IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, EASTERN ZONAL BENCH: KOLKATA

<u>S.T.Appeal No.63/08</u>

(Arising out of Order-in-Original No.01/Commr./ST/Adj./DIB/08 dated 31.01.2008 passed by the Commissioner of Central Excise & Service Tax, Dibrugarh)

M/s Brahmaputra Consortium Ltd.

Applicant (s)/Appellant (s)

Vs.

CCEx. & S.Tax, Dibrugarh

Respondent (s)

<u>Appearance</u>:

Shri Ankit Kanoria, C.A. for the Appellant (s)
Shri A. Roy, Supdt. (AR) for the Revenue

<u>S.T.Appeal No.71/08</u>

(Arising out of Order-in-Original No.01/Commr./ST/Adj./DIB/08 dated 31.01.2008 passed by the Commissioner of Central Excise & Service Tax, Dibrugarh)

CCEx. & S.Tax, Dibrugarh

Applicant (s)/Appellant (s)

Vs.

M/s Brahmaputra Consortium Ltd.

Respondent (s)

<u>Appearance</u>:

Shri A. Roy, Supdt. (AR) for the Revenue
Shri Ankit Kanoria, C.A. for the Appellant (s)

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

<u>Date of Hearing : 08.10.2018</u>
<u>Date of Decision : 08.10.2018</u>

ORDER NO…FO/A/76752-76753/2018

Per Bench :

The present two appeals are cross appeals against the Order-in-Original No.01/Commr./ST/Adj./DIB/08 dated 31.01.2008.

2. The appellant was awarded a contract by M/s North Eastern Coal Fields, Coal India Ltd., Assam. The contract dated 18.08.2005 was for production of Carbonaceous Shale (CS) and removal of Hard Shale (HS). These materials were required to be removed from the mining area upto the railways siding as per the terms of the contract. The Department was of the view that the activity carried out by the appellant, in terms of the above contract, would be liable for service tax under the category of Site Formation and Clearance, Excavation and Earthmoving and Demolition Services as defined under Section 65 (97a) of the Finance Act, 1994. Accordingly, show-cause notice was issued on 15.12.2006, demanding service tax for the period from 11.07.2005 to 26.06.2006. The adjudication process culminated with the issue of the impugned order, in which demand for service tax amounting to Rs.1,68,70,620/- was upheld along with an order for payment of interest under Section 75 as well as penalties under Section 76 and 77 of the Finance Act, 1994. The service tax involved therein has also been paid by the appellant after issuance of show-cause notice against the impugned order. The main grounds advanced by both sides are as follows :

(i) In the appeal filed by assessee, it is argued that the service tax liability is not challenged and the same has already been paid. The assessee was under a bonafide belief that the act involved in the contract was not liable to payment of service tax. Since M/s North

Eastern Coal Fields, Coal India Ltd., Assam, did not initially pay the service tax, no service tax was paid, but once the service tax was received by them the same paid into the Government Account. Accordingly, it is prayed that the interest as well as penalties levied may be waived.

(ii) In the appeal filed by Revenue, Revenue has pleaded that the adjudicating authority has not imposed penalty under Section 78, but only restricted to penalties under Sections 76 and 77 of the Finance Act, 1994.

(iii) The quantum of penalty imposed under Section 76 is also quantified incorrectly by the adjudicating authority. The adjudicating authority has failed to take note of the amendment carried out under Section 76 of the Act w.e.f.18.04.2006.

3. Both the appeals are being taken up together for decision and in this connection, we have heard Shri Ankit Kanoria, ld.C.A. for the Assessee as well as Shri A.Roy, ld.D.R. for the Revenue.

4. The ld.C.A. submitted that the service tax liability is not being challenged by the assessee. The service tax amount have been received from M/s North Eastern Coal Fields, Coal India Ltd., Assam and immediately thereafter, paid to the Government Account. He submitted that since the assessee being under a bonafide belief that service tax was not liable to be paid, the same was not paid until received of the same from M/s North Eastern Coal Fields, Coal India Ltd., Assam. Under these circumstances, he prayed that the interest as well as penalties may be waived. In this connection, he has also relied upon several case laws, which are as follows :

(i) National Mining Co. Ltd. Vs. CCEx., Dibrugarh : 2008 (10) S.T.R. 136 (Tri.-Kolkata) ;

(ii) Ramesh Construction Company Vs. Commissioner of Central Excise, Raipur : 2017 (52) STR 291 (Tri.-Delhi).

5. The ld.D.R. while justifying the order, submitted that the adjudicating authority has erred in not imposing penalty under Section 78 of the Finance Act, 1994. He further submitted that since the appellant is not challenging the service tax liability, the interest under Section 75 is required to be paid. However, he reiterated the Revenue's grounds that the quantification of penalties under Section 76, has not been done correctly by the adjudicating authority.

6. Heard both sides and perused the records.

7. In terms of the contract awarded by M/s North Eastern Coal Fields, Coal India Ltd., Assam, the activities carried out by appellant were for production of Carbonaceous Shale (CS) as well as transportation of Hard Shale (HS) from the mining area upto the railways siding. The Department issued show-cause notices proposing to classify such activities under Site Formation Services. The service tax was not initially paid by the assessee, but what amount they received from M/s North Eastern Coal Fields, Coal India Ltd., Assam, the same has been paid to the Government Account. The liability for service tax is not in challenge during the present proceeding, but the plea of the assessee is that the interest as well penalties may be waived.

8. In the case of National Mining Company Ltd. (supra), the Kolkata Bench of the Tribunal, while upholding the payment of service tax, has

sustained the order for payment of interest, but waived penalty with the following observations:

> "***4.*** *After hearing both sides and perusal of the case records, we are of the view that the Adjudicating Commissioner has passed a detailed speaking order with reference to the work done by the appellants and the definition of the impugned service under clause 105(zzza) of Section 65 of the Finance Act, 1994. We note that some of the entries under the definition such as extraction for geological purposes, drilling, soil stabilization etc. are part of the works undertaken by the appellants in the process of extraction of coal. In any case, the appellants are not challenging the tax amount itself which they have already paid and recovered from their clients. In view of the fact that the tax liability is not being challenged, the interest liability is required to be discharged by the appellants, as has been ordered by the Adjudicating Commissioner. However, keeping in view the disputed nature of service and the interpretation of the scope of the service involved, we are of the opinion that this is a fit case to waive the penalty under Section 80 of the Finance Act, 1994 as the appellants have taken out Service Tax Registration as well as taken steps to obtain a clarification regarding taxability service and the tax amount has only subsequently been reimbursed to the appellants by their clients which are in the public sector".*

9. In the case of Ramesh Construction Company (supra), the Delhi Bench of the Tribunal, has referred to the decision of the Hon'ble High Court of Gujarat in the case of National Security Force reported in 2014 (35) STR 303 (Gujarat), wherein it has been observed that the discretion under Section 80 of the Finance Act, 1994, can be exercised

in a situation where there is a bonafide belief regarding non-liability to service tax as the client did not pay the same.

10. In the present case, the appellants were no doubt under bonafide belief that the activity may not be liable for payment of service tax as the activity of mining was included as a separate service tax w.e.f. 01.06.2007 only. Keeping in view the disputed nature of service tax and bonafide belief of the assessee, we are of the view that this is a fit case to waive penalties under Section 80 of the Finance Act, 1994.

11. We make it clear that we are not interfering with the levy of service tax which is admitted by the assessee. By following the decision in the case of National Mining Company Ltd. (supra), we uphold the payment of interest also.

12. In the result, appeal filed by the assessee is partly allowed and the appeal filed by the Revenue is rejected.

(Dictated and pronounced in the open court.)

Sd/
(P.K.Choudhary)
Member (Judicial)

Sd/
(V.Padmanabhan)
Member (Technical)

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