IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

EASTERN ZONAL BENCH: KOLKATA

Date of Hearing: 12/07/2018
Date of Pronouncement: 02.01.2019

Appeal No. ST/260/2012

(Arising out of Order-in-Original No. 13/Commr./ ST/ Bolpur/12 dated 7/3/2012, passed by the Commissioner of Customs (Port. Customs House, Kolkata)

Bakreswar Co. Operative Multipurpose Society. Appellant(s)

vs.

CCE & S, Bolpur. Respondent (s)

<u>Appearance:</u>

Shri B.N. Chatopadhyaya, Consultant. for the Appellant (s)
Shri H.S. Abidem, AC(AR) for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)
Hon'ble Shri Bijay Kumar, Member (Technical)

<u>Final Order No. FO/A/75006/2019</u>

<u>Per Shri Bijay Kumar</u>

1. The present appeal is directed against the Order-in-Original No 13/Commr./ ST/ Bolpur/12 dated 7/3/2012, passed by the Commissioner of Central Excise and Service Tax, Bolpur. Vide the impugned order the appellant has been fastened with the demand of service tax amounting to Rs. 1,18,21,995/- against the appellant under Section 73 (2) of the Finance Act, 1994 (for short 'Finance Act') read with proviso 2 sub Section (1) of Section 73 of the Finance Act. The interest was also imposed under the provision of Section 75 of the Finance Act, along the penalty under provision of Section 76 and 77 of the Act. An amount of Rs. 5 lakh deposited by the appellant during the investigation was also appropriated. Penalty under Section 77

(1)(a) of the Finance Act and 77(2) of the Finance Acts were also imposed upon the appellant.

2. The brief facts of the case are that the appellants are holder of Service Tax, Registration No. AAABB023DST00 under Finance Act. A Show Cause Notice was notices to the appellant for alleged contravention of the provisions of the Section 66, 67, 68 of the Finance Act read with Rule 5 and Rule 6 of service tax, Rules, 1994 (for short ' Rules') as they have allegedly failed to pay the service tax of the amount indicated above on the value of the taxable service under the category of " Manpower Recruitment or Supply Agency services" classifiable under sub-Section(105) (k) of the Section 65 of the Finance Act, which were charged by them from the recipient of the service and payments were subsequently received by them for providing the taxable service to their client, namely, WBPTCL by way of suppressing the fact by not showing the actual amount received by them in their ST-3 return submitted as required in terms of Rule 7 of Service Tax Rules read with Section 70 of the Finance Act. It was alleged that the appellant used to raise their bills including various elements like wage/salary, tiffin allowance, night allowance, dust allowance, bonus, gratuity, contribution to the provident fund etc., and they used to charge additional amount as over head cost which was at the rate of 8 per cent of above charges. But the appellant charged service tax only on over head cost and deposited the same with the Revenue. Thus it was alleged in the Show Cause Notice that

the appellant has paid only part of the gross bill value, therefore, undervalued the value of taxable services for the purpose of payment of Service Tax. But after introduction of Service Tax Determination of the Value Rules, 2006, the concept of valuation has been changed as the service tax is to be paid on the gross value received including expenses incurred on behalf of the receiver of the service. In terms of the section 67(1) of Finance Act, where the service tax is charged on the taxable value with reference to its value, the gross amount charged by the service provided for such service provider or to be provided shall be value on which service tax is leviable. It was alleged that the appellant have short paid the service tax including secondary and higher secondary cess during the Financial Year 2006-07, 2007-08, 2008-09, 2009-10, 2010-11. The impugned Show Cause Notice was adjudicated which culminated into the impugned order.

3. Ld. Advocate on behalf of the appellant contest the impugned order on the following ground; that the appellant got the service tax registration after levy of service tax on Manpower Recruitment Agency Service which come into effect by Finance Act, 1997, that the scope which was extended by Finance Act 2005; that the appellant was engaged in supply of manpower to BKTPPP and other contractor where the appellant is acted as sub contractor; That the appellant had been meticulously submitting the ST-3 report periodically and also complying with the required provisions relating

to service tax under the Finance Act and at no stage any discrepancy was notices. It was also submitted that the appellant is a cooperative society and in pursuit of its social service engaged in providing employment to local unemployed youth by providing manpower supply to various power projects and including main contractor. In this while adjudicating the case Ld. Adjudicating Authority has adopted the balance sheet figures in order to raise the disputed demand wherein he has adopted the figure of total service plus service charge for raising the demand and not with basic value of service rendered.

4. It is the submission of Ld. Advocate that the main contractor in the instant case has been discharging the service tax liability in full since from June, 2009, to which, inter alia, covered the gross amount paid to the appellant as sub-contractor and also paid the limited service tax thereon as applicable. Ld. Advocate also submitted that the declaration issued by the main contractor to that effect before the Adjudicating Authority.

5. Ld. Advocate further relied upon the following decisions;

(i) Tamil Nadu Housing Board vs. Collector of Central Excise, Madras[1994 (74) ELT 9(SC)

(ii) Collector of Central Excise vs Chemphar Drugs & Liniments [1989 (40) ELT 276(SC)

(iii) Padmini Products vs Collector of C. EX. [1989 (43) ELT 195 (SC)]

(iv) Sainik Security Service vs Commissioner of C. Ex. Allahabad. [2016(41) STR 159 (Tri-All)

(v) Continental Foundation JT. Venture vs Commr. Of C. Ex. Chandigarh-I[2007 (216) ELT 177 (SC)]

(vi) Commissioner of C. Ex. Chandigarh vs Satyam Digital Photo Lab,.[2012(27) STR 64 (Tri-Del.)]

(vii) URVI Construction vs Commissioner of Service Tax, Ahmadabad. [2010 (17) STR 302 (Tri-Ahmb.)]

(viii) Visesh Engineering Co. vs Commissioner of Customs. Ex. & ST Guntur [2016 (43) STR 232 (Tri-Hyd.)]

(ix) L.G. Electronics India Pvt. Ltd. vs Commissioner of Customs Excise & ST Noida[2017 (48) STR 248 (Tri-All)]

6. It was submitted that for the disputed period from 2006-07 to December, 200,8 liability, if any, in respect of service tax towards the execution of manpower supply contract directly by the appellant is barred by limitation of time and hence not liable to be paid, having regard to the fact that the appellant discharged its liability either directly or through main contractor. This mode of payment of service tax through main contractor of the appellant on the total transaction value was known to the Department as the regular returns were being filed with the jurisdictional Central Excise Authority. Ld. Advocate also submits that the appellant paid the amount of Rs. 5 lakh as ad hoc payment in the month of September 2011, which as per him was not payable and hence liability refunded. It was also impressed upon that the appellants are having work place in remote rural area and it was primarily dependent on the advice and guidance of local Central Excise/ Service Tax authority and they have only guide then and not informed that there is any short payment on their behalf. It was also

argued that Ld. Adjudicating Authority has confirmed the demand in arbitrary manner without considering submissions made by the appellant.

7. Ld. AR on the other hand justified the impugned order stating that the appellant has not paid service tax on the gross amount received by them on services rendered as the same was required to be paid.

8. We have gone through the fact of the case and perused the appeal records. We have also heard Ld. Advocate on behalf of the appellant and Ld. AR on behalf of the Revenue.

9. We find that in this case the issue is regarding including all expenses such as wage/salary, tiffin, allowance, night allowance, days allowance, bonus , gratuity, contribution to the provident fund etc., for the purpose of discharge of service tax. The appellant had been disclosing the above fact of non inclusion of these amounts received on these head in their ST-3 returns. And therefore, the Department was aware of non payment of service tax by the appellant. In this case, the Show Cause Notice has been issued for the period from 2006-07 to 2010-11 under Section 73(1) & 73 (2) of the Finance Act. Audit of the appellant unit has been conducted on 8/9/11 and the appellant submitted reply thereon on 30/9/2011. During the inquiry statement of the Chairman and Director of the company was recorded on 8/10/11. It has been held by the various decisions of Hon'ble

Tribunal that if the demand is raised at the strength of Audit Objection and the necessary information is available in RT-12/ ST-3 return the extend of demand cannot be sustained. In this case, we find that the appellant has submitted the ST-3 returns indicating the amount received from their clients for providing the taxable services. It is the submission of the Revenue that in the return actual amount received has been suppressed by the appellant. In this case, we find that the taxable value has been arrived as per the sales bills for the relevant years the appellant states that in this case the main contractor has also paid service tax which was not taking into consideration by the Adjudicating Authority. In view of above, we are of the view that the extended period of limitation is not available to the Revenue and the demand is required to be limited to the normal period only. The Adjudicating Authority are thus required to consider the fact the payment of service tax on the same transaction by the main contractor also has stated by the appellant.

10. In view of above, we set aside the impugned order and remand the case back to the Adjudicating Authority to re-determination of duty liability in view of above direction.

(Pronounced in open court on 02.01.2019

Sd/ Sd/

(P.K.Choudhary) **(Bijay Kumar)**
MEMBER(JUDICIAL) **MEMBER(TECHNICAL)**

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