

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH – COURT NO. III

Service Tax Appeal No. 55152 of 2023 – (SM)

(Arising out of Order-in-Original No. DDN-EXCUS-APPL-245-22-23 dated 16.03.2023 passed by the Commissioner (Appeals), Central Goods & Service Tax, Dehradun (Uttarakhand))

M/s Rawat Constructions

Appellant

VERSUS

**Commissioner (Appeals), Central Goods
& Service Tax, Commissionerate : Dehradun**

Respondent

Appearance

Shri Rajesh Kumar Yadav, Advocate – for the Appellant.

Shri Vishwa Jeet Saharan, Authorized Representative – for the Respondent

CORAM :

HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

Date of Hearing: 12/02/2024

Date of Decision: 14/02/2024

Final Order No. 50239/2024

Binu Tamta

The present appeal has been filed challenging the Order-in-Appeal No. DDN-EXCUS-APPL-245-22-23 dated 16.03.2023, whereby the Commissioner dismissed the appeal on account of failure of the appellant to make the pre-deposit under Section 35F of the Central Excise Act, 1944 read with Circular No. 1070/3/2019-CX dated 24.06.2019 and further reiterated vide instruction dated 28.10.2022 issued by the CBIC.

2. The brief facts are that the appellant is engaged as a civil contractor and is providing work contract services to the Government agency viz. Public Works Department. The nature of work executed by the appellant includes road safety works, repair

of culvert on road, Edge Wall of road and construction and repair of retaining wall. Show cause notice dated 21.10.2021 was issued to the appellant. On the basis of information received from CBDT, demand was raised in view of the difference between the ITR and value of the services under ST-3 returns under proviso to sub-section (1) of Section 73 of the Finance Act, 1994 for recovery of service tax amounting to Rs. 31,00,432/- for the period April 2016 to March 2017. It appears that the appellant had not filed any reply to the show cause notice and the matter was placed for adjudication, when despite notice for personal hearing, the appellant did not appear and the matter was taken up ex-parte on the basis of the show cause notice and the relied upon documents thereto. The adjudicating authority observing that in the absence of any evidence produced by the party regarding taxability or non-taxability of the services rendered by them, there is no option but to work out the tax liability. On the basis of the data provided by Income Tax department, the service tax along with interest and penalty was confirmed. Being aggrieved by the order-in-original dated 20.07.2022, the appellant preferred an appeal. The learned Commissioner noticed that without discussing the merits of the case, *ab initio*, the appellant in compliance of the requirement of Section 35F of Central Excise Act, 1944 as made applicable to the service tax, has made pre-deposit of Rs. 2,32,533/- only through DRC-03 No. AD051022001991P dated 27.10.2022 which is not in terms of Circular No. 1070/3/2019-CX dated 24.06.2019 i.e. by utilizing the new payment gate way portal 'CBIC' (ICEGATE) E-payment, operational with effect from 01.07.2019 onwards and subsequently reiterated vide instruction dated 28.10.2022 issued

by the CBIC. The appeal was rejected on the ground that the same is not accompanied by a proof evidencing that the appellant had deposited 7.5% of duty demanded or penalty imposed through the new revised procedure.

3. The learned counsel for the appellant has made submissions on merits of the case that is the work contract service rendered by them to the Government in relation to construction and safety of highways was exempt from payment of service tax during the relevant period and relied on the provisions of Circular No. 25/2012-ST dated 20.06.2012 which provides exemption on the taxable services from the whole of the service tax leviable thereon under Section 66B of the said Act. The other submission made was that the payment raised under show cause notice is based on the ITRs which is not sustainable for levying service tax. He referred to series of decisions laying down that the Revenue cannot levy service tax on the basis of gross receipts shown in the profit and loss account and the details shown in the income tax returns as the details which are filed under the Income Tax returns are different from the returns that have to be filed in terms of the service tax. He referred to the decision of the Tribunal in **Alpa Management Consultants (P) Ltd. Vs. CST, Bangalore - 2007 (6) STR 181 (T)** where it was held that service tax cannot be recovered based on the returns shown in the Income Tax returns, as the provisions of Income Tax requires declaration of amounts still due from the debtors while in the case of service tax, the same has to be paid when recoveries are made.

4. The learned Authorised Representative has referred to the circular as taken note of by the impugned order and prayed that the appeal may be dismissed.

5. During the course of hearing, the learned counsel for the appellant has pointed out to the challan dated 13 May 2023 whereby he has made the pre-deposit of the complete 10% in order to avail the appeal to be filed before this Tribunal and the appeal has been filed before the Tribunal on 29.05.,2023. Since the needful for payment of the pre-deposit stands complied with, I have no hesitation in remanding the matter back for proper adjudication on merits. Since neither the adjudicating authority in the absence of the documents to be placed by the appellant nor the appellate authority has considered the issue on merits, it would be just and appropriate that the matter is remanded to the adjudicating authority to consider the same on merits and decide the issue in the light of the decisions referred by the superior forums. The appellant is at liberty to raise all the points and place the requisite documents in support of his submissions, before the adjudicating authority.

6. The impugned order is, therefore, set aside and the matter is remanded back to the adjudicating authority, to be considered de novo. The appeal is accordingly allowed by way of remand.

(Pronounced in open Court on 14.02.2024)

(Binu Tamta)
Member (Judicial)

RM