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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Mar-05-2008

Reported in : (2008)13STJ390CESTAT(Chennai)

Judge : K T P.

Appellant : Rajarathinam Fireworks

Respondent : Cce

Judgement :

1. This application filed by M/s. Rajarathinam Fire Works Industries, Sivakasi is for waiver of predeposit and stay of recovery of an amount of Rs. 24,547/- being the tax due on "Goods Transport Operators Service" (GTO service) availed by the applicant during the period 16.11.97 to 1.6.98. After due process of law, the original authority dropped the proceedings to demand the above amount of service tax. In the impugned order passed in terms of Section 84(5) of the Finance Act, 1994, the Commissioner revised the orders of the original authority and confirmed the demand of Rs. 24,547/- under Section 73 read with Section 71A of the Finance Act, 1994.

1.1. After hearing both sides on the stay application, the appeal is taken up for disposal with the consent of both parties.

2. Ld. consultant submits that the Commissioner (Appeals) has confirmed the demand under Section 73 read with Section 71A of the Finance Act, 1994 and that

the same is not sustainable in law in view of the judgment of the Supreme Court in CCE Meerut-II v. L.H. Sugar Factories Ltd. 2006 (3) STR 715 (SC). He also submits that the show-cause notice had not invoked Section 71A and the Commissioner had confirmed the demand under Section 71A without such a proposal in the SCN. Ld.

consultant pointed out that the Commissioner had relied on a stay order passed by the Single Member of the Tribunal and that the said decision ignored the law laid down by the apex court in the aforesaid judgment.

Ld. SDR reiterates the arguments contained in the impugned order.

3. I have carefully considered the case records and the submissions made by both sides. As rightly pointed out by ld. consultant for the appellants, the Commissioner confirmed the demand under Section 73 read with Section 71A. Section 71A had not been invoked in the SCN.Therefore, the demand confirmed under Section 71A is not sustainable.

The Commissioner has passed the impugned order following a decision of a Single Member of this Tribunal in the case of Bhima SSK Ltd v. CCE Pune-III . In that decision, it was held that recovery of service tax from availers of GTO service had been authorised by the Finance Act, 2003 and the tax was recoverable from such availers of GTO service. It was immaterial that Section 73 did not apply. It was also held that recovery was sustainable only through Section 71A. The Commissioner found that a harmonious reading of the Sections 68, 71, 71A and 73 led to an inference that Section 73 could be invoked to demand service tax not paid in respect of which returns had to be filed under Section 71A. He also observed that an issue similar to the one decided by the apex court in LH Sugar Factories Ltd. case was pending before the apex court in an appeal filed by the department in CCE Chennai-II v. Sundaram Fasteners Ltd. Since the said appeal stood admitted by the Supreme Court, the issue had not reached finality.

4. I find that the Commissioner has relied on a decision of the Tribunal in passing the impugned order which had laid down a ratio contrary to the one laid down by the apex court. In the case of CCE Meerut-II v. LH Sugar Factories (supra), the

apex court passed an order agreeing with the conclusion recorded in the order of the Tribunal impugned before the Supreme Court which is extracted herein below : 2. Learned Counsel for the parties have drawn our notice to the relevant provisions of the Finance Act 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 assessees who are liable to file return under Section 70. Admittedly, the liability to file return is cast on the appellants only under Section 71A. The class of persons who come under Section 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 orders as to costs In view of the above binding ratio of the judgment of the apex court, the impugned order cannot be sustained. Accordingly, the stay application is dismissed and the appeal is allowed.