CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.2128 of 2012-Single Member

(Arising out of Order-in-Appeal No.219-ST/LKO/2012 dated 26/04/2012 passed by Commissioner (Appeals), Customs, Central Excise & Service Tax, Lucknow)

M/s Agarwal Company **.....Appellant**

(B-18, Aliganj, Lucknow)

VERSUS

Commissioner (Appeals), Central Excise

& Service Tax, Lucknow **....Respondent**

(Lucknow)

APPEARANCE:

Request to Decide on Merit, for the Appellant
Shri Mohd. Altaf, Assistant Commissioner Authorised Representative for the Respondent

CORAM:

HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)

FINAL ORDER NO. 70963/2019

Date of Hearing : 13 May, 2019
Date of Decision : 16 May, 2019

PER: ARCHANA WADHWA

The appellant had made a request to decide the appeal on merits. Accordingly, I have gone through the impugned orders and have heard learned A.R. appearing for the Revenue.

2. As per facts on record, the appellant was registered with the Service Tax Department under the category of construction services in respect of "Commercial or Industrial or Civil Structure" and was paying service tax accordingly. However,

during the period from October, 2007 to March, 2008 and April, 2008 to September, 2008 the appellant discharged its service tax liability by treating the said services as 'Works Contract Services' and in terms of the (Composition Scheme for Payment of Service Tax) Rules, 2007, without amending the registration certificate.

3. According to the Revenue, the same resulted in short payment of service tax of Rs.12,25,533/-. The appellant deposited an amount of Rs.7,69,820/- alongwith interest immediately i.e. before the issuance of the show cause notice to them. The balance amount of Rs.4,55,713/- alongwith interest was deposited by them within a period of one month of passing of the Order-in-Original, adjudicating the show cause notice. They also deposited 25% of the balance amount, as penalty.

4. Commissioner (Appeals) observed that inasmuch as the entire demand of duty confirmed against them was to the tune of Rs.12,25,533/- and the appellant had only deposited a part amount before the issuance of the show cause notice, imposition of penalty of 100% upon the appellant was justified. Accordingly, he held that option of payment of 25% penalty by the Original Adjudicating Authority would relate to the entire penalty imposed to the extent of Rs.12,25,533/- and not to balance amount of Rs.4,55,713/- which was deposited subsequent to the passing of the order, even though within a period of one month. He also upheld the imposition of penalty under Section 78, reduced the amount of Rs.3 lakhs penalty imposed under Section 76 was set aside by him.

The said order of Commissioner (Appeals) is impugned before Tribunal.

5. The appellants are challenging only the imposition of penalty under Section 76 and 78. As regards the penalty imposed under Section 78 I find that the major part of the demand was deposited by the appellant prior to the issuance of

the show cause notice. As such penalty required to be imposed under Section 78 was only to the extent of the amount not deposited by them. The Original Adjudicating Authority had given an option to the appellant to deposit 25% of the penalty within a period of one month from the date of passing of the order. As such deposit of 25% of the balance amount as deposited by the appellant, as penalty under Section 78 is appropriate. Otherwise also, I find that there is no dispute about the fact that the services provided by the appellants were 'Works Contract Service' and as such switch over to the said services for payment of service tax which was in the knowledge of the Revenue also cannot be held to be with any *mala fide*. The only lapse on the part of the appellant was that they did not get their registration certificate amended.

However, appellant has already deposited duty plus 25% penalty on balance duty which was deposited after the order, I set aside the balance amount of penalty imposed upon them under Section 78.

6. As regards the imposition of penalties under Section 78 it is well settled law that both the penalties i.e. under Section 76 and 78 cannot be imposed simultaneously. Reference can be made to Tribunal decision in the case of Artefact Projects Ltd. vs. Commissioner of Central Excise, Nagpur 2018 (363) E.L.T. 1041 (Tri.-Mumbai). By following the same, I set aside the imposition of penalty under Section 76 of the Act.

7. The appeal is disposed of in above terms.

(Order pronounced in the open court on – 16/05/2019)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Lks