the appellant is engaged in providing logistic services. By Order-in-Original dated, 30.09.2011, the appellant was assessed to tax for the services rendered in the ''Renting of immovable property'' for the period April 2010 to September 2010, and the amount demanded was Rs. 4,97,490/-. Against the said order, the appellant filed an appeal before the Commissioner of Customs, Central Excise and Service Tax (Appeals). As a pre-condition for entertaining the appeal, the Commissioner (Appeals), by order dated 17.02.2012, directed the appellant to deposit 50% of the disputed tax and granted time upto 19.03.2012. The appellant did not comply with the conditional order. On the ground of violation of condition of pre-deposit, the Commissioner (Appeals) dismissed the appeal by order dated 26.03.2012. Against the said

order, the appellant filed an appeal before CESTAT, South Zonal Bench, Bangalore, with a delay of 312 days. The Tribunal, adverting to the reasons stated in the affidavit for condonation of delay, was not satisfied with the reasons stated for the delay, and thereby refused to condone the delay and dismissed the delay condonation petition by order dated 05.02.2015 and, thus, the appeal itself came to be dismissed. Against the said order, the present appeal is filed.

4. Learned counsel for the appellant Mr. M.V.J.K. Kumar, submits that the Tribunal had failed to consider the crucial aspect of the matter that the appellant was not aware of the order dated 26.03.2012 passed by the Commissioner (Appeals), as a copy of the said order was not served on the appellant. Further, the Tribunal found fault with the appellant for not keeping track of the proceedings before the Commissioner (Appeals), stating that two officers of the appellant were present on the date of hearing and therefore the appellant is presumed to have knowledge of passing of the order dated 26.03.2012. Learned counsel further points out that there was no finding of the Tribunal that the order dated 26.03.2012 was, as a matter of fact, served at any point of time on the appellant. On the contrary, the material submitted by the appellant purports that the order was served on the employee of one of the sister companies of the appellant and, in the process, the order never came to the notice of the appellant and that this aspect of the matter has not been countered by the respondent.

5. On the other hand, Mr. Jalakam Satyaram, learned Standing Counsel for the Department, contends that the appellant, at every stage, is playing only delay tactics and the appellant was never diligent in prosecuting the appeal which is evident from the conduct of the appellant wherein the appellant did not choose to comply with the condition of pre-deposit and that too when the pre-deposit was reduced to only 50% of the disputed tax. Even after the order of the Commissioner (Appeals), the appellant did not choose to file appeal before CESTAT in time and the reasons stated in the delay condonation petition are not tenable and the Tribunal had rightly dismissed the delay condonation application and also the appeal and hence there is no illegality in the order of the Tribunal.

6. Having considered the rival contentions and in the facts and circumstances of the case, we are inclined to allow the appeal, however, on terms.

7. It is not in dispute that similar issues with respect to taxability of services rendered in the renting of immovable property are pending before the Supreme Court in the case of M/s. Retailers Association of India v. Union of India & Ors. Civil Appeal No. 8390 of 2011, and further the appellant''s own case for the earlier and subsequent years are pending before the Tribunal in Appeal No. ST/27707/2013-DB. In other words, the substantial issue is pending for consideration before the Tribunal. Coupled with this fact, the aspect that the order dated 26.03.2012 came to be served on the employee of a sister concern and the same came to the notice of the appellant belatedly, cannot be ignored. No motive as such can be attributed to the appellant for not filing appeal in time, especially in view of the fact that the appellant is diligently agitating the issue

involved as against the assessment for the previous years and also for subsequent years, which fact is not disputed before us.

8. In the facts and circumstances of the case, the Tribunal could have taken a lenient view and, by putting the appellant on terms, could have condoned the delay. Inasmuch as the Tribunal failed to exercise the discretion, considering the facts of the case, we are inclined to allow the appeal, however, on condition of the appellant depositing a sum of Rs. 3,50,000/- within a period of six weeks from the date of receipt of a copy of this order. The appeal shall stand restored to the Tribunal and the Tribunal shall consider the matter on merits along with Appeal No. ST/27707/2013-DB said to be pending on the file of CESTAT, South Zonal Bench, Bangalore.

9. The appeal is, accordingly, allowed. However, we are inclined to observe that the condition of deposit of amount in this case is considering the peculiar facts of the present case and the same shall not be treated as a precedent or as expressing any opinion with regard to course of action to be followed by the Tribunal in similar circumstances. No costs. Miscellaneous petitions, if any pending in this appeal, shall stand closed.