IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
[COURT III : Division Bench B1]

Application No.: ST/Misc[CT]/41490/2017
Appeal No.: ST/00692/2011

[Arising out of Order-in-Appeal No. 181/2011 (MST) dated 22.09.2011 passed by the Commissioner of Central Excise (Appeals), Chennai]

The Commissioner of G.S.T. & Central Excise, Chennai South Commissionerate **: Appellant**
[Formerly: 'The Deputy Commr. of Service Tax, Service Tax-II Division, Chennai – 600 018']

Versus

M/s. Cherrytec Intelisolve Ltd., **: Respondent**
MAC House, III Floor,
No. 4, Sardar Patel Road,
Guindy, Chennai – 600 032

Appearance:-
Shri. K. Veerabhadra Reddy, ADC (AR)
for the Appellant

None
for the Respondent

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

Date of Hearing: 21.01.2019

Date of Pronouncement: 30.01.2019

Final Order No. 40177 / 2019

Per Bench :

This is an appeal filed by the Department against the Order passed by the Commissioner (Appeals) who set aside the demand, interest and penalties.

2.1 The respondent is engaged in software development services and provides extensive project management skills in consulting, development and support services to their clients. During the course of audit, it was noticed that they had received amounts for software maintenance and had not discharged service tax for "Maintenance and Repair Services" for the period from 09.07.2004 to 31.03.2006. Notification No. 20/2003-ST dated 21.08.2003 exempted service tax in relation to maintenance or repair of computers, computer systems or computer peripherals. Later, Circular No. 70/19/2003-ST dated 17.12.2003 clarified that such computer software would form part of computer systems and would be covered by the Notification No. 20/2003-ST dated 21.08.2003 which exempted service tax on maintenance of software. Thereafter, Notification No. 07/2004-ST dated 09.07.2004 was issued rescinding the earlier Notification No. 20/2003-ST. Therefore, according to the Department, maintenance and repair of computer software became taxable after 09.07.2004.

2.2 A Show Cause Notice was issued proposing to demand service tax along with interest and also for imposing penalties. After due process of law, the Original Authority confirmed the demand of Rs. 37,84,409/- along with interest and imposed equal penalty. In appeal, the Commissioner (Appeals) set aside the same. Hence, the Department is now before the Tribunal.

3.1 Ld. AR Shri. K. Veerabhadra Reddy appearing on behalf of the appellant reiterated the grounds of appeal. He argued that vide Notification No. 07/2004-ST dated 09.07.2004, the earlier Notification No. 20/2003-ST, which gave exemption to maintenance and repair of computer software, was rescinded. The Board thereafter vide Circular No. 81/2/2005-ST dated 07.10.2005 had clarified that software being goods, any service in relation to maintenance or repair or servicing of software is leviable to service tax. Further clarification was issued by the Board vide letter F. No. 256/1/2006-CX4 dated 07.03.2006 wherein it was categorically clarified that such services are taxable from 10.07.2004 onwards.

3.2 The respondent has not paid the service tax for the period from 09.07.2004 to 31.03.2006. Therefore, the demand ought to have been sustained by the Commissioner (Appeals). In the impugned Order, the Commissioner (Appeals) has been carried away by the Board Circulars and therefore, the impugned Order cannot sustain.

4. None appeared on behalf of the respondent although notice was issued.

5.1 The matter is taken up for disposal after hearing the Ld. AR for the appellant as well as on perusal of records. From the facts narrated as above, Notification No. 20/2003-ST dated 21.08.2003 exempted services provided to a customer in relation to maintenance or repair of computers, computer systems or computer peripherals from payment of service tax. Later, it was clarified vide Circular dated 17.12.2003 that the maintenance of software is also a part of computer systems and therefore, would be covered by the exemption Notification. The above Notification was later rescinded by Notification No. 07/2004 dated 09.07.2004. Although the Notification rescinded the above exemption Notification, the said services were not brought into the levy of service tax by the specific Notification.

5.2 Later, Circular No. 81/2/2005-ST dated 07.10.2005 clarified that maintenance or repair or servicing of software is leviable to service tax. This was pursuant to the decision of the Hon'ble Supreme Court in ***M/s. Tata Consultancy Services Vs. State of Andhra Pradesh reported in 2004-TIOL-87-SC-CT-LB***. The Hon'ble High Court of Madras in the case of ***M/s. Kasthuri & Sons Ltd. Vs. U.O.I. reported in 2011 (22) S.T.R. 129 (Mad.)*** had quashed the said Circular holding that service tax cannot be levied by issuing a Circular. Therefore, for the disputed period though the Circular made the said services taxable, the same is not applicable for the levy of service tax since the Hon'ble jurisdictional High Court has quashed the Circular. The respondents have been paying service tax from 2006 onwards noting that the Board had issued Circular dated 07.03.2006 again clarifying that the said services are taxable from 10.07.2004.

6. All this would go to show that there was much confusion as to whether Maintenance and Repair of computer software is subject to levy of service tax during the disputed period. However, taking note of the fact that the Circular dated 07.10.2005 has been quashed by the Hon'ble jurisdictional High Court, we are of the considered opinion that the Commissioner (Appeals) has rightly applied the law and precedents so as to set aside the demand, interest and penalties. We find no merit in the appeal filed by the Department. Miscellaneous Application filed by the Department for change in cause title is allowed.

7. The appeal is dismissed.

(Pronounced in open court on 30.01.2019)

(Madhu Mohan Damodhar)
Member (Technical)

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

Sdd