CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. 1

Service Tax Appeal No. 51270 of 2015 -DB

(Arising out of Order-in-Original No. COMMISSIONER/RPR/ST/116/2013 dated 17.12.2013 passed by the Commissioner, Central Excise & Customs, Raipur)

M/s Mammen Engineering Works Appellant
Prop. Shri Mammen Thomas
S-121. J.P. Nagar, Stage – 2, RSPO-
A-7, Ashiwadpuram Colony,
Dhirampur, Raigarh, C.g.
Tiruvalla 689111 - Kerala

Versus

Commissioner, Central Excise & Customs, Raipur Respondent
Central Excise Building, Dhamtari Road,,
Tikrapara,Raipur (Chhattisgarh) 492 001

Appearance

Shri Bipin Garg, Advocate - for the appellant

Shri Vivek Pandey, DR - for the respondent

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

Date of Hearing/Decision: 1.8.2019

Final Order No. 51076/2019

Justice Dilip Gupta:

This appeal has been filed for setting aside the order dated 17 December, 2013 passed by the Commissioner by which the demand of service tax has been confirmed and the appellant has also been directed to pay interest. Penalty has also been imposed upon the appellant under sections 76 and 78 of

78 of the Finance Act, 1994[1].

2. The appellant is a sub-contractor and had received payment of Rs.19,30,94,411/- for fabrication, erection and commissioning work of the main contractors namely, M/s Gannon Dunkerley & Co. Limited, New Delhi and M/s Viraj Steel & Energy Limited, New Delhi. It did not pay service tax for the reason that the works order required service tax to be paid by the main contractors and the main contractors had also discharged this liability of tax and had given a certificate to the appellant.

3. However, a Show Cause Notice dated 19 October, 2012 was issued to the appellant mentioning therein that during the course of audit of the records, it was noticed from the balance sheets for the financial years 2007-2008, 2008-2009, 2009-2010 and 2010-2011 and the Trial Balance Sheet for the financial year 2011-2012 (up to December, 2011) that the appellant as a sub-contractor had received payments from the main contractors but had not paid service tax, even though it was required to pay the service tax in terms of the Circular dated 4 January, 2008 issued by the Central Board of Excise and Customs. The extended period of limitation was also invoked. Paragraph-14 of the Show Cause Notice which deals with the aspect of limitation is reproduced below:

> "14. Further Noticee has never disclosed the facts to the department with intent to evade payment of Service Tax deliberately. The said facts were detected during the course of audit and it came to the notice that the Noticee have neither

1. The Act

> charged Service Tax for the said gross receipts nor paid Service Tax for the said gross receipts received from their main contractors. The Noticee have also not shown the said amounts received in the ST-3 returns filed by them from time to time. Copies of ST-3 returns (2009-10) enclosed as Annexure B. Therefore, for recovery of Service Tax, extended period under Section 73 of the Act is invokable in the instant case. The Service Tax amounting to Rs. 2,12,24,424/- for the period from 2007-08 to 2011-12 (upto December, 2011), thus appears to be payable by the Noticee in terms of Section 73 of the Finance Act, 1994. Further, the interest is also recoverable in terms of Section 75 of the Finance Act, 1994. They also appear to be liable for imposition of penalties under Section 76 (for period till 10.5.2008) and 78 of the Finance Act, 1994."

4. The appellant filed a detailed reply to the Show Cause Notice mentioning therein that since the main contractors had already made payment of service tax and the appellant did not collect the service tax amount from the main contractors, the levy of service tax was not justified. The appellant also pointed out that the main contractors had also issued certificates which indicated that service tax had been paid by them also for the value of work executed by the appellant. It was also stated that the work orders also provided that the principal contractors shall bear the service tax. The appellant further stated that there would be no loss to the revenue since even if the appellant had paid the service tax, credit would have been taken by the main contractors and then payment of service tax by the appellant would have resulted in double taxation. Regarding the invocation of the extended period of limitation, the appellant pointed out that the appellant had been regularly paying the service tax in time but for the works under the sub contract, it had not paid the service tax for a bona fide reason that the main contractors were not only required to pay the service tax, but had

actually paid the service tax. It was, therefore, submitted that there was no suppression of facts with an intention to evade payment of service tax. The appellant also referred to various decisions of the Tribunal wherein it was held that when the main contractors had paid the service tax, no levy could be imposed by the Department on a sub-contractor for the value of works which were included in the service tax paid by the main contractors.

5. The Commissioner, however, did not accept the contentions made by the appellant. The Commissioner held that the appellant was required to pay the service tax on the works undertaken as a sub-contractor. Regarding the invocation of the extended period of limitation contained in the proviso to Section 73(1) of the Act, the Commissioner after noticing that it was only during the course of the audit that it came to the light of the Department that the appellant had not paid service tax on the value of work undertaken as a sub-contractor and the payment was not even disclosed in the ST-3 returns, concluded that the appellant had suppressed facts with an intention to evade payment of service tax.

6. Learned Counsel for the appellant does not dispute that in view of the Larger Bench decision of this Tribunal in **Commissioner of Service Tax Versus M/s Melange Developers Private Limited**[2] a sub-contractor is required to pay service tax but what he contends is that during the period in dispute namely, from 2007 up to 2012, the appellant bonafide

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2. Service Tax Appeal No. 50399 of 2014
decided on 23 May, 2019

believed that no service tax was required was required to be paid by a sub-contractor because of various decisions of Division Benches of the Tribunal and it is only when the reference was answered by a Larger Bench that the position of law became clear. It is, therefore, his submission that suppression was neither wilful nor with an intent to evade payment of service tax, more particularly, when the main contractor in terms of the clauses of the works order had discharged the service tax liability for the entire value of work, including the work under the sub-contract. The submission is that even though this issue was specifically raised by the appellant in reply to the Show Cause Notice, but still there is no consideration at all in the impugned order and the Commissioner appeared to have been swayed by the fact that the appellant had not disclosed the value in the ST-3 returns.

7. Shri Vivek Pandey, learned Authorised Representative of the Department, has, however, supported the impugned order and has submitted that the Commissioner committed no illegality in confirming the demand because the appellant was required to pay service tax in view of the Circular of the Board. Learned Authorised Representative also submitted that the Commissioner was justified in holding that the extended period of limitation could be invoked in the facts and circumstances of the case.

8. We have considered the submissions advanced by the learned Counsel for the appellant and the learned Authorised Representative of the Department.

9. Learned Counsel for the appellant has very fairly stated that in terms of the decision of the Larger Bench of this Tribunal in **Melange Developers,** a sub-contractor is required to discharge the service tax liability for which credit can be taken by the main contractors, but what he contends is that such service tax liability should be confined to the main period of limitation provided for Section 73(1) of the Act and the extended period of the limitation under the proviso to Section 73(1) of the Act could not have been invoked.

10. We find substance in the submission advanced by the learned Counsel for the appellant. It cannot be urged that there was any wilful suppression of facts with an intention to evade payment of duty as is the requirement of Section 73(1) of the Act. There were conflicting decisions of the Tribunal in this regard and it is for this reason that the matter had been referred to a Larger Bench of the Tribunal. In fact, under the terms of work order also it was the main contractor who had to discharge the service tax liability and the appellant had also not collected any service tax from the main contractors. This apart, it is not in dispute that the main contractors had actually deposited the service tax. The Commissioner failed to examine the reply filed by the appellant on this issue and has invoked the extended period of limitation in the impugned order only for the reason that facts came to the notice of the Department only when an audit was carried out and that the appellant had also not mentioned the amount in the ST-3 returns. As noticed above, the appellant could have been under a bona fide belief that neither service tax was required to be collected from the

main contractor nor was it required to be deposited with the Government.

11. Such being the position, the Commissioner fell in error in invoking the extended period of limitation. The matter, therefore, needs to be remitted to the Commissioner to calculate the service tax liability for the period prescribed under Section 73(1) of the Act without invoking the proviso that seeks to extend the period of limitation. Such exercise shall be carried out by the Commissioner within a period of three months from the date a copy of the order is produced by either of the parties before the Commissioner. The appeal is allowed only to the extent indicated above and the order passed by the Commissioner stands modified, accordingly.

(Dictated & pronounced in open Court)

(Justice Dilip Gupta)
President

(Bijay Kumar)
Member (Technical)

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