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

ST/407/2009

(Arising out of Order-in-Original No. 3/2009 (ST) dated 1.5.2009 passed by the Commissioner of Central Excise, Trichy)

M/s. Bharat Heavy Electricals Ltd. Appellant

Vs.

Commissioner of Central Excise, Trichy Respondent

Appearance

Ms. S. Sridevi, Advocate for the Appellant
Shri S. Govindarajan, 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 / Decision: **04.08.2017**

Final Order No. 41501/2017

Per Bench

The appellants are engaged in manufacture of boilers, steam generators, water tube boilers etc. and are registered with the Service Tax Department for the services namely Consulting Engineering, Commercial Training and Coaching, GTA, rending of immovable property and works contract service. The appellant had availed the services of consulting engineers provided by M/s. Lenjtes GMBH, Germany, for which the appellants have discharged service tax as a service recipient under section 68(2) of Finance Act read with Rule 2(1)(d)(iv) of Service Tax Rules, 1994. As per the contract, the consideration was payable in four equal instalments. On this amount, the appellant is liable to deduct the Tax Deducted at Source (TDS) and remit the same with the Income Tax Department. While paying the first three instalments, the appellant did not pay service tax on the TDS portion whereas they paid service tax on the TDS portion on the last instalment paid by them. Thus, a show cause notice was issued alleging that the appellants have not discharged service tax on the TDS portion pertaining to the period August 2006 to December 2006 to the tune of Rs.70,57,564/-. The appellants paid the service tax immediately on being pointed out about the short-payment by the audit team. Thus, the service tax along with interest was discharged by the appellant even before issue of show cause notice on 5.2.2008. The learned counsel submitted that the department has issued show cause notice invoking extended period and whereas the omission to pay service tax was only because the appellant was not aware of the non-payment of service tax on the TDS amount. There was no deliberate intention to evade payment of service tax. Therefore, she pleaded that the penalties may be set aside.

2. The learned AR Shri S.Govindarajan reiterated the findings in the impugned order.

3. The learned counsel appearing for the appellant submitted that the appellant has discharged service tax along with interest and is confining her challenge only on the penalties imposed. We do take note of the fact that there was much confusion as to whether the service recipient who is bound to pay the service tax is liable to pay service tax on the TDS portion. Further, since the appellants have discharged the service tax, we are of the view that the penalties imposed are unwarranted. In the case of C. Ramachandran Vs. Commissioner of Service Tax, Chennai – 2016 (46) STR 866 (Tri.) the Tribunal has held that in such situation penalties ought to be waived by invoking section 80 of the Finance Act, 1994. A similar view has been taken in the case of M/s. Magarpatta Township Development & Construction Co. Ltd. Vs. Commissioner of Central Excise, Pune – III – 2016-TIOL-660-CESTAT-MUM.

4. Following the said judgments, we hold that the penalties imposed under sections 76 and 78 require to be set aside which we hereby do. The impugned order is modified to the extent of setting aside the penalties imposed under sections 76

and 78 without interfering with the demand of service tax or interest and the penalty imposed under section 77.

5. In the result, the appeal is partly allowed in the above terms.

(Operative portion of the order was pronounced in open court)

Sulekha Beevi C

(Madhu Mohan Damodhar)
Member (Technical)

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

Rex

Customs, Excise & Service Tax Appellate Tribunal

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चेन्नै/Chennai