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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK NO.2, R.K.PURAM, NEW DELHI-110066
CUSTOMS APPEAL BRANCH

STAY Application No. : ST/Stay/35/2008
Appeal No. : ST/15/2008-CU[DB]

Dated: **19/09/2012**

Assistant Registrar
C.E.S.T.A.T. New Delhi
To,
PUNJAB SMALL INDUSTRIES &
EXPORT CORPORATION
G.T. ROAD, MANDIGOBINDGARH,
PUNJAB

PUNJAB SMALL INDUSTRIES & EXPORT CORPORATION (Appellant)

VS

C.C.E. CHANDIGARH (Respondent)

I am directed to transmit herewith a certified copy of Final Order No. **ST/A/585/2012-CU[DB]** dated **06/09/2012** passed by the Tribunal under section **01(5) of the Finance Act, 1994 relating to Service Tax Act, 1994.**

Assistant Registrar
CUSTOMS Appeal Branch

Copy To,
1. Respondent
C.C.E. CHANDIGARH
C.R. Building, Plot No. 19, Sector 17-C,
Chandigarh 160017

2. Advocate(s) / Consultant(s):
MR. PRABHAT KUMAR
B-51(BASEMENT) SARVODAY
ENCLAVE NEAR MOTHER
INTERNATIONAL SCHOOL NEW DELHI

3. C.D.R
4. Bar Association. CESTAT, New Delhi

5. Director Publications, Customs, Excise. I.P. Estate, New Delhi

6. M/s Centax Publications Pvt. Ltd., 1512-B, Bhishm Pitamah Marg, Opp. ICICI Bank of Defence Colony, New Delhi-3

7. Company Law Institute of India Pvt. Ltd., No.2 (old no.36), Vaithyaram Street, T. Nagar, Chennai-17

8. Taxmann Allied Service Pvt. Ltd., 59/32, New Rohtak Road, New Delhi-110005

9. Easy Service Tax Online Dot Com Pvt. Ltd., 407A, Iscon Mall, Above Star India Bazar, Satellite Road, Ahmedabad-15

10. LAWCRUX Advisors Pvt. Ltd., LAW House, 1-8, Sector-10, Faridabad 121003 (Haryana)

11. TaxIndiaOnline.com Pvt. Ltd., Unit No. 1, 2nd Floor, Vasant Arcade, Nelson Mandela Road, Vasant Kunj, New Delhi - 110070

12. Mark Professional Services Pvt. Ltd., 108, Everest Block, Aditya Enclave, Ameer Pet, Hyderabad – 500038

13. Office Copy

14. Gaurd File

(Assistant Registrar)
Custom Branch

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.II, R.K. PURAM, NEW DELHI-110066

COURT NO. II

Service Tax Appeal No. 15 of 2008

[Both arising out of Order-in-Appeal No. 441/CE/CHD/07 dated 8.10.2007 passed by the Commissioner (Appeals) Customs & Central Excise, Chandigarh]

Date of Hearing/decision: 6th September, 2012

M/s. Punjab Small Industries & Export Corpn. Appellant

Vs.

CC& CE, Chandigarh Respondent

Present for the Assessee : Shri Prabhat Kumar, Advocate
Present for the Respondent : Shri Amresh Jain, A.R.

Coram: Hon'ble Shri D.N. Panda, Judicial Member;
Hon'ble Shri Mathew John, Technical Member

FINAL ORDER NO. ST/A/585/12-ens

Per D.N. Panda:

We have heard both sides extensively. We are able to understand that for the confusion and no examination of evidence for the relevant years, demand arose against the appellant. Page 37 of the appeal folder (which is page 3 of the adjudication order) shows that the Adjudicating authority clearly made a finding that the appellant has paid service tax of different denominations for the year 2001 to 2004-05. Similarly page 38 of appeal folder (which is page of 4 of adjudication order) the authority has noted that the amount shown in the Balance sheet for the above years in different denominations were recovery of service tax. It appears that without examining the relevant evidence an abrupt conclusion was drawn.

2. Shri Prabhat Kumar, learned Counsel filing a set of paper book brings to our notice that at page 42 to 87, respective invoices issued for the year 2001-02 to 2004-05 are available to determine the liability of the appellant, if any, under Finance Act, 1994. He points out that in respect of each year, appellant had made reconciliation of the service tax collected and paid. Had the materials been examined there would not have been any grievance. We also find difficulty at our level to arrive at conclusion when examination was not done in depth by adjudicating authority as to the reasons of appearing figures in Balance sheet. To cite an example, when service tax of Rs. 3,30,492/- appears in the liability side of the Balance sheet for the year 2001-02 under the heading "other liabilities" which is exhibited by page 107 of appeal folder, its reason was not examined. Reasons for all the figures appearing at page 4 of adjudication order needs to be examined. Once liability, if any under law is determined and tax payable is arrived at, tax collected shall come into play for set off subject to other provision of statute as may be applicable.

3. The adjudication order does not disclose whether the authority examined the invoices involved as claimed to be appearing at page 42 to 87 of the paper book filed today to determine the liability of the appellant. It is only when the appellant recovered service tax from its sub-contractor, Revenue

has made out a case inferring difference between the service tax paid to treasury and service tax recovered from Sub-contractor. It is only a summary conclusion drawn without a reasoned and self-speaking order passed determining liability under Finance Act, 1994. When we find the adjudication process adopted was faulty for the reasons stated above, we have no other alternative but to direct the learned adjudicating authority to re-do the adjudication in the manner highlighted above.

4. Since we are proposing remand of the matter with the aforesaid direction all points of law and facts are open to the appellant to argue before learned Adjudicating Authority. We direct learned D.R. to send a copy of the paper book to the learned adjudicating authority which has been filed before us today so that he will be able to examine the issue before him upon hearing the appellant thoroughly. It is needless to say that the appellant is entitled to a reasonable opportunity of hearing. In the result, appeal is allowed by way of remand.

(Dictated & pronounced in the Open Court)

(D.N. PANDA)
JUDICIAL MEMBER

(MATHEW JOHN)
TECHNICAL MEMBER

RK

5. While I agree with the order passed by my Ld. Brother I want to specify the issues, which forced us to make the order, in a slightly different manner so that the same deficiencies do not occur in the denovo adjudication. This order is recorded for that purpose.

6. This is case where the appellant provided Clearing and Forwarding Services to SAIL. The appellant paid service tax on such services. No case is made out in the SCN or adjudication order that such tax has not been properly paid.

7. The appellant was recovering the service tax paid by them from their sub-contractors who were providing part of the services to the appellant. The case is that the appellant did not deposit the service tax amounts so recovered from the sub-contractors during the period 2001-02 to 2004-05. The demand is confirmed under section 73 of the Finance Act, 1994. This section applies to taxes short levied or short paid. Such short levy or short payment can be only with reference to tax that becomes payable under section 66. That is to say there should be a taxable service provided by the appellant and there should be short fall in taxes that is payable under section 66. This section will not apply for any services received by the appellant so long as the obligation to pay tax is not on the recipient of services under a valid reverse charge mechanism as introduced later in section 66A. May be there is a case for making such demand under section 11D of the Central Excise Act, 1944 made applicable to service tax as per section 83

of Finance Act, 1994. This provision is not invoked either in the SCN or in the adjudication order, though some of the facts that are necessary for invoking the provisions are stated in the SCN and adjudication order without examining all aspects that may be necessary for the purpose.

8. Section 11D of Central Excise Act reads as under:

11D "(1) Notwithstanding anything to the contrary contained in any order or direction of the Appellate Tribunal or any Court or in any other provision of this Act or the rules made thereunder, ***every person who*** *is liable to pay duty under this Act or the rules made thereunder, and* ***has collected any amount in excess of the duty*** *assessed or determined and paid on any excisable goods under this Act or the rules made thereunder* ***from the buyer of such goods in any manner as representing duty of excise****, shall forthwith pay the amount so collected to the credit of the Central Government."*

9. This section has to be read with necessary modification to apply to service tax levy. It would appear that the section applies only to a situation where excess amount of tax is collected from the person to whom service is provided. In this case the disputed amount is collected from persons from whom service was received. So before confirming the demand this aspect has to be examined and a finding given.

10. For argument sake let us understand section 11D to mean that the requirement is that a person who collects any amount as tax has to deposit such amounts collected in Government's account. The argument of the appellant is precisely that they have done so as reflected in the unnumbered paragraph on page three of the adjudication order stating information as under:

S. No	Year	Tax paid	Tax collected
1	2001-02	315374	330492
2	2002-03	220912	712414
3	2003-04	838122	873013
4	2004-05	1427182	422881
	Total	2801590	2338800

(There appears to be some mistake in totaling in the figures furnished in the adjudication order)

11. Adjudicating authority has to give a finding why the deposit of tax made by them in excess of what was collected is not a satisfactory compliance with provisions of section 11D. There appears to be no law providing that the money deposited should be over and above his liability.

12. The Counsel also pleads that during the relevant time there were instructions from CBEC to the effect that sub-contractors need not pay tax if the main contractor was paying tax on the same taxable activity. So they as main contractor had an arrangement by which they were paying tax to the government and were collecting part of such tax paid from the sub-contractors for the value of services provided by the sub-contractors. The matter is to be examined in the context of such instructions as may be provided by the Appellant during denovo hearing.

13. It is also to be noted that there may not be exact co-relation between amount collected from sub-contractors and amount paid to government if any particular period like a financial year is taken for the reason that tax liability under section 66 is to be discharged as and when payment is received from SAIL. Recovery from the sub-contractors would be at the time when the appellants paid for services received by the appellant. The matter has to be seen for larger period for which the appellant may be able to provide reconciliation.

14. The above position is recorded so the denovo adjudication does not result in just a retyping of the order passed earlier. It is made clear that all issues are kept open for decision is denovo adjudication.

(Operative part pronounced in Court)

(Mathew John)
Technical Member

MPS.