

Commr. of C. Ex. Vs. Daya Engineering Works (Sleeper)

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-05-2006

Reported in : (2006)(111)ECC227

Judge : M T K.C.

Appellant : Commr. of C. Ex.

Respondent : Daya Engineering Works (Sleeper)

Judgement :

1. This appeal is filed by Revenue against the order of the Commissioner (Appeals). The respondent had availed services of Goods Transport Operator during the period from November, 1997 to June, 1998.

After retrospective amendment of the provisions of Sections 65, 66 and 67 of Chapter V of Finance Act, 1994, show cause notice dated 2.8.2002 was issued to the respondent for recovery of service tax under Section 117 of the Finance Act, 2002, which re-validated the levy and collection of service tax from the user of services of Goods Transport Operators. The demand was confirmed by the Dy. Commissioner but the Commissioner (Appeals) set aside the order of the adjudicating authority by following the decision of the Tribunal in case of L.H.Sugar Factories Ltd. v. CCE Meerut-II and similar other decisions.

2. It is contended by the Revenue that the Tribunal's decision in case of L.H. Sugar Factories Ltd. has not yet attained the finality as they have filed appeal

before the Hon'ble Supreme Court against the said decision of the Tribunal. It is also argued that Section 117 of the Finance Act revalidates the provisions of Sub-clause (xvii) of Clause (d) of Sub-rule (1) of Rule 2 of Service Tax Rules, 1994. Section 71A was inserted vide Finance Act, 2003, with a view to give such assessee (i.e. persons, who availed the services of Goods Transport Operators and were liable to pay the service tax), one more chance to file ST-3 Return. It was also argued that Section 117 of Finance Act gives retrospective effect to the said sub-clause of Service Tax Rules so as to re validate the levy and collection of service tax on the services rendered by the Goods Transport Operator from the users of such services.

3. I find that Section 117 of the Finance Act, 2000 validated the action taken by the Department against the receiver of the services from the Goods Transport Operator. However, demand for value of taxable service escaping assessment of service tax could have been issued only under Section 73 of the Finance Act, 1994 at the relevant time when show cause notice was issued. Since no return was filed by respondent under Section 70, notice for short levy and non-levy could not have been issued under Section 73 of the Finance Act, 1994. This Tribunal in case of L.H. Sugar Factories Ltd. v. CCE Meerut-II (supra) has held that no show cause notice could have been issued against them under Section 73 as it stood on the date of issue of show cause notice. Even amended Section 73 takes only the cases of assesseees, who are liable to file returns under Section 70. The liability to file return is cast on the appellants only under Section 71. The class of persons which come under Section 71A is not brought under the net of Section 73. Above being the position show cause notice were issued to the appellants invoking Section 73 are not maintainable. The abovementioned decision of the Tribunal was upheld by the Supreme Court in case of CCE Meerut-II v. L.H. Sugar Factories Ltd. reported in 2005 (187) E.L.T. 5 where the Supreme Court confirmed that liability under Section 73 of the Finance Act, 1994 covers cases of assessee, who are liable to file return under Section 70 and liability to file return being cast on the appellants under Section 71A, show cause notice issued under Section 73 *ibid* is not maintainable. In view of this position, persons who have filed return under Section 71A cannot be show caused under Section 73 of the Finance Act. Therefore, the Commissioner (Appeals) has correctly dropped the demand.

