(2013) 08 BOM CK 0197

In the Bombay High Court

Case No : Central Excise Appeal No. 9 of 2013

Space Age Associates	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 14-08-2013

Acts Referred:

Citation : (2014) 46 GST 208 : (2014) 33 STR 372

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

Bench : Division Bench

Judgement

1. By this Appeal u/s 35G of the Central Excise Act, 1944 r/w Section 83 of the Finance Act, 1994, the appellant assails the order dated 12 September, 2012 (2014 (33) S.T.R. 398 (Tri. - Mumbai)) of the Customs, Excise & Service Tax Appellate Tribunal (in short "Tribunal"). The Tribunal by the impugned order directed the appellant to pre-deposit an amount of Rs. 1 Crore out of total demand of Service Tax of Rs. 6.35 Crores and equivalent penalty of Rs. 6.35 Crores aggregating to Rs. 12.70 Crores for the purpose of entertaining appellant''s appeal on merits. The appellant provides taxable service of erection, commissioning and installation of power stations to various Electricity Boards. The appellant is registered with Service Tax Department and was paying Service Tax in respect of the services rendered by them to its customers in respect of services rendered in execution of the supply erection and commissioning of power station. The contract entered into by the appellant with its customers is a composite contract including supply of goods and rendering of services.

2. On 18 October, 2010, a show cause notice was issued to the appellant, calling upon it to show cause to the Commissioner of Central Excise as to why Service Tax amounting to Rs. 635 Crores on account of short payment of Service Tax for the period 2005-06 to 2009-10 should not be recovered. The extended period was invoked alleging that there was suppression of facts on the part of the appellant with intent to evade payment of Service Tax. The appellant responded to the notice pointing out that the extended period is not invocable as all facts

were within the knowledge of the respondents/revenue. Besides, the demand has been erroneously computed taking into account the balance sheet figures for sales which includes sales made by the appellant in respect of activity of trading in goods. On merits, it was inter alia contended that in view of the benefit of Notification No. 12/2003-S.T. dated 20 June, 2003 being available to them resulting in the value of goods sold for the execution of the contract being excluded, no differential duty as demanded/is payable.

3. However, the Commissioner of Service Tax by his order dated 30 March, 2012, did not accept the appellant''s contention. The evidence led by the appellant in support of its contentions that goods had been supplied in the execution of contract for erection and commissioning of power stations for purposes of claiming Notification No. 12/2003-S.T., dated 20 June, 2003 was not accepted. This was on the ground that the evidence of supply of goods was not to his satisfaction. Consequently, the demand of Rs. 6.35 Crores was confirmed along with equivalent penalty u/s 78 of the Finance Act, 1994.

4. Being aggrieved, the appellant preferred an appeal before the Tribunal. Along with its appeal, the appellant also filed an application for dispensing with pre-deposit of Service Tax, interest and penalty for hearing the appeal from the order dated 30 March, 2012, on merits. The Tribunal by the impugned order dated 12 September, 2012 held that there was no justification for invoking the extended period of limitation as the respondent/revenue was aware of all the facts. Thus there appeared to be a complete justification to dispense with the demand attributable to the period 2005-06 to 2008-09. So far the normal period was concerned, the demand attributable to it was Rs. 2.54 Crores. The Tribunal held that the appellant''s claim to the benefit of Notification No. 12/2003-S.T. dated 20 June, 2003 is not available, as the appellant''s have not produced any documentary proof regarding sale of the goods and materials. The impugned order held that "In the present case, even before us, the appellant has not produced evidence by way of invoices under which the goods were sold to the service recipient." Therefore, the appellant was directed to deposit a sum of Rs. 1 Crore for hearing the appeal on merits.

5. Aggrieved by the order of the Tribunal, the appellant contends that the Tribunal completely mis-read the Notification No. 12/2003-S.T. dated 20 June, 2003 by proceeding on the basis that the documentary proof of supply of materials is to be only in the form of invoices. Moreover, the appellant had before the Commissioner as well as before the Tribunal produced the returns filed under the Sales Tax Act which indicated the value of goods supplied in execution of the contracts for supply, erection and commissioning of power station. Besides, the agreement entered into by appellant with its customers which indicated the quantum of goods to be supplied in the execution of the contract along with the running bills submitted to its customers were all produced on sample basis. This was for the reason that contracts were voluminous and it was difficult to produce all the contracts. Moreover, before us, the learned Counsel for the appellant has

also produced certificate of Chartered Accountant dated 8 August, 2013, indicating that the Service Tax had been paid on labour charges incurred in various tenders/contracts at the rate of 10.30%. Thus according to the appellant, no further amount is payable and the appeal be entertained on merits by the Tribunal, without insisting on any pre-deposit.

6. As against the above, Mr. Jetly, learned Counsel appearing for the revenue contends that the appellant had not produced any documentary evidence, indicating the value of goods supplied in the execution of contracts for erection and installation of power station. In that view of the matter, as no evidence was produced by the appellant, they are not entitled to the benefit of Notification No. 12/2003-S.T. dated 20 June, 2003. Moreover, it is submitted that the Chartered Accountant''s Certificate cannot be a substitute to prove the value of goods supplied for the purpose of appellant satisfying the condition of Notification No. 12/2003-S.T. dated 20 June, 2003. Mr. Jetly, therefore, submits that no interference is called for as out of total demand including duty and penalty aggregating to Rs. 12.70 Crores, the appellant has been directed only to deposit Rs. 1 Crore for the purpose of entertaining its appeal on merits.

7. We have considered the submission. We note that Notification No. 12/2003-S.T. dated 20 June, 2003 is a conditional Notification which extends benefit only upon the assessees producing documentary proof, indicating the value of the goods and material supplied to the extent the same are supplied in rendering services. The Tribunal in the impugned order has denied the benefit of Notification No. 12/2003-S.T. dated 20 June, 2003 on the ground that no evidence of sale of goods and materials in the form of invoices under which the goods were sold, were produced either before the Commissioner or before the Tribunal. The condition in the Notification is only production of documentary proof indicating the value of the goods and materials supplied. This does not in any manner mean that the goods have to necessarily be supplied by way of or under invoices. Therefore, evidence was produced before the authority and the sufficiency of it has to be examined. If the appellant is able to show from the documents i.e. contract read with other documents including its R.A. Bills (Running Account Bills) and returns filed with the Sales Tax Authorities, the value of goods sold and supplied to the satisfaction of the authorities, it would be complying with the condition provided in Notification No. 12/2003-S.T. dated 20 June, 2003. We are normally loath to interfere with the discretion exercised by the Tribunal in passing orders, directing pre-deposit for the purposes of entertaining the appeal on merits. However, in this case, the Tribunal has committed a fundamental error in insisting only upon production of Invoices, as evidence of goods being sold and ignoring the contract, R.A. Bills, etc. to arrive at the value of goods sold. Therefore, grave prejudice has been caused to the appellant and we are required to interfere with the impugned order.

8. In the peculiar facts of this case, it would be appropriate to set aside, and we hereby set aside the impugned order dated 12 September, 2012 of the Tribunal

and remand the matter to the Tribunal to consider the stay application afresh and pass order after permitting the appellant to lead documentary evidence to establish its claim with regard to the value of goods and materials supplied in execution of its contracts for supply, erection and commissioning of power stations for availing of the benefit of Notification No. 12/2003-S.T. dated 20 June, 2003.

9. However, we make it clear that it would be open to the Tribunal to remand the proceeding to the Commissioner of Central Excise for a fresh adjudication, if it is prima facie satisfied with the submission of the appellant on the basis of the documents produced that goods and materials have been sold and supplied in execution of the contracts entitling the appellant to the benefit of Notification No. 12/2003-S.T. dated 20 June, 2003. The observation made by us in this order are only of a prima facie nature and the Tribunal would independently consider the documentary evidence produced by the appellant to satisfy itself about the appellant''s entitlement to Notification No. 12/2003-S.T. dated 20 June, 2003 while passing orders. Appeal is disposed of in the above terms.

