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

DIVISION BENCH – COURT NO. 1

Service Tax Appeal No 502 of 2008

(Arising out of **Order-in-Original** No. 41/2007-08 (RS), dated 07.05.2008 passed by Commissioner, Visakhapatnam)

Commissioner of Customs & .. APPELLANT
Central Excise, Visakhapatnam
Central Excise Builging,
Port Area, Visakhapatnam,
Andhra Pradesh-530 035.

VERSUS

MMTC LTd., .. RESPONDENT
Regional Office, MMTC Bhawan,
Port Area, Visakhapatnam,
Andhra Pradesh-530035.

WITH

Service Tax Appeal No 514 of 2008

(Arising out of **Order-in-Original** No. 41/2007-08 (RS), dated 07.05.2008 passed by Commissioner, Visakhapatnam)

MMTC LTd., .. APPELLANT
Regional Office, MMTC Bhawan,
Port Area, Visakhapatnam,
Andhra Pradesh-530035.

VERSUS

Commissioner of Customs & .. RESPONDENT
Central Excise, Visakhapatnam
Central Excise Builging,
Port Area, Visakhapatnam,
Andhra Pradesh-530 035.

<u>Appearance</u>

Shri C. Mallikarjun Reddy, Superintendent for the Department.

Shri A. Sarveswar Rao, Advocate for the Assessee.

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

FINAL ORDER No. ________________

Date of Hearing:08.04.2019
Date of Decision:08.04.2019

[ORDER PER: MR. ANIL CHOUDHARY]

1. Heard the parties. These cross appeals arise from Order-in-Original No. 41/2007-08 dated 07.05.2008.

2. Show cause notice dated 23.03.2007 was issued for demanding service tax under the head Business Auxilliary Service. Revenue found in the course of investigation/enquiry that appellant was working as marketing agent/sole selling agent for one M/s Nilachal Ispat Nigam Ltd., (NINL). Accordingly, the show cause notice proposed to demand the service tax of Rs. 1,00,21,224/- for the period October 2004 to September 2006 with cess. Further the show cause notice contained proposal to appropriate service tax already paid Rs. 91,73,103/- with the proposal to impose the penalty. Para 8 of the show cause notice further records that in the course of enquiry, the appellant MMTC on being so pointed, out they obtained service tax registration and deposited the tax amounting to Rs. 91,73,103/- plus Rs. 1,83,460/- towards cess. The show cause notice was for the demand, prima facie of the differential tax with cess of about Rs. 8 lakhs.

3. The show cause notice was adjudicated on contest vide Order-in-Original. Further, in para 5 of the impugned order it is recorded, based on the statement of Deputy General Manager of MMTC Ltd., that there was a dispute with the buyer of the goods M/s Rastriya Ispat Nigam Ltd., (RINL) Visakhapatnam, [during the relevant period, to the tune of Rs. 25 lakhs] who had disputed the amount payable towards the supply. Appellants depends upon commission of the sales proceeds of the product – coal. The said issue finally got settled with the buyer of goods, sometime in May–June 2008, and the appellant MMTC issued credit notes to RINL for total amount of Rs. 24,47,66,640/-.

4. The Revenue is in appeal for imposition of penalty under section 77 and 78, whereas the assessee is in appeal for modification of the demand as the fact of dispute with the buyer of goods, has been recorded by the adjudicating authority, who had not given the adjustment for the same, inspite of the fact that tax was payable on receipt basis. Further the assessee said that the element for imposition of penalty under section 78 and 76 are not available and accordingly prays for deletion of penalty imposed under section 76.

5. Heard Learned AR for Revenue who has urged for imposition of penalty.

6. Having considered the rival contentions, we are satisfied that the elements for imposition of penalty under section 76 and 78 are not available in the facts, as it is admitted in the show cause notice itself, that the appellant deposited the service tax on being so pointed out. Further the transaction was found duly recorded in the books of accounts maintained in the ordinary course of business. Accordingly, we set aside the penalty imposed under section 76 and also hold that no penalty was imposable under section 78. Further, we allow the appeal of assessee on the point of re-determination of the tax liability, by way of remand to the adjudicating authority, who shall re-determine the demand taking into account, the amount less received by them, as per documents and accounts.

6. The appeal by Revenue is dismissed and appeal by the appellant assessee is allowed by way of remand as indicated herein above.

(Dictated and pronounced in open court)

ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P. VENKATA SUBBA RAO)
(MEMBER (TECHNICAL)

Jaya