(2015) 01 MAD CK 0091

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 3642 of 2014 and M.P. No. 1 of 2014

R. Muthulakshmi and Co. APPELLANT

Vs

The Commissioner of Central Excise RESPONDENT

Date of Decision : 09-01-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 73(1), 73(2), 75, 77(2), 78

Citation : (2015) 50 GST 328

Hon'ble Judges : R. Karuppiah, J.;R. Sudhakar, J.

Bench : Division Bench

Advocate : S. Durairaj, for the Appellant; V. Sundareswaran, SC, Advocates for the Respondent

Judgement

R. Sudhakar, J.

1. This Civil Miscellaneous Appeal has been filed by the assessee as against the Miscellaneous Order No. 41806 of 2014 dated 28.10.2014 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, raising the following substantial questions of law:

"1. Whether pre-deposit can be ordered under Section 35G of the Central Excise Act, 1944 by relying on an order which is factually different and irrelevant to the case at hand?

2. Whether pre-deposit can be ordered when the service tax liability is not on the appellants as per Rule 2(1)(d)(v) of the Service Tax Rules, 1994 read with Notification No. 35/2004 dated 03.12.2004 ?"

2. The brief facts are as follows:

The appellant/assessee, who is a service provider, is engaged in the business of maintenance of fly ash collecting machines and equipments on behalf of M/s.Madras Cements Ltd., Ariyalur installed at the premises of M/s.Mettur Thermal

Power Station of TNEB Power Plant at Mettur Dam. The said service of the assessee is taxable under the category of "Management, Maintenance or Repair Service". On verification of the accounts and records of the assessee by the officers attached to Internal Audit, Salem Commissionerate on 18.11.2010 and 19.11.2010, it was found that there was short payment of service tax and they had not shown the entire amount of service charges received in the half yearly ST3 returns and challans in which service tax was paid. Further it was noticed by the Departmental audit officers that huge amounts were paid for hire charges/ transport charges which was nothing but transportation charges of fly ash from Metturdam to Alathiyur. Since the appellant was not able to provide any evidence or consignment notes showing that service tax has been paid on the transport/ hire charges, show cause notice was issued demanding a sum of Rs.8,53,874/-.

3. In response to the show cause notice issue, the appellant filed a reply stating that they were discharging the service tax promptly and for the transportation charges collected from others, they need not pay any service tax as the persons who incur the freight charges has to pay the service tax as per Rule 2(1)(d) of the Service Tax Rules, 1994. Not satisfied with reply filed by the assessee, in response to the show cause notice, the Adjudicating Authority passed the following order confirming the demand.

"i) The extended period under proviso to Section 73(1) of the Finance Act, 1994 is invokable against M/s.R.Muthulakshmi and Co., Mettur to demand service tax;

ii) I confirm the demand of Rs.36,47,023/- (Rupees Thirty Six Lakhs Forty Seven Thousand Twenty Three only) [Service Tax Rs.35,40,799/-, Education Cess Rs.70,816/- and SHE Cess Rs.35,408/-] being the service tax not paid/short paid by them under the ''Management, Maintenance or Repair Service'' from M/ s.R.Muthulakshmi and Co., Mettur under Section 73(2) of Chapter V of the Finance Act, 1994 for the period from 2006-07 to 2010-11;.

iii) I confirm the demand of Rs.8,53,874/- (Rupees Eight lakhs Fifty Three Thousand Eight Hundred and Seventy Four only) [Service Tax Rs.8,29,004/- + Edu.Cess Rs.16,580/- + SHE Cess Rs.8,290/-] being the service tax not paid by them in respect of ''Goods Transport Agency service'' from M/s.Muthulakshmi and Co., Mettur for the period 2007-08 to 2010-11 under Section 73(2) of Chapter V of the Finance Act, 1994;

iv) I demand appropriate interest as applicable on the amount of Service tax demanded at sl.No. (ii) and (iii) above, under Section 75 ibid from M/ s.R.Muthulakshmi and Co., Mettur;

v) I impose a penalty of Rs.45,00,897/- on M/s.R.Muthulakshmi and Co., Mettur under Section 78 of Chapter V of the Finance Act, 1994;

vi) I impose a penalty of Rs.5000/- on M/s.R.Muthulakshmi and Co., Mettur under Section 77(2) of Chapter V of Finance Act 1994 for the contraventions ibid;"

4. Aggrieved by this order of adjudication, the assessee preferred an appeal before the Commissioner of Central Excise (Appeals), who, after considering the entire gamut of the case, came to hold that for the period 01.10.2005 to 30.6.2009, demand cannot be raised, since for the same period demand has already been raised. However, for the period 2008-09, 2009-10 and 2010-11, the Commissioner of Central Excise (Appeals) confirmed the order passed by the Adjudicating Authority holding that the appellant had failed to adduce documentary evidence to substantiate their claim.

5. As against the order of the Commissioner, the appellant preferred further appeal before the Tribunal along with the application for waiver of pre-deposit.

6. The Tribunal, after following the decision in the case of RAMCO Cements Ltd. vide Stay Order No. 41613 of 2014 dated 9.9.2014, who is the recipient of service, ordered pre-deposit of Rs.10,00,000/-.

7. Aggrieved by the said order of pre-deposit, the assessee is before this Court.

8. Learned counsel appearing for the appellant submitted that as per Rule 2(1)(d)(v) of the Service Tax Rules, 1994 read with Notification No. 35/2004-ST dated 3.12.2004, service tax with respect to Goods Transport Agency Service has to be paid by the person liable to pay freight. He further submitted that invoices had been raised on the recipient of service quoting the relevant provisions of law. He also submitted that some records have been produced before the Tribunal and the Tribunal has not looked into the same. Hence, the order of the Tribunal has to be set aside.

9. Heard learned counsel appearing for the appellant and the learned standing counsel appearing for the respondent and perused the materials placed before this Court.

10. Learned counsel appearing for the appellant submits that some records have been produced before the Tribunal. In that view of the matter, it is a clear case of material evidence, which has to be appreciated by the Tribunal insofar as invocation of Rule 2(1)(d) of the Service Tax Rules, 1994 by the Original Authority, which was confirmed by the Commissioner of Central Excise (Appeals). The Adjudicating Authority was of the view that either the consignor or consignee, who incurred the freight, has to pay the service tax and as the appellant was not able to furnish documentary evidence, such as consignment notes, to prove that the freight and service tax was paid by the consignee, the demand was confirmed. The Commissioner of Central Excise (Appeals), to uphold the view of the Adjudicating Authority, was of the view that profit and loss account and other documents produced by the appellant show that there has been non payment of service tax. The Tribunal, after following the decision in the case of RAMCO Cements Ltd., who is the recipient of service, held that the appellant had paid only freight and hence liable to pay tax under this category and directed pre-deposit of Rs.10.00 lakhs.

11. On the facts stated above, we find that the issue raised by the appellant, as to whether the payment of service tax has to be made by the service recipient or by the appellant, has to be considered by the Tribunal in the Appeal. At this point of time, the disputed fact does not merit consideration or does not justify any modification of the order passed by the Tribunal.

12. Accordingly, finding no merits, this Civil Miscellaneous Appeal stands dismissed. No costs. Consequently, M.P.No. 1 of 2014 is also dismissed.

