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

Appeal No. ST/218/2011

(Arising out of Order-in-Appeal No. 1/2011-ST dated 31..2011 passed by the Commissioner of Customs, Central Excise and Service Tax (Appeals), Coimbatore)

M/s. SMS Shelters (P) Ltd. Appellant

Vs.

Commissioner of GST & Central Excise
Coimbatore Respondent

Appearance

Ms. D. Naveena, Advocate for the Appellant
Shri B. Balamurugan, AC (AR) for the Respondent

CORAM

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

Date of Hearing : **17.07.2018**
Date of Pronouncement: **20.07.2018**

Final Order No. **42045 / 2018**

Per Bench

Brief facts are that the appellants are providing construction service and are registered with the department for Commercial or Industrial Construction Service on 16.12.2005 and did not get registered for Residential Complex Service. Show cause notice was issued demanding an amount of

Rs.9,34,810/- under the category of construction of residential complex service for the period from 1.10.2007 to 31.3.2008 besides proposing to impose penalties under section 76 and 77 of the Finance Act, 1994. After due process of law, the original authority confirmed the demand which was upheld by the Commissioner (Appeals). Hence this appeal.

2. On behalf of the appellant, ld. Counsel Ms. D.Naveena submitted that the entire demand is unsustainable since the activity undertaken by the appellant falls under the category of 'works contract service' and not under 'construction of residential complex service' since the contract also involves transfer of property in goods and in a composite contract. The department itself has extended the benefit of Notification No.1/2006-ST dated 1.3.2006 which shows that the contract is a composite contract and the Tribunal held that the activity undertaken by the appellant would fall under works contract service for the previous period from 16.6.2005 to 30.9.2007 vide Final Order No. 41509/2017 dated 3.8.2017. She submitted, however, the appellant is only contesting the penalty imposed under section 76 in the present appeal. It is her case that the entire service tax has been paid along with interest. The appellant has made full disclosure in the ST-3 returns filed by them, which is relied for issuance of the show cause notice. Therefore, it is only a case of belated payment of

tax since during the period, there was serious doubt as to the classification of the service. The appellant had entertained a bonafide doubt regarding the tax liability of the service rendered as there were several litigations pending on the said issue. Being an interpretation of law, the same shall be considered and the penalty may be waived. She relied upon the decision of the Tribunal in the case of Shree Hari Enterprises Vs. Commissioner of Central Excise, Raigad – 2018 (5) TMI 317 and the decision in their own case vide Final Order No.41509/2017 dated 3.8.2017 as well as the decision of the Tribunal in the case of Elix Met Form Pvt. Ltd. Vs. Commissioner of Central Excise – 2017 (3) TMI 310.

3. Against this the ld. AR Shri B. Balamurugan supported the findings in the impugned order. He submitted that the appellants have not paid the service tax within the due date and penalty imposed under section 76 is legal and proper.

4. Heard both sides.

5. The ld. counsel for the appellant has submitted that they are contesting only the penalty imposed under section 76 of the Finance Act. It is brought out from evidence that there is no intention to evade payment of service and that it was only a delay in payment of service tax. Further, during the relevant period, the issue whether the construction of residential complex service was taxable was under much dispute and

being an interpretational issue, the contention of the appellant that they had bonafide belief regarding the classification and payment of service tax is not without force. The decisions relied by the ld. counsel in the case of Shree Hari Enterprises (supra) brings out the litigations that were pending on the said issue. Further, the Tribunal in the appellant's own case, for the previous period, has held that the services would fall under works contract service. Taking into consideration all these factors, we are of the considered opinion that the appellant has brought out a reasonable cause for non-payment of service tax and it is a fit case for invocation of section 80 of the Finance Act, 1994. We therefore hold that the penalty imposed under section 76 is unjustified and requires to be set aside, which we hereby do. The impugned order is modified to the extent of setting aside the penalty imposed under section 76 alone without disturbing the remaining part of the order. The appeal is partly allowed in the above terms.

(Pronounced in open court on 20.07.2018)

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

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

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