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

EASTERN ZONAL BENCH: KOLKATA

Appeal No. ST/137/2009

Arising out of Order-in-Original No.CCE/BBSR-II/S.Tax/Denovo/No.02-COMMISSIONER/2009 dt. 21/04/2009 passed by the Commissioner of Central Excise, Customs & Service Tax, Bhubaneswar.

M/s. BSNL
Door Sanchar Bhavan,
Sundargarh, Orissa

Appellant (s)

VERSUS

Commissioner of Central Excise, BBSR-II
CR Building, Rajaswavihar,
Bhubaneswar
751007 **Respondent (s)**

APPERANCE :

Shri Kartik Kurmi & Rajesh Sharma, Advocates for the Appellant
Shri K. Chowdhary, 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/75463/2019

Date of Hearing : 24.04.2019
Date of Decision : 24.04.2019

PER P. K. CHOUDHARY :

This Appeal arises out of the Order-in-Original No.CCE/BBSR-II/STAX/Denovo/No.02-COMMISSIONER/2009 dated 21-04-2009 passed by the Ld. Commissioner, Bhubaneswar.

2. This is the second round of Litigation before the Tribunal. The facts of the case in brief are that a Show Cause Notice dated 16-02.2006 was issued by the Ld. Commissioner, Bhubaneswar II Commissionerate for recovery of Service Tax of Rs. 1,14,12,210/- short paid by the Appellant in some months during 10/2000 to 03/2004, along with interest and proposing penalties U/s. 76 and 78 of

the Finance Act,1994. By adjudication order dated 29-03-2007 the Ld. Commissioner confirmed Service Tax demand of Rs. 1,14,12,210/- along with interest and imposed penalty of Rs. 100/- per day U/s 76 and penalty U/s. 78 of Rs. 1,14,12,210/-. The Appellant, being aggrieved filed an Appeal before this Tribunal. This Tribunal vide Final Order dated 25-09-2008 bearing No. M-272-273/S-790-791/A-967-968/KOL/2008, set aside the adjudication order dated 29-03-2007 and remanded the matter back to the adjudicating authority for adjudication afresh, after taking into account the details of exempted services provided by the Appellant, with liberty to raise any legal issue including the issue of limitation before the original authority. By the impugned *de novo* adjudication Order dated 21-04-2009, the Ld. Commissioner has confirmed the Service Tax demand of Rs. 1,05,56,556/- U/s. 73(2) of the Finance Act, 1994 along with interest and imposed penalty of Rs. 1,05,56,556/-U/s. 78 of the Finance Act, 1994. Hence, the present appeal before the Tribunal

3. The Ld. Advocate for the Appellant Shri Kartik Kurmy contended that there is no short payment of Service tax inasmuch as for the self same period i.e., from 10/2000 to 03/2004, the Ld. Commissioner, Bhubaneswar-II vide adjudication Order dated 30-03-2007 bearing No. CCE/BBSR-II/STAX/No.09-COMMISSIONER/2007 has held that the entire Service Tax for the said period has already been paid by depositing Service Tax through book transfer which is disclosed in the ST-3 returns. Hence, there is no short payment of tax and also there is no suppression of facts or intent to evade payment of duty. The Ld. Advocate further contended that there was no short payment of Service Tax and the demand arose due to non adjustment of advance/excess payment of Service Tax of Rs. 77,56,170.69/- in some months against short payments in other months on the ground that it does not fit into the situation described in Rule 6(3) of the Service Tax Rules, 1994 and also that such issues were never raised by the Appellant earlier and also that the Service Tax in the Show Cause Notice is raised in respect of months in which there were short payments of Service Tax and the months in which advance/excess

Service Tax is paid are outside the scope of the Show Cause Notice. The Ld. Advocate submitted that in their reply to the Show Cause Notice vide letter dated 10-03-2006 (paragraph 3), submitted in the first round and also in their Written Submission dated 05-11-2008 (submitted on 10-11-2008) (paragraph 2.6), in the second round, they have taken specific contentions for adjustment of excess Service Tax in some months against short payment of Service Tax in subsequent months as they were not able to correctly estimate their Service Tax liability and to be on the safer side they used to pay Service Tax provisionally which were never less than the Service Tax actually payable by them and if the said excess payment is allowed adjustment, there will not be any demand. He relied upon decisions of this Tribunal in their own case i.e., in the cases of General Manager, BSNL Vs. CCE reported in 2015 (39) S.T.R. 278 (Tri – Del) and in the case of General Manager, Telecom, BSNL Vs. CCE as reported in 2015 (38) S.T.R. 1182 (Tri – Del) and in the case of BSNL Vs. CCE reported in 2011 (24) S.T.R. 719 (Tri – Del).It is further submitted by him that out of a total Service Tax demand of Rs. 1,05,56,556/-, Service Tax of Rs. 28,00,384.57/- has been calculated by applying wrong tax rate @ 8% on the basis of the time of receipt of the value of taxable services after 14.05.2003, whereas the services were provided during 03/2000 to 13-05-2003 when the rate of tax was 5% and they are liable to pay tax @5% and not 8%. The Ld. Advocate relied upon the decision in the case of Vistar Const. (P) Ltd. Vs. UOI reported in 2013 (31)S.T.R. 129 (Del.) and Bharati Tele-Ventures Ltd. Vs. CCE reported in 2014 (33) S.T.R. 86 (Tri. – Mum.). It is further submitted by the Ld. Advocate that the entire demand is barred by limitation as for the self same period, by earlier adjudication Order dated 30-03-2007, demand was dropped and it was held that entire facts were disclosed in the ST-3 returns. Therefore, there is no suppression of facts with intent to evade payment of duty. He relied on the decision in their own case in BSNL Vs. CCE reported in 2009 (15) S.T.R. 168 (Tri. – Ahmd.).

4. The Ld. D.R. submitted that the earlier Order-in-Original dated 30-03-2007, though holds that there was no short payment of Service

Tax but the issues in the said adjudication order and the impugned Order are different inasmuch as in the earlier adjudication order, the issue was relating to depositing of Service Tax through book transfer whereas the dispute in the instant case relates to short payment of Service Tax in some months, though for the self same period.

5. Heard both the sides and perused the appeal records.

6. We find that the Appellant has paid Service Tax of Rs. 77,56,170.69/- in excess in some months during 10/2000 to 03/2004 as they were not able to estimate their correct Service Tax liability and to be on the safer side, they used to pay Service Tax provisionally which were never less than Service Tax actually payable by them, which were adjusted by them during subsequent months. The Tribunal in the Appellant's own cases in General Manager, BSNL Vs. CCE reported in 2015 (39) S.T.R. 278 (Tri. Del.) and in the case of General Manager, Telecom, BSNL Vs. CCE reported in 2015 (38) S.T.R. 1182 (Tri. Del.) and in the case of BSNL Vs. CCE reported in 2011 (24) S.T.R. 719 (Tri.-Del.) have allowed adjustment of excess Service Tax paid against short payment of Service Tax. Hence, we find considerable force in the contentions of the Ld. Advocate for the Appellant. In respect of the second ground of application of wrong rate of tax, we observe that the services were provided by the Appellant during 10/2000 to 13-05-2003 when the rate of tax was 5% whereas, the value of taxable services were received during 14-05-2003 to 03/2004 when the rate of tax was 8%. It is well settled that the rate of tax shall be the rate as applicable on the date of provision of taxable services and not the date of receipt of value of such taxable services. The case of the Appellant is covered by the decisions in the cases of Vistar Const. (P) Ltd. Vs. UOI (Supra) and Bharati Tele-Ventures Ltd. Vs. CCE (Supra). We also find that the demand in the instant case is barred by limitation as for the self same period, the Ld. Commissioner vide the earlier adjudication order dated 30-03-2007 has held that the Appellant has been regularly filing ST-3 returns and reflecting payment of Service Tax and that there is no suppression of fact or intent to evade payment of duty and also the case of the Appellant is covered

by the decision of the Tribunal in their own case in BSNL Vs. CCE reported in 2009 (15) S.T.R. 168 (Tri. – Ahmd.).

7. In view of the above discussions, we set aside the impugned order and allow the Appeal with consequential reliefs to the Appellant.

(Operative part of the order was pronounced in the open court.)

Sd/-
(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(V. PADMANABHAN)
MEMBER (TECHNICAL)

Pooja