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

ST/302/2009

(Arising out of Orders-in-Original No. 5/2009 dated 30.1.2009 passed by the Commissioner of Service Tax, Chennai)

M/s. Jay Bharath Associates — Appellants

Vs.

Commissioner of Service Tax, Chennai — Respondent

Appearance

Shri Raghavan Ramabhadran, Advocate for the Appellant
Shri K. Veerabhadra Reddy, JC (AR) for the Respondent

CORAM

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Date of Hearing / Decision: **04.09.2017**

Final Order Nos. 41946/2017

Per Ms. Sulekha Beevi C.S.

The appellants are engaged in providing 'seismic job services and shot hole drilling services' mainly to M/s. ONGC for survey and exploration of mineral oil/gases. They obtained service tax registration under the category of 'Survey and Exploration of Mineral' services with effect from 16.11.2004. During audit of accounts, it was noticed that the appellant delayed payment of service tax on several occasions to the tune of Rs.2,67,31,766/- and have not paid interest for such

Customs, Excise & Service Tax Appellate Tribunal delayed payment. It was also noticed that they have not paid service tax of Rs.4,48,583/- in respect of services provided to other customers during the May and June 2005. Show cause notice dated 28.2.2008 was issued raising the above allegations and after due process of law, the adjudicating authority confirmed the demand of Rs.2,71,80,349/- being the service tax for the period 10.9.2004 to 31.3.2007 along with interest and also appropriated the amount of Rs.2,67,31,766/- which was already paid by the appellant. The adjudicating authority also imposed penalty of Rs.2.75 crores under section 78 of the Finance Act besides confirming the demand of interest of Rs.4,48,583/- till the date of payment. Hence this appeal.

2. On behalf of the appellant, ld. Counsel Shri R. Raghavan explained the facts leading to non-payment of servie tax. ONGC was conducting seismic survey for hydrocarbon exploration in various places. In the process of conducting the survey, ONGC required the appellant to undertake seismic job services (such as camp mobilization & demobilization, camp establishment & maintenance, topographic surveying, cable laying, shooting, etc.) and shot hole drilling done at regular interval ranging from 15-100 metres and of depth varying from 20 metres to 60 metres etc. The detailed activities were in the nature of support services to ONGC for conducting seismic job survey and shot hole drilling services. On the date of filling

the bid document and pre bid conference dated 5/7.2004 the said services were not taxable under the existing taxable category of services specified under the existing taxable category of services specified under the Finance Act, 1994. The appellant vide their letter dated 16.09.2004 brought to the notice of ONGC in addition to other rate negotiations, the fact of imposition of taxes by the Central Government after the tender date i.e., 23.07.2004 is not to the appellant's account. The appellant under a bonafide belief took service tax registration under "Exploration of Mineral, oil and Natural gas service" vide S.T. Regn No. AAAFJ3189KST001 on 16.11.2004. The appellant vide their letter dated 25.11.2004 once again put forth before ONGC that the accepted rates for 2004-05 are excluding service tax and hence service tax, if any payable is to the account of ONGC. Copy of the letters dated 16.09.2004 and 25.11.2004 were furnished before the authorities before. The appellant paid service tax of Rs.1,27,793/- on 28.05.2005 to the exchequer voluntarily without any recovery from ONGC. However, as ONGC refused to pay service tax the appellant thereafter could not pay service tax. Further, appellant had entered into contract with M/s. M/s. Geofizyka Tourn (GT) to provide shot hole drilling services. The said services were provided during April 2005 upto June 2005. When the contract was cancelled by GT. The appellant received part payment of Rs.41,87,900/- towards the value of services provided during the 3 months. As the appellant was informed that GT had already remitted service tax on the entire contract value, the appellants did not pay service tax as during the said period, sub-contractors need not pay when the tax is already remitted on the gross value by the main contractor. In any case the service to the GT was not complete and the contract was cancelled. The matter is under dispute between the parties.

3. He further submitted that the issue whether the appellants are liable to pay service tax on such services has been decided against the appellant in the case of Shiv-Vani Oil & Gas Exploration Services Ltd. Vs. Commissioner of Service Tax, New Delhi – 2017 (47) STR 200 (Tri. – Del.). Although the appellants had contested their liability to pay service tax before the adjudicating authority, in the present appeal, they are confining their contest on the imposition of penalty only. He contended that in the said decision, Tribunal had set aside the penalty imposed under section 78 and therefore pleaded that the penalty imposed may be set aside for the reason that there was no intention to evade payment of service tax. It is also argued that the appellant had discharged the entire service tax liability and that for verification of the said aspect, the matter requires to be remanded to the adjudicating authority.

4. Against this, the ld. AR Shri K. Veerabhadra Reddy reiterated the findings in the impugned order. He submitted that there was deliberate delay as well as non-payment of

service tax on the part of the appellant. The same would not have come to light but for the audit conducted by the department. Therefore, the penalty imposed is legal and proper.

5. Heard both sides and perused the records.

6. On behalf of the appellant, it is submitted that they are not contesting the liability to pay service tax. The main argument put forward are with regard to penalty imposed. It is submitted by ld. Counsel that in fact the appellant had paid the entire service tax liability and interest thereon and the same has not been taken note of by the adjudicating authority. Though it is stated in the order that an amount of Rs.4,48,583/- is yet to be paid by the appellant, the same requires to be verified since the appellant has discharged the entire service tax liability prior to issuance of show cause notice. On the facts stated before us, as well as considering the submissions made, we are able to see that the issue whether the subject services of drilling of shot hole would come within the ambit of survey and exploration of mineral services was subject matter of doubt and dispute. The Tribunal in the case of Shiv-Vani Oil & Gas Exploration Services Ltd. (supra) has held that such activities would also come within the definition of 'Survey and Exploration of Mineral services'. It is also seen discussed in the Order-in-Original that appellant had pleaded that there was delay in discharge of service tax for the reason

that ONGC did not make the payments within time and therefore there was no lapse on the part of the appellant to discharge the service tax liability. The adjudicating authority failed to accept the contention of the appellant that the delay in making payment of service tax was out of their control since ONGC refused to pay the service tax for all the services provided by them including that of drilling of shot hole. There is no specific allegation of fraud or willful suppression in the show cause notice. We find that the department has failed to establish the deliberate attempt to evade payment of service tax by suppressing or mis-declaring facts. Further, the issue was subject matter of litigation before the Tribunal and being an interpretational issue, the penalty imposed is too harsh on the appellant. On such score, the penalty of Rs.2.75 crores imposed, in our view, is unjustified and requires to be set aside, which we hereby do.

7. Taking note of the contentions of the appellant that the amount that has been already discharged by them has not been properly taken note of and requires verification, we direct the adjudicating authority to consider the same and if there is any short fall to be discharged by the appellant, they shall be liable to discharge the service tax along with interest. We do not disturb the demand of service tax or the interest thereof, raised in the impugned order.

8. In the result, the impugned order is modified to the extent of setting aside the penalty imposed under section 78 only without disturbing the demand of service tax or interest thereon. The appeal is partly allowed in the above terms.

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

(**B. Ravichandran**)
Member (Technical)

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

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Customs, Excise & Service Tax Appellate Tribunal

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