CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Service Tax Appeal No. 1501 of 2012

[Arising out of No. 02-2012 dated 07/03/2012 passed by Commissioner of Central Excise , BELGAUM]

KMMI STEEL PVT LTD
NO.811/2, NH-63, HOSPET ROAD, ALIPUR,
BELLARY 583 105

Appellant(s)

VERSUS

C.C.,C.E.& S.T-BELGAUM
NO. 71...CLUB ROAD,
CENTRAL EXCISE BUILDING,
BELGAUM,
KARNATAKA
590001

Respondent(s)

Appearance:

Shri M.S. NAGARAJA ,Advocate
T. RAJESWARA SASTRY &
ASSOCIATAES.
NO.1010, 2ND FLOOR,
ABOVE CORP.BANK, 26TH MAIN, 4TH T BLOCK,
JAYANAGAR
BANGALORE
KARNATAKA
560 041

For the Appellant

Shri Rama Holla, Superintendent(AR) — For the Respondent

CORAM:
HON'BLE MR. P.K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE MR. P. ANJANI KUMAR, TECHNICAL MEMBER

Final Order No. 20402 / 2020

Date of Hearing: 02/03/2020
Date of Decision: 23/07/2020

Per : P.K. CHOUDHARY

Briefly stated the facts of the case are that show-cause notice dt.

20/09/2011 was issued to the appellant assessee alleging failure to discharge service tax on "Mining of Mineral services" for the period 2007-08 and 2008-09. The show-cause notice proposed to demand service tax of Rs.93,45,509/- along with interest and also proposed to impose penalties under Sections 76, 77(1)(a) and Section 78 of the Finance Act, 1994 and penalty/fine under Section 70 read with Rule 7 of the Service Tax Rules, 1994. The show-cause notice also proposed to appropriate service tax of Rs.93,45,509/- and interest of Rs.24,20,408/- paid by the appellant assessee. The adjudicating authority passed the following order:-

(i) I hold that the services of excavation of iron ore and shifting and leveling in the mining area provided by the noticee M/s. KMMI Steel Pvt. Ltd., Bellary to their client M/s. Trident Minerals, Hospet during the period from November 2007 to February 2009 to be a taxable service under the category of **"Mining of Mineral"** services classified in terms of Section 65(105)(zzzy) of the Finance Act, 1994;

(ii) I hold that the gross receipts of **Rs.7,56,10,911/-**, received by the noticee M/s. KMMI Steel Pvt. Ltd., Bellary from their client M/s. Trident Minerals, Hospet during the period from **March 2008 to May 2009** for the aforesaid services provided under the taxable service category of **"Mining of Mineral"** services, to be the taxable value in terms of Section 67(2) of the Finance Act, 1994;

(iii) I confirm the demand of **Rs.93,45,509/-** (Rupees Ninety Three Lakhs Forty Five Thousand Five Hundred and Nine only) being Service Tax of **Rs.90,73,310/-** and Education Cess of Rs.1,81,466/- and Secondary & Higher Education Cess of Rs.90,733/- on the taxable value of Rs.7,56,10,911/- received by the noticee M/s. KMMI Steel Pvt. Ltd., Bellary from their client M/s. Trident Minerals, Hospet towards providing taxable services under "Mining of Mineral" services, in terms of Section 73(2) of the Finance Act, 1994 read with proviso to Section 73(1) and Section 68 ibid;

(iv) I confirm the demand of interest at applicable rates, amounting to **Rs.24,20,408/-** on the service tax amount of **Rs.93,45,509/-** confirmed at

Sl. No.(iii) above, under Section 75 of the Finance Act, 1994;

(v) I order appropriation of Rs.46,72,755/- (Rupees Forty Six Lakhs Seventy Two Thousand Seven Hundred and Fifty Five only) paid by the noticee vide GAR-7 Challan No.04526 dated 04.12.2010 and Rs.46,72,754/- (Rupees Forty Six Lakhs Seventy Two Thousand Seven Hundred and Fifty Four only) paid by the noticee vide GAR-7 Challan No.04548 dated 04.12.2010 and adjustment of the same against the demand of **Rs.93,45,509/-** confirmed at Sl. No.(iii) above;

(vi) I order appropriation of Rs.24,20,408/- (Rupees Twenty Four Lakhs Twenty Thousand Four Hundred and Eight only) paid by the noticee vide GAR-7 Challan No.0519/30.12.2010 and adjustment of the same against the demand of **Rs.24,20,408/-** confirmed at Sl. No.(iv) above;

(vii) I impose a penalty of **Rs.93,45,509/-** (Rupees Ninety Three Lakhs Forty Five Thousand Five Hundred and Nine only) under the provisions of Section 78 of the Finance Act, 1994 for evasion of service tax owing to willful misstatement and suppression of facts of providing taxable service under the category of “mining of Mineral” service and the corresponding receipts of value of taxable services and by contravention of the provisions of Section 68, Section 69 and Section 70 of the Finance Act, 1994;

(viii) I impose penalty under Section 77(1)(a) of the Finance Act, 1994 as amended, for failure to obtain Service Tax Registration in terms of Section 69 of Finance Act, 1994 read with Rule 4 of the Service Tax Rules, 1994, to an extent of Rs.10,000/- (Rupees Ten Thousand only) or Rs.200/- (Rupees Two Hundred only) per day during which such failure continued, whichever is higher, starting with the first day after the due date till the date of actual compliance;

(ix) I impose penalty of Rs.10,000/-under Section 77(2) of the Finance Act, 1994 as amended, for failure to file the ST3 returns for the relevant period within the stipulated due date under Section 70 of the Finance Act, 1994 read with Rule 7 of the Service Tax Rules, 1994, along with applicable late fee as stipulated in Rule 7C of Service Tax Rules, 1994 read with Section 70 of Finance Act, 1994; and

(x) I do not impose penalty under Section 76 of the Finance Act, 1994 as penalty is imposed under Section 78 of the Finance Act, 1994.

2. Hence the present appeal before the Tribunal.

3. The learned Advocate appearing on behalf of the appellant assessee reiterated the grounds of appeal and argued that as the appropriation of the service tax and interest paid was well before the issuance of show-cause notice, there was no occasion to issue the show-cause notice alleging suppression of facts or contravention of the statutory provisions with intention to evade payment of service tax. It is his submission that the appellant assessee have paid the service tax of Rs.93,45,509/- vide GAR7 challans Nos. 04526 and 0458 both dated 04/12/2010 and interest of Rs.24,20,408/- vide challan No.0519 dt. 30/12/2010 immediately on being pointed out by the Department. It is also his submission that they were under the bona fide belief that the activity of excavation, shifting and leveling in the mining area was not a taxable service under mining of minerals which was taxable w.e.f. 01/06/2007. The learned Advocate further submits that had the appellants been aware of levy of service tax on the aforesaid activity, they would have included the amount of service tax and collected from the recipient of the services, the recipient being an exporter of iron ore was eligible to claim refund of service tax so paid resulting in a revenue neutral situation. It is also not in dispute that the appellant assessee had not collected any amount of service tax from the service recipient. The learned Advocate has filed a synopsis and a compilation of various decisions in support of his arguments.

4. The learned departmental representative justified the impugned order and relied upon the decision of Hon’ble High Court of Karnataka in the case of CC, Mangalore Vs. Jindal Vijayanagar Steel Ltd. as reported in 2017(346) ELT 378 (Kar.) in support of his submissions.

5. Heard both sides and perused the appeal records.

6. We find that the appellant assessee, immediately on being pointed out regarding their statutory liability for payment of service tax on mining of minerals, they paid the entire amount of service tax of Rs.93,45,509/- along with interest of Rs.24,20,408/-well before the issuance of the show-cause notice.

7. We find that the issue is no more *res integra* and has been settled in favour of the assessee that once the assessee pays the tax along with applicable interest before issuance of the show-cause notice, the show-cause notice should not have been issued in the facts of the present case. We find that the case of the appellant is squarely covered by Section 73(3) of the Finance Act, 1994 since the appellant assessee after making payment of service tax and the applicable interest before issuance of the show-cause notice, intimated the authorities for not issuing the show-cause notice. Once the payment of service tax and interest is made by the appellant assessee and the intimation is furnished to the authorities, then the authorities should not serve any notice under sub-section (3) of Section 73 in respect of amounts already paid. It is our considered view that there was no case to initiate proceedings for imposition of penalties under various sections of the Act. Our view is fortified by the decisions of the Hon'ble High Courts in the case of (i) CCE&ST, LTU, Bangalore Vs. Adecco Flexione Workforce Solution Ltd. [2012(26) STR 3 (Kar.)], (ii) CCE Vs. Galaxy Construction Pvt. Ltd. [2017(48) STR 37 (Bom.)].

8. Regarding the case decision of the Hon'ble Karnataka High Court as cited by the learned AR for the Department, we find that the facts of that case are entirely different inasmuch as in that case, there was a deliberate non-payment of duty and there was a positive evidence to show that goods were being clandestinely cleared in defiance of law which fact was not in dispute. In the present case, there is no positive evidence on record to show that the assessee did not deliberately pay service tax and therefore, the ratio of the aforesaid ruling of the Hon'ble High Court is not applicable to the facts of the present case. Moreover, it is on record that the service recipient being an exporter of goods could have claimed refund of service tax charged and paid by the appellant, there would not have been any reason for him to indulge in wilful non-payment. Therefore, we are of the view that is this is not the case of wilful non-payment in the instant case with intent to evade tax.

9. In view of the above discussion and by respectfully following the ratio of the above cited decisions, we hold that the appellant is not liable to pay penalty. Extending the benefit of Section of 80 of the Finance Act, 1994, the penalties and late fines are set aside in entirety. The appellant's liability to pay service tax and interest amount is upheld which already stands paid, as also recorded in the impugned order, there is no warrant to impose penalty and late fees in view of the findings made above.

Hence, the impugned order is modified in the manner stated above. The appeal filed by the assessee is partly allowed in the above terms.

(Order was pronounced
in Open Court on **23/07/2020**)

(P.K. CHOUDHARY)
JUDICIAL MEMBER

(P. ANJANI KUMAR)
TECHNICAL MEMBER

Raja…