IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI

ST/76/2011

(Arising out of Order-in-Revision No. 7/2010 (ST) dated 04.11.2010 passed by the Commissioner of Central Excise, & Service Tax, Trichy).

1. M/s. RRR Associates : Appellant

Vs.

CC& ST, Trichy : Respondent

ST/443/2011

(Arising out of Order-in-Appeal No. 30/2011 dated 29/04/2011 passed by the Commissioner of Central Excise, Chennai).

2. M/s. RPP Selvam Infrastructure Pvt. Ltd. : Appellant

Vs.

CCE & ST, Salem : Respondent

Appearance

Ms. Cinduja Crishnan, Advocate
for the Appellant

Shri K.P. Muralidharan, AC (AR)
Shri R. Subramaniyam, AC (AR)
for the Respondent.

CORAM :

Hon'ble Ms. Sulekha Beevi, Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of Hearing/Decision: **23.03.2018**

FINAL ORDER No**.** ___________**/ 2018**

Per Bench

Brief facts of the case are that the appellants were issued SCN dated 12.12.2007 demanding service tax of Rs. 10,62,425/- along with interest and also proposing to impose penalty on the ground that the appellants had not discharged the service tax on the gross amount received by them as commission and had discharged service tax only on the net amount. The original authority confirmed the demand to the tune of Rs. 2,18,039/- along with interest and imposed penalty and dropped the balance demand. Against such order the department filed appeal before the Tribunal and vide Final Order No. 41263/2016, the appeal filed by the department was dismissed. Meanwhile, SCN dated 09.08.2010 was issued under Section 84 of the Finance Act, 1994 invoking the revisional powers proposing to amend the Order-in-Original No.15/12/2008 and demanding service tax to the tune of Rs. 6,09,185/- which was originally dropped by the adjudicating authority. Thereafter, the impugned order in Revision was passed confirming the proposal in the SCN dated 09.08.2010. Aggrieved, appellants are now before the Tribunal.

2. On behalf of the appellants, Ld. Counsel Ms. Cinduja Crishnan submitted that the order passed by the Commissioner is not sustainable as the SCN invoking revisional powers under sub-section 4 of Section 84 has been issued after the Commissioner (Appeals) disposed the appeal filed by the appellant. AS per sub-section 4 of Section 84 of the Finance Act, 1994, if the issue is pending in appeal, the revisional jurisdiction cannot be exercised.

She submitted that the SCN has been issued much later after the Commissioner (Appeals) disposed the appeal bending before him. Against this order, the department had already filed an appeal before the Tribunal. He submitted that the SCN issued proposes to amend the Order-in-Original dated 15.12.2008 and on such date after passing of OIA No. 76/2010 by Doctrine of Merger, the order in-Original is not in existence. Thus, the SCN itself is invalid and void abinitio. She relied upon the decision in the case *of CCE, Vs. Shiva Builders* – 2011 (22) STR 513 (P & H).

3. The Ld. AR, Shri K.P. Muralidharan reiterated the findings in the impugned order.

4. For better appreciation the relevant provisos contained in Section 84 is reproduced as under:-

> "(1) The Commissioner of Central Excise may call for records of a proceeding under this chapter which has been taken by the subordinate to him and may make such inquiry or cause such inquiry to be made and subject to the provisions of this chapter, pass such order thereon as he thinks fit.
> (2) xx xx xx xx xx
> (3) xx xx xx xx xx
> (4) No order under this section shall be passed by the Commissioner of Central Excise in respect of any issue if an Appeal against such issue is pending before the Commissioner of Central Excise (Appeal).
> (5) No such order under this section shall be passed after the expiry of two years from the date of which the order sought to be revised has been passed."

The above provision shows that if any issue is pending in appeal, the Commissioner (Appeals) cannot exercise the revisional jurisdiction. In the present case, the appeal was filed before the Commissioner (Appeals) and the same was disposed of.

Therefore, the O-in-O which was sought to be revised by the Commissioner was not in existence at the time when the SCN was issued. The O-in-O No. 10/2008 dated 15.12.2008 confirmed demand of Rs.2,18,039/- out of total demand of Rs. 10,54,875/- and dropped the rest of the demand as well as penal proceedings. In para 9 of SCN issued under Section 84 it is stated that the O-in-O dated 15.12.2008 needs to be revised. By doctrine of merger the O-in-O dated 15.12.2008 has merged with O-in-A No. 76/2010. The SCN dated 09.08.2010 is therefore against the provisions of law. Moreover, against the OIA No. 76/2010 which dropped part of the demand, the department had already filed appeal before the Tribunal, which was pending consideration during the relevant time.

5. Taking these aspects into consideration, we are of the considered opinion that the demand cannot sustain. The impugned order requires to be set aside, which we hereby do. The appeal is allowed with consequential benefits, if any.

(Operative part of the Order pronounced in the open Court)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

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