CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL ALLAHABAD

REGIONAL BENCH - COURT No. I

Service Tax Appeal No.70864 of 2018-Division Bench

(Arising out of Order-in-Appeal No.17/ST/APPEAL/AUDIT LKO/2018 dated 31/01/2018 passed by Commissioner (Audit) Central Goods & Central Excise & Service Tax, Lucknow)

M/s Parwati Construction **.....Appellant**

(2/87, Awas Vikas Colony, Barabanki, U.P.)

VERSUS

Commissioner (Audit) GST, Customs

& Central Excise, Lucknow **....Respondent**

(7-A, Ashok Marg, Lucknow)

APPEARANCE:

Shri Dharmendra Srivastava, Chartered Accountant, for the Appellant
Shri Rajeev Ranjan, Authorised Representative for the Respondent

CORAM:

HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 71036 / 2019

Date of Hearing : 07 March, 2019
Date of Decision : 24 May, 2019

PER: ARCHANA WADHWA

As per facts on record, the appellant was engaged in providing taxable services falling under the category of "Works Contract Services". As a result of enquiry conducted against them, they were issued a show cause notice dated 20/10/2015 raising demand of service tax to the tune of around Rs.88.55 lakhs for the Financial Year 2010-11 to 2013-14. The said show cause notice was adjudicated by the Additional Commissioner confirming the demand of Rs.33,27,535/-. As out of said payment appellant had already deposited the service tax to the tune of Rs.13,38,882/-, he confirmed the balance amount of Rs.19,82,250/-.

2. The said order was challenged by the appellant before Commissioner (Appeals). The appellant contended that the Original Adjudicating Authority was not justified in confirming the service tax in respect of the sale of the construction material to the Government Department as also to various private parties. As they also produced the certificates from the various Government Authorities to whom material was sold, the Appellate Authority accepted the sales made to Government Authorities. However, in respect of sales made to various private parties, he confirmed the demand. Similarly the service tax in respect of 'Construction of Residential Complex' for U.P. Avas Evam Vikas Parishad was upheld and penalty was reduced to 50%.

3. The learned advocate appearing for the appellant have filed written submissions and have submitted that the demand on sale of building material to private parties was not justified. He clarified that building materials sold by the appellant were outside the purview of VAT and as such no VAT has been charged by them on the sales invoices. For period till 30/06/2012 – sale of goods was not taxable under any category of taxable service as also sale of goods is a State subject liable to VAT. Even otherwise, appellant is entitled to benefit of Notification No.12/2003-ST dated 20/06/2003. For the period w.e.f. 01/07/2012, sale of goods is excluded from purview of definition of 'service' given under Section 65B(44) of Finance Act, 1994 also trading of goods is in the negative list and hence, sale of goods is not liable to service tax. He also submits that Commissioner (Appeals) has not granted benefit on the ground that consideration for such sale was received in cash. He submits the mode of receipt of consideration is not determinative of the taxability under service tax law and hence confirmation of

demand was not justified. He also produced the copies of the invoices as also certificate from the buyers to establish that the activity was sale of building material and not providing of any services.

Similarly in respect of demand under U.P. Avas Evam Vikas Parishad, he submits that the appellant was under a *bona fide* belief that since they were working for U.P. Government, they were not required to pay any tax. However, the same was subsequently paid by them alongwith interest prior to issuance of the show cause notice and hence penalty should not have been imposed upon them.

4. After hearing learned A.R., we find that the Commissioner (Appeals) has accepted the fact that the appellant raised invoices for sale of the construction material. However, he has observed that since the consideration was received in cash and invoices do not contain VAT amount it has to be held that the same was a service. We find no merits in the above reasoning of the Revenue. As explained, sale of building material does not invite VAT. Nevertheless same remain State subject. On the other hand, Revenue have also not established as to which service taxable under the Act stands provided by the appellant. As such, we agree with the learned advocate that no service tax is required to be confirmed against the appellant in respect of sale of building material to private parties. Accordingly demand of Rs.5,29,556/- confirmed against them on the said ground is set aside alongwith setting aside of penalty.

5. As regards penalty imposition of Rs.6,72,643/- imposed upon the appellant while confirming the demand of Rs.13,45,285/- under the category of 'Construction of Residential Complex', we note that admittedly the said construction was for U.P. Avas Evam Vikas Parishad. Service tax was deposited by the appellant alongwith interest even before issuance of the show cause notice in which case no notice should have been issued to them in terms of the provision of Section

73(3) of Finance Act, 1994. Otherwise also, we note that the said services having been provided for Government body, there could be a *bona fide* belief on the part of the assessee not to pay any tax on the sale, Revenue has not adduced any evidence to show that such non-payment was with any mala fide intention. As such, we agree with the learned advocate that the penalty imposition on the said ground is not justified. We accordingly set aside the same.

6. Appeal is disposed of in above terms.

(Order pronounced in the open court on – 24 May, 2019)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

Lks