IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:26.09.2017

Date of Decision:04.10.2017

Service Tax Appeal No.915/2009-DB

[Arising out of Order-in-Original No.08/JM/2009 dated 30.07.2009 passed by the Commissioner (Adjudication), Service Tax Commissionerate, New Delhi]

M/s.Gannon Dunkerley &Co. Ltd. Appellants

Vs.

CST, Delhi Respondent

Appearance:
Rep. by none for the appellant
Rep. by Shri Ranjan Khanna, AR for the respondent.

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. B. Ravichandran, Member (Technical)

Final Order No.56889/2017

Per B. Ravichandran:-

The appeal is against order dated 30.07.2009 of Commissioner (Adj.), Service Tax, New Delhi. The appellants are engaged in construction activities. They have entered into contracts with various companies for construction of various civil structures, which were used for commercial and industrial purposes. The dispute in the present case relates to the eligibility of the appellant for benefit under Notification No.15/2004-ST dated 10.09.2004 for availing abatement of 67% of the gross value to pay service tax. The Revenue held a view that the appellants have not calculated the tax liability properly while claiming the abatement under the said notification. They have not included the value of free issue materials received from the clients. Accordingly, the proceedings initiated against the appellants concluded in the impugned order. The Original Authority held that the appellants have short paid service tax of Rs.40,06,220/- on the ground that they have not included the value of free issue materials in the gross amount for calculating the service tax liability.

2. None appeared on behalf of the appellant in spite of notice. In fact, notice sent to the Counsel for the appellant has been returned by the postal authorities. As the case has been listed many times earlier and most of the times, none appeared on behalf of the appellant, we find it fit and proper to take up the case for disposal based on the appeal records and submissions of the ld. AR.

3. The only prayer made in the appeal is against the imposition of penalty by the Original Authority. It is submitted by the appellant that they have paid the service tax along with interest much before the issue of show cause notice. They have prayed for setting aside the penalty imposed under Section 78. They have pleaded that non-payment of differential service tax is on the ground of bonafide belief and accounting error. We note that the inclusion or otherwise of the value of free supply materials in the gross amount liable to tax and computing the abatement has been a subject matter of litigation in various decisions of the Tribunal. In fact, the Tribunal in **Bhayana Builders – 2015 (37) STR 525 (Tribunal-Delhi)** held that there is no legal sanction for including the value of free supply materials in the taxable value.

4. Considering the matter is involving interpretation and in fact on merits, the appellant has got a strong case though not pleaded before us we find that there is

no justification to impose equal amount of penalty in the present case. Accordingly, we set aside the impugned order with reference to imposition of penalty under Section 78. The appeal is allowed to this limited extent.

[Order pronounced on 4.10.2017.]

(Justice (Dr.) Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

Ckp