CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

Service Tax Appeal No. 51545 of 2017

(Arising out of Order-in-Original No. DLI/SV-TAX/001/COM/00/517-18 dated 08.06.2017 passed by the Commissioner, Service Tax, Delhi-I)

M/s Varun Associates **Appellant**
A-37, 1st Floor, Nirman Vihar,
New Delhi-110092

VERSUS

Commissioner, Service Tax, Delhi-I **Respondent**
Plot 2b, EIL Annexure, IIIrd Floor,
Bhikaji Cama Place,
New Delhi-110066.

Appearance

Shri A.K. Batra, Chartered Accountant & Shri Ishaan, Advocate – for the Appellant.

Shri Rajeev Kapoor, Authorized Representative – for the Respondent.

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MS. HEMAMBIKA R. PRIYA, MEMBER (TECHNICAL)

DATE OF HEARING/DECISION : 26/04/2023

Final Order No. 50587/2023

Justice Dilip Gupta

The order dated 08.06.2017 passed by the Commissioner of Service Tax, Delhi-I to give effect to the order dated 28.09.2016 passed by the Tribunal in the appeal that was filed before the Tribunal by the appellant to assail the order dated 24.12.2010 earlier passed by the Commissioner confirming the demand of service tax, has been assailed in this appeal.

2. The Tribunal had by the aforesaid order dated 28.9.2016 remanded the matter to the Commissioner to examine whether the

work orders that were issued to the appellant related to works contract service or in the nature of service relatable to transmission or distribution of electricity. The Commissioner, after remand, has given a finding that all the work orders issued to the appellant relate to works contract service.

3. The contention that has been advanced by Shri A.K. Batra, learned consultant for the appellant is that the two show cause notices that culminated in the impugned order were issued proposing demand of service tax under erection, commissioning or installation service, but the Commissioner has confirmed the demand under works contract service, which he could not.

4. Shri Rajeev Kapoor, learned authorised representative appearing for the department has, however, submitting that the order passed by the Commissioner does not suffer from any illegality so as to call for any interference in this appeal.

5. All that needs to be examined in this appeal is as to whether the Commissioner could have confirmed the demand of service tax under a category that was not proposed in the show cause notices. It is clear from the order that was passed by the Commissioner after remand that the demand of service tax has been confirmed under works contract service though the show cause notices that were issued to the appellant proposed demand under erection, commissioning or installation services.

6. It has been repeatedly held that a demand cannot be confirmed under a category not proposed in the show cause notice.

7. A Division Bench of the Tribunal in **M/s Gurjar Construction as Commissioner of Central Excise, Jaipur II**[1] examined such a position and after placing reliance on the decisions of the Supreme Court in **Hindustan Polymers Company Ltd. Vs Collector of Central Excise, Guntur**[2] and **Reckitt & Colman of India Ltd Vs Collector of Central Excise**[3] observed that a demand made under a particular category cannot be sustained under a different category. The relevant portions of the decision of the Tribunal are reproduced below:

> "14. The position that comes out very clearly, therefore, is that even prior to 01 June, 2007 and post 01 June 2007, the nature of service rendered by the Appellant was WCS and not CCS. The show cause notice alleged that the Appellant was providing CCS service and the demand has also been confirmed under this category by the adjudicating authority. The impugned order, therefore, deserves to be set aside for this reason alone since the demand made under a particular category of service found to be incorrect in a subsequent proceeding, cannot be sustained. This is what was observed by the Supreme Court in Hindustan Polymers Company and the relevant portion is reproduced below:
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> > 6. While we appreciate the Tribunal's desire to do complete justice and mould the relief in that direction, we think that, in the circumstances, the Tribunal should not, in the case, have passed an order which proceeded upon a basis that is altogether different from that of the demand made upon the Appellants. That is not "moulding" relief. The demand that was made upon the Appellants was under Tariff item 68 and it proceeded upon the basis that there was a process of manufacture of coloured polystyrene from uncoloured polystyrene. Having come to a conclusion against the Revenue on these counts, the appropriate order for the Tribunal to have passed was to have set aside the demand and left it open to the Revenue to proceed against the appellants, as permissible under the law. The Appellants would then have had the opportunity of meeting the precise case made out by the Revenue.
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> 15. This is what was also observed by the Supreme Court in **Reckitt Colman of India** in paragraph 3 of the judgment which is reproduced below:

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1 2019 (5) TMI 717-CESTAT, New Delhi
2 1996 (12) TMI 84 – Supreme Court
3 1996 (10) TMI 100- Supreme Court

> 3. It will be remembered that the case of the Revenue, which the appellant had been required to meet at every stage from the show cause notice onwards, was that the said product was a preparation based on starch. Having come to the conclusion that the said product was not a preparation based on starch, the Tribunal should have allowed the appeal. It was beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had never canvassed and which the appellants had never been required to meet. It is upon this ground alone that the appeal must succeed.

16. The decision of the Mumbai Tribunal in **Ashish Ramesh Dasarwar vs Commissioner of Central Excise & Service Tax, Nagpur**, reported in **2017-TIOL-3230-CESTAT-MUM**, also needs to be referred. The Division Bench of the Tribunal held as follows:

> **6. As regard the period after 01 June 2007, since the demand was raised under "commercial or industrial construction service, whereas admittedly the service is correctly classifiable under works contract service, the demand raised under wrong head of service cannot sustain.**
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> 7. As per above discussion, the demand raised under "commercial or industrial construction service" shall not sustain. Hence, the same is set aside."

[emphasis supplied]

8. It is, therefore, not possible to sustain the impugned order dated 08.06.2017 passed by the Commissioner. It is accordingly, set aside and the appeal is allowed

(Dictated & pronounced in open Court)

(Justice Dilip Gupta)
President

(Hemambika R. Priya)
Member (Technical)

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