CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. I

Service Tax Appeal No. 40869 of 2016

(Arising out of Order-in-Appeal No.434/2015 (STA-II) dated 31.12.2015 passed by the Commissioner of Service Tax (Appeals II), Chennai)

M/s. Arun Excello Foundation Pvt Ltd **...Appellant**
Royapettah, Chennai-600 014.

Versus

Commissioner of GST and Central Excise **..Respondent**
Chennai North Commissionerate
No.26/1, Mahathma Gandhi Road,
Nungambakkam, Chenai-600 034.

APPEARANCE:

Shri N. Viswanathan, Advocate for the Appellant
Shri N. Satyanarayana, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)
HON'BLE MR. AJAYAN T.V, MEMBER (JUDICIAL)

FINAL ORDER No.40522/2025

DATE OF HEARING: 28.03.2025
DATE OF DECISION: 07.05.2025

Per Mr. Ajayan T.V.

M/s. Arun Excello Foundation Pvt Ltd., the appellant herein has assailed the Order-in-Appeal No.434/2015 (STA-II) dated 31.12.2015 whereby the appellant's contentions raised in cross objections were not considered on its merits and was rejected on the ground that neither Section 84 nor Section 85 of the Act empowered the filing of such cross objections.

2. The facts briefly stated are that the appellant is registered under categories of works Contract Service and goods transport agency service with the department and the main activity of the

appellant is construction of residential complex. The appellant was duly discharging its tax liability and also filling the returns. The appellant was also collecting maintenance charges at Rs.1 per sq. feet from their customers who had engaged them for construction of the individual flats. The above amount that was collected along with construction charges were included by the appellant in the taxable value of the construction service provided by them and have discharged service tax thereon. The appellant did so, as it was of the view that the said value related to bundled services with the essential characteristics of works contract that was being rendered by the appellant. The officers of the department during their visit in October 2009 and audit of appellant's records, raised an objection that the amount collected by the appellant was maintenance charges liable to tax at full rate under the category of "management, maintenance or repair service" and accordingly directed the appellant to pay differential service tax of Rs.1,59,750/- along with the interest of Rs.26,930/- for the period June to September 2009. The appellant *vide* letter 18.11.2009 contested the said objection. The Show Cause Notice dated 11.10.2010 was there after issued proposing to demand the Service Tax along with interest invoking the extended period as well as proposing imposition of mandatory penalty under Section 78 of the Act. The appellant then paid the differential tax and interest during January 2010 and November 2010 in order to avoid paying any penalty. However, the Adjudicating Authority vide its order No.11/2011 dated 25.01.2011 while confirming the demand and interest refrained from imposing penalties. The department however preferred a statutory appeal before the Commissioner of Service Tax (Appeals) questioning the Lower Adjudicating Authority's decision to drop the penalty under Section 78. There after the Commissioner (Appeals) *vide* his communication dated 21.09.2015 asked the appellant to file the appellant's cross objection, if any to the Revenue's appeal. As directed by the First Appellate Authority the appellant filed their cross objections in which they raised the grounds questioning the correctness of demand for tax confirmed by the Original Authority on merits. They also raised grounds as to the non-sustainability of the extended period of time invoked for confirmation of the demand. However inadvertently in bottom of para 6 of the cross objections the appellant stated their eligibility to certain Cenvat credit, which was extraneous to the order, but however had no impact whatsoever on the merits of the other grounds raised in the cross objection. The Commissioner(Appeals) there after passed the impugned order while rejecting the revenue's appeal, however recorded a finding that the request of the appeal for restoring the Cenvat credit is liable to be rejected on the grounds that neither Section 84 nor Section 85 of the Act which deals with "appeals to the Commissioner of Central Excise(Appeals)", have provisions like Section 35 E(4) of the Central Excise Act or Section 86(4) of the Act empowering the other party to assail the impugned order by filing cross objection memorandum notwithstanding the fact that the other party may not have filed any appeal against the impugned order. Aggrieved by the said order the appellant preferred this appeal and is thus before this Tribunal.

3. Shri N. Viswanathan, Ld. Advocate appeared and argued for the appellant. It is his submission that the Ld. Appellate Authority has failed to note that in terms of the Finance Act, separate provision have been enacted, one for filling of appeal by the department and another for filling of appeal by the assesse. The Ld. Counsel submits that the First Appellate Authority ought to have read the provision contained in Section 84 and 85, especially sub Sections 3 of Section 84 and sub Section 4 and 5 of Section 85 conjointly which had it been done would not have resulted in the negation of the appellants right of cross appeal. The Ld. Counsel submits that the Appellate Commissioner ought to have considered that the management charges collected by them were prior to the handing over of the flat and was paid as part of the construction charges by the customers to the appellant and therefore squarely needed to be treated as part of the bundled services in terms of Section 65A of the Act. H would submit further that there was no separate service receiver identified for the receipt of the said taxable services which otherwise was carried out as a self-service by them and the Appellate Authority ought to have held that the demand for the tax under the management repair and maintenance services cannot be sustained in light of the decisions he had relied on in the appeal before the Ld. Commissioner Appeals. He submits that they had a good case which unfortunately was not considered by the Ld. Commissioner Appeals and prayed that the matter be remanded to the Ld. Appellate Authority for decision afresh.

4. Shri. N. Satyanarayana, Ld. Authorised Representative appeared for the Respondent and reiterated the findings in the impugned OIA.

5. We have heard both sides, perused the records and the case laws submitted as relied upon.

6. We find that a similar issue came up for consideration by the Tribunal as can be seen from its decision in Eveready Industries India Ltd v CCE, Meerut, 2013 (31) STR 683 (Tri-Del), where the matter was remanded to Commissioner (Appeals) for decision on merits. The relevant portions are as under:

> ***3.*** *It is seen that the said order was not appealed against by the appellants. However, Revenue filed the appeal on the ground that penalty under Section 77 should also have been imposed. When the Revenue's appeal was pending decision before Commissioner (Appeals), the appellant received a letter from his office on 29-7-2010 directing the appellant to file cross-objection against the same impugned order. Accordingly, the appellant filed cross-objection, which were required to be treated as an appeal by Commissioner (Appeals).*
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> ***4.*** *Vide his impugned order, Commissioner (Appeals) rejected the Revenue's appeal. However, he also rejected the cross-objection filed by the appellant on the ground that the same are not maintainable inasmuch as there is no provision for filing cross-objection before Commissioner (Appeals). The said order is impugned by the appellants. The contention of the learned advocate is that it was on the direction of Commissioner (Appeals) that they filed the cross-objection. Secondly, the appellate authority has not disclosed the reason for rejection of such cross-objections before passing the impugned order so as to enable the appellant to contest the same. In any case, he draws our attention to the Karnataka High Court judgment in the case of Southern Auto Products v. CCE, Bangalore reported as 2009 (244) E.L.T. 348 (Kar.) laying down that cross-objections filed before the Commissioner (Appeals), at the direction of the Commissioner (Appeals) are maintainable. As such, he submits that the impugned order holding to the contrary is not sustainable.*
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> ***5.*** *Admittedly, the appellants were not given chance to show cause against the non-maintainability of the cross-objection. Accordingly, the Karnataka High Court judgment cannot be placed by the appellants before the Commissioner (Appeals). The cross-objections filed by the appellants are maintainable in the light of the declaration of law by the Hon'ble High Court in the above referred judgment of the Southern Auto Products. Accordingly, we*

set aside the impugned order and remand the matter to the Commissioner (Appeals) for decisions on merits.

7. We have noted above the decision taken by the Tribunal in identical fact circumstances. We find no reason to adopt a different course of action. Therefore, following the precedent decision of this Tribunal, we are of the considered view that the findings of the learned Commissioner Appeals in the impugned OIA to that extent is unsustainable and is liable to be set aside. The OIA stands modified to that extent. We remand the matter to the Learned Commissioner (Appeals) to consider the cross-objections filed by the appellant and to take a decision on its merits, duly adhering to the principles of natural justice.

Appeal is allowed by way of remand on the above terms.

(Order pronounced in open court on **07.05.2025**)

(AJAYAN T.V.)
Member (Judicial)

(VASA SESHAGIRI RAO)
Member (Technical)

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