CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench
Court - I

Appeal No. ST/977/2009

(Arising out of Order-in-Appeal No.84/2009 (V-I) ST dated 31.08.2009 passed by CCCE & ST (Appeals), Visakhapatnam)

Sheladia Rites ….. **Appellant(s)**

Vs.

CCCE & ST, Visakhapatnam - I ….. **Respondent(s)**

Appearance
Ms Radhika Ranjani, Advocate for the Appellant.
Shri A.V.L.N. Chary, Superintendent/AR for the Respondent.

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

Date of Hearing: 25.10.2018
Date of Decision: 21.12.2018

FINAL ORDER No. A/31604/2018

[Order per: M.V. Ravindran]

1. This appeal is directed against Order-in-Appeal No. 84/2009 (V-I) ST dated 31.08.2009.

2. The relevant facts that arise for consideration, after filtering out unnecessary details are appellant herein entered into an agreement with the National Highways Authority of India (NHAI) in 2001 and rendered services to them. On verification of the records of the appellant for the period February, 2002 to February, 2007 it was observed that NHAI had paid Income Tax (TDS) to the Government of India on behalf of the appellant and the same was not included for discharge of service tax by the appellant. A show cause notice was issued to the appellant for the recovery of differential Service Tax on the amounts paid by NHAI as TDS and interest was also demanded in addition to the proposals for imposition of penalties. The show

cause notice was resisted by the appellant on limitation as well as on merits. Adjudicating authority after following due process of law confirmed the demands so raised and also imposed penalties besides demanding interest. An appeal against such an order was considered by the first appellate authority on its merits as well as on limitation and was rejected after following due process of law.

3. Learned counsel draws our attention to the facts of the case and also to the agreement entered into. After reading the agreement exhaustively, it is her submission that appellant was paid an amount for the services rendered in full and on that, appellant discharged the entire service tax liability. NHAI, as per agreement, deducted the income tax and deposited the same with the Government of India, and the said amount of TDS does not form the part of gross amount charged for the services rendered. After stating this proposition, learned counsel draws our attention to Sec.67 of Finance Act, 1994 and after reading the section submits that the said section contemplates of collecting the service tax on the gross amount charged. It is her submission that appellant had raised invoices as per the running bills but the total amount charged was as per the agreement entered into and hence, demand of tax liability on appellant of the amount of TDS deducted and paid to the Government of India is incorrect.

4. Learned departmental representative, on the other hand, reiterates the findings of the lower authority.

5. Heard both sides and perused the records.

6. The issue involved in this case is whether revenue authorities were correct in demanding service tax on the amounts paid as TDS by NHAI on behalf of the appellant is correct or otherwise.

7. It is the finding of the first appellate authority and the adjudicating authority that the said amount is as per the agreement entered into by the appellant with NHAI and more specifically clause 1.10.2 of the said agreement indicates so, while it is the case of the appellant that they had discharged the service tax liability entirely on the amounts received as consideration for the services rendered by them and the amounts deducted and paid by NHAI as TDS cannot be considered as an amount received by them for the service rendered.

8. We find that there is no dispute as to the fact that the agreement entered by the appellant with NHAI at clause 1.10.2 [under taxes and duties clauses] wherein the liability to discharge/ deduct the income tax from the consultant, sub-consultant and personnel was on the part of NHAI which they have complied with and it is also undisputed that appellant had received the amount of consideration of the contract and discharged the service tax liability on such an amount.

9. Under the Income Tax Act, 1961, hypothetically giving an example, if 'A' has to deduct tax at source of Rs.10/- on the amount of consideration paid of Rs.100/- to 'B', 'A' is mandated to pay the same into Government Treasury. If 'A' has not deducted any tax from Rs.100/- paid to 'B' but paid from his pocket the tax of Rs.10/- to Government Treasury with a view to comply with the provisions of Income Tax Act, it would get covered under the provisions of Sec.195A of the Income Tax Act, 1961 which talks about net of tax amount. Further, a person who deducted tax at source or pays from his pocket has to file a quarterly return with the authorities which indicates details of tax deducted at source and also the name of the person on whose account the tax is deducted and this amount of TDS ultimately gets reflected in Form 26AS of the recipient, who will get credit for the said

TDS. Provisions of Sec.195A of Income Tax Act, are very clear inasmuch that where the tax chargeable on the income of payee is borne by the payer, then for the purpose of TDS such income shall be increased to such an amount as would after TDS be equal to the net amount equal to payee. We reproduce the provisions of Sec.195A:

> *"**195A**. In a case other than that referred to in sub-section (1A) of section 192, where under an agreement or other arrangement, the tax chargeable on any income referred to in the foregoing provisions of this Chapter is to be borne by the person by whom the income is payable, then, for the purpose of deduction of tax under those provisions such income shall be increased to such amount as would, after deduction of tax thereon at the rates in force for the financial year in which such income is payable, be equal to the net amount payable under such agreement or arrangement."*

10. Further as per the provisions of Sec.198 of Income Tax Act, 1961, all sums deducted by payer from the amounts payable to payee is deemed to be the income of payee and the said section reads as under:

> *"**Tax deducted is income received.***
>
> ***198.** All sums deducted in accordance with the foregoing provisions of this chapter shall, for the purpose of computing the income of an assesee, be deemed to be income received.*
>
> ***Provided** that the sum being the tax paid, under sub-section (1A) of section 192 for the purpose of computing the income of an assesee, shall not be deemed to be income received."*

11. It can be seen from the above reproduced sections that the amount of TDS either deducted from the payee's account or paid on behalf of the payee is considered as income by the Income Tax Act, 1961 and in the case in hand, it is very clear from the records that the amount of consideration on which service tax demand has been raised was reflected and captured from the accounts on verification of the records of the appellant. This would indicate that appellant herein had shown the amount of TDS paid by NHAI as income in his account. This income is directly correlatable to the services rendered by the appellant under the agreement entered with NHAI. In our view, if this amount cannot be considered as consideration for the purpose of levying service tax then it would be travesty of justice.

12. Learned counsel placed heavy reliance on the provisions of Sec.67 of the Finance Act, 1994 to advance argument that the said section talks about the gross amount charged for the purpose of levying service tax. We reproduce the said section as under:

> ***"SECTION 67.Valuation of taxable services for charging service tax****—*
> *(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —*
>
> *(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;*
>
> *(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;*
>
> *(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.*
>
> *(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.*
>
> *(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.*
>
> *(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.*
>
> *Explanation. — For the purposes of this section, —*
>
> *(a)"consideration" includes —*
>
> *(i) any amount that is payable for the taxable services provided or to be provided;*
>
> *(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service, except in such circumstances, and subject to such conditions, as may be prescribed;*
>
> *(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket.*
>
> *(b) [* * * *]*
>
> *(c)"gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and [book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise."*

13. It can be seen from the above reproduced section 67 of the Finance Act that service tax shall be chargeable on the gross amount charged by the service provider for such services rendered. In the case in hand, the contention of the appellant that they had charged fully for the services rendered and the invoices raised also indicate the discharge of service tax liability on the total consideration agreed, has overlooked the provisions which indicate that "gross amount charged is for such services". Undisputedly, the TDS deducted by NHAI and paid on behalf of the appellant is the amount received for the services rendered as amount of TDS which has been paid by NHAI gets reflected as income in the books of the appellant. It is undisputed that appellant has no other income other than amounts received as consideration from NHAI. If that be so, the amount of tax deducted and paid is shown as income and is directly related to the contract entered by the appellant with NHAI, it can be said that the amount of TDS is charged by the appellant to NHAI for services rendered and is definitely liable to the service tax.

14. Our above findings is fortified by the judgment of the Apex Court in the case of Bhayana Builders Pvt Ltd [2018 (10) GSTL 118] wherein the Apex Court has clearly held that the phrase "gross amount" only refers to the entire contract value between the parties, if something is not charged by the service provider it cannot be included in the value, after referring to explanation 'C' to Sec.67, observed that plain reading of explanation 'C' made in the gross amount charges inclusive to certain other payment including other modes of payments in whatever form. Applying the ratio of the aforesaid judgment, in the facts and circumstances of this case, it can definitely be said that TDS amount paid by NHAI into the Government

Treasury on behalf of the appellant herein was an amount paid towards consideration for the services rendered.

15. In view of the above analysis, we find that the impugned order is correct and no interference is called for.

16. As regards the point on limitation, we find that appellant has also not been able to make out a case on limitation for simple reason that despite showing TDS amount as income in his balance sheet, did not indicate the same or reconcile figures with the service tax returns filed by them and revenue had to come out with the figures on verification of the records itself indicates that there was suppression of facts. In view of this, we hold that the point raised on limitation would also not carry the case of the appellant any further.

17. In view of the foregoing, we find that the appeal is devoid of merits and stands rejected.

(Pronounced in the Open Court on 21.12.2018)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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