(2013) 01 GUJ CK 0031

In the Gujarat High Court

Case No : Tax Appeal No. 535 of 2012, Civil Application No. 221 of 2012 in First Appeal No. 848 of 2012

Utkarsh Corporate Services APPELLANT

Vs

Commissioner of Central Excise and Service Tax RESPONDENT

Date of Decision : 10-01-2013

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 1994 — Section 65(105)(W), 65(93), 76, 83
Income Tax Act, 1961 — Section 254

Citation : (2014) 34 STR 35 : (2013) 58 VST 331

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; Gaurang H. Bhatt, for the Respondent

Judgement

Sonia Gokani, J.—The appellant herein, in this tax appeal, preferred u/s 35G of the, Central Excise Act, 1944 read with section 83 of the Finance Act, 1994, has, raised, the, following Substantial questions of law for our consideration.

(A) Whether the orders of the Tribunal in not considering that the Commissioner (Appeals) had prevented the petitioner from raising substantive grounds in appeal was. proper and sustainable, and whether the rejection of the petitioners appeal, by the Tribunal without considering the submissions made, by the petitioner is correct and justified in the facts of this case?

(B) Whether the action of the Tribunal in riot allowing the petitioner''s appeal at the first instances and then not allowing the application for rectification of mistake though the written submission/synopsis filed by the petitioner were not considered by the Tribunal while rejecting the appeal is sustainable and correct in facts of this case?

(C) Whether the petitioner was liable for penalty only because of late payment of service tax in the facts of this case ?

Brief facts necessary for considering this appeal are as follows:

1.1 The appellant is a sole proprietor concern engaged in the business of providing security services. The petitioner obtained a registration certificate as required under the Finance Act for providing such security services. Three show-cause notices were issued to the petitioners for short-payment of service tax as also for recovering interest and imposing penalties. Total demand made was of Rs. 8,79,750. This amount was deposited by three different challans however, this demand had been challenged by the appellant herein before the assessment Commissioner who, vide his order dated July 8, 2009, confirmed the service tax liability with interest and penalty against the petitioner

1.2 Being aggrieved by the same, this was challenged before the Commissioner (Appeals) raising additional grounds who did not consider those grounds by referring to rule'' 5 of the Central Excise (Appeal) Rules, 2001 and rejected the appeal on October 28, 2010.

1.3 Further challenging the same before the Appellate Tribunal the appellant contended those very grounds before the Tribunal. The Tribunal, in its order dated July 1, 2011, upheld the decision of the Commissioner (Appeals) in the following mariner.

4. I find that main issue to be decided is whether the original adjudicating authority has correctly imposed the penalty or not. The Original adjudicating authority had discussed in detail this issue. He finds that there is a late payment of service tax and three show-cause notices were issued to the assessee proposing penalty u/s 76 as they have repeatedly defaulted. I find that this is a sufficient reason for imposition of penalty. I therefore uphold the order of the Commissioner (Appeals).

1.4 The appellant once again preferred miscellaneous civil application before the Appellate Tribunal seeking rectification of mistake and this application was heard on the merits and the Tribunal, vide its order dated May 8, 2012, rejected the said application. It would be worthwhile to reproduce the said order herein:

This rectification of mistake application has been filed on the ground that the appellant had filed written submission and had relied upon several decisions which are not discussed in the order passed by this Tribunal vide order No. A/1237/WZB/AHD/2011 dated July 1, 2011. On going through the order, it is seen that the order was passed on the ground that the assessee had repeatedly defaulted and show-cause notices have been issued on three occasions for default and therefore, there was enough justification for imposing penalty. Further, the Tribunal also considered not only the order in appeal impugned but also the order in original passed by the adjudicating authority while passing the order.

2. Under these circumstances, it cannot be said that there was a mistake just because written submission was not discussed or cases relied upon were not

considered. After considering both the orders Tribunal came to. a view that, in view of the circumstances in this particular case, there was no reason to interfere with the order in appeal. Under these circumstances, I do not consider it appropriate that application for rectification of mistakes requires consideration. Accordingly, the application for rectification of mistake is rejected.

1.5 Aggrieved by this rejection, the present appeal is preferred raising aforementioned substantial questions, of law.

1.6 We have framed the following substantial question of law for determining the Lis between the parties:

Whether, the orders of the Commissioner (Appeals) and of CESTAT (Tribunal) of not allowing additional grounds raised by the appellant based on relevant facts cm record and law are contrary to law?

2. We have heard the learned, counsel Mr. Dave for the appellant who has vehemently submitted that before, the, Commissioner (Appeals), the appellant raised three, grounds which are the legal contentions and which could be raised before any authority at any stage. There was no bar nor could there be any hitch under such law in raising such legal contentions. Instead of considering those contentions of the appellants, the Commissioner (Appeals) chose not to adjudicate relying wrongly on the decision of the apex court. He urged further that, there were factual details already available on the record to substantiate his ground, and they were new grounds and not new evidences. He has. also relied on the decision of the Madras High Court rendered in case of R.K. Herbals Vs. The State of Tamilnadu, .

3. Per contra, learned counsel, Mr. Gaurang Bhatt, who appears for the Department, has urged that both the authorities have adequately dealt with the issues which were at large before them and no interference is necessary. He has also heavily relied upon the decision of the apex court in case of Sanghvi Reconditioners Pvt. Ltd. Vs. Union of India (UOI) and Others, . He urged that these were the additional grounds based on the facts and therefore, they could not have been permitted at the stage of Commissioner (Appeals).

4. On thus having heard both the sides and having examined the materials on record with the assistance of the learned counsels, this appeal is being allowed for the following reasons:

4.1. At the outset, it would be profitable to reproduce rule 5 of the Central Excise (Appeals) Rules, 2001:

5. Production of additional evidence before Commissioner (Appeals).--(1) The appellant shall not be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced, by him during the course of the proceedings before the adjudicating authority except In the following circumstances, namely:--

(a) where the adjudicating authority has refused to admit evidence which ought to have been admitted;

or

(b) where the appellant was prevented by sufficient cause from producing the evidence Which he was called upon to produce by adjudicating authority; or

(c) where the appellant was prevented by sufficient cause from producing, before the adjudicating authority any evidence which is relevant to any ground of appeal; or

(d) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the Commissioner (Appeals) records in writing the reasons for its admission.

(3) The Commissioner (Appeals) shall not take any evidence produced under sub-rule (1) unless the adjudicating authority or an officer authorized in this behalf by the said authority has been allowed a reasonable opportunity,--

(a) to examine the evidence or document or to cross-examine any witness produced by the appellant; or

(b) to produce any evidence or any witness in rebuttal of the evidence produced by the appellant under sub-rule (1).

(4) Nothing contained in this rule shall affect the power of the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal.

4.2. This rule, if examined closely, permits under certain circumstances, the Commissioner (Appeals) to take on record and examine additional evidence produced before it and, once those circumstances exist for so permitting evidences, the only requirement would be to allow a reasonable opportunity to the other side to produce any evidence in rebuttal. Eventualities narrated under the law which pave a way for additional evidence are: (i) denial to admit evidence by assessing officer, (ii) existence of sufficient cause which prevented such admission, when called upon by assessing officer, (iii) sufficiency of reasons which prevented production, (iv) absence of availing of opportunity of adducing evidence when any of these grounds is established by assessee--such productions could be made permissible, of evidence by the Commissioner (Appeals) whether oral or documentary. Thus, this rule itself provides for adducement of additional evidence, when necessary, as mentioned hereinabove. However, it is to be noted that in the instant case, we are concerned with raising of only new grounds and not the additional evidence by the appellant and thus, appellant is on a stronger footing.

5. The additional grounds raised by the appellant are as follows:

(a) That the appellant''s firm being a proprietorship firm, cannot be considered as security ''agency'' vide section 65(93) and 65(105)(W), as clarified by the Board in its Circular No. B3/7/2003-TRU dated August 21, 2003, and No. B11/1/2002-TRU dated August 1, 2002. Please also refer to the following judgments of the honourable Tribunal'':

(i) (2008) 13 STJ 148 ..

(ii) (2010) 21 STJ 186 .

(b) As per order of the honourable Tribunal, Ahmedabad, in case of 2009 (15) S.T.R. 237 no penalty ought to have been imposed, as ST-3 returns were filed declaring full value of services and when the issue involved was a pure question of interpretation of law and when staff salary and other infrastructural expenses are not. required to be added in the assessable value, as per the precedent judgments.

(c) That as per judgment of the honourable Tribunal, staff salary and other infrastructural expenses are to be excluded from the gross amount received for security service. Please refer to the following judgments of the honourable Tribunal:

(i) (2008) 12 STJ 45 .

(ii) 2009 (15) S.T.R. 237 .

6. It can be observed that all the three grounds are legal contentions and from the order of the Commissioner (Appeals), it is clear that it has chosen not to adjudicate on any of these grounds raised before it and instead has held that no satisfactory reasons have been provided by the appellant for entertaining such additional submissions, by placing reliance on the decision of the apex court rendered in case of Sanghvi Reconditioners Pvt. Ltd. Vs. Union of India (UOI) and Others, .

7. The Tribunal as mentioned hereinabove, in its very brief order dated July 1, 2011 has emphasized only on the late payment of the service tax and repeated defaults on the part of the appellant and furthermore, it chose not to deal with any of these contentions in the rectification of mistake application also where the very ground has been reiterated and submissions raised by the appellant have not been dealt with.

8. The apex court in Sanghvi Reconditioners Pvt. Ltd. Vs. Union of India (UOI) and Others, , has in fact held that there is no bar in entertaining the additional ground involving pure questions of law before the High Court or the Supreme Court, however misreading this authority, the additional grounds based on relevant facts existing on record, were held not to be permissible.

9. It is also relevant to make a mention at this stage of some of the observations

made in case of R.K. Herbals Vs. The State of Tamilnadu, wherein the Madras High Court has dealt with identical issue where additional grounds were raised before the Sales Tax Appellate Tribunal and the Tribunal had denied the same, holding that there were no reasonable grounds for admitting the additional grounds by applying principles enunciated in case of Southern Nitrochemicals Ltd. Vs. State of Tamil Nadu . The court in such case had held thus (pages 376-378 in 24 VST):

Again in National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, , it was held by the Supreme Court as hereunder:

Under section 254 of the income tax Act, 1961, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial, decision given while the appeal is pending before the Tribunal, it is found that non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of the item (emphasis supplied). There is no reason to restrict the power of the Tribunal u/s 254 only to decide the grounds Which arise from the order of the Commissioner of income tax (Appeals): Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal, The Tribunal should not be prevented from considering the questions of law arising in assessment proceedings, although riot raised earlier. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) is too narrow a view to take of the powers of the Tribunal.

Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment proceedings, there is no reason why such a question should riot be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

The Supreme Court further held that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee and therefore, remitted the matter to the Tribunal for consideration of the new grounds raised by the assessee on the merits.

6. In Commissioner of Income Tax Vs. ASHOK LEYLAND LTD., , the Division Bench of this court held thus:

(1) The first part of the second question concerns the correctness of the

Tribunal''s view that the additional ground could be allowed to be raised for the first time before it. The view of the Tribunal is correct. The apex court has, in the case of National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, , held that it is within the jurisdiction of the Tribunal to entertain a new ground for the first time, if the facts required for answering the new plea are available on record. The part of the question is answered against the Revenue.

7. Section 36(3) of the Tamil Nadu General Sales Tax Act gives the Tribunal the power ''to pass orders as it thinks fit''. The words, are the same as those used in section 254 of the income tax Act which is extracted by the Supreme Court in National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, , So we are of the opinion that the Tribunal shall consider the new grounds raised by the assessee which arise from the facts before it and on the basis of the materials available before it, the Tribunal can consider the new grounds raised. We are bound to follow the decision reported in National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, and not Southern Nitrochemicals Ltd. Vs. State of Tamil Nadu and; hold the Tribunal: as the final fact-finding authority, is bound to answer the new grounds raised by the assessee when the facts required for answering the new plea are already available on record. The revision is allowed and the matter is remitted to the Tribunal, which shall decide the issue on the merits and in accordance with law.

10. It is evident from the provision made-in the form of rule 5 of the Central Excise (Appeals). Rules as also from the decisions of the apex court and that of the Madras High Court'' (supra) that the Commissioner (Appeals) is provided with sufficient discretion to allow additional evidence once the ground is made out by the" appellant. It. needs to allow adducement of evidence also if any of those grounds exists and "legal-issue can be raised at any stage before even this court and the apex court as well. What is trite to note is that if additional evidence is permissible as discussed raising of additional grounds on the basis, of relevant facts existing on record is permissible. There would be nothing to, hamper raising of legal grounds surely And, all the three additional grounds raised are the issues based on.

11. On the basis of the aforementioned discussion, we are of the firm opinion that both, the Commissioner (Appeals) and the Tribunal have committed error in not considering the additional grounds raised by the appellant before it. As it could be noted very clearly that these were the legal grounds which could have been raised at any stage before any authority as laid down in the decision rendered in case of Sanghvi Reconditioners Pvt. Ltd. Vs. Union of India (UOI) and Others, on which the Commissioner (Appeals) sought to rely upon and the said proposition hardly, requires any further elaboration and yet both the authorities having failed to entertain these new legal grounds for which already the facts were, existing on record, the appellant has succeeded in convincing us of a need to interfere with the orders of both the authorities by answering the question framed in its favour.

13. Resultantly, the impugned orders of both the authorities are hereby quashed and set aside, Parties are requested to be relegated to the Commissioner (Appeals) for consideration of these issues afresh. Accordingly, the Commissioner (Appeals) is directed to examine all the grounds raised before it by both the sides in accordance with law-and both the parties are directed to cooperate in proceeding with the matter with requisite promptness. Appeal is, accordingly, allowed Rule is confirmed. No order as to costs.

Order in Civil Application No. 221 of 2012

In view of the decision rendered hereinabove, civil application does not survive and stands disposed of.