CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

ST/188/2009-DB

[Arising out of Order-in-Appeal No. 297/2008 dated 15/12/2008 passed by the Commissioner of Central Excise, Mangalore]

SATCOM
Proprietor:Prashanth Suvarna,
B.V. Road, Attavar, Mangalore — **Appellant(s)**

Versus

C.C.E. & S.T.-Mangalore
7th Floor, Trade Centre,
Bunts Hostel Road,
Mangalore – 575 003,
Karnataka — **Respondent(s)**

Appearance:

Shri. S. Vittal Shetty, Advocate
1st Floor, Chandrashekar Complex,
No.27, Ist Main Road, Gandhi Nagar,
Bangalore – 560 009
Karnataka — For the Appellant

Shri. K. Murali, Superintendent (AR) — For the Respondent

Date of Hearing: 29/08/2018
Date of Decision: 06/12/2018

CORAM:

HON'BLE MR. S.S GARG, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 21855 / 2018

Per: S.S GARG

The present appeal is directed against the impugned order dated

15.12.2008 passed by the Commissioner (Appeals) whereby the Commissioner (Appeals) has upheld the Order-in-Original but with regard to cenvat credit the Commissioner (Appeals) has asked the adjudicating authority to examine the issue and allow the same on merits. Briefly the facts of the present case are that the appellant was a registered service provider and providing taxable service under the category 'Cable Operator'. During the year 2002-2003 to 2004-2005 the service provider suppressed the actual amount of cable service charges in the guise of repair charges and new connection material charges and for purchase of spare parts and thereby short paid service tax for the period from August, 2002 to March, 2005. Further, from April, 2005 to September, 2005 the taxable value worked out more than the declared value and thus resulted in short payment of service tax. On these allegation a show-cause notice was issued and after following the due process, the original authority confirmed the service tax amounting to Rs. 1,07,267/- (Rupees One Lakh Seven Thousand Two Hundred and Sixty Seven only) and Education Cess of Rs. 914/- (Rupees Nine Hundred and Fourteen only) short paid for the period from August 2002 to September 2005. Interest was also demanded and penalty under Section 76, 77 and 78 was also imposed. Aggrieved by the said order, the appellant filed appeal before the Commissioner who rejected the appeal.

2. Heard both the parties and perused the records.

3. Learned counsel for the appellant submitted that impugned order is not sustainable in law as the same has been passed only on the basis of contents of the letter dated 09.06.2006 of the appellant. He further

submitted that the said letter has wrongly been considered as reply to the show-cause. He further submitted that the original authority mainly relied upon the contents of the letter dated 09.06.2006 to pass an order whereas the said letter was not a reply to the show-cause notice. He further submitted that when the appellant came to know that the said letter has been taken on record and has been considered as a reply, then the appellant withdrew that letter before the adjudicating authority on 19.09.2006 during the hearing before the original authority. He further submitted that the submissions made before the adjudicating authority vide various letters dated 11.08.2006, 19.09.2006 and 10.11.2006 were not considered at all whereas the contents of the letter dated 09.06.2006 has been considered to pass the Order-in-Original. He further submitted that other submissions of the appellants have also not been considered by the original authority and the same were raised before the Commissioner (Appeals) also but the Commissioner (Appeals) has also not given any finding on the same. He further submitted that the adjudicating authority has held in the operative part of the order that the differential value of Rs. 9,54,890/- (Rupees Nine Lakhs Fifty Four Thousand Eight Hundred and Ninety only) for the period from August 2002 to March 2005 and differential value of Rs. 1,85,392/- (Rupees One Lakh Eighty Five Thousand Three Hundred and Ninety Two only) for the period from April 2005 to September 2005 is liable for a tax of Rs. 1,07,267/- (Rupees One Lakh Seven Thousand Two Hundred and Sixty Seven only) and education cess of Rs. 914/- (Rupees Nine Hundred and Fourteen only). He also submitted that the amount of Rs. 9,54,890/- (Rupees Nine Lakhs Fifty Four Thousand Eight Hundred and Ninety only) includes Rs. 1,85,392/- (Rupees One Lakh Eighty Five Thousand Three

Hundred and Ninety Two only) going by the learned adjudicating authority's own order and therefore adjudicating authority has erred in taxing Rs. 1,85,392/- (Rupees One Lakh Eighty Five Thousand Three Hundred and Ninety Two only) again. He further submitted that the Tribunal has consistently held that penalties under Section 76 & 78 cannot be imposed simultaneously. For this submission, he relied upon the decision in the case of ***Remac Marketing (P) Ltd. Vs. CST, Kolkata – 2009 (13) S.T.R. 658 (Tri.-Kolkata).***

4. On the other hand the learned AR defended the impugned order.

5. After considering the submissions of both the parties, we find that the original authority has passed the order mainly relying upon the contents of the letter dated 09.06.2006 which was withdrawn by the appellant and the same cannot be considered to be reply to the show-cause notice. Further we find that the original authority has also not considered other submissions of the appellant. Further we note that the order-in-original was passed in violation of the principles of natural justice as the contentions raised by the appellant in their letter dated 11.08.2006, 19.09.2006 and 10.11.2006 have not been considered whereas only the contents of letter dated 09.06.2006 were considered as reply to the show-cause notice and based on that demand was confirmed. Even the Commissioner (Appeals) has not given any finding relating to the withdrawal of the letter dated 09.06.2006 in spite of the ground raised in the grounds of appeal before the Commissioner (Appeals). Further we find that both the authorities have wrongly imposed penalty under Section 76 and 78 which cannot be legally imposed in view of

the judgment of the Tribunal cited supra. Further we find that there is a calculation error in the computation of service tax and it appears that the adjudicating authority has taxed Rs. 1,85,392/- (Rupees One Lakh Eighty Five Thousand Three Hundred and Ninety Two only) again. In view of these inconsistencies, we are of the opinion that the impugned order is not sustainable in law and the same is set aside and the matter is remanded to the original authority to consider the submissions of the appellant submitted in letters dated 11.08.2006, 19.09.2006 and 10.11.2006 and pass a fresh order in accordance with law after considering the cenvat claim of the appellant also. In view of the discussion, the case is remanded to the original authority for passing a fresh order. Consequently, the appeal is allowed by way of remand.

(Order Pronounced in Open Court on **06/12/2018**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(S.S GARG)
JUDICIAL MEMBER

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