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

Appeal No. ST/76069/2018

(Arising out of Order-in-Appeal No. 09/ST/BBSR-GST/2018 dated 17/01/2018 passed by the Commissioner (Appeals), GST,CX & Customs, BBSR.)

Toshali Cement Pvt. Ltd.,

….Appellant (s)

Vs.

Commissioner of GST-BBSR

….Respondent (s)

Appearance:
Shri J. Sahu, Sr. Adv. for the Appellant (s)
Shri A. Roy, Supdt. (A.R.) for the Revenue

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

Date of Hearing/Decision :- 23.08.2018
ORDER NO: FO NO. 77296/2018

PER CORAM

Briefly stated the facts of the case are that the appellant is engaged in manufacture of Clinker and Cement. Pursuant to audit for the period 2009-2010 and 2010-2011, the appellant was informed to pay a sum of Rs. 11,93,290/- along with interest. In compliance to the Audit Memo the appellant paid service tax amounting to Rs. 2,43,325/- Subsequently, a Show Cause Notice dated 26.08.2014 was issued alleging difference between value as per the Profit & Loss A/c. and the value as declared in ST-3 Returns in respect of claim of payment of outward freight, loading/unloading, rail freight, clearing and forwarding and the amount paid by the Transporters in respect of which service tax is paid by the Transporters.

2. The Adjudicating Authority confirmed the demand of service tax of Rs. 9,30,480/- along with interest and imposed equal amount of penalty under Section 78 and penalty of Rs. 5,000/- under Section 77 of the Finance Act, 1994. On appeal, the Learned Commissioner (Appeals) upheld the adjudication order and rejected the appeal filed before him. Hence, the present appeal before the Tribunal.

3. The Ld. Sr. Advocate appearing on behalf of the appellants submitted that in the course of hearing of appeal the appellant had filed a detailed summary of expenditure incurred during the year 2009-2010 and 2010-2011 which shows a reconciliation of the Figures which relate to the demand of differential amount of service tax. It is his submission that on reconciliation, the differential amount of service tax would be miniscule. The Reconciliation Statements are reproduced as under:-

Reconciliation of 2009-2010

Particulars	Amount in Rs.	Amount in Rs.
Freight outwards as per ledger Less amount shown as per returns		4,06,80,243 2,33,92,127
	Total	1,72,88,116
Less amount on which service tax along with interest paid as per mail from suptd see annexure 5 page 20 of our appeal challan enclosed on page no. 17 of appeal.		95,66,031
	Total	77,22,085
Less loading/unloading charges		7,92,407
	Total	69,29,678
Now details submitted 22.11.2016		
Rake handling charges	29,73,255	
Railway freight	23,16,728	
Service Tax collected by C&F	16,38,108	69,28,091
Difference		1,587

Reconciliation of 2010-2011

Particulars	Amount in Rs.	Amount in Rs.
Freight outwards as per ledger Less amount shown as per returns		5,03,33,032 2,19,19,078
	Total	2,84,13,054
Details already submitted		
Clearing and Forwarding charges	3,09,066	
Railway Freight	52,61,566	
Railway Rake Handling	29,89,859	
Loading /Unloading charges	34,29,164	
Service Tax collected by C&F	1,49,85,759	2,69,75,414
	Total	14,37,640
Now details submitted 22.11.2016		
Railway Rake Handling	10,95,100	
Service Tax collected by C&F	3,40,961	14,36,061
Difference	Total	1,579

As regards the loading and unloading charges incurred by the appellant for the period 2009-2010 and 2010-2011 amounting to Rs. 7,92,407/- and Rs. 34,29,164/- respectively, it is submitted that the service provider had collected the service tax in the invoice raised which was paid by the appellant. Accordingly, service tax cannot be demanded from the appellant on the amount on which service tax has already been paid by them to the service provider. Regarding clearing and forwarding charges covered under the invoices raised, it is submitted that it has been collected by the clearing and forwarding agency and accordingly the same cannot be demanded from the appellant. As regards, railway freight, it is submitted that the same was exempted from service tax vide CBEC No. 33/09/ST dated 01/09/2009 for the period 2009-2010 and 2010-2011.

It is the submission of the Learned Sr. Advocate that expenditure incurred for transportation of goods by own vehicles of appellant company does not attract any service tax liability as no service is received or provided and therefore the same cannot be construed as taxable service for exigibility of service tax. Further the service tax having been collected by the clearing and forwarding Agency on import cargo, the same cannot be subject to further levy of the service tax in the hands of the appellant company.

4. The Ld. Sr. Advocate vehemently argued that a sum of Rs. 2,46,235/- realized from the appellant by the Superintendent vide letter dated 27.11.2012 under the Reverse Charge Mechanism is liable to be refunded to the appellant company.

5. The Learned DR reiterates the orders of the Lower Authorities.

6. Heard both sides and perused the appeal records.

7. I find that the Show Cause Notice dated 26.08.2014 was issued alleging that the value of expenditure for the Financial Year 2009-2010 and 2010-2011 as shown in the Profit & Loss A/c. of the appellant company have not been properly declared in ST-3 Returns filed by them. Regarding loading/unloading charges it is submitted that the same have been paid to the labourers for loading of materials into the Lorries and for unloading from the Lorries and since these amounts are paid to the labourers by vouchers, no service tax liability arose on this amount. Regarding service tax on freight charges it is submitted that service tax was paid by the Transporter and also claimed by them in their bills. Regarding service tax liability on railway freight it is claimed that the same is exempted from service tax vide Notification No. 36/2004-ST dated 31.12.2004. Rs. 3,09,066/- consists of clearing and forwarding charge of import of coal on which service tax was already paid. I observe that even though the liability to pay service tax as per

Rule 2(1)(d)(v) of the Service Tax Rules and Notification No. 36/2004-ST has been shifted on the category of persons who have received the services and are liable to pay under the Reverse Charge Mechanism but the Tribunal has consistently held that once the assessee has paid the service tax to the service provider he cannot be made liable to pay service tax all over again.

8. In view of the above discussions and the submissions made by the appellant, I consider it appropriate to remand the matter to the Adjudicating Authority to verify the claim as made by the appellant in their grounds of appeal and pass order in accordance with law. The appellant is directed to cooperate in the denovo proceedings. The appeal is allowed by way of remand to the Adjudicating Authority.

(Dictated and pronounced in the open court.)

(P.K.Choudhary)
Member(Judicial)

msh