IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I

APPEAL No. ST/2442/2012-CU[DB]

(Arising out of Order-in-Appeal No.227/ST/LKO/2011 dated 08/05/2012 passed by Commissioner (Appeals), Customs of Central Excise & Service Tax, Lucknow)

Mr. Devi Chand Contractor — **Appellant**

Vs.

Commissioner of Central Excise & Service Tax, Lucknow (Now Agra) — **Respondent**

Appearance:

Shri Raj Kumar (C.A.) — for Appellant
Shri Mohd. Altaf (Asstt. Commr.) AR — for Respondent

CORAM:

Hon'ble Mr. Anil Choudhary, Member (Judicial)
Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 02/04/2018
Date of Decision : 02/04/2018

FINAL ORDER NO. - **72286/2018**

Per: Anil Choudhary

The appellant a contractor was carrying on Repair & Maintenance of Coal Handling Plant for U.P. Rajya Vidyut Utpadan Nigam Ltd. for their Harduaganj Thermal Power Project. In the earlier round of litigation this matter was adjudicated by the Learned Commissioner (appeals) vide Order-in-Appeal No.272-276/ST/LKO/2010 dated 17/09/2010 wherein it was held that the work done by the appellant is 'Repair & Maintenance of Immovable Property'.

Further Immovable Property – Repair & Maintenance became taxable with effect from 16th June, 2005 vide Notification No.15/2005-ST dated 07/06/2005. It was also observed that vide Board Circular F. No. B1/6/2005-TRU has clarified that service of 'Maintenance or Repair of Immovable Property' has become chargeable to Service Tax with effect from 16/06/2005. Accordingly Learned Commissioner remanded the matter back to the Adjudicating Authority to pass the consequent order and/or quantify the demand accordingly.

2. In response thereto the Adjudicating Authority by Order-in-Original dated 26/09/2011 quantified the demand as directed by the learned Commissioner (appeals).

3. Being aggrieved with the Order-in-Original dated 26/09/2011 Revenue preferred appeal before learned Commissioner (appeals) on the ground as follows:-

"a) *The amount of Rs.75,760/- already deposited by the respondent has not been appropriated to the credit of Government account.*

b) *The penalty proposed in the Show Cause Notice under Section 76 of the Finance Act, 1994 for non-payment of service tax has not been imposed."*

4. The learned Commissioner (appeals) in the second round by his order dated 08/05/2012 have held that the activity done by the appellant is service of Repair & Maintenance of Movable Property and not immovable property and accordingly he was pleased to re-quantify the tax and

also imposed penalty under Section 78, 77 of the Act. The assessee has also filed Cross Objections for grant of the threshold exemption limit for the Financial Year 2005-06 which was not considered by the learned Commissioner.

5. Heard the parties.

6. In this appeal filed by the appellant –assessee, we find that the impugned order is hit by the doctrine of merger and *res-judicata* and accordingly the impugned Order-in-Appeal is as *ab initio void* accordingly the same is set aside. So far the penalty imposed under Section 78 is concerned, we find that the issue being wholly interpretational in nature such penalty is not warranted and accordingly set aside. The appeal stands allow only for statistical purpose.

(Dictated & Pronounced in Court)

Sd/-	**Sd/-**
(Anil G. Shakkarwar)	**(Anil Choudhary)**
Member (Technical)	**Member (Judicial)**

Lks