IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH-COURT NO.-1

Service Tax Appeal No. 50566 of 2014-[DB]

[Arising out of Order-in-Appeal No.NOI/EXCUS/000/APPL/145/13-14 dated 26.07.2013 passed by the Commissioner (Appeals) Customs, Central Excise & Service Tax, Noida]

M/s Samsung India Electonics Private Limited ..Appellant
B-1, Sector-81, Noida (UP)

Versus

Commissioner of Central Excise, Noida ....Respondent
C-56/42, Sector-62, Noida

Appearance

Present for the appellant : Shri B L Narsihman, Advocate

Present for the respondent: Shri Gyanendra Kumar Tripathi, Deputy Commissioner, Authorised Representative

Coram:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. ANIL G SHAKKARWAR, MEMBER (TECHNICAL)

Date of Hearing/Decision: 18 July, 2019

Final Order No. 71611 / 2019

PER ANIL G. SHAKKARWAR:

1. After hearing both the sides duly represented by Shri B L Narsihman, learned Counsel for the appellant and Shri Gyanendra Kumar Tripathi, Deputy Commissioner representing Revenue, we note that through the present appeal appellant have challenged the impugned Order-in-Appeal dated 26.07.2013.

2. The appellant were engaged in the manufacture of electronic and electrical goods such as mobile phone handsets, computers etc. The appellants were also registered for payment of service tax. The appellant had entered into technology license agreement with M/s Samsung Electronics Company Limited (hereinafter referred to as 'Samsung Korea') for use of Samsung brand and technical know-how and to receive technical information and technical support service. Samsung Korea was under an obligation to provide technical training to the employees of the appellant on payment technical training fee. On initiation of investigation appellant informed Revenue that the appellant paid an amount of Rs. 1,97,54,700/- on account of Royalty of Training and another amount of Rs. 1,48,35,393/- as reimbursement for business and travels. The appellant paid service tax of Rs. 24,93,946/- along with interest of Rs. 4,67,222/- on 06.11.2008 and informed Revenue that the same was not liable to service tax as the expenses were reimbursable. When the appellant received notice for personal hearing the appellant intimated Revenue that referred Show Cause Notice dated 28.09.2011 was not served upon them, and therefore, they were not in a position to submit their defence. In spite of that *ex-parte* Order-in-Original dated 05.03.2013 was passed confirming the demand of service tax of Rs. 24,93,946/- and interest of Rs. 4,67,222/-. Further, the appellant were imposed with penalty of Rs. 24,93,946/- under Section 78 of Finance Act, 1994 and another penalty of Rs. 10,000/- under Section 77 of Finance Act, 1994. Aggrieved by the said order the appellant preferred appeal before Commissioner (Appeal), the said appeal was decided through impugned Order-in-Appeal. The appellant raised the contention before the learned Commissioner (Appeal) that the said Show Cause Notice dated 28.09.2011 was not served upon the appellant and also that under sub-Section (3) of Section 73 of Finance Act, 1994 the said Order-in-Original dated 05.03.2013 was

not sustainable. Learned Commissioner (Appeal) did not interfere with the said Order-in-Original dated 05.03.2013. Aggrieved by the said Order-in-Appeal the appellant is before this Tribunal.

3. Learned Counsel for the appellant has submitted that despite making several requests Revenue did not provide copy of Show Cause Notice to the appellant and that through letter dated 30.11.2012 Revenue provided the appellant with speed post receipt number without providing any proof of delivery or any acknowledgment in respect of service of said Show Cause Notice and that the said speed post receipt did not provide any proof of delivery of said Show Cause Notice to the appellant. They, therefore, submitted that the said Show Cause Notice was not served upon the appellant in terms of provisions of Section 37 C of Central Excise Act, 1944 made applicable to service tax matters. They submitted that the principle of natural justice were violated in imposing penalty against them since they were not put on notice to defend against the proposal of imposition of penalty. They relied on order of Hon'ble High Court of Madras in the case of **OSA Shipping Pvt. Ltd. vs. Commissioner of Central Excise, Chennai[1].** Learned Counsel submitted that Hon'ble Madras High Court had held that since the Department could not be produced acknowledgement of having served order on the appellant to the said appeal it was held that in terms of Section 37 C of Central Excise Act, 1944, the service of order was not complete. Further, he has submitted that as per the contention of Revenue Show Cause Notice was issued on 28.09.2011 whereas the service

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1. 2015 (325) ELT 486 (Mad.)

tax along with interest was paid on 06.11.2008, and therefore, in terms of sub-Section (3) of Section 73 of Finance Act, 1994 the Show Cause Notice was not to be issued, and therefore, the penalty was also not imposable.

4. Heard learned Authorised Representative who has submitted that learned Commissioner (Appeal) has dealt with service of notice in paragraph 5.4 of the impugned Order-in-Appeal and that the learned Commissioner (Appeal) has also held that in view of invocation of proviso to sub-Section (1) of Section 73 of Finance Act, 1994 the provisions of sub-Section (3) of Section 73 are not invokable and applicable in the present case.
5. Having considered the submissions made by both the sides and on perusal of record we note that it is relevant to reproduce paragraph 5.4 of the impugned order;

> 5.4 It is noticed that the appellants mainly contested that delivery of show cause notice through speed post is not proper as the Section 37 C prescribed delivery of notice through registered post and not through speed post. Therefore, in these circumstances it becomes necessary to examine what is Registered Post and how it is distinguished from speed post. From study of the various dictionaries, I reach on conclusion that the Registered post is the pre paid post or mail officially listed and accepted. The nature and characteristic of registered post shows that under Registered post "the pre paid post" or "the mail" is accepted by the Post Office under a receipt, official record/ receipt that "the letter" or "the mail" has been posted for delivery by the Post Office and it delivers such letter or mail to the addressee or his/her/its agent under proper receipt by way of taking signature, stamp, etc., and in case of non-delivery of such post of mail upon the person to whom it was meant the said post or mail is returned back to its sender after mentioning the causes of its non-delivery that too under proper receipt. After examining the nature and characteristics of the Registered post I proceed to examine the nature and characteristic of speed post. The speed post is special mail delivery service of Indian post ensuring of speedy delivery of the post of mail. The Post Office under "speed post service" accept the pre paid letters or mail under proper receipt/acknowledgment and delivers such letter or mail upon its addressee or his/her/its agent under receipt in the form of signature, thumb impression, stamp, etc. If the

> Post Office found itself unable to deliver the speed post than it (post office) returns back such undelivered speed post having proper account of non-delivery on the speed post letter itself, to it sender. An another advance feature of speed post, I find, is that its travelling path & delivery can be tracked on online under either circumstances of delivery upon the addressee or of return undelivered to its sender. Thus, I observe that speed post is the most advance mail delivery service of the Post Office which includes all the features and characteristics of Registered post. From the perusal of Section 37 C, I deduce that its provisions no way negatives delivery of notice through speed post. The provisions of Section 37 C, in case of service of notice, etc., by post, by mentioning its delivery through registered post, contemplate its official recorded proof of booking of letter for delivery upon its addressee and delivery upon the addressee or upon its sender, in case of non-delivery, having proper account of its non-delivery. Therefore, I am of the view that service of notice through speed post comes in the purview of provisions of Section 37 C, ibid. I, therefore, hold that delivery of notice, etc., through speed post is proper delivery or service of notice in the true meaning of the provisions of Section 37 C, ibid. The above views also find support from the Section 27 of the General Clauses Act, 1897. I observe the adjudicating authority provided ample opportunities of personal hearing but the appellants did not attend on the pretext of delivery of show cause notice through speed post is improper service of notice. Thus, the appellant's contention that ex-parte order passed is in violation of natural justice is devoid of merit. The ratio of judgment in the case of Amidev Agro Private Limited vs. U.O.I. 2012 (279) ELT 353 is not applicable in the appellants case as the issue involve in the relied upon case was pertaining to condonation of delay in filing of appeal.

6. We note that the learned Commissioner (Appeals) has nowhere established that the acknowledgement received from the appellant on having received the said Show Cause Notice is available with Revenue. We note that provisions of Section 37 C of Central Excise Act, 1944 require that the notice is to be sent through "registered post with acknowledgement due" and if the same is sent through speed post then Department should be in a position to establish that the same has been served on the person for whom it is intended. We, therefore, hold that the appellants

were not put on notice to defend themselves against the proposal of imposition of penalty. Therefore, penalties imposed are not sustainable.

7. We have further examined the finding of the learned Commissioner (Appeal) that in view of invocation of said proviso the provisions of said sub-Section(3) are not applicable in the present case. We note that on being pointed out immediately the appellants deposited the required service tax along with interest. We also note that there were not sufficient grounds to invoke said proviso since the information was available through the books of accounts maintained by the appellant. The internal page 3 of the said Order-in-Original dated 05.03.2013 clearly indicates that scrutiny of ST-3 returns and balance sheet was taken together for arriving at the service tax payable by the appellant. Therefore, it is clear that the appellant had filed ST-3 also and the whole transaction was reflected in the balance sheet. Therefore, we note that there is no element of suppression. We, therefore, held that invocation of proviso to sub-Section (1) of Section 73 of Finance Act, 1994 was not justified in the present case. Therefore, the finding of the learned Commissioner (Appeal) that provisions of sub-Section (3) of Section 73 of Finance Act, 1994 were not applicable in the present case is not sustainable.

8. In view of above findings as recorded above, we set aside the penalty imposed and without interfering with the voluntary deposit of service tax along with interest we allow the appeal.

(Operative part of the order pronounced in open court)

Sd/- Sd/-

(Anil G. Shakkarwar) **(Justice Dilip Gupta)**
Member(Technical) **President**

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