[2016] 68 taxmann.com 251 (Punjab & Haryana)

HIGH COURT OF PUNJAB & HARYANA

Mittal Construction Co.

v.

Commissioner of Central Excise, Ludhiana

AJAY KUMAR MITTAL AND MRS. RAJ RAHUL GARG, JJ.
STA NO. 34 OF 2015 (O & M)
FEBRUARY 24, 2016

CASE REVIEW

Canara Bank v. *V.K. Awasthy* AIR 2005 SC 2090 (para 7) *relied on*.

CCE v. *Mittal Construction Co.* [Final Order No. 53022/2014, dated 23-7-2014] *set aside and appeal restored.*

CASES REFERRED TO

Canara Bank v. *V.K. Awasthy* AIR 2005 SC 2090 (para 7).

Jagmohan Bansal, Advocate *for the Appellant.* **Sukhdev Sharma**, Advocate *for the Respondent.*

JUDGMENT

Ajay Kumar Mittal, J. - This is an application under Section 35G (2A) of the Central Excise Act, 1944 read with Finance Act, 1994 seeking condonation of delay of 302 days in filing the appeal. It has been inter alia stated in the application that the assessee-appellant had not received the notice of hearing and thus, there was non appearance on its part. After receipt of copy of final order passed by the Tribunal, the appellant filed application seeking recalling of the order dated 23.7.2014, Annexure A.5 allowing the revenue's appeal. The said application was listed before the Tribunal on 7.9.2015. The appellant through its counsel appeared. The Tribunal dismissed the application. Thus, there was a delay of 302 days in filing the appeal against the order dated 23.7.2014.

2. Notice of the application was given to the respondent. For the reasons stated in the application and after hearing learned counsel for the parties, the delay of 302 days in filing the appeal is condoned. CM stands disposed of.

STA No.34 of 2015

3. This appeal has been filed under Section 35G of the Central Excise Act, 1944 (in short, "the Act")

read with Section 83 of the Finance Act, 1994 seeking quashing of the orders dated 23.7.2014 and 7.9.2015, Annexures P.5 and P.7 respectively passed in appeal No.ST/41/2009-CU(DB) whereby the Customs, Excise and Service Tax Appellate Tribunal (in short, "the Tribunal") allowed the appeal of the respondent ex parte and dismissed the application seeking recalling of the ex parte order.

4. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The appellant- assessee is engaged in providing various services including site formation and clearance services. The assessee got itself registered with the department w.e.f 7.2.2006 for providing services of site formation. During the course of audit, the respondent observed that the appellant had provided services of protection, pipe laying using trenching/trenchless, reinstatement of trench, OFC cable blowing including other associated works to its clients namely M/s BSNL, Tata Tele Services, HFCL Infotel and HFCL Int. Division valuing Rs. 4,43,20,475/- during the year 2005-06. The respondent formed an opinion that the appellant was liable to pay tax amounting to Rs. 45,20,689/- whereas the appellant had paid tax amounting to Rs. 10,35,360/- only. Accordingly, a show cause notice dated 4.12.2007, Annexure A.1, was issued to the appellant to show cause as to why a sum of Rs. 34,85,329/- should not be demanded and recovered invoking the extended period of limitation. The appellant filed reply to the show cause notice inter alia pleading that it had carried out substantial part of work prior to levy of service tax and thus, there was no question of levy of tax on services rendered prior to date of levy of tax. The adjudicating authority did not accept the submissions of the appellant and confirmed the demand of service tax amounting to Rs. 34,85,329/- alongwith interest and imposed penalty under sections 76 and 78 of the Act vide order dated 5.3.2008, Annexure A.2. Aggrieved by the order, the appellant filed appeal before the Commissioner (Appeals). The appellant submitted copies of all the agreements executed with different parties. It was clarified by the appellant that out of total amount received i.e. Rs. 4,43,20,475/-, a sum of Rs. 1,58,15,689/- related to the work executed prior to 16.6.2005. There was no question of levy of service tax on the said amount. According to the appellant, service tax was payable on the amount actually received. It was further submitted that the appellant had not carried out the work of horizontal drilling for the passage of cables or drain pipes. Thus, the case of the appellant was covered by clarification dated 27.7.2005 issued by the Board. The appeal of the appellant came up for hearing before the Commissioner (Appeals) on 3.9.2008. Learned counsel for the appellant appeared and made submissions. The Commissioner (Appeals) vide order dated 3.9.2008, Annexure A.3, allowed the appeal holding that service tax was not payable on services rendered prior to 16.6.2005 relying upon the Board's circular dated 27.7.2005 and after examining the contracts as well as certificates issued by various service recipients. It was concluded that the activities of the appellant did not fall within the purview of site formation and clearance, excavation and earthmoving or levelling. The department filed an appeal before the Tribunal against the order dated 30.9.2008, Annexure A.3 passed by the Commissioner (Appeals) on the ground that the services of the appellant did fall under clause (iii) of Section 65(97a) of the Act. The appeal was filed in the year 2009. Due to huge pendency before the Tribunal, the appeal came up for hearing before the Tribunal on 23.7.2014. The appellant or its counsel due to non receipt of notice of hearing could not appear. No fresh notice was issued to the appellant. The Tribunal after hearing the representative of the department allowed the appeal vide order dated 23.7.2014, Annexure A.5. It was held that the activity

of the appellant was covered under clause (iii) of Section 65(97a) of the Act and the appellant was liable to pay tax. On receipt of copy of the order passed by the Tribunal, the appellant filed an application seeking recalling of the order dated 23.7.2014 and restoration of the appeal. The appellant submitted that it had not received notice of hearing and had engaged Shri Kamal Jeet Singh, Advocate as its counsel who in the absence of receipt of hearing notice failed to appear before the Tribunal. The said application came up for hearing before the Tribunal on 7.9.2015 though it was filed in October 2014. The Tribunal vide order dated 7.9.2015, Annexure A.7 dismissed the application on the ground that notice was dispatched on the address furnished in the memo of appeal which was a correct address. Hence the instant appeal by the appellant-assessee.

5. We have heard learned counsel for the parties.

6. Admittedly, the appeal against the order dated 30.9.2008 passed by the Commissioner (Appeals) was filed by the revenue before the Tribunal on 15.1.2009. Due to pendency before the Tribunal, it came up for hearing on 23.7.2014. No fresh notice of the date of hearing was received by the appellant. Thus, there was non appearance on the part of the appellant. The Tribunal after hearing the representative of the department allowed the appeal ex parte vide order dated 23.7.2014, Annexure A.5. Even the recalling application was filed in October 2014 by the appellant whereas the same came up for hearing before the Tribunal on 7.9.2015. Therefore, sufficient opportunity to represent its case was not afforded to the appellant before passing the impugned orders. Thus, there was violation of the principles of natural justice.

7. The Hon'ble Apex Court in *Canara Bank* v. *V.K. Awasthy* AIR 2005 SC 2090 while dealing with the doctrine of principles of natural justice had noticed as under:—

> '8. Natural justice is another name for commonsense justice. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a commonsense liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.
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> 9. The expressions "natural justice'' and "legal justice'' do not present a water-tight classification. It is the substance of justice which is to be secured by both, and whenever legal justice fails to achieve this solemn purpose, natural justice is called in aid of legal justice. Natural justice relieves legal justice from unnecessary technicality, grammatical pedantry or logical prevarication. It supplies the omissions of a formulated law. As Lord Buckmaster said, no form or procedure should ever be permitted to exclude the presentation of a litigants' defence.
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> 10. The adherence to principles of natural justice as recognized by all civilized States is of supreme importance when a quasi- judicial body embarks on determining disputes between the parties, or any administrative action involving civil consequences is in issue. These principles are well settled.

The first and foremost principle is what is commonly known as audi alteram partem rule. It says that no one should be condemned unheard. Notice is the first limb of this principle. It must be precise and unambiguous. It should appraise the party determinatively the case he has to meet. Time given for the purpose should be adequate so as to enable him to make his representation. In the absence of a notice of the kind and such reasonable opportunity, the order passed becomes wholly vitiated. Thus, it is but essential that a party should be put on notice of the case before any adverse order is passed against him. This is one of the most important principles of natural justice. It is after all an approved rule of fair play. The concept has gained significance and shades with time. When the historic document was made at Runnymede in 1215, the first statutory recognition of this principle found its way into the "Magna Carta". The classic exposition of Sir Edward Coke of natural justice requires to "`vocate interrogate and adjudicate". In the celebrated case of *Cooper* v. *Wandsworth Board of Works*, (1963) 143 ER 414, the principle was thus stated:

"Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where art thou has thou not eaten of the tree whereof I commanded thee that though should not eat". Since then the principle has been chiselled, honed and refined, enriching its content. Judicial treatment has added light and luminosity to the concept, like polishing of a diamond.

11. Principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. These rules are intended to prevent such authority from doing injustice.'

8. After giving our thoughtful consideration to the facts and circumstances of the case, in our opinion, the interest of justice would be met if the case is remanded back to the Tribunal to decide the same afresh after affording an opportunity to the appellant to put forward its claim. Accordingly, the impugned orders dated 23.7.2014 and 7.9.2015, Annexures A.5 and A.7 respectively are quashed and the matter is remanded to the Tribunal to decide it afresh after affording an opportunity of hearing to the appellant in accordance with law. The appeal stands disposed of.