# CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
# SOUTH ZONAL BENCH
# CHENNAI

| S.No. | Appeal No. | Appellant | Respondent |
|---|---|---|---|
| 1. | ST/43/2011 | H. Kannan,<br>Prop. of Unikans | CCE & ST Madurai |
| 2. | ST/181/2011 | CCE & ST Madurai | H. Kannan, Prop. of Unikans |
| **Arising out of Order-in-Original No.03/2010 ST dt. 16.12.2010 passed by Commissioner of Central Excise, Madurai** | | | |

Appearance :

Shri M. Kannan, Advocate
For the Assessee

Shri A. Cletus, ADC (AR)
For the Revenue

**CORAM :**

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

Date of hearing / decision : 09.05.2018

**FINAL ORDER No. 41447-41448 / 2018**

**Per Bench**

The parties herein are referred to as assessee and department for the sake of convenience.

2. M/s.Unikans is a proprietary concern owned by Shri H. Kannan rendering services under the category of 'Commercial or Industrial Construction Service' (CICS). During the course of audit of the assessee, the following discrepancies came to light :

(1) Non-inclusion of value of cost of materials supplied free of cost by the service recipient of the assessee in their taxable value. It appeared that assessee were charging service tax from their clients including the

cost of free supply materials, however they were themselves discharging service tax only on the amounts received from the service recipient excluding the value of materials supplied free of cost. Department took the view that assessee have to pay service tax on gross amount received from service recipients and that they are not eligible for exemption provided under Notification No.1/2006-ST. Hence they have short paid amount of Rs.1,20,74,688/- for the period 1.10.2004 to 31.03.2009.

(2) Non-payment of service tax on services provided to educational institutions. It emerged that assessee had provided commercial or industrial construction services to educational institutions like schools and colleges for the period 23.08.2007 to 31.03.2009 but were not discharging any tax liability thereon. Department took the view that the gross amount charged and received from such educational institutions are taxable and that assessees have not paid service tax of Rs.41,09,392/- on these activities.

(3) Non-inclusion of TDS amounts in taxable value. It emerged that assessee had received payment from the service recipients who had deducted certain amounts towards income, namely, Tax Deducted at Source (TDS). Assessee were discharging service tax on the amounts so deducted by service recipients towards the TDS. Department took the view that TDS deducted is a tax obligation of assessee discharged through service recipient as per provisions of Income Tax Act and that the amount of service tax short paid on account of such non-inclusion

of TDS amounts works out to Rs.2,34,358/- for the periods 2004-05 and 2008-09.

Accordingly, show cause notice dt. 22.04.2010 was issued proposing demand of these amounts along with interest thereon as also imposition of penalty under various provisions of law. In adjudication vide the impugned order dt. 16.12.2010, the adjudicating authority denied benefit of Notification No.15/2004-ST as amended by Notification No.01/2006-ST and confirmed a total amount of Rs.1,09,61,287/- with interest and imposed equal penalty. While doing so, the adjudicating authority dropped the demand proposed in Annexure-II to the SCN on the taxability of construction service relating to educational institutions. He also dropped proposals in SCN to impose penalties under Section 76 and Section 77 ibid. Assessee has come in Appeal No.ST/43/2011 against the confirmation of tax demand and imposition of penalty under Section 78 ibid. Department has come in Appeal ST/181/2011 against the dropping of demand by adjudicating authority towards the CICS provided to educational institutions and also on dropping of penalties under Section 76 and 77.

3. Today when the matter came up for hearing, on behalf of the assessee, Ld. Counsel ShriM.Kannan made oral and written submissions which can be briefly summarized as under :

i) The assessee had provided the services under the category of “Commercial or Industrial Corporation Service” taxable under Section 65 (25b) read with Section 65 (105) (zzq) for the period from 1.10.2004 to 31.3.2009.

ii) During the course of oaudit of accounts of the assessee by the officers of Internal Audit of Cental Excise Commissionerate, Madurai, it was noticed that assessees were providing Commercial or Industrial Construction Services to various receivers like Schools, Colleges, Textile Mills and Nursing Homes etc. Scrutiny of the accounts revealed short payment/non payment of service tax i.e. (i) the assessee had availed 67% abatement in taxable value under Notifications 15/2004-ST dt 10.09.2004 and 1/2006-ST dt. 1.3.2006 despite non inclusion of value of goods (cement & Steel) supplied free by the customers (ii) the assessee had not paid service tax on the payments received for constructions of educational institutions (iii) the amounts deducted from the payments towards TDS were not included in the taxable value.

iii) In these circumstances, a SCN No.3/2010 dt. 22.4.2010 was issued for recovery of service tax of Rs.1,20,74,688/- towards non-inclusion of value of free supply materials Rs.41,09,392/- towards payments received for constructions of educational institutions and Rs.2,34,358/- towards TDS were not included in the taxable value with interest and penalties for the period from 1.10.2004 to 31.3.2009

(iv) The adjudicating authority vide impugned order dt. 16.12.2010 confirmed the demand of service tax with interest and imposed equal penalty under Section 78 of the Act towards non-inclusion of value of free supply materials and non-inclusion of TDS amounts in the taxable value, however dropped demand of service tax of Rs.41,09,392/- towards payments received from the educational institutions. They have filed appeal against confirmation of demand of service tax whereas Department has filed appeal against dropping of service tax demand of Rs.41,09,392/- as well as dropping of penalties under Section 76 & 77 ibid.

(v) Ld. Advocate concedes that the assessee have to discharge service tax liability on the TDS amount deducted by service recipient. He however submits that assessee is eligible for 67% abatement on the amount of TDS which has not been extended to them. For this reason, Ld. Advocate submits that the matter may be remanded to the adjudicating authority for re-quantification of the demand in respect of TDS after permitting the abatement of 67%.

(vi) On the issue of inclusion of value of goods / materials supplied free of cost, the matter has been settled by the Hon'ble Supreme Court in the case of *CST Vs Bhayana Builders Pvt. Ltd*. - 2018 (10) GSTL 118 (SC) holding that value of such goods cannot be added in taxable value. Therefore, the assessee had rightly excluded the value of cement and steel etc. supplied free of cost by the service recipients in the taxable value and they had therefore correctly availed 67% abatement under Notifications No.15/2004-ST dt. 10.09.2004 and 01/2006-ST dt.1.3.2006.

(vii) He submits that as the issue is of interpretational in nature, imposition of equal penalty is not sustainable and has been rightly dropped by the Commissioner.

4.1 In the grounds of appeal filed by Department, it has been contended that as per the definition of 'CICS', there is no specific exemption from service tax to schools and colleges, commercial nature of the buildings is a sole criteria for determination of service tax liability; that educational institutions are commercial buildings so long as fees / charges are collected for their activities; as clarified by Board's Circular dt. 28.01.2009 service tax is chargeable on the gross amount irrespective whether venture is profit making, loss making or charity oriented in its motive or its outcome. In the grounds of appeal, Department has also put forth their grievance on the non-imposition of penalty under Sections 76 & 77 of the Act by the adjudicating authority on the grounds that penalty is imposed under Section 78 of the Act equivalent to service tax demanded. Revenue argues that these are separate penalties and should have been imposed by the adjudicating authority.

4.2 On behalf of the department, Ld. A.R Shri A. Cletus supports the impugned order in respect of value of free supplies, TDS amounts not included in the assessable value. With regard to department appeal ST/181/2011, Ld. A.R reiterated the grounds of appeal.

5. In response, Ld. Advocate Shri M. Kannan submits that issue of taxability on CICS service provided to educational institutions has been decided in favour of the assessee in a number of Tribunal decisions. Ld. Advocate also submits that there is no infirmity in the decision of Commissioner not to impose penalty under Sections 76 & 77 ibid. In fact, considering the fact that except for TDS both the other demands are not sustainable, there can be no penalty imposed on the assessee even under Section 78 also since the entire issue was only one of interpretation.

6. Heard both sides and have gone through the facts.

7. We find merit in the assertion of the Ld. Advocate that the issue of includibility of value of free supply made by service recipient, in the assessable value for determining service tax liability, has been laid to rest by the Hon'ble Apex Court in the case of *Bhayana Builders Pvt. Ltd*. (supra). The Hon'ble Apex Court in their landmark judgment has unequivocally held that value of goods / materials supplied free of cost by service recipient and used for providing taxable service of construction and industrial complex is not to be included in "gross amounts" because no price is charged for that by the assessee / service provider.

8. Following the ratio laid down in by the Apex Court, we set aside that part of the impugned order confirming the tax demand on this score. So ordered.

9. Coming to the demand of service tax on the TDS amounts and not included by the assessees, there is no doubt that these amounts are required to be included in the assessable value, a fact also conceded by the Ld. Advocate. We find some merit in the submission of the Ld. Advocate that they would be eligible for 67% abatement on the amount of TDS and accordingly the service tax liability is required to be re-quantified. In the event, we hold that the demand on this count will require to be remanded to adjudicating authority for examining the claim of assessee on the eligibility of abatement in the value of taxable service. So ordered.

10. Coming to the demand on CICS provided to educational institutions, the department has come in appeal against the non-confirmation of the demand by the adjudicating authority. We are not able to find any force in the grounds of the Revenue. This particular issue has been addressed in a number of Tribunal decisions and decided in favour of the assesse, for example in the following cases :

(1) SRM Engg. Construction Ltd. Vs CST
2018 (11) GSTL 174 (Tri.-Chennai)

(2) Ratan Das Gupta & Co. Vs CCE
2017 (3) GSTL 247 (Tri.-Delhi)

(3) CST Vs S.M. Sai Corporation
2016 (42) STR (Tri.-Mumbai)

Accordingly, no merit is found in the department appeal on this issue and it is rejected. We also find that the only demand that survives is that of non-inclusion of TDS deducted by the service recipient. No doubt, there is full clarity with regard to inclusion of these amounts at this point of time. However, it cannot be denied that the issue was very much mired in confusion and litigation for quite some time. In the circumstances, we find there was reasonable cause on the part of the assessee in his failure to discharge tax liability on the portion of the TDS amounts. For these reason, penalty on the assessee under Section 78 ibid is surely an overkill and requires to be set aside, which we hereby do. So ordered. For the same reasons, there cannot be any penalty under Section 76 & 77 ibid also for which reason, the Department Appeal ST/181/2011 on this account is rejected.

To sum up,

- Assessee appeal on the issue concerned against demand of service tax in respect of free supplies allowed.
- Assessee appeal in respect of taxability of TDS portion allowed by way of remand, only for the purpose of examining their eligibility of abatement to be granted on the value of taxable service.
- Penalty under Section 78 of the Finance Act, 1994 set aside.
- Department appeal dismissed in its entirety.
- Both the appeals disposed of.

(Operative part of the order pronounced in court)

**(Madhu Mohan Damodhar)**
**Member (Technical)**

**(Sulekha Beevi C.S)**
**Member (Judicial)**

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