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

Date of Hearing: 14.06.2018
Date of Decision: 06.07.2018

Appeal No. ST/ROA/50428/2018 in ST/50669/2014

[Arising out of OIA No. MRT-EXCUS-002-APP/167/13-14 dated 28.10.2013 passed by the Commissioner (Appeals), CCE&ST, Meerut-II]

R.K. Engineers & Contractors …Appellant

Vs.

CCE&ST, Meerut-II …Respondent

Appearance:

Represented by Shri Rakshit Verma, Advocate for the Appellant.

Represented by Shri Amresh Jain, D.R. for the Respondent.

Coram:

Hon'ble Mr. V. Padmanabhan, Member (Technical)

Hon'ble Ms. Rachna Gupta, Member (Judicial)

Final Order No. 52445/2018

Per V. Padmanabhan:

The present Miscellaneous Application stands filed for restoration of the appeal which was dismissed for default vide Final Order No. 50514/2018 dated 31.01.2018.

2. It has been submitted that the appeal could not be prosecuted on the previous date because the husband of the proprietor was hospitalized on 21.01.2017, and the Appellant needed to take care of him. We take note of the circumstances and allow appeal to be restored. With the concurrence of both the sides, the appeal is taken up for a decision

3. The present appeal is directed against the Order in Appeal No. 167/2013-14 dated 28.10.2013.

4. The brief facts of the case are that the Appellant was engaged in rendering construction services. The dispute covers the period 2006-01 to 2008-09. The Department noticed that the Appellant was neither filing ST-3 Returns nor they were discharging their Service Tax liabilities on services rendered by them. Show Cause Notice was issued proposing to demand Service Tax for the disputed period under the category of Commercial or Industrial Construction Service. Both the authorities below confirmed the demand of Service Tax totaling to an amount of Rs. 29,39,110/- along with interest and penalty under Section 76 of the Finance Act, 1994. Against such impugned order, the present appeal has been filed.

5. In this connection, we heard Shri Rakshit Verma, learned Advocate for the Appellant and Shri Amreesh Jain, learned D.R. for the Revenue.

6. The arguments advanced by the learned Advocate are summarized below:

(i) The learned Advocate submitted that out of the total Service Tax demand of about Rs. 59.39 lakhs, the Appellant has already paid Service Tax totaling to an amount of Rs. 27.53 lakhs along with the applicable interest. It is the claim of the Appellant that the total Service Tax demand would come down to an amount less than the amount which is already paid if the cum-tax benefit is extended. Since the Appellant has already discharged their Service Tax liability in full along with interest, even before the issue of Show Cause Notice, he submitted that the penalty involved may be waived.

(ii) The further argument advanced is that the nature of the activity carried out by the Appellant would be appropriately classifiable under the category of Works Contract Service included in the statute which has come into effect from 01.06.2007 under the category of Section 65(105)(zzzza) of the Finance Act, 1994. He relied upon the decision of the Hon'ble Supreme Court in the case of Larsen and Turbo 2015 (39) STR 913 (SC) and submitted that since the services are classifiable appropriately under Works Contract Service, there can be no levy of Service Tax for the period prior. Even in the period prior to 01.06.2007, he relied upon the case of URC vs. Commissioner STR 147 (Tri.-Chennai) and submitted that the Show Cause Notice relevant in the present dispute has not mentioned the category of services for raising such a demand, accordingly, he submitted that the entire Service Tax demand may be set aside.

3. The learned D.R. justified the impugned order. He argued that the Appellant has neither come forward to pay the Service Tax, nor filed returns. Until the Department investigated into their affairs and demanded Service Tax. Accordingly, he

justified that the demand is liable to be sustained along with imposition of penalty under Section 76.

4. After hearing both sides and perusal of records, it appears that the dispute is regarding payment of Service Tax on the construction activities carried out by the Appellant for the period 2006-07 to 2008-09. Out of the total Service Tax demand of about Rs. 29.39 lakhs, the submission of the Appellant is that an amount of Rs. 27.53 lakhs has already been paid by the Appellant along with the taxable interest of Rs. 2.83 lakhs, even before the issue of Show Cause Notice dated 21.10.2011. It has further been submitted that the lower authorities have not extended the benefit of calculation of Service Tax with the cum tax benefit. By relying on the decision of the Honourable Supreme Court in the case of M/s Maruti Udyog Ltd., 2001 (141) ELT 3 (SC), it has been submitted that the Service Tax demand with cum tax benefit works as follows:

F.Y.	**Value for the purpose of payment of Service Tax**	**Service Tax calculated on the gross amount charged**	**Service Tax calculated on cum-tax value basis**
2006-07	2,59,53,755/-	10,47,924/-	9,34,002/-
2007-08	3,40,69,162/-	13,88,944/-	12,36,751/-
2008-09	1,23,13,485/-	5,02,242/-	4,46,994/-
TOTAL	**7,23,36,402/-**	**29,39,110/-**	**26,17,747/-**

5. The benefit of calculation of Service Tax payable with the cum tax benefit is allowable to the Appellant in line with the

decision of the Apex Court cited above. The same also is evident from the provisions of Section 67 of the Finance Act, 1994. Once the cum tax benefit is extended, the total demand for Service Tax works out to Rs. 26.17 lakhs. It is seen that the Appellant has already deposited Service Tax amounting to Rs. 27.53 lakhs along with applicable interest even before the issuance of Show Cause Notice. Once the entire Service Tax dues are paid with interest, the Revenue need not have issued the Show Cause Notice. In any case, there is no justification for levy of penalty under the circumstances, which is set aside via 80 ibid.

6. In view of the above discussions, we uphold the demand of Service Tax after extending the cum tax benefit along with interest. All penalties are set aside by taking recourse to Section 80.

7. Impugned order is modified and appeal is partly allowed.

[Pronounced in open court on 06.07.2018]

(Rachna Gupta)
Member (Judicial)

(V.Padmanabhan)
Member (Technical)

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