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

REGIONAL BENCH – COURT NO.2

Ex. Appeal No. 75277 of 2016

Arising out of Order-in-Original No.29/COMMR/ST/BOL/15 dated 30.11.2015 passed by Commissioner of Central Excise, Bolpur.

M/s. Maithan Alloys Ltd.
Debipur, PO Kalyaneswari, Distt. Burdwan
West Bengal, 713369 **Appellant (s)**

VERSUS

CCE & ST, Bolpur
Sian, Nanoor, Chandidas
Road, Bolpur

Respondent (s)

APPERANCE :

Shri B. N. Chattopadhyay, Consultant for the Appellant
Shri S. Mukhopadhyay, Suptd. (A. R.) for the Respondent

CORAM:

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

ORDER NO. FO/77299/2018

Date of Hearing : 02.11.2018
Date of Decision : 02.11.2018

PER P.K.CHOUDHARY :

The present appeal has been filed by assessee being aggrieved with the Order-in-Original dated 30.11.2015 passed by the Ld. Commissioner, whereby he has confirmed the demand of service tax of Rs. 70,54,065/- for the period August 2012 to March 2013, alongwith interest and penalty as proposed in the Show Cause Notice dated 12.03.2014.

2. Briefly stated, the facts of the case are that the appellant assessee is a manufacturer of Ferro Alloys on which central excise duty is being paid. In the course of business, the assessee company pays remuneration to its whole time directors which has fixed as well as variable components. The said variable component comprised of commission payable on the basis of percentage of profit in conformity

with the provisions of the Companies Act. The Department has raised demand of service tax under reverse charge mechanism on the said remuneration paid to the whole time directors, in terms of Notification no. 30/2012-ST, dated 20.06.2012, as amended. It is the case of the department that the said remuneration paid to the directors would constitute 'service' liable to service tax in the hands of assessee under reverse charge mechanism.

3. Sri B. N. Chattopadhyay, Ld. Consultant, appeared on behalf of the appellant assessee. He submitted that the present dispute is only in respect of the remuneration amount paid to the four directors who are the whole time directors in the Board of the Company. The whole time directors are actually salaried employees and whatever remuneration has been paid to the said directors, on which the impugned demand has been raised, has been made exigible to deduction of tax (TDS) under Section 192 of the Income tax Act, 1961, the provision as applicable to deduction of income tax on employees. He also submitted Form 26AS Traces Statement issued by the Income Tax Deptt., wherein the details of TDS for the said whole time directors evidencing deposit of TDS as 'salaries'. He also submitted that there is no dispute with regard to the payment of remuneration to other directors, who are not whole time directors, inasmuch as service tax is being duly paid under reverse charge. Payment to the said directors are being made upon deduction of income tax (TDS) under Section 194J of the Income Tax Act, which is applicable for fee paid for technical or professional services. The Ld. Consultant also submitted that the very definition of 'service' under Section 65B(44) of the Finance Act, 1994, excludes the services rendered by employee to the employer, from the levy of service tax. In support of his contention, he relied upon the decision of the Tribunal in the case of Rent Works India Pvt Ltd vs. CCE, Mumbai 2016 (43) STR 634 (Tri-Mum) wherein it is held that there is a difference between salary and consultancy fee inasmuch as when the Income Tax Department considers payment in the nomenclature 'consultancy fee' as salaries, on which TDS is also made, the said payments cannot be said towards rendition of taxable service for levy of service tax. He also relied on the decision of the Tribunal in the case of PCM Cement

Concrete Pvt Ltd. vs. CCE, Siliguri 2018 (9) GSTL 391 (Tri-Kol) wherein the Tribunal observed that consideration paid to whole time directors would be treated as payment of salaries inasmuch as there would be employer – employee relationships and in such cases, there cannot be any levy of service tax. He further relied on the CBEC Circular no. 115/9/2009-ST dated 31.07.2009, wherein it has been clarified that no service tax is leviable on commission paid to managing directors/ whole time directors, even if the remuneration is termed as 'commission', inasmuch as the said managing directors/ whole time directors do not perform consultancy or advisory function. The Ld. Consultant also referred to the relevant provisions contained in the Companies Act and the Income Tax Act pertaining to whole time directors and applicability of TDS on employees respectively. It is his submission that the entire payments made to the whole time directors and other directors are duly disclosed in the Balance Sheet and necessary compliance is being made by filing returns with the ROC under the Companies Act and therefore, there is no question of any fraud or suppression and hence, no penalty is imposable.

4. The Ld. Departmental Representative (DR), while supporting the impugned order passed by the Commissioner, reiterated the findings made therein. He stated that since the directors are paid a variable amount based on the percentage of profit though approved by the Company's Board, it cannot be said to have constituted the employer – employee relationship, despite the fact that they are whole time directors. He accordingly prayed for confirming the entire service tax demand.

5. Heard both sides and perused the appeal records.

6. In the instant case, it is not in dispute that service tax has been duly paid on remuneration paid to directors who are not whole time employee directors. The only dispute herein is for payment of remuneration to whole time directors, which is a fact on record. The provisions of Companies Act, 2013, contained in section 2(94), duly defines 'whole time director' to include a director in the whole-time employment of the company. A whole-time director refers to a director who has been in employment of the company on a fulltime basis and is

also entitled to receive remuneration. We further find that the position of a whole-time director is a position of significance under the Companies Act. Moreover, a whole-time director is considered and recognized as a 'key managerial personnel' under Section 2(51) of the Companies Act. Further, he is an officer in default [as defined in clause (60) of section 2] for any violation or non-compliance of the provisions of Companies Act. Thus, in our view, the whole time director is essentially an employee of the Company and accordingly, whatever remuneration is being paid in conformity with the provisions of the Companies Act, is pursuant to employer – employee relationship and the mere fact that the whole time director is compensated by way of variable pay will not in any manner alter or dilute the position of employer – employee status between the company assessee and the whole time director. We are thoroughly convinced that when the very provisions of the Companies Act makes whole time director (as also in capacity of key managerial personnel) responsible for any default / offences, it leads to the conclusion that those directors are employees of the assessee company.

7. Further, in the present case, the appellant has duly deducted tax under section 192 of the Income Tax which is the applicable provisions for TDS on payments to employees. This factual and legal position also fortifies the submission made by the appellant that the whole time directors who are entitled to variable pay in the form of commission are 'employees' and payments actually made to them are in the nature of salaries. This factual position cannot be faulted in absence of any evidence to the contrary. The submission of Ld. DR as well as the finding made by the Commissioner in the impugned order that since the whole time directors are compensated by way of variable pay and hence not employees, does not have any legal basis and is completely misplaced, and the same cannot be sustained. The decision of the Tribunal in Rent Works India (Supra) has clearly set the legal position that when the Income Tax Department considers payment in the nomenclature 'consultancy fee' as salaries, on which TDS is also made, the said payments cannot be said towards rendition of taxable service for levy of service tax. The decision in case of PCM Cement Concrete Pvt

Ltd. (Supra) has set the legal proposition that consideration paid to whole time directors would be treated as payment of salaries inasmuch as there would be employer – employee relationships and in such case the levy of service tax cannot be sustained.

8. In view of the above discussions and the settled legal judicial precedence and provisions contained in statutes referred above, demand of service tax on remuneration paid to whole time directors cannot be sustained and hence set aside. Since demand of service tax is set aside, penalty and interest are also not sustainable.

The appeal filed by appellant is thus allowed with consequential relief, if any, as per law.

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

Sd/-
V. PADMANABHAN
MEMBER(TECHNICAL)

Pooja