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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Chennai

Decided On : Jan-24-2014

Judge : The Honourable Mr. Mathew John, Technical Member

Appeal No. : Appeal No.ST/40060 of 2013 [Arising Out of Order-in-Appeal No.MAD-CEX-000-APP-208-12dt. 28-09-2012 passed by the Commissioner of Central Excise (Appeals),Madurai]

Appellant : G. Bobban

Respondent : Commissioner of Central Excise

Judgement :

1. The appellant had provided man power supply service to M/s.Fenner India Ltd. Kochadi, Madurai during the period 16-06-05 to 31-03-09. The appellant had not paid service tax on such services in time. Therefore a show cause notice dt. 25.9.2010 was issued and adjudicated. On adjudication, a demand of Rs.5,43,501/- was confirmed against the appellant along with interest under section 75 of the Finance Act, 1994. Further, a penalty of Rs.10,000/- under section 77 and penalty of Rs.5,43,501/- under section 78 of the Finance Act, 1994 were imposed. An amount of Rs.4,17,123/- paid by the appellant was appropriated against the demand. Aggrieved by the order, the appellant filed appeal before the Commissioner (Appeals). The Commissioner (Appeals) vide order dated 28.9.2012 set aside demand for the period 16.6.2005 to 30.4.2006 for the reason that the appellant was only an individual and during the said period service

provided by a commercial concern only was taxable. The Commissioner (Appeals) upheld the demand from 1.5.2006 to 31.3.2009. Interest under section 75 was confirmed and penalty under section 78 equal to the duty to be determined by the adjudicating, authority as per directions of the Commissioner (Appeal), was also upheld. Penalty imposed under section 77 was also upheld. Aggrieved by the order of Commissioner (Appeals), in the matter of penalties imposed the appellant has filed this appeal.

2. The Ld. A. R. for Revenue took a preliminary objection that the appellant had not submitted any stay petition and therefore the appeal should be dismissed for non-compliance with section 35F of Central Excise Act, 1944 made applicable to service tax levy.

3. Arguing for the appellant, the learned advocate submitted that appellant did not file any stay petition because at the time of filing appeal, the amount of penalty was yet to be quantified by the adjudicating authority as per the orders of the Commissioner (Appeal). Now he submits that the adjudicating authority has passed a de novo adjudication order dt. 6.11.2013 and in that order also penalty is imposed and the appellant wants to pursue remedy against that order. Since the matter in this proceedings and the matter in the de-novo order by adjudicating authority are the same this appeal has become infructuous and this appeal may be dismissed as infructuous. So he submits that there is no need for filing any stay petition.

4. Ld. AR for Revenue submitted that since the appellant is not contesting the tax demanded the appellant should be asked to deposit the tax amount in full for admission of appeal. Further he submitted that the fact that the appellant is not contesting the tax demand may be recorded.

5. The order was pronounced in the Court that the appeal is dismissed as infructuous since the appellant wanted to seek remedy against the de-novo order involving the same matter.

6. While dictating the order in the chamber it was noticed that the adjudicating authority, in the de-novo order, did not agree with the relief given by the

Commissioner (Appeal), but has re-confirmed the original amount. The reason as explained in the de-novo order is clear from paras 28, 29 and 30 of the order which are reproduced below:-

"28. The Commissioner (Appeals), Madurai, in his Order-in-Appeal No.MAD-CEX-000-APP-208/2012 dated 28.09.2012, held that Bobban was not liable for payment of Service Tax for the period from 16.06.2005 to 30.04.2006, as he was not covered under the term "Commercial Concern" and directed the lower authority to re-quantify the demand for the impugned period, i.e. from 01.05.2006 to 31.03.2009.

29. The facts leading to demanding Service Tax in terms of Commercial Concern has been dealt with in detail in the Order-in-Original No.14/2011 dated 31.10.1011 already passed.

30. I find that the above Order-in-Appeal has been accepted by the Department only on the grounds of monetary limit fixed by Board for filing appeal. Hence, I proceed to confirm the demands raised against the assessee in the Order-in-Original No.14/2011 dated 31.10.2011 and therefore, pass the following order"

7. Thus the adjudicating authority has disapproved of the order of the Commissioner (Appeal) without getting it modified through appeal proceeding.

8. The proceeding before me is only for deciding the whether the appeal in the matter of penalty can be disposed of for the reason that a de-novo adjudication order is passed by the adjudicating authority on the same matter and appellant wants to pursue appeal remedy against that order.

9. Considered submissions on both sides. It is made clear that no finding on the merit of the finding of the adjudicating authority in para 30 of order dated 06-11-2013 is being given in this order because such matter is not before the Tribunal. The right of the appellant to contest the de-novo adjudication order in all respects need not be limited because of submission made during oral hearing for withdrawal of appeal filed against imposition of penalty. It was not clear from the submission of the advocate whether the advocate was mentioning tax liability as

ordered by Commissioner (Appeal) in order dated 28-09-2012 impugned in this appeal or the tax liability as determined in the de-novo order dated 06-11-2013 of the adjudicating authority.

10. In the circumstances already explained, the present appeal has become infructuous and the same is dismissed accordingly with liberty to the appellant to pursue appeal remedy against the de-novo order.