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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Oct-09-2007

Reported in : (2008)12STJ56CESTATNew(Delhi)

Judge : R Abichandani

Appellant : Hind Polymers

Respondent : Cce

Judgement :

1. The appellant Company has challenged the order of the Commissioner (Appeals) made on 08.05.2007 upholding the order of the adjudicating authority by which the demand of service tax of Rs. 2,42,423/- was upheld and penalty of like amount imposed under Section 78 of the Finance Act, 1944, besides imposing other penalties.

2. The appellant was engaged in the manufacture of sheathing compound and colour master batches, and had received 'Goods Transporter Services' during the period from 16.11.1997 to 02.06.1998, for which freight charges of Rs. 48,48,452/- were paid. The appellant did not furnished returns as contemplated by Section 71-A of the Act read with Rule 7-A within a period of six months from 13.05.2003 and did not deposit the Service Tax as contemplated thereunder. The appellant did not even inform the Department about the freight charges paid prior to 26.02.2004. It was, therefore, held that, the appellant had suppressed the material facts.

3. The only contention that was raised before the Appellate Commissioner was that, the show cause notice issued on 25.06.2004 was hit by period of limitation. This was rightly negatived by the Commissioner (Appeals), in view of the provisions of Rule 7-A read with Section 71-A of the Act.

4. The learned authorised representative for the Department, submitted that, earlier, relying upon the decision of the Tribunal in the case of L.H. Sugar Factories Ltd. v. CCE, Meerut-II , the Single Member Bench, had, on 18.05.2006, set-aside the order requiring pre-deposit to be made and directed the Commissioner to decide the case on merits. Reference to the ratio of the decision in the case of L.H. Sugar Factories Ltd. v. CCE, Meerut-II, (supra), is no longer relevant in view of the decision of the Division Bench of this Tribunal in the case of CCE, Jaipur v.Mangalam Cement Ltd. reported in (2007) 10 STT 203 (New Delhi-CESTAT), in view of the reasoning adopted in paras 16 to 17.1 of the decision, which reads as under: 16. In view of the clear ratio of the decision of the Hon'ble Supreme Court in Gujarat Ambuja Cement Ltd.'s case (supra), which was followed by this Tribunal in J.K. Industries Ltd.'s (supra), any contrary decisions simply giving directions without dealing with or showing dissent from the ratio laid down in these decisions or attempting to distinguish them, cannot be considered to be laying down any precedent on the doctrine of ratio decidendi. Mere directions, issued contrary to the settled legal position, cannot be said to be laying down any contrary ratio, so as to constitute an opposite precedent or laying down a contrary proposition. We are of the opinion that the ratio of the decision of the Hon'ble Supreme Court in Gujarat Ambuja Cement Ltd.'s case (supra), cannot be overlooked on the spacious plea of a Learned authorized representative of the respondent-assessees that 'later is better".

It is obvious that while affirming the decision of the Tribunal in L.H. Sugar Factories Ltd.'s case (supra), the Hon'ble Supreme Court was not concerned with the validating provisions which prompted the decision in Gujarat Ambuja Cement Ltd.'s case (supra). In fact, there could be no conflict between the two decisions, which dealt with different situations, one dealing with challenge against a show-cause notice in a situation prevailing before the validating law and the other dealing with the effect of the validating provisions. Therefore, even if the decision

of the L.H. Sugar Factories Ltd.'s case (supra) rendered by the Tribunal came to be affirmed later on, that is, after the decision in Gujarat Ambuja Cement Ltd.'s case (supra), the subsequent decision was relevant only in the context of the law, as stood prior to the validating provisions, the constitutionality of which came to be upheld by the Hon'ble Supreme Court in Gujarat Ambuja Cement Ltd.'s case (supra).

For the same reason any contrary decision rendered by this Tribunal cannot be followed, because that would be defying the law laid down by the Hon'ble Supreme Court in Gujarat Ambuja Cement Ltd.'s case (supra).

17. The contention that the notices were barred by limitation is wholly misconceived in view of the fact that the revised show cause notices were issued as per the amended provisions of Section 73 which came into force from 10.9.2004 within one year from the relevant date which was defined in Sub-section (6) of Section 73 as under: (i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short paid- (a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed; (b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules; (c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder.

17.1. It will be seen from the above provisions that the show cause notice was required to be served within one year from the 'relevant date' in cases where there was no fraud, collusion etc. The "relevant date" in cases where periodic return is filed and in cases where periodic return is not filed was governed by Clauses (a) and (b) of Sub-section (6)(i) of Section 73. In the present case, there is no dispute that the return which was filed as per the prescribed Form ST-3B under Rule 7A was not a periodic return, but a return which was required to be filed by the specified date, as contemplated by Section 71A, read with Rule 7A. In Sub-clause (c) of Clause (i) of Section 73(6)(c) all other cases where no periodic return was involved, the date on which the service tax was to be paid was to be considered as

the "relevant date". In the present case, the service tax was to be paid within six months from 13.11.2003 by filing the return in the prescribed Form ST-3B under Section 71A, read with Rule 7A. The relevant date, therefore, in the present case for filing such return was 14.11.2003. Therefore, even if 14.11.2003 is considered and 30.11.2003, which was the date extended by the Supreme Court, the show-cause notice issued on 4.11.2004 were clearly within the prescribed period of one year.

Therefore, no ground for total waiver of pre-deposit is made out. It is, however, submitted by the learned authorised representative for the applicant that, the financial condition of the applicant is not sound and the Company has been declared a sick unit under the BIFR provisions. In view of the decision of the Hon'ble Supreme Court in the case of Metal Box India Ltd. v. Commissioner of Central Excise, Mumbai , the payment of pre-deposit, covered under Section 35-F of the Central Excise Act, 1944, does not fall under any of the categories in Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985. The Hon'ble Supreme Court rejected the contention, on behalf of the assessee, that the appellant/assessee need not deposit the amount as protection of Section 22 of the Act, was available to the appellant. However, though, pre-deposit can be ordered, financial hardship would be a relevant consideration. There is no material on record to show, what are the assets and liabilities of the Company and what is the income from the business run by them. It appears from the letter dated 27th July, 2004, that the Company was having a turnover of more than Rs. 40 crores a year in 1997-98 and 1998-99. It appears from the "summary record" of the proceedings before the BIFR, a copy of which is on record, that the chances of revival of the appellant are remote and that the company had disposed of all its assets. There is, therefore, every possibility of the claim of the Revenue being defeated, in the event the Revenue succeeds in the present proceedings. In order to safeguard the interest of the Revenue, as contemplated by Section 83 of the Finance Act, 1944 read with Section 35-F of the Central Excise Act, 1944, the appellant is directed to deposit a sum of Rs. 50,000/- (rupees fifty thousand only) within eight weeks from today and to execute a bond for payment of the rest of the amount payable under the impugned order. It may be recorded that, the learned authorised representative for the appellant had stated that, the appellant would

execute the bond for the remaining amount, as directed above. In the event of the order being complied with within eight weeks from today, there shall be waiver of the pre-deposit of the remaining amount of Service Tax and penalties payable under the impugned order. If the amount is not so deposited or the bond is not so executed within the aforesaid period, the appeal will stand dismissed.

Post the matter for reporting compliance on 14th December, 2007. This application is disposed of accordingly.

(Dictated and pronounced in the open Court on the 9^TH day of October, 2007)

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