**SUPREME COURT OF INDIA**

Commissioner of Central Excise, Vadodara-I

Vs.

M/s Gujarat Carbon & Industries Ltd.

C.A.No.1618 of 2005

(Dr. Arijit Pasayat and Dr. Mukundakam Sharma JJ.)

18.08.2008

**JUDGMENT**

**Dr.Arijit Pasayat, J.**

1. Delay condoned. Appeal Admitted.

2. In these appeals common points are involved and therefore they are disposed of by this common judgment.

3. Challenge in each case is to the judgment of various Benches of Customs, Excise & Service Tax Appellate Tribunal (in short `CESTAT'). The respondents in each case had engaged the services of transport operators. They were in other words availers of service and not service providers. The Central Excise Authorities issued notice asking them to explain as to why penalty should not be imposed upon them under the provisions of Sections 76 and 77 of Chapter V of the Finance Act, 1994 for alleged contravention of the provisions of Sections 70, 76 and 81 of the said Chapter and as to why interest should not be recovered from them for delayed payment of service tax as provided under the aforesaid Act. Relying on a decision of this Court in *Laghu Udyog Bharti & Ors. v. Union of India*[1] the show cause notice was dropped. In the said case, it was held that service availers are not required to pay service tax under the provisions of the Finance Act. In some cases the orders were reviewed under Section 84 of the said Act on the ground that Section 117 of the *Finance Act, 2000* validates retrospectively the provisions of sub-clause (xii) of clause (d) of sub-rule (1) of Rule 1 of *Service Tax Rules, 1994*. As a sample case, we refer to the factual scenario of Civil Appeal No.1618 of 2005. The factual scenario is that Commissioner was of the view that according to Section117 of the Finance Act, 2000 notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority , sub-clause (xii) and sub-clause (xvii) of clause (d) of sub-rule (1) of Rule 2 of the Service Tax Rules, 1994 as they stood immediately before the commencement of the Service Tax (Amendment) Rules, 1998 shall be deemed to be valid as if the said clause had been in force at all material times. In view of the aforesaid retrospective amendment, the order of the Deputy Commissioner was reviewed. A show cause notice was issued seeking to review the order. After considering the

reply of the respondent-assessee the Commissioner demanded service tax on the gross amount of transport charges paid by it to the goods transport operators excluding insurance charges during the period 16.11.1997 to 1.6.1998 alongwith interest for delayed payment of service tax required to be paid under the Finance Act, 1994.

4. The Tribunal referred to Section 73 of the Finance Act which reads as follows:

> "Section 73 (a)- The Assistant Commissioner of Central Excise or, as the case may be, the Deputy Commissioner of Central Excise has reason to believe that by reason of omission or failure on the part of the assessee to make a return under Section 70 for any prescribed period or to disclose wholly or truly all material facts required for verification of the assessment under Section 71, the value of taxable service for that quarter has escaped assessment or has been under assessed, or any sum has erroneously been refunded, or
>
> (b) Notwithstanding that there has been no omission or failure as mentioned in Clause [a] on the part of the assessee, the Assistant Commissioner of Central Excise or, as the case may be Deputy Commissioner of Central Excise has, in consequence of information in his possession, reason to believe that the value of any taxable service assessable in any prescribed period has escaped assessment or has been under-assessed, or any sum has erroneously been refunded, he may, in cases falling under Clause (a), at any time within five years, and in cases falling under Clause (b), at time within six months from the date for filing the return, serve on the assessee a notice and proceed to assess or reassess the value of the taxable service."

5. The Tribunal referred to a decision in the case of *L.H. Sugar Factories Ltd. v. CCE, Meerut-II*[2] where under similar circumstances the show cause notice was issued. It was held that during the relevant period Section 73 takes in only the case of assessees who are liable to file return under Section 70. The liability to file return is cast on the assessees only under Section 71-A which was introduced in the Finance Bill, 2003. Thus, during the period in question no notice could have been issued under Section 73 for non filing of return under Section 70. According to the Tribunal, the service receiver was not required to file any return under Section 70 of the Finance Act, 1994 prior to 2003. The Tribunal accordingly quashed the order demanding service tax from the respondents-service availers. Similar view has been expressed in the connected cases.

6. According to learned counsel for the revenue, the view of CESTAT is clearly unsustainable, because of retrospective operation of the provisions.

7. Learned counsel for the respondents on the other hand supported the respective judgments of the Tribunal.

8. It is to be noted that in an identical case in *Commissioner of Central Excise, Meerut-II v. L.H. Sugar Factories Ltd. and Ors.*[3], this Court agreed with similar conclusions of the Tribunal. In the said case, the conclusions of the Tribunal were as follows:

> "The above would show that even the amended Section 73 takes in only the case of assesses 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 73are not maintainable."

9. In view of what has been stated in L.H. Sugar's case (supra) we do not find any merit in the present appeals which are accordingly dismissed.

[1]*(1999 (112) ELT 365)*
[2]*(2004 (165) ELT 161)*
[3]*(2005 (13) SCC 245)*