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**IN THE HIGH COURT OF KARNATAKA
CIRCUIT BENCH AT DHARWAD**

DATED THIS THE 29TH DAY OF JULY, 2011

PRESENT

THE HON'BLE MR.JUSTICE V.G.SABHAHIT

AND

THE HON'BLE MR.JUSTICE B.MANOVAR

C.E.A.NO.75/2007

BETWEEN:

THE COMMISSIONER OF CENTRAL EXCISE,
CUSTOMS & SERVICE TAX,
NO.71, CLUB ROAD,
BELGAUM-590 001.

... APPELLANT

(BY SRI.S.N.RAJENDRA, ADVOCATE)

AND:

M/S. BELLARY STEELS AND ALLOYS LTD.,
S.10/11, ANANTHPUR ROAD,
BELLARY-583 101.

...RESPONDENT

(BY SRI.K.S.RAVISHANKAR, ADVOCATE)

THIS CEA FILED UNDER SECTION 35G OF THE CENTRAL
EXCISE ACT, 1944 ARISING OUT OF THE ORDER DATED
19/12/2006 PASSED IN FINAL ORDER 2070/2006 IN ST/80/2006,
PRAYING THAT THIS HON'BLE COURT MAY BE PLEASED TO:

- i) TO DECIDE THE SUBSTANTIAL QUESTION OF STATED
THEREIN,
- ii) SET ASIDE THE ORDER DATED 19/12/2006 MADE IN
ST/80/2006 VIDE ITS FINAL ORDER NO.2070/2006 PASSED

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BY CESTAT, SOUTH ZONAL BENCH, BANGALORE
PRODUCED AS ANNEXURE-C AND ALLOW THE APPEAL
WITH COSTS, IN THE INTEREST OF JUSTICE.

THIS APPEAL COMING ON FOR FINAL HEARING, THIS DAY,
V.G.SABHAHIT.J., DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is filed by the revenue being aggrieved by the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, at Bangalore, in Appeal No.ST/80/2006 wherein the appeal filed by the revenue has been dismissed by holding that the show cause notice issued after the amendment of the Finance Act retrospectively from 11.05.2000 could not have been issued in respect of the persons who are assesseees u/s 71-A as such persons are not covered by Section 73 following the judgment of the Supreme Court in the case of **COMMISSIONER OF CENTRAL EXCISE, MEERUT-II VS. LH SUGAR FACTORIES LTD., (2005 (187) ELT 5 (SC).**

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2. The appeal has been admitted for consideration of the following substantial question of law as framed in the appeal memo:

- "a) Whether under the facts and circumstances of the case the Appellate Authority is correct in saying that Notice issued to the assesseees under Section 73 of the Act are not liable to pay the tax?"*
- b) Whether under the facts and circumstances of the case the Tribunal is right in holding that in view of Amendment Appellants have no right to demand?"*
- c) Whether under the facts and circumstances of the case the Tribunal is right in holding that Goods Transport Operators are not liable to pay Service Tax?"*

3. The material facts leading up to this appeal are as follows:

The respondent having its registered office at Anantapur Road, Bellary, have availed the service of Goods Transport Operator during the period from

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16.11.1997 to 02.06.1998 without getting themselves registered with the Central Excise Department as required under section 69 of Chapter V of the Finance Act, 1994 without following the statutory procedures laid down in the Service Tax Rules, 1994 without payment of service tax and without following the statutory procedures laid down in the Service Tax Rules 1994. During the said period, the receiver of the service was liable to pay service tax @ 5% on the taxable value of the service used by him in terms of Section 65, 66 and 68 of the Finance Act, 1994. Section 68 has been amended retrospectively and a new Section 71A of Finance Act, 1994, has been inserted to revalidate the collection of Service Tax payable by the user of services of Goods Transport Operators (GTOs) for the period from 16.11.1997 to 02.06.1998 the amendments made are in continuation to the earlier amendments which were made in Section 65 and 66 Vide Finance Act, 2000. As per amended Rules, a new Rule 7A has been inserted vide Notification No.4/2003 dated

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14.05.2003 which provides that the service receiver in case of service received by GTOs for the aforesaid period shall be required to file return in form ST-3B along with copy of TR6 challan within a period of six months from the date of 13.05.2003. In case, assessee fails to file return for the aforesaid period, the interest and penalty are liable to be imposed. The said assessee have failed to file the return within the stipulated period and also failed to pay the service tax on the taxable value paid during the period mentioned supra which works out to Rs.2,16,620/- @ the rate of 5% on the taxable value of Rs.43,32,391/- paid during the period mentioned supra and show cause notice was issued for imposition of the said tax and interest and penalty on 09.01.2004 and after the respondent replied to the said show cause notice, the original authority confirmed the order rejecting the cause shown and ordered to issue demand for payment of tax of Rs.2,16,620/- and penalty u/s 76, 77 and 78 of the Act. Being aggrieved by the same, appeal was preferred in

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appeal No.14/2006 by the assessee before the Commissioner of Central Excise (Appeals) and the appellate authority by order dated 18.01.2006 allowed the appeal by setting aside the order of the original authority and being aggrieved by the same, revenue preferred appeal before the Customs, Excise and Service Tax Appellate Tribunal wherein the order passed by the Commissioner was confirmed on the ground that the subject matter is covered by the judgment of the Supreme Court in **CCE MEERUT VS. LH SUGAR FACTORIES LTD., (2005) (187) ELT 5 (SC)** and dismissed the appeal. Being aggrieved by the same, this appeal is filed by the revenue which is admitted for consideration of the substantial question of law framed in the appeal memo by order dated 11.09.2007.

4. Heard the counsel for the appellant and the learned counsel for the respondent.

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5. Learned counsel for the appellant submitted that the decision of the Supreme Court is not helpful to the respondent in the present case as no return has been filed u/s 71-A of the Act and therefore the appellate authorities were not justified in setting aside the show cause notice and giving relief to the respondent.

6. Learned counsel for the respondent argued in support of the order passed by the Tribunal and submitted that the question that arise for determination about the validity of the show cause notice has been already decided by the Hon'ble Supreme Court in the LH Sugar Factory's case referred to above. He also submitted that the same has been reiterated in the case of **COMMISSIONER OF CENTRAL EXCISE, VADODARA VS. GUJARAT CARBON AND INDUSTRIES LTD., (2008 (12) STR 3 (SC))** and it has been followed by the division bench of this court in CEA 52 and 53/2006 dated 25.02.2010.



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7. We have carefully considered the contentions of the learned counsel appearing for the parties and scrutinised the material on record.

8. The material on record would clearly show that there is no doubt about the date on which the amendment was made to the provisions of the Act retrospectively with effect from 11.05.2000. The show cause notice is issued on 09.11.2004. In view of the decision of the Supreme Court and decision of this court, it cannot be disputed that when the assessee is covered u/s 71-A of the Act any show cause notice can be issued u/s 73 of the Act. The decision relied upon by the Tribunal of the Apex Court in LH Sugar Factory's case has been reiterated in the subsequent judgment in Gujarat Carbon Industries' case referred to by the learned counsel for the respondent wherein it is clearly stated that class of persons who come under Section 71-A are not brought under net of Section 73 and show cause notice issued to the assessee invoking

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Section 73 are not maintainable. Therefore, following the judgment of the Supreme Court and this court, we hold that substantial question of law has to be answered against the revenue and in favour of the respondent.

Appeal is dismissed.

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