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

Appeal Nos. ST/123 & 226/2008

(Arising out of Order-in-Original No. 09/2007- (S.T.) –Commr. dated 07.01.2008 & 01/2008-(Service Tax) – Commr. dated 05.03.2008 passed by Commissioner of Customs & Central Excise, Hyderabad)

M/s Ordnance Factory **…..Appellant(s)**

Vs.

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

Appearance
Shri K. Nagaraja Rao, Advocate for the Appellant.
Shri Guna Ranjan, Superintendent (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: 19/07/2018
Date of Decision: 19/07/2018

FINAL ORDER No. A/30795-30796/2018

[Order per: P. Venkata Subba Rao]

These appeals are filed against Order-in-Original No. 09/2007- (S.T.) –Commr. dated 07.01.2008 & 01/2008-(Service Tax) – Commr. dated 05.03.2008.

2. Heard both sides and perused the records.

3. The facts of the case are that the appellant herein is a unit of the Indian Ordnance Factory located in Medak and engaged in producing Infantry Combat vehicles for the Defence. Since they have some excess capacity and they also engaged in Bullet proofing and Mine proofing vehicles for Para military force and CRPF and BSF. With respect to these supplies, they had either received the vehicles from the customers and bullet proofed and mine proofed them for a cost or in some cases and they procured the vehicles from the manufacturer of the vehicles and there bullet proofed and mine proofed and supplied them to the customers.

4. Three show cause notices were issued by the Department as follows:

i) O.R. No. 32/2003 dated 03.11.2003.

ii) O.R. No. 08/2005 dated 07.02.2005.

iii) O.R. No. 03/2006 dated 18.01.2006.

5. In all these show cause notices, it was alleged that the activity under taken by the appellant amounts to manufacture and hence they are liable to pay Central Excise duty. After following due process of law, the Commissioner vide Order-in-Original No. 14/2005 dated 29.06.2005 dropped the demands against the first two show cause notices. The Additional Commissioner vide Order-in-Original No. 09/2006 dated 31.07.2006 dropped the demand with respect to

the third show cause notice. Thus, the activities under taken by the appellant were fully in the knowledge of the Department.

6. Later, the following show cause notices were issued demanding service tax on the activities under taken by the appellant classifying the services as Business Auxiliary Services.

i) Show cause notice No. 09/2007 dated 21.05.2007.

ii) Show cause notice No. 17/2007 dated 30.11.2007.

It was proposed in the both show cause notices, to demand of service tax along with interest and also to impose penalties under Section 78 and 76 of the Finance Act, 1994. After following due process of law, the Learned Commissioner vide Order-in-Original No. 09/2007-ST dated 07.01.2008 confirmed the first demand and vide Order-in-Original No. 01/2008 –ST dated 05.03.2008 confirmed the second demand. He also demanded interest and imposed penalties as proposed in the show cause notice.

7. The Learned Counsel for the appellant argued with respect to the appeal No. ST/123/2008 that extended period of limitation cannot be invoked in this case since, the Department was fully aware to the activities under taken by them. The Department felt that the activities amount to manufacture and had issued show cause notices demanding excise duty on these activities which was subsequently dropped by the Commissioner and Additional

Commissioner. Therefore, the appellant cannot be alleged to have committed fraud or collusion or made willful mis-statement or suppressed the facts from the Department andextended period of limitation is not applicable in their case. We respect to appeal No. ST/226/2008, he had also argued an additional ground that they are eligible for abatement as per Notification No. 12/2003-ST because the demand was on the value of the full vehicle after including the value of vehicle and the cost of Bullet proofing and Mine proofing. As per the notification they are entitled to the abatement of the value of the vehicle.

8. He further submitted that the Business Auxiliary Services included “production of goods on behalf of the client” w.e.f 10.09.2004. This was amended w.e.f. 16.05.2005 as “production or processing of goods for, or on behalf of, the client”. As they were not producing goods as already accepted by the Department in the Order-in-Original with respect to the excise cases referred above, they are not liable to pay service tax before 16.05.2005. They were processing the goods by making them bullet proof and mine proof and hence their activities will get covered under the definition of Business Auxiliary Services w.e.f. 16.05.2005. He, therefore, argued that they are liable for payment of service tax w.e.f 16.05.2005. However, since their activities known to the Department no extended period of demand can be levied. He also argued that they are not

liable for penalty as they have no intention to evade service tax. In fact, the appellant are also an organization under the Government of India working for their clients who were also organizations under the Government of India and they will gain nothing by evading payment of service tax.

9. The Learned Departmental Representative, agreed with the facts of the case as narrated above. He reiterated the arguments in the Orders-in-Original and said that the assessee had not discharged their service tax liability and hence the Order-in-Originals were correct and need to be upheld. As far as the abatement under Notification No. 12/2003- ST with respect to appeal No. ST/226/2008 is concerned, he draws our attention to para 19 of the Order-in-Original which reads as below:

> *"**19**. Notification No. 12/2003 dated 20.06.2003 exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service, from the service ax leivable thereon under Section 66 of the Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and material. The exemption notification is subject to the condition that there is documentary proof specifically indicating the value of the said goods and material. In the instant case, the assesses have not submitted any documentary proof specifically showing the value of goods and materials used by them to provide the said service. The issue voucher shows the total amount for vehicle and there is no indication of values of material or goods anywhere in the said issue voucher. I am inclined to give benefit of notification No. 12/2003 dated 20.06.2003 to the assesses but in the absence of the documentary evidence in their support, I am forced to deny the benefit of the said Notification. The service tax demanded on invoice value in the show cause notice is appropriate."*

He argued that the burden of proving the eligibility of abatement under the Notification rests on the assessee and they had not discharged this burden and hence are not entitled to the benefit of notification.

10. We have considered the arguments on both sides and perused the records.

11. We find that, the appellant is liable to pay the service tax w.e.f 16.05.2005 as they were processing the goods for their clients namely the Para Military forces, CRPF etc. However, these activities of the appellant were fully in the knowledge of the Department and they have not suppressed any facts. In fact, the Department had themselves issued a show cause notices alleging that these activities amount to manufacture activity excise duties and subsequently, dropped those demands. Therefore, the extended period of limitation cannot be invoked in this regard and no penalty can also be imposed on the appellant for the same reason. The demand of service tax and interest is sustainable within the normal period of limitation.

12. As far as appeal No. ST/226/2008 is concerned, the Original Authority was fully willing to extended benefit of the abatement under the notification but the process had not submitted the relevant documents to substantiate for claim the abatement. We therefore find, it is a fit case to be remanded back to the Original Authority to enable the assessee to produce necessary documents.

13. In conclusion, we find that appeal No. ST/123/2008 is liable to be allowed to the extent of confirming the demand and interest within the normal period of limitation demand for the extended period and penalties are liable to be set aside. As far as appeal No. ST/226/2008 is concerned, the penalties are liable to be set aside and the demand needs to be recalculated after allowing the benefit of abatement under Notification No. 12/2003-ST based on the documentary evidence which can be produced by the appellant. Appeal No. ST/123/2008 is partly allowed confirming the demand within the normal period of limitation along with interest and setting aside the demand for the extended period and also setting aside the penalties imposed. Appeal No. ST/226/2008 is remanded back to the Original Authority to recalculate the duty liability after following principles of natural justice and giving the appellant an opportunity to produce evidence to claim the abatement.

14. The penalty imposed vide the Orders-in-Original are set aside. Appeals are disposed of as indicated herein above.

(Operative portion of this order was pronounced in the open court
on conclusion of hearing)

P. VENKATA SUBBA RAO
MEMBER (TECHNICAL)

M.V. RAVINDRAN
MEMBER (JUDICIAL)

Lakshmi….