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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

SINGLE MEMBER APPEAL BRANCH

Appeal No. ST/281/2009,303 /2009 – SM[BR] Date 22/07/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
C.C.E. LUDHIANA
CENTRAL EXCISE HOUSE, 'F' BLOCK, RISHI NAGAR,
LUDHIANA 141001 (PUNJAB)

C.C.E. LUDHIANA Appellant

Vs

M/S ERA CONSTRUCTIONS (INDAI) LTD. Respondent

I am directed to transmit herewith a certified copy of **Final order No**. 789 – 790 / 2010 –SM[BR] dated 26.5.2010 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :

1. Respondent
   M/S ERA CONSTRUCTIONS (INDAI) LTD.
   C/O AERENS GOLDSOUK INTERNATIONAL LTD. VILL :- KADIAN, JALANDHAR BYE PASS, LUDHIANA.
2. Adv. / Consult SHRI M.P. SINGH & M.P. SINGH ADV.
   N-30, GROUND FLOOR MALVIYA NAGAR
   NEW DELHI-17.
3. S.D.R
4. ~~J.C.D.R.~~
5. Bar association, CESTAT, New Delhi
6. Director Publications, Customs, Excise. I.P. Estate, New Delhi
7. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi - 3
8. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
10. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
11. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-15
12. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
13. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(SM Appeal Branch)

3. M/S ERA INFRA ENGINEERING LTD.
(FORMERLY M/S ERA CONSTRUCTION (INDIA) LTD. 370-371/2,
SAHI HOSPITAL ROAD, JUNGPURA, BHOGAL, NEW

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. IV

Service Tax Appeal No. 281 of 2009-SM(BR)

Commissioner of Central Excise Ludhiana — Appellants

Vs.

M/s. Era Construction (I) Ltd. — Respondent

Service Tax Appeal No. 303 of 2009-SM(BR)

M/s. Era Construction (I) Ltd. — Appellants

Vs.

Commissioner of Central Excise Ludhiana — Respondent

[Arising out of Order-in-Appeal No. 06-CE/LDH/09 dated 16.1.09 passed by Commissioner of Central Excise (Appeals) Chandigarh]

For approval and signature:

Hon'ble Mr. Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :
2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether Their Lordships wish to see the fair copy of the Order? :
4. Whether Order is to be circulated to the Departmental authorities? :

Appearance:

Shri S.K. Bhaskar, SDR for the Appellant Revenue
Shri M.P. Singh & Shri V.K. Singh, Advocates for the Respondent assessee

Date of Hearing/decision : 26.5.2010

Final **ORAL ORDER NO. 789-790/2010 SM (Br)**

Per Rakesh Kumar:

The facts giving rise to these two appeals– first appeal by M/s. Era Constructions (I) Ltd. (hereinafter referred to as appellant) and second by Commissioner of Central Excise, Ludhiana (hereinafter referred to as respondent), are as under:-

1.1 The appellant provided the taxable services of industrial construction for which they have Central Excise registration. In addition to this, they have registration for goods transport agency (GTA) services as service receiver. Notification No. 15/2004-ST dated 10.9.04 issued under section 93 of the Finance Act, 1994 exempted the taxable services provided by a commercial concern to a person in relation to construction services from so much of the service tax leviable thereon under section 66 of the said Act, as is in excess of the service tax calculated on the value, which is equivalent to 33% of the gross amount charged from any person by such commercial concern for providing the said taxable service, subject to condition that no credit of duty paid on inputs or capital goods had been taken under the provisions of Cenvat Credit Rules, 2004 or the commercial concern has not availed the benefit of Notification No. 12/2003-ST dated 20.6.2003. In other words, under this notification, a commercial concern, who is providing the services in relation to construction, was required to pay the tax only on 33% of the gross amount charged and avail 67% abatement subject to condition that no credit of duty paid on inputs or capital goods had been availed or the Notification No. 12/2003 ST has not been availed. With effect from 1.3.2006, Notification No.1/2006 was issued in supersession of earlier notification No. 15/2004 ST and the new notification also provided same exemption to the construction services but the condition under this new notification was that no Cenvat credit in respect of inputs / capital goods or inputs services has been availed under Cenvat Credit Rules, 2004. Thus while during the period prior to 1.3.2006, the condition for availing this exemption was that no Cenvat credit on inputs / capital goods had been taken, from 1.3.2006, the condition for availing this exemption became that no Cenvat credit in respect of inputs/ capital goods or input service has been availed. The appellant during the month of March, 2006, while availing the benefit of Notification No. 1/2006-ST also took Service Tax credit amounting to Rs. 41,658/- and in the ST 3 return for the period ending 31.3.2006, availment of Service Tax credit amounting to Rs.41,658/- had been declared. It appears that on scrutiny of Service Tax return, when the department found that during the month of March, 2006, appellant, while availing the Service Tax credit of Rs. 41,658/- also availed the benefit of exemption under Notification No. 1/2006 ST it issued a show cause notice dated 5.12.2006 for denying the exemption under Notification No. 1/2006 ST for the month of March, 2006 and also for recovery of

Service Tax amounting to Rs. 2,69,063/- along with education cess and interest from the appellant and also imposition of penalty on them under section 76 and 78 of the Finance Act, 1994. The show cause notice was adjudicated by Deputy Commissioner of Central Excise Division III, Ludhiana vide order-in-original dated 11.3.08 by which the Service Tax demand of Rs. 2,69,063/- was confirmed along with interest and in addition to this, penalties of equal amount were imposed under section 76 and 78 of the Finance Act, 1994. Against this order of the Deputy Commissioner, the appellants filed an appeal before the Commissioner (Appeals) and before filing the appeal, they deposited the entire disputed amount of Service Tax. The Commissioner (Appeals) vide order-in-appeal No. 6/CE/LDH/2009 dated 16.1.09 while upholding the Service Tax demanded and penalty under section 76, set aside the penalty under section 78. Against this order, while the appellant have filed the appeal praying for setting aside the penalty under section 76, the Department has filed the appeal for restoring the penalty under section 78.

2. Heard both sides.

2.1 Shri M.P. Singh, advocate, learned Counsel for the appellant, pleaded that prior to 1.3.2006 for availing the exemption under Notification No. 15/2004-ST, the only condition for this exemption was non-availment of Cenvat credit in respect of inputs / capital goods and by Notification No. 1/2006 ST dated 1.3.2006, for availing the same exemption, additional condition ~~of~~ non-availment of Service Tax Credit was also imposed, that the appellant, under the mistaken impression that new notification will be applicable from April, 2006, took credit of Rs.41,081/- in respect of some inputs services during the month of March, 2006 and also availed the exemption under Notification No.1/2006 ST, though there was no malafide intention on the part of the appellant, as the availment of exemption as well as Cenvat credit of input services had been declared in the ST-3 return and it is only from scrutiny of the ST-3 return that the department subsequently issued Show cause notice for denying the exemption and recovery of Service Tax; that this is only an unintentional mistake and in the absence of any element of wilful suppression, fraud etc., the elements for invoking the provisions of section 78 are not present and hence penalty under section 78 has been rightly set aside by the Commissioner (Appeals) and that since this is a case of bonafide mistake and this has happened in March, 2006, when the notification had been amended and since the appellant have already suffered enough, this is a case where invoking the provision of section 80 is warranted for waiving the penalty under section 76 imposed on the Appellants. Shri M.P. Singh, therefore, prayed for waiving the penalty under section 76. At the same time he also submitted that the Commissioner (Appeals) has rightly set aside the penalty under section 78.

2.2. Shri S.K. Bhaskar, learned DR, reiterated the grounds of appeal in the Revenue appeal and emphasised that the appellant had intentionally availed the exemption for which they were not eligible, that penalty under section 76 and 78 had been rightly imposed by the original adjudicating authority and reason given by the Commissioner (Appeals) for setting aside the penalty under section 78 are not correct and that there is no bar on the simultaneous penalty under section 76 as well as under 78. He also pleaded that penalty under section 76 would be attracted in every case where Service Tax payable is not paid by the due date and this is not case for invoking section 80.

3. I have carefully considered the submissions from both sides and perused the records. There is no dispute about the fact that availment of Service Tax credit as well as the benefit of exemption under notification No. 1/2006 ST had been declared in the ST 3 return in the six monthly return for period ending March, 2006 and only on scrutiny of this ST 3 return that the department had issued Show cause notice. In view of this, I do not find any element, whatsoever, of wilful suppression of facts, fraud, mis-statement etc. with intent to evade the Service Tax and hence the provisions of section 78 are not attracted at all and accordingly the Commissioner (Appeals)'s findings on this point are correct.

4. As regards the penalty under section 76, though the penalty under this section is attracted in every case where service tax is not paid by the due date, this is not a case of default in payment but the case of short payment of service tax due to wrong availment of exemption which prima facie, had taken place due to a mistake on the part of the appellant, as during the month of March, 2006 the appellant while availing the exemption also took Service Tax Cenvat credit of Rs. 40,841/- in violation of condition of the notification under the mistaken belief that additional condition of non availment of service tax credit would be effective from April, 2006. That this is a bonafides mistake, is clear from the fact that this irregularity had happened

in March, 2006 only not in subsequent months and the availment of exemption as well as Cenvat credit /service tax on inputs services had been declared in the ST-3 return. Looking to the circumstances of the case, I am of the view that this is a case where the provisions of section 80 can be invoked as ~~——~~, I find that there was reasonable cause for short payment of service tax and the same was paid immediately after the issue of adjudication order and besides the Service tax, the interest on this amount has also been paid. In view of these circumstances, the impugned order rejecting the appellant's plea for invoking the provisions of section 80 and upholding the penalty under section 76 is not correct. The same is, therefore, set aside. The appeal filed by the appellant is allowed and the appeal filed by the department is dismissed.

(Rakesh Kumar)
Member(Technical)

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