(2011) 11 CHH CK 0034

In the Chhattisgarh High Court

Case No : Tax Case No. 41 of 2007

Union of India APPELLANT

Vs

Bharat Aluminium Co. Ltd. RESPONDENT

Date of Decision : 21-11-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 11A, 65, 65(6), 66, 67
Finance Act, 2000 — Section 116, 117
Service Tax Act, 1994 — Section 66, 71A, 77
Service Tax Rules, 1994 — Rule 2(1), 7

Citation : (2012) 26 ELT 101 : (2012) 26 STR 101

Hon'ble Judges : Satish K. Agnihotri, J;R.S. Sharma, J

Bench : Full Bench

Final Decision : Dismissed

Judgement

Satish K. Agnihotri, j

1. The instant appeal u/s 35-G of the Central Excise Act, 1944 is directed against the order dated 3-4-2007 (Annexure A/1) passed by the Customs, Excise & Service Tax Appellate Tribunal, Principal Bench, New Delhi, (for short "the Tribunal") in appeal No. ST/25/2006, ST/75/2006 [2007 (8) S.T.R. 27 (Tribunal)]. The appeal of the revenue was admitted for hearing by this Court on 10-9-2010 on the following substantial questions of law :

1. Whether the respondent is liable to pay the Service tax under the provisions of Chapter V of the Finance Act, 1994 in respect of service received form their consignment agents during the period 16-7-1997 to 31-8-1999?

2. Whether the Appellant Tribunal was justified in holding that the show cause notice issued to the respondent was time barred without considering the reasons assigned by the Appellate Commissioner who held that the show cause notice issued to the appellant so far as it relates to the period from 16-10-1998 to 31-8-1999 was not time barred u/s 73 of the Finance Act, 1994? and

3. Whether the orders passed by both the forums i.e., the Appellate Commissioner and the Appellate Tribunal are based on incorrect interpretation of Section 73 of the Finance Act, 1994?

2. The facts, in brief, as projected by the revenue are that the respondent company was engaged in the manufacture of excisable goods falling under Chapter 76 of the First Schedule to the Central Excise Tariff Act, 1985. According to learned counsel for the revenue, the service provided by the "clearing and forwarding agent" was exigible to Service Tax with effect from 16-7-1997. The service receiver was made responsible for collecting the Service tax by amendment in the Service Tax Rules, 1994. The respondent is further required to obtain the Service tax registration, file returns and discharge tax liability under the provisions of Chapter V of the Finance Act, 1994, in respect of services received from their consignment agents. A show cause notice under C.No. V(S. Tax) 4-41/Adj/Bil/2002/3769, dated 2-7-2002 (Annexure A/2), was therefore, issued to the respondent-assessee for recovery of Service tax amounting to Rs. 1,97,35,583/- on clearing and forwarding agent. The Assistant Commissioner, Central Excise, Division Bilaspur, vide order in original No. 17/STAX/ADJ/05 dated 13-4-2005, (Annexure A/3) confirmed the demand of the aforesaid duty and ordered for imposition of penalties and interest.

3. Being aggrieved by the order dated 13-4-2005, the respondent-assessee preferred an appeal before the Commissioner, (Appeals) Central Excise, Raipur. The Commissioner (Appeals), vide order dated 20-10-2005 (Annexure A/4) in Appeal No. 121/RPR-1/2005, dropped the demand of Service Tax for the period upto 15-9-1998 holding that the provider of the service has to pay the tax, but confirmed the demand of Rs. 1,35,47,981/- payable after 16-9-1998 for the period after 15-9-1998.

4. The revenue, being aggrieved, preferred an appeal against the dropping of demand of Service tax for the period upto 15-9-1998 before the Tribunal. The assessee also filed an appeal against the same order of the confirmation of demand for the period after 16-9-1998, in Appeal No. ST/25/06. The Tribunal heard both the appeals together and held that the relevant show cause notice was time barred as it is well settled that extended period for raising demand is not available to the department where there are conflicting views of Tribunal on any issue. Thus, this appeal.

5. Shri Maneesh Sharma, learned counsel appearing for the revenue would submit that the Tribunal ought to have decided the case on merits. He would further contend that there was no question of bona fide belief on the part of the assessee that it was not the liability of the assessee to pay the tax, and as such, this cannot be a ground for grant of relief in favour of the assessee. The respondent-assessee, despite several request made by the department, withheld the details of the activities carried out at their end and also failed to show any positive act. The levy of Service tax on the service receiver of services rendered by clearing and forwarding agent for the period 16-7-1997 to 16-7-1998 was

revalidated by Section 116 and 117 of the Finance Act, 2000 by making amendment in Section 65, 66 and 67 of the Act. Under the definition of ''assessee'' under Sections 65(6) of the Act, 2000 which was amended by Section 116 of the Finance Act, 2000, it was defined as "his agent; or in relation to service provided by a clearing agent, every person who engages a clearing and forwarding agent by whom remuneration or commission (by whatever name called) is paid for such services to the said agent". Thus, it was the responsibility of the assessee to pay Service tax.

6. In support of his contention, Shri Sharma would rely on a decision of Gujarat Ambuja Cements Ltd. & Others v. UOI - 2005 (182) E.L.T. 33 (S.C.). Under amended provision of the Act, which came into force w.e.f. 16-10-1998, the responsibility of payment of Service tax was shifted on the service receiver in respect of services rendered by the clearing and forwarding agents, by making specific provision under Rule 2(1)(d)(iii) of the Rules w.e.f. 16-10-1998.

7. Shri M.P. Devnath with Shri Aditya Bhattacharya, learned counsel appearing for the assessee would submit in support of the impugned order passed by the Tribunal. Shri Devnath would rely on Bharat Aluminium Co. Ltd. v. Comm. of Central Excise, Raipur - 2007 (8) S.T.R. 27 (Tri. - Del.), Larsen & Tubro Ltd. v. Comm. of Central Excise, Chennai - 2006 (3) S.T.R. 321 (Tri. - LB), Continental Foundation Jt. Venture v. Comm. of Central Excise, Chandigarh-I - 2007 (216) E.L.T. 177 (S.C.), Jaiprakash Industries Ltd. v. Comm. of Central Excise, Chandigarh - 2002 (146) E.L.T. 481 (S.C.).

8. The relevant period for which, according to the revenue, tax was payable, was 16-7-1997 to 31-8-1999. A show cause notice was issued on 2-7-2002 (Annexure A-2) under provisions of Section 66 read with Section 68 of the Finance Act, 1994, which was revalidated vide Section 116 and 117 of the Finance Act, 2000, calling upon the assessee to explain as to why Service tax to the tune of Rs. 1,97,358/- @ 5% to the taxable value on Rs. 39,47,11,657/- on account of the service provided by the clearing and forwarding agents and consignment agents was not paid with intent to evade Service tax. Response to the said notice was filed. After hearing the assessee, the Assistant Excise Commissioner, Bilaspur, by order dated 13-4-2008 (Annexure A-4) ordered as under :

(i) to pay the Service tax amount of Rs. 1,97,15,538/- (Rupees One Crore Ninety Seven Lakh Fifteen Thousand Five Hundred and Eighty Three only).

(ii) to pay penalty of Rs. 1,97,15,583/- (Rupees One Crore Ninety Seven Lakh Fifteen Thousand Five Hundred and Eighty Three only) u/s 76 read with section 78 of the Act.

(iii) to pay penalty of Rs. 1000/- (Rupees One Thousand only) u/s 77 of the Service Tax Act, 1994.

(iv) to pay interest u/s 75 of the Finance Act, 1994 as amended at the rate as effective during the relevant period, which shall be calculated from the due date of payment as per the provisions and procedure envisaged u/s 66, section 71A read with rule 7 of the Service Tax Rules, 1994.

(v) to pay penalty of Rs. 500/- (Rupees Five Hundred only) under erstwhile section 75A of the Act.

9. In appeal, the Commissioner (Appeals) held that the assessee was liable to pay Service tax on the "clearing and forwarding" service received from their consignment agents during the period 16-10-1998 to 31-8-1999 and as such, demand of Service tax for the said period was upheld. However, demand for the rest of the period was set aside. The amount of penalty imposed u/s 78 of the Act was also reduced to an amount equivalent of Service tax determined by the adjudicating authority for the period 16-10-1998 to 31-8-1999. Further, the penalty amounting to Rs. 500/- imposed u/s 75A was upheld and the penalty amounting to Rs. 1,000/- imposed u/s 77 was set aside.

10. The Tribunal held that when different views are prevalent about the applicability of tax, extended period is not available to the revenue for the purposes of raising demands. The Tribunal itself had rendered conflicting decisions and the issue was subsequently decided by a larger Bench. It was held that the procedural failure on the part of the assessee was the result of bona fide belief that it was not liable to pay the tax under the extended period. Thus, the appeal of the assessee was allowed. Since the demand notice was quashed on the ground of limitation, the appeal of the revenue was also accordingly rejected.

11. We proceed to decide the questions of law No. 2 and 3 as to whether the demand notice so far as it relates to 16-7-1997 to 31-8-1999 is concerned, was barred u/s 73 of the Finance Act and also whether the Tribunal as well as the Commissioner (Appeals) has rightly interpreted Section 73 of the Finance Act, 1994. Indisputably, there were conflicting decisions passed by the Tribunal, wherein, in some cases, it was held that the assessee was not liable to pay Service tax, being recipient of consignments by clearing and forwarding agents.

12. Section 73 of the Finance Act, read as under :

73. Value of taxable services escaping assessment.

If-

(a) the Central Excise Officer has reason to believe that by reason of omission or failure on the part of the assessee to make a return u/s 70 for any prescribed period or to disclose wholly and truly all material facts necessary for his assessment for any prescribed period, the value of taxable service for that prescribed period has escaped assessment or has been under assessed, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Central Excise Officer has, in consequence of information in his possession, reason to believe that the value of any taxable service assessable in any prescribed period has escaped assessment or has been under assessed, or he may, in cases falling under clause (a), at any time within five years, and in cases falling under clause (b), at any time within six months from the date for filing the return, serve on the assessee a notice and proceed to assess or reassess the value of taxable service.

13. Since, there have been a conflicting decisions, the issue was referred to the larger Bench, and the Tribunal in Larsen & Toubro Ltd. (supra), the Tribunal conclusively decided holding as under:

11. We, therefore, hold that mere procuring or booking orders for the principal by an agent on payment of commission basis would not amount to providing services as "clearing and forwarding agent", within the meaning of the definition of that expression u/s 65(25) of the Finance Act, 1994, as has been held in the decision of the Tribunal in Prabhat Zarda Factory (Pvt.) Ltd. v. CCE, Patna reported in 2002 (145) E.L.T. 222 = 2002 (50) R.L.T. 326 (CEGAT-KOL). The decision in Prabhat Zarda Factory (Pvt.) Ltd. stands overruled to the extent of the aforesaid ratio laid down thereunder. The reference is answered accordingly. All these appeals will now be placed before the concerned Division Bench for decision on merits in the light of this judgment and in accordance with law.

14. The Supreme Court in the matter of Jaiprakash Industries Ltd. (supra) held that if there was a divergent view in various cases. There was a bona fide doubt.

15. In Continental Foundation JT. Venture (supra), the Supreme Court held as under:

10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as ''fraud'' or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation u/s 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a willful misstatement. The latter implies making of an incorrect statement with the knowledge that the statement was not correct.

12. As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word ''wilful'', preceding the words "mis-statement or suppression of facts" which means with intent to evade duty. The next set of words ''contravention of any of the provisions of this Act or Rules'' are again qualified by the immediately following words ''with intent to evade payment of duty''. Therefore, there cannot be suppression or mis-statement of fact, which is not willful and yet constitute a permissible ground for the purpose of the proviso to Section 11A. Mis-statement of fact must be willful.

16. The show cause notice under the provisions of Section 65, 66 and 67 of the Finance Act, 1994 was issued on 2-7-2002 after a period of about three years. The instant case is covered u/s 73(b) of the Finance Act, 1994 as there was no omission or failure on the part of the assessee to make return u/s 70 of the Finance Act, 1994 for any prescribed period or to disclose wholly and truly all material facts necessary for assessment for any prescribed period and the value of taxable service for that prescribed period has escaped assessment or has been under assessed. Thus, this does not come within the purview of Section 73(a) of the Finance Act, 1994. u/s 73(b) of the Finance Act, 1994, if any taxable service assessable in any prescribed period has escaped assessment or has been under assessed, the Assessing Officer in consequence of information in his possession, after forming reason to believe, may issue notice within six months from the date of filing the return. In this case, the return was not filed in respect of consignments from clearing and forwarding agent. Thus, the issue involved herein comes within the purview of Section 73(b) of the Finance Act, 1994. However, there should be an intention to evade tax if certain value of any taxable service was not assessed.

17. In the case on hand, since there were conflicting views, it is a settled principle of law that the same amounts bona fide doubt, and in that event, it cannot be held that there was any intention to evade the tax. Thus, the extended period as provided u/s 73 of the Finance Act, 1994 would not be applicable.

18. In Continental Foundation Jt. Venture (supra), it has been held that there should be a willful suppression of facts with intent to avoid duty. In the facts as aforestated and in the light of several decisions, it is clearly established that in view of the contrary views rendered by the Tribunal in different cases, the case of the assessee comes within the definition of bona fide doubt and in that event, the extended period as provided u/s 73 of the Finance Act, 1994 would not be applicable.

19. We have given thoughtful consideration to the observations made by the Tribunal and the authorities below. We are of the opinion that the view taken by the Tribunal was just and proper, thus the questions No. 2 and 3 are answered in affirmation.

20. In view of foregoing conclusion, it is not necessary to decide question No. 1 as the same depends on merits, which was not dealt with by the Tribunal also and no answer is required in this appeal. For the reasons mentioned hereinabove, the appeal is dismissed.

