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

APPEAL No. ST/48/2011
*(Arising out of **Order-in-Revision** No. 05/2010-ST, dated 28.09.2010 passed by CCCE&ST, Hyderabad-III Commissionerate)*

Swayamkrushi Electrical & Technical Workers MACS Limited .. APPELLANT(s)

Vs.

CCE C&ST, Hyderabad-III .. RESPONDENT(s)

Appearance
Shri Y. Siri Reddy, Advocate for the appellant
Shri V.R. Pawan Kumar, 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: 08.02.2019
Date of Decision: 08.02.2019

FINAL ORDER No. A/30256/2019

[Order per: Mr. M.V. Ravindran)

1. This appeal is filed against Order-in-Revision No. 05/2010-ST, dated 28.09.2010.

2. Heard both sides and perused the records.

3. The appellant herein are a registered mutually aided cooperative society and have been undertaking the operations and maintenance of electrical sub stations and related work for APTRANSCO and were registered with the authorities in February 2008 under the category of "Maintenance or Repair" service and paid the service tax for the period September 2007 to February 2008. However, it was noticed by the lower authorities that they have been rendering the services since June 2005 and did not discharge the tax liability for the period 16.06.2005 to 31.08.2008; proceedings were accordingly initiated for the demand of tax liability along with interest for this period i.e. 16.06.2005 to 31.08.2008 and also for initiating penal action. The Adjudicating Authority confirmed the demands raised along with interest and imposed penalties under sections 76, 77 & 78 of the Finance Act, 1994. Appellants filed an appeal before the lower authorities against imposition of penalty on them under sections 76 & 77 of the Finance Act as also for Section 78. The first appellate authority did not agree with the contentions of the appellants and upheld the Order-in-Original with the modification that the penalty under sections 76 & 77 needs to be set aside. The Commissioner, exercising the powers vested on him under the provisions of Section 84 of Finance Act, 1994, issued a show cause notice dated 19.06.2009 and after reviewing the order of the adjudicating authority for non imposition of penalty under section 78 of the finance act to the equivalent amount of service tax liability confirmed. By the impugned order dated 28.09.2010, the Commissioner as a Revisionary authority, ordered the appellant to pay an additional amount of Rs.

1,15,933/- towards the penalty under section 78 of the Finance Act, 1994. Appellants are in appeal against such an order.

4. Ld. Counsel submits that the Order-in-Revision was passed after the Order-in-Appeal was pronounced on 31.07.2009 which in effect merged within the OIA, hence on the date of issuance of the impugned order, there was no O-I-A which needed revision. She submits that in an identical case, the Tribunal at Bangalore vide final order No.25577/2013, dated 15.07.2013 held that no penalty can be imposed when the entire tax liability if contested would have been set aside. It is also her submission that it is undisputed that the services rendered by the appellant to APTRANSCO were in respect of distribution of electricity and hence were exempted from payment of tax liability by notification No. 45/2010-ST, dated 20.07.2010 (retrospective notification). She prays to set aside the impugned order.

5. Ld. DR submits that the Revisioning Authority has passed the order as per the provisions of Section 84 of the Finance Act, 1994, which does not empower the authority to initiate the proceedings if the matter is pending before the Commissioner (Appeals) and in the case in hand the Commissioner (Appeals) has passed an order on 13.07.2009 and the show cause notice on 19.06.2009 and Revision of impugned order is passed on 28.09.2010. He further submits that the issue was before the Commissioner (Appeals) only for revision proceedings.

6. On careful consideration of the submissions made, we find that Ld. Counsel was correct in submitting that identical issue is now decided by the Tribunal in the case of Sadhana Electricals & Technical Works MACS Limited in Final Order No. 25577/2013, dated 15.07.2013. In the case in hand, undisputedly, services rendered by appellant are to APTRANSCO. We find that in the case of Sadhana Electricals & Technical Works MACS Limited (supra), the Tribunal has recorded the following findings:

> *" According to Notification No. 45/2010-ST, dt.20.07.2010, the tax on taxable services relating to transmission and distribution of electricity provided by the service provider to the service receiver which was not being levied shall not be required to be paid in respect of taxable services relating to transmission and distribution of electricity upto 21.06.2010. From the notification, it becomes quite clear that the service tax itself was not leviable if it was not levied during the relevant period. In this case, service tax has been levied and collected with interest and the question is only whether the appellant is required to pay revised penalty. Under the circumstances, I consider that in view of the Notification which exempts service tax upto 21.06.2010, the activity undertaken by them would not have been leviable to service tax at all if the appellant was not to pay the tax with interest and 25% of the penalty. Needless to say that the question of imposition of a revised penalty would not arise in such a situation since it would amount to imposing penalty on assessees who pay the tax as and when demanded with interest without questioning the right to collect and without any delay. Accordingly, the impugned order is set aside and appeal is allowed."*

7. The same ratio will apply in the case in hand and as the appellant's Counsel is canvassing that the entire tax liability which has been paid by them, if would have come in contest, the same would have been set aside due to retrospective notification issued by the Govt. of India. We find that the ratio in the case of Sadhana Electricals & Technical Works MACS

Limited, squarely covers the issue in favor of the appellant. Accordingly, we hold that the impugned order is unsustainable and is liable to be set aside and we do so.

8. The impugned order is set aside and the appeal stands allowed.

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

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

vrg