CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. ST/602/2008

(Arising out of Order-in-Appeal No. 21/2008 (V-I) - ST dated 08.09.2008 passed by Commissioner of Customs, Central Excise & Service Tax (Appeals), Visakhapatnam)

Praveen Engineering Works **…..Appellant(s)**

Vs.

Commissioner of Central Excise, Customs & Service Tax, Visakhapatnam - I **…..Respondent(s)**

Appearance
Shri Viswanathan, Consultant for the Appellant.
Shri Arun Kumar, Deputy Commissioner (AR) for the Respondent.

Coram:
Hon'ble Mr. M.V. RAVINDRAN, MEMBER (JUDICIAL)
Hon'ble Mr. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

Date of Hearing: 09/05/2018
Date of Decision: 09/05/2018

FINAL ORDER No. A/30580/2018

[Order per: M.V. Ravindran]

This appeal is directed against Order-in-Appeal No. 21/2008 (V-I) - ST dated 08.09.2008.

2. Heard both sides and perused the records.

3. On perusal of records, it transpires that during the period September, 2004, January, 2006, appellant herein was engaged in cutting, straightening and bending steel wire rod coils for various steel traders. Appellant used to receive wire rods for Rashtriya Ispat Nigam Ltd., (RINL) as per the purchase order of traders; engaged in the activity of cutting the coils, straightening and bending as per the requirement; appellant charged service charges for such activity from traders. Appellant was not registered with the Central Excise Department nor Service Tax Department. It is the case of the Revenue in the show cause notice such activity of cutting, straightening and bending does not amount to manufacture, it would fall under the category of Business Auxiliary Service as per the definition under Section 65 (19) of the Finance Act, 1994 more specifically under Clause (v) – "production or processing of goods on behalf of the client". Appellant contested the show cause notice on limitation as well as on merits. The Adjudicating Authority as well as First Appellate Authority relied upon the decision of the Tribunal in the case of *Rashtriya Ispat Nigam Ltd.,* [2005 (179) ELT 65] wherein the Bench came to a conclusion that activity of bending, cutting and straightening does not amount to manufacturing hence the service tax liability arises under Business Auxiliary Services. On limitation both the lower authorities held that appellant having not obtained registration is correctly taxed by invoking the extended period.

4. Learned Consultant submits, the issue involved in this case is whether the appellant activity would not fall under the category of Business Auxiliary Service or as they are not providing any services on behalf of client. It is also his submission that they are contesting the demand for the year 2004-2005 on limitation. The issue relating to the cutting, bending steel wire rod coils and straitening, whether amounts to manufacture was not under dispute, the Hon'ble Apex Court settled the issue as reported at [2005 (187) ELT A 34 (S.C)]. It is his further submission that the Hon'ble High Court of Madras in the case of *Nexus Computers Pvt. Ltd.,* [2007-TIOL-1606-CESTAT-Mad] has held that Department was itself in confusion as to the activity under taken is taxable under service tax or excisable under Central Excise benefit of doubt, should go to the appellant hence the extended period cannot be invoked. It is his further submission that the penalties have been imposed under Section 76 &78 of Finance Act, 1994 and submits that 76 & 78 will not arise though they are contesting no penalties should imposed.

5. Learned Departmental Representative reiterates the findings of the lower authorities and submits that the appellant activity will fall under the category of Business Auxiliary Service under clause (v) of definition of Business Auxiliary Services, and both the lower authorities have correctly upheld the demands and imposed penalties.

6. On careful consideration of the submissions made, we find that there is no dispute as to the fact appellant is undertaking the activity of bending, straightening cutting of steel wire rod coils received from the traders, this activity would be covered under the Business Auxiliary Service. In order to understand the issue we reproduce the definition of Business Auxiliary Service during the relevant period, which reads as follows:

> *"Any service in relation to, -*
>
> *i)Promotion or marketing or sale of goods produced or provided by or belonging to the client; or*
> *ii) Promotion or marketing of service provided by the client; or*
> *iii) Any customer care service provided on behalf of the client; or*
> *iv) Procurement of goods or services, which are inputs for the client; or*
> *v) Production or processing of goods for, or on behalf of, the client;*
> *vi) Provision of service on behalf of the client; or*
> *vii) A service incidental or auxiliary to any activity specified in sub clauses (i) to*
> *viii) Such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision and includes services as a commission agent."*

It can be seen from the above reproduced definition, the activity of appellant would fall under Clause (v) wherein, the processing of the goods for, or on behalf of the client has been considered as Business Auxiliary Service and the service tax liability would arise. In our view, the arguments put forth by the Learned Counsel that extended period for the limitation cannot be invoked the Department itself as in confusion for which reliance was placed in the case of *Nexus Computers Pvt. Ltd.,* we find that there was no confusion at least in this case as demand is of the service tax only not excise duty. It is also to be noted in the case of RINL was settled in July, 2004 and demands which has been raised on the appellant are from September, 2004 onwards. As regards the decision of the *Nexus Computers Pvt. Ltd.,* we find in that case the Bench came to a conclusion, that there is a confusion that the demand involved in that case of the appellant therein was sought to classified from one service to another service, which is not in the case in the proceedings before us in this case. In view of this, since the appellant failed to take any registration/certificate the service tax, demand for the extended period is correctly confirmed. We uphold the service tax liability and interest thereof.

7. As regards the penalty since, we uphold the demand of service tax liability which is confirmed under Proviso to Section 73 of the Finance Act, 1944, equivalent amount of penalty under Section 78 gets attracted. We hold that penalty under Section 76 need not be imposed as judgement of the Hon'ble High Court of Gujarat in the case of *Raval Trading Company* [2016 (42) STR 210 Guj.] in para. 11 & 12 has held that both the penalties are not to be imposed, more specifically after the provisions in Section 78 of the Finance Ac, 1944. We reproduce the said ratio in para. 11 & 12.

> ***"11.*** *In view of the nature of his further proviso and the relevant position of the two statutory provisions both pertaining to penalty, we are convinced that the proviso was in the nature of clarificatory amendment and not creating a liability for the first time. Even without the aid to this further proviso to Section 78, one entire plausible view was that the situation envisaged under Section 76 of the Finance Act, 1994, would exclude those cases covered under Section 78 of the Finance Act, 1994. In other words,*

Section 76 of the Finance Act, 1994, would cover only the cases of non-payment of service tax which are not related to fraud, collusion, willful misstatement, suppression of facts or contravention of any of the provisions of the said Chapter or the rules made thereunder with the intent to evade payment of service tax since legislature had already provided for penalty in Section 78 in such situations. Thus further proviso to Section 78 made it explicit which was till then implicit.

12. *Section 76 of the Finance Act, 1994, as is now amended with effect from 14.05.2015 gives further credence to this argument. Section 76(1) as it stands after the said amendment provides that where service tax was not levied or not paid or having been short-levied or short-paid, or erroneously refunded for any reason, other than the reason of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of Chapter 5 or the rules made thereunder with an intent to evade the payment of service tax, the person liable shall in addition to service tax and interest also be liable to pay penalty not exceeding ten per cent of the amount of such service tax. Thus, by way of this amendment, the statute has ensured that Sections 76 and 78 of the Finance Act, 1994, apply in mutually exclusive areas. In other words, the cases of non-payment of tax by reason of fraud or collusion or wilful misstatement or suppression of facts, etc., would be covered under Section 78 of the Finance Act, 1994, and all cases other than those envisaged under Section 78 would be covered under Section 76 of the Finance Act, 1994."*

8. In view of the foregoing, the service tax liability with interest and equivalent penalty under Section 78 is upheld, while penalty imposed under Section 76 is set aside. The appeal stands disposed of as indicated herein above.

(Order dictated & pronounced in open court)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….