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

Appeal No.ST/141/2009

(Arising out of Order-in-Appeal No.11/ST/2009 dated 17.03.2009 passed by the Commissioner of Central Excise (Appeal-I), Kolkata, Haldia Commissionerate)

M/s Bansal Cylinders & Tubes Ltd. Applicant (s)/Appellant (s)

Vs.

Commissioner of Central Excise, Haldia

Respondent (s)

Appearance:
Shri A.K.Das, Advocate for the Appellant (s)
Shri S.Mukhopadhyay, Suptd.(AR) for the Respondent (s)

CORAM:
Hon'ble SHRI P.K.CHOUDHARY, Member (Judicial)
Hon'ble SHRI Bijay Kumar, Member (Technical)

Date of Hearing/Decision:- 03.07.2018

Order No.FO/A/77152/2018

Per Shri P.K.Choudhary

The facts of the case in brief are that the appellant had entered into a contract with M/s. Skipper Steels Ltd. for providing HDD Machine on hire basis during the period 01.04.2004 to 31.03.2005. The said contract also stipulated that there will be maintenance charge of the machine provided on hire @ Rs.3,00,000.00 per month, which was collected by the appellant through bills raised from time to time for providing such maintenance service. Show Cause Notice dated 09.05.2007 was issued for the period 2004-2005 demanding service tax under the category of 'Maintenance and Repairing Services' as defined in Section 65(64) of the Finance Act, 1994 and the service has become taxable w.e.f. 01.07.2003. The adjudicating authority confirmed the demand of Rs.3,60,000/- and education cess of Rs.72,000/- alongwith interest and imposed penalty of Rs.3,60,000/- under Sections 76,77 and 78. On appeal the ld. Commissioner (Appeals) upheld the adjudication order. Hence, the present appeal before the Tribunal.

2. Ld. Consultant appearing on behalf of the appellant submits that transaction of giving the machinery on hire is a composite contract and hence maintenance charge included into the contract cannot be vivisected and charged service tax. He further submits that the supply of Tangible Goods Service became taxable w.e.f. 10.05.2008 i.e. much after the period of demand in question. Accordingly, department cannot demand service tax for a prior period. He further submits that the entire amount of service tax has been deposited by them. Ld. Consultant further submits that the service tax demanded and confirmed against them has not been collected by the appellant and accordingly the demand ought to have been adjusted taking/treating the same as cum-tax value in terms of 67(2) of the Finance Act, 1994. Working on that line, the demandable amount works out to Rs.3,67,200*100/110.20 = Rs.3,33,212/-. He also argued that penalties are not imposable on the appellant since they were under the bonafide belief that service tax was not leviable on the impugned transaction.

3. Ld. DR reiterates the impugned order.

4. Heard both sides and perused the appeal records.

5. We find that the appellant had hired machines to the client for hire charge of Rs.1 lakh per month. During this period, maintenance charges for said machines were stipulated @ Rs.3.00 lakhs per month and the ownership of the machines remains with the appellant. For the period in dispute the machines were in use by the client and for such use the maintenance services were provided that this activity will be clearly fall under the

definition of 'Maintenance and Repair Service'. However, since the appellant did not collect the service tax from its customers/clients, the benefit of cum-tax value in terms of Section 67(2) of the Finance Act, 1994 should be given to the appellant.

6. On perusal of records we do not find any ingredients of suppression of facts, misstatements with an intent to evade payment of service tax. Accordingly, we invoke the provision of Section 80 and set aside the penalties imposed under various Sections of the Finance Act, 1994. In view of the above discussions the appeal filed by the appellant is partly allowed.

(Operative Portion of the Order have already pronounced in the open court)

Sd/

(BIJAY KUMAR)
MEMBER (TECHNICAL)

Sd/

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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