IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :17.01.2018

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.2 of 2018
and W.M.P.No.2 of 2018

M/s.Shanthi Builders,
Represented by its Partner Mr.T.Arunkumar,
Sorathur, Vallam Post,
Panruti Taluk, Cuddalore. ... Petitioner

Vs.

The Assistant Commissioner of Central Excise,
#1, Vallalar Nagar,
Manjakuppam, Cuddalore 607 001. ... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records of the respondent culminating in the Order-in-Original No.04/2012-ST dated 26.07.2012 passed from File No.C.No.IV/16/STC/341/2009-ADJ and quash the same.

For Petitioner : Mr.S.Murugappan

For Respondent : Mr.K.Ravi
Senior Panel Counsel

O R D E R

Heard Mr.S.Murugappan, learned counsel for the petitioner and Mr.K.Ravi, learned Senior Standing Counsel for the revenue. With the consent on either side, the writ petition is taken up for disposal.

2.The petitioner has challenged an order passed by the respondent being Order-in-Original No.04/2012-ST dated 26.07.2012, by which, the respondent has confirmed the demand of service tax as made in the show cause notice dated 10.10.2009 and directed the petitioner to pay a sum of Rs.1,23,454/- apart from demanding interest Section 75 of the Finance Act, 1994 and imposing penalty. The petitioner preferred an appeal as against the said order before the Commissioner (Appeals), who by order dated 04.03.2014 dismissed the appeal as being time barred. The Commissioner (Appeals) did not go into the merits of the matter and has held that he had no jurisdiction to condone the delay beyond the period of 90 days from the date of the order-in-original. The petitioner carried the matter to the CESTAT and this appeal was dismissed by the CESTAT by order dated 25.09.2014 for the very same reason and holding that the Commissioner (Appeals) was fully justified by stating that he had no power to condone the delay. The petitioner filed appeal before the

Hon'ble Division Bench in CMA.No.103 of 2015. Before the Hon'ble Division Bench, the petitioner submitted that the petitioner is entitled to the benefit of exemption notification bearing No.6/2005-S.T. dated 01.03.2005 as amended by notification No.8/2008-S.T. dated 01.03.2008. Therefore, the petitioner sought for liberty to assail the correctness of the show cause notice dated 10.10.2009 and sought leave of the Hon'ble Division Bench to withdraw the appeal and assail the correctness of the show cause notice.

3.It appears that the Hon'ble Division Bench was prima facie satisfied with the submission made on behalf of the petitioner, permitted the petitioner to withdraw the appeal with liberty to them to assail the correctness of the show cause notice, if he is otherwise entitled to in law. By way of this writ petition, the petitioner has challenged the order-in-original as the show cause notice has culminated in such a manner.

4.The learned counsel for the revenue contended that by applying Doctrine of Merger, the petitioner cannot maintain the second round of litigation by challenging the impugned order-in-original.

5.I am unable to countenance the stand for the reason that the Commissioner (Appeals) as well as the CESTAT did not decide on the merits of the issue. The Hon'ble Division Bench thought fit to grant liberty to the petitioner to assail the correctness of the show cause notice. The Division Bench has recorded the submission of the petitioner with regard to the applicability of the exemption notification. This is a good indication that the Hon'ble Division Bench was prima facie satisfied that the case has projected by the petitioner. If the benefit of the exemption notification is applied and if it is found that the turnover for the service tax provided by the petitioner firm has not exceeded Rs.10 lakhs during 2008-09, the question of demanding service tax from the petitioner would not arise. The petitioner is partially to be blamed as they did not effectively contest the proceedings before the respondent on receipt of the show cause notice dated 10.10.2009. Nevertheless, considering the nature of activity done by the petitioner and the quantum of service tax demanded, this Court is of the considered view that the respondent should take a decision as regards the applicability of the exemption notification to the case of the petitioner.

6.The learned counsel for the petitioner would point out that the respondent themselves have admitted that the turnover is Rs.9,98,817/- and if that is so, the benefit of the exemption notification would automatically stand attracted.

7.Thus, considering the peculiar facts and circumstances of the case, this Court is inclined to issue appropriate directions so as to enable the petitioner to go before the respondent and place the exemption notification for their consideration sot hat the respondent can pass reverse orders. Accordingly, the writ petition stands disposed of by directing the petitioner to treat the impugned order-in-original dated 26.07.2012 as show cause notice and submit their reply within a period of fifteen days from the date of receipt of a copy of this order. On receipt of the reply, the respondent shall afford an opportunity of personal hearing, consider as to the applicability of the exemption notification whether the petitioner has complied with the condition contained therein and pass fresh orders on merits and in accordance with law. No costs. Consequently, connected Miscellaneous Petition is closed.

17.01.2018

Index : Yes/No

Internet : Yes/No

Speaking Order/Non-Speaking Order

dna/cse

To

The Assistant Commissioner of Central Excise,
#1, Vallalar Nagar,
Manjakuppam, Cuddalore 607 001.

T.S.SIVAGNANAM, J.

dna/cse

W.P.No.2 of 2018

17.01.2018