(2013) 08 BOM CK 0035

In the Bombay High Court

Case No : Central Excise Appeal (ST.) No. 164 of 2013

Saswad Mali Sugar Factory Ltd. APPELLANT

Vs

Commissioner of C. Ex. RESPONDENT

Date of Decision : 14-08-2013

Acts Referred:

Citation : (2014) 33 STR 481

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sanklecha, J

Bench : Division Bench

Judgement

M.S. Sanklecha, J.—This Appeal u/s 35G of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994 (in short "the Act"), was originally filed against order dated 14 May, 2013 of the Customs, Excise and Service Tax Appellate Tribunal (in short "the Tribunal"), directing the Appellant to deposit the entire amount of Service Tax of Rs. 10,04,928/- for the purpose of hearing the appellant''s appeal on merits. During the pendency of the present appeal, the Tribunal on 3 July, 2013, dismissed the appellant''s appeal on account of non-deposit of Service Tax of Rs. 10,04,928/- as directed by its order dated 14 May, 2013. The appeal was dismissed on 3 July, 2013 for non-deposit, even though a short adjournment was sought from the Tribunal on the ground that the appeal from the order dated 14 May, 2013 had come up for hearing before this Court on 2 July, 2013 and it had been posted for hearing on 3 July, 2013. In these circumstances, when on 4 July, 2013 the appellant pointed out the aforesaid facts, liberty was granted to the appellant to amend its appeal memo and also challenge the order of the Tribunal dated 3 July, 2013 dismissing the appellant''s appeal.

2. In the above circumstances, the appellant now challenges the final order dated 3 July, 2013 of the Tribunal as well as the order dated 14 May, 2013, directing the appellant''s to pre-deposit the entire amount of Service Tax of Rs. 10,04,928/-.

3. As the issue arising in this appeal is with regard to pre-deposit of Service Tax

before the Tribunal decides the issue on merits, Counsel for both sides request that the appeal itself be disposed of at the stage of admission. Accepting the request of the Counsel, the appeal is being taken up for final disposal.

4. In the above facts, we first set aside the order dated 3 July, 2013 of the Tribunal. We shall now consider the sustainability of the order dated 14 May, 2013 of the Tribunal directing pre-deposit of the entire duty demanded for the purposes of hearing the appeal.

5. The appellant is Sugar Factory which received during period 1 April, 2005 to 31 October, 2006 service of a Goods Transport Agency (GTA). In this GTA service, the liability to pay Service Tax is cast on the recipient of the services and accordingly, the appellant was liable to pay the Service Tax liability. On 14 October, 2010, show cause notice was issued by the revenue, demanding Service Tax of Rs. 10,04,928/- u/s 73 of the Act and also proposed equivalent penalty u/s 78 of the said Act for the services of GTA received by it during period 1 April, 2005 to 31 October, 2006. Additional Commissioner, Central Excise by order dated 30 March, 2012, confirmed the demand of Service Tax invoking the extended period of limitation and also imposed equivalent penalty of Rs. 10,04,928/- u/s 78 of the said Act. The demand for extended the period for the limitation as well as the penalty was confirmed on the ground that the appellant had suppressed the receipt of the GTA services by it.

6. In appeal, the Commissioner (Appeals) by order dated 17 October, 2012 upheld the Service Tax confirmed by the Additional Commissioner of Central Excise on the ground that there was suppression of facts by the appellant. However, the penalty u/s 78 of the said Act was deleted by holding as under:-

Coming to imposition of penalty on the Appellant, I find that there is no doubt that right since initial imposition of Service Tax on Goods Transport Operators in 1997, there have been cases in various High Courts and the matter was finally settled by Hon''ble Supreme Court and the initial levy of Service Tax was eventually not enforced. The period covered by the present Show Cause Notice/Order-in-Original is immediately after imposition of Service Tax afresh on GTA. Thus there was genuine room for confusion regarding the correct legal position in respect of liability to pay Service Tax, especially because reverse charge mechanism was introduced for first time (on GTA) under the Service Tax Law. Further, in the case of Appellant, the fact of individual truck owner''s providing transportation services further leaves ample scope for doubt about the Service Tax liability on GTA, as ''Commercial concern'' was mentioned in the definition during the period of demand covered by the Show Cause Notice/Order-in-Original. Thus, I am of the view that as per the facts of this case, as narrated above, the Appellant has proved that there was reasonable cause for the failure on their part to pay the required Service Tax as GTA during the period prior to 1-5-2006, as covered in the Show Cause Notice/Order-in-Original. My conclusion is also supported by the fact that the Appellant have been paying Service Tax as GTA since 1-5-2006. Thus, their case is squarely covered under the provisions of

Section 80 of the Act and no penalty needs to be imposed on the Appellant in this case.

7. The Appellant preferred an appeal before the Tribunal against the order dated 17 October, 2012 of the Commissioner (Appeals) and also filed stay application for waiver of pre-deposit of Service Tax and interest. We are informed that no appeal has been preferred by the revenue from the order dated 17 October, 2012 of the Commissioner (Appeals) deleting the penalty imposed u/s 78 of the Act.

8. We find that the condition for invocation extended the period of limitation as provided u/s 73 of the Act and the condition precedent for imposing penalty u/s 78 of the Act are identical viz. there should be either the fraud, collusion or wilful mis-statement or suppression of facts or contravention with intent to evade payment of Service Tax. Once the Commissioner (Appeals) has come to a finding that for the relevant period, there was genuine cause for confusion regarding the correct legal position and also scope for doubt about the Service Tax liability on GTA as the ''Commercial concern'' for non-imposition of penalty then the same cause is also to be factored in to conclude that extended period of limitation cannot be invoked. Even if the finding that there was sufficient cause for non-payment of Service Tax was rendered in the context of Section 80 of the Act (as it stood at the relevant time). This finding will also apply to determine whether there was any intent to evade payment of Service Tax. Moreover, the revenue has accepted the deletion of penalty as we are informed that the revenue has not preferred any appeal from the order dated 17 October, 2012 of the Commissioner (Appeals) deleting the penalty. Moreover, Mr. Joshi, learned Counsel for the appellant point out that the services were provided by individual Truck owners who are not covered by the definition of GTA as existing during the relevant period as they are not commercial concern. This according to Mr. Joshi has been the consistent view of the Tribunal as held in the matter of 2010 (19) S.T.R. 437 , (2010) 21 STJ 242 and (2009) 19 STJ 405 . The revenue has not been able to dispute the above position.

9. In the above circumstances, we are of a prima facie view that the appellant''s appeal against order dated 17 October, 2010 be heard on merits without requiring any pre-deposit of Service Tax.

10. Accordingly, the order dated 3 July, 2013 and the order dated 14 May, 2013 of the Tribunal directing pre-deposit of Rs. 10,04,928/- are set aside. Further, the Tribunal is directed to hear the appellant''s appeal from order dated 17 October, 2012 of Commissioner (Appeals) on merits without insisting any pre-deposit. Appeal is disposed of in the above terms. No order as to costs.

