(2007) 12 RAJ CK 0035

In the Rajasthan High Court

Union of India (UOI) APPELLANT

Vs

Shri Mahesh Granites Pvt. Ltd. RESPONDENT

Date of Decision : 06-12-2007

Acts Referred:
Finance Act, 1994 — Section 71A, 73

Citation : (2008) 10 STR 3

Hon'ble Judges : N.P. Gupta, J;Munishwar Nath Bhandari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Aggrieved by the order dated 14-6-2006 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi, this appeal is preferred by the Department.

2. The facts relevant to the present matter are, that the assessee was served with a Show Cause Notice dated 2-7-2002 under the Section 73 of the Finance Act, 1994, which was challenged by the assessee, on the ground, that his case is not covered by the provision of Section 73 as prior to the amendment in the Act and inserting Section 71A, the assessee was not liable to submit the return, and there is no provision to cover their cases u/s 70 of the Act. Learned Tribunal decided the said issue in the light of the judgment given by the Hon''ble Apex Court in the case of L.H. Sugar Factories reported in 2006 (3) S.T.R. 715 : 2005 (187) E.L.T. 5 (S.C.). In the said judgment, the Hon''ble Apex Court was clearly of the view, that the cases, which are covered by the provision of Section 71A cannot be covered by issuing notice u/s 73 of the Act, and therefore, the Revenue has no jurisdiction to serve the notice u/s 73 of the Act of 1994, as it stood in 1994 and thereafter, as amended till issuance of the Show Cause Notice. Even, the very same, tribunal had also decided the bunch of the cases, considering the judgment of the Hon''ble Supreme Court, wherein it was held as under:

2. Learned Counsel for the parties have drawn our notice to the relevant provisions of the Finance Act as it stood in the year 1944 and thereafter as it stood in the year 1994 and thereafter as it stood after the various amendments to the Act in subsequent years. Having considered the relevant provisions of the Act, the Tribunal has, inter alia, recorded the following conclusion.

The above would show that even the amended Section 73 takes in only the case of assessee who are liable to file return u/s 70. Admittedly, the liability to file return is cast on the appellants only u/s 71A. The class of persons who come u/s 71A is not brought under the net of Section 73. The above being the position Show Cause Notices issued to the appellants invoking Section 73 are not maintainable.

3. We entirely agree with the conclusion arrived at by the Tribunal. We find no merit in these appeals and the same are accordingly dismissed. No order as to costs.

3. The view taken by the Hon''ble Supreme Court is applicable to the present matter also, and in light of the judgment of the Hon''ble Supreme Court, the appeal of the assessee was allowed.

4. The learned Counsel appearing for the Union of India submitted, that merely for the reason, that the assessee was not liable to submit the return, it cannot take away his liability to pay the service tax or is absolved from such liability. It has been specifically submitted, that the tribunal failed to consider, while relying on the judgment of Hon''ble Supreme Court, reported in 2005 (187) E.L.T. 5 (S.C.), that issue regarding the liability to pay service tax by the assessee did not come to an end, and therefore, main argument, canvased is, that even in the liqht of the judgment of the Hon''ble Apex Court, referred to above, the assessee is still liable to pay service tax, and therefore, judgment of the tribunal as assailed in this appeal, is not sustainable in the eye of law.

5. We have considered the arguments of the learned Counsel for the Union of India and perused the impugned judgment of the tribunal. The perusal of the judgment of the tribunal shows, that a limited issue has been answered, which is otherwise covered by the judgment of Hon''ble Apex Court, in case of L.H. Sugar Factories v. CCE, Meerut-II reported in 2005 (187) E.L.T. 5 (S.C.). The issue involved herein and in the said case was as to whether the Show Cause Notice can be served by invoking the provision of Section 73 of the Act, when admittedly, assessee is not covered by the provision of Section 70, but was covered by the provisions of Section 71A of the Act. The tribunal relaying on the judgment of the Hon''ble Apex Court held that the Show Cause Notice u/s 73 is not maintainable, as it does not cover those cases, which falls u/s 71A of the Act. The issue regarding the liability to pay tax and all other matters were not required to be gone into and has not even been decided in view of above facts. Assessee had challenged issuance of the Show Cause Notice, by the respondent by invoking the provision of Section 73 of the Act. Hence, the main argument

taken by the learned Counsel for the Union of India, that the tribunal failed to consider the issue of liability of payment of service tax by the assessee is not correct, as the said issue can be looked into if initiation of proceedings for that purpose is as per law. Hence, the argument raised by the learned Counsel for the appellant cannot sustain because even in the earlier judgment rendered by the tribunal and also in the judgment decided by the Hon''ble Apex Court maintaing the view of the Tribunal, held that the Show Cause Notice u/s 73 cannot be issued by the Department. The department is not however debarred to take action as per any other provision of the Act of 1994 if so permissible for recovery of Tax, if any.

6. Thus, in view of the discussion made above, since the present matter is also covered by the judgment of the Hon''ble Apex Court in the case of L.H. Sugar Factories''s case, we find no infirmity in the order of the tribunal.

Thus, the appeal preferred by the Revenue is dismissed, as according to us, no substantial questions of law are involved in the matter.