CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Service Tax Appeal No. 52160 of 2014
(Arising out of Order in Appeal no. BPL-EXCUS-000-APP-117-13-14 dated 24.10.2013 passed by Commissioner (Appeals) of Customs, Central Excise & Service Tax, Bhopal)

R P Anand Contractor ...... **Appellant**
M-1, Narmada Road, Panchsheel Nagar,
Jabalpur
Madhya Pradesh- 482002

VERSUS

Commissioner, Central Excise- Bhopal ......**Respondent**
C.R.Building, Mission Chowk, Napier Town
Jabalpur
Madhya Pradesh-462015

APPEARANCE:
Ms. Surabhi Sinha, Advocate for the Respondent
Ms. Jaya Kumari, Authorized Representative of the Department

CORAM :
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing/Decision: November 14, 2023

FINAL ORDER NO. 51581 /2023

JUSTICE DILIP GUPTA

The order dated 24.10.2013 passed by the Commissioner (Appeals) of **Customs, Central Excise & Service Tax[1],** Bhopal has been assailed in this appeal filed by a contractor. The appeal had been filed before the Commissioner (Appeals) by the Department to assail the order dated 23.03.2012 passed by the **Joint Commissioner of Customs, Central Excise[2],** Bhopal

1 The Commissioner (Appeals)
2 The Joint Commissioner

dropping the proceedings initiated against the **RP Anand Contractor**[3] by the by the show cause notice dated 14.10.2009.

2. The appellant had performed certain works under contract issued by the Madhya Pradesh State Electricity Board and MP Power Generating Company. A show cause notice dated 14.10.2009 was issued to the appellant alleging that the appellant was providing "maintenance and repair services and manpower recruitment agency" services to Madhya Pradesh State Electricity Board and MP Power Generating Company, which services were leviable to service tax with effect from 01.07.2003 and 16.06.2005 respectively but the appellant had not paid service tax. The extended period of limitation was also invoked and the appellant was called upon to pay service tax on maintenance and repair services and manpower recruitment agency service.

3. The appellant filed a reply to the aforesaid show cause notice and contended that the appellant had in fact undertaken construction work which was in the nature of works contract service and, therefore, the allegation raised in the show cause notice that the appellant had provided maintenance and repair services and manpower recruitment agency was incorrect. The appellant also pointed out that works contact services became leviable to service tax with effect from 01.06.2007 without making any changes in the previous entries relating to maintenance and repair services or manpower recruitment agency services. The

3 The appellant

appellant also pointed out that the tax deduction certificates for VAT issued by the officers would also make it clear that the appellant had provided works contract service.

4. The Joint Commissioner, by the order dated 23.03.2012, dropped the demand proposed in the show cause notice. In the first instance, the Joint Commissioner observed that the services rendered by the appellant were in relation to building and civil structure and would appropriately be covered under the category of commercial or industrial construction and construction of complex service and not under management, maintenance or repair services or manpower recruitment and supply agency services. The Joint Commissioner also recorded a finding that with effect from 01.06.2007 the nature of work carried out by the appellant would fall under works contract service. This finding was recorded by the Joint Commissioner after a careful perusal of the documents including the deduction of VAT under MP VAT Act, 2002. Thus, the proceedings initiated against the appellant by the show cause notice dated 14.10.2009 was dropped.

5. Feeling aggrieved, the department filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) divided the period from prior to 01.06.2007 and post 01.06.2007. For the period post 01.06.2007, after noting that the appellant had paid service tax under works contract services, the Commissioner (Appeals) confirmed the demand raised in the show cause notice holding that the appellant had not produced the works contact nor

the bills/invoices for the said period. For the period prior to 01.06.2007, the Commissioner (Appeals) noted that the Joint Commissioner had not applied his mind while deciding the issue and in fact the Commissioner (Appeals) proceeded to observe, "He has just taken recourse to the Show Cause Notice". The Commissioner (Appeals) held as follows:

> "**The respondent cannot get the benefit of the provisions of law, to evade tax. It is proved beyond doubt that services were provided and it is on record that said services were taxable else the Respondent would not have applied for Registration**. ....
>
> The demand raised in the past period in absence of any proof being produced by the Respondent viz contracts and bills/invoices covering the entire period, to show contrary to the findings, confirmed demand for the entire period along with interest."
>
> (emphasis supplied)

6. The approach of the Commissioner (Appeals), the least that can be said, is contrary to the well established principle. A show cause notice is the foundation of any demand but the Commissioner (Appeals) proceeded to comment upon the order passed by the Joint Commissioner observing that the Joint Commissioner just took recourse to the show cause notice. The Commissioner (Appeals) could not have dealt with an issue not raised in the show cause notice.

7. For the period prior to 01.06.2007, once it was found as the fact that the nature of services provided by the appellant were works contract service and this service had not been carved out of the earlier entries relating to maintenance and repair services and

manpower recruitment agency services, it has to be held that no service tax could have been demanded. In any case, the appellant had not rendered manpower recruitment services and, therefore, even otherwise, the demand could not have been confirmed under a different category. In fact, no reasons have been given by the Commissioner (Appeals) to confirm the demand, except stating that the show cause notice can be ignored.

8. For the period post 01.06.2007, it is not in dispute that the appellant had rendered works contract and had also paid service tax. Without giving any reasons as to why service tax demanded under maintenance and repair services and manpower recruitment agency services was required to be confirmed, the Commissioner (Appeals) simply confirmed the demand holding that since the appellant had applied for registration, the demand against service tax was required to be confirmed. In any view of the matter, once the service tax is proposed under a particular category it cannot be confirmed under a different category.

9. The order dated 24.10.2013 passed by the Commissioner (Appeals), therefore, cannot be sustained and is set aside. The appeal is, accordingly, allowed.

(Dictated and pronounced in the open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Diksha