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

REGIONAL BENCH – COURT NO.2

S.Tax Appeal No.12 of 2009

(Arising out of Order-in-Appeal No.10/ST/B-II/2008 dated 29.09.2008 passed by Commissioner of Customs, Central Excise & S.Tax (Appeals), BBSR)

M/s Hari Machines Ltd.
Rajgangpur,
Dist.-Sundergarh,
Orissa

Applicant (s)

VERSUS

CCEx., BBSR II
Central Revenue Building,
Rajaswa Vihar,
Bhubaneswar-751007

Respondent (s)

APPERANCE :

None for the Appellant
Shri S. S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

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

FINAL ORDER NO.75498/2019

DATE OF HEARING : 16.01.2019
DATE OF DECISION : 16.01.2019

PER P.K.CHOUDHARY :

When the matter was called, none appeared on behalf of the appellant. We find that the case was being listed regularly on Board, but the appellant was either not appearing or filing the adjournment request. Since the present appeal is an old one pertaining to the year 2009 and the issue involved in the instant appeal, lies in a narrow compass, the appeal is taken up for hearing with the consent of ld.D.R. for the Revenue.

2. The facts of the case in brief are that the appellants are engaged in the manufacture of machinery and machinery parts classifiable under Chapters 73 & 84 of the Central Excise Tariff Act, 1985. They are also engaged in providing taxable services under the category of "Consulting Engineers, Business Auxiliary Service, Rapair & Maintenance Service" etc. The appellants have entered into separate agreements with three non-resident manufacturers of machineries i.e. (i) M/s DBT Mineral Processing GmbH (DBTMP), Germany, (ii) ALLMINERALS Aufbereitungstechnik GmbH & Co. K.G (ALLMINERAL, Germany), Germany & (iii) ALL MINERALS L.L.C. (ALLMINERAL, USA). As per of the terms of the contract, non-resident manufacturers were to supply technical and marketing knowhow and their expertise for manufacture and marketing of certain types of machineries by the appellant in India. Copies of the contracts are filed with Appeal Paper Book. It is the case of the appellant that the contract with non-resident parties were not for receiving any service from them but for transfer of knowhow, engineering design, promotional literature etc. from stock. The appellant against the contract with the non-resident parties paid Rs.83,56,543/- during the Financial Year, 2005-06. Show-cause notice dated 02.03.2007 was issued alleging, *inter-alia*, that the said payments are nothing but technical fees and are liable to service tax under Rule 2(i)(d)(iv) read with Section 68 (2) of the Service Tax Rules, 1994, according to which person receiving taxable services from non-resident service providers are held persons liable to pay service tax. Show-cause notice also proposed to invoke extended period of limitation under proviso to Section 73 (1) for alleged non-payment of service tax and non-disclosure of information to the Department regarding receipt of the aforesaid services from non-resident service providers.

3. The Adjudicating Authority confirmed the demand of service tax amounting to Rs.8,52,761/- along with interest and imposed penalty of Rs.100/- per day from due date under Section 76 and equal amount of penalty under Section 78. Since the appellant had already paid an

amount of Rs.10,23,313/-, the entire amount was appropriated towards confirmed demand and penalty payable. The appellants have also paid Rs.1,22,310/-, which has been appropriated towards interest and penalty. On appeal before the lower appellate authority, the ld.Commissioner (Appeals) rejected the appeal. Hence, the present appeal before the Tribunal.

4. Heard the ld.D.R. for the Revenue and perused the appeal records.

5. It is mentioned by the appellant in their grounds of appeal that non-resident parties are manufacturers and are not professionally qualified engineers/engineering firm and therefore, services received from them cannot be brought under the ambit of the Act. It is their submission that they are not receiving any services from the non-resident parties, but are receiving technical and marketing knowhow for the manufacture and marketing of Feeder Breaker, Water Jigs & classifier for upgrading of coal etc. They also challenged the demand on limitation. The period of dispute in the present appeal is during the Financial Year 2005-06. During the above period, the appellant received technical knowhow and expertise by the non-resident parties. After investigation into the issue, the Department held that the appellant is liable to payment of service tax under the reverse charge mechanism for the services procured from outside India. Show-cause notice was issued proposing the demand of service tax in terms of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 and Taxation of Services (Provided from outside India and received in India) Rules, 2006. The adjudicating authority passed the following order :

"1. I confirm the demand of service tax amounting to Rs.8,52,761/- under proviso to Sec.73 (2) of the Finance Act, 1994 read with Section 68 ibid and the amount confirmed is appropriated from the amount already deposited by the notice towards payment of service tax. The balance amount of Rs.1,70,552/- (Rs.10,23,313/- (-) Rs.8,52,761/-) lying after appropriation of service tax is appropriated towards penalty payable.

2. I also order for recovery of interest from the notice on the amount of service tax so determined at the appropriate rate under Sec. 75 of the Finance Act, 1994. The amount of interest so payable is to be appropriated from the amount already deposited towards payment of interest by the notice. The amount of Rs.5,478/- (Rs.1,22,310/- (-) Rs.1,16,832/-) lying after appropriation of interest is also appropriated towards penalty payable.

3 I impose penalty of Rs.100/- per day from due date due to late payment under Section 76 of the Finance Act, 1994 in view of the discussions above.

4. I also impose a penalty of Rs.8,52,761/- equal to the service tax amount demanded as mandatory penalty under Section 78 of the Finance Act, 1994, which shall stand reduced to Rs.2,13,760/- (25% of Rs.8,52,761/-) if they choose to pay the amount within 30 (thirty) days of communication of this order.

5. I do not impose any penalty under Section 77 of the Finance Act, 1994 in view of my discussions above."

6. We observe that that the liability for payment of service tax on reverse charge basis for services procured from abroad was the subject matter of numerous litigation, which was settled by the Hon'ble Supreme Court in the case of Union of India Vs. Indian National Shipowners Association : 2010 (17) STR J57 (SC). The Hon'ble Supreme Court upheld the decision of the Hon'ble Bombay High Court in the case of Indian National Shipowners Association as reported in 2009 (13) STR 235 (Bom.). It stands settled that the charge of service tax on the recipient of service is payable only after introduction of Section 66A of the Finance Act, 1994 w.e.f. 18.04.2006. We find that in the present case, the period is of 2005-06. The demand has been made on the reverse charge basis on the services procured by the appellants from the persons located outside India, against payments made in foreign currencies. Section 66A ibid has been inserted in the Statute w.e.f. 18.04.2006 providing for levy of service tax on reverse

charge basis on the services procured from outside India. In the terms of the settled law on the subject, no service tax can be demanded for the period upto 17.04.2006. Consequently, we set aside the demand for service tax along with interest and penalties.

7. The appeal filed by the appellant is allowed with consequential benefit to the appellant, if any.

(Operative portion of the order was pronounced
in the open court)

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

Sd/
(V.Padmanabhan)
Member (Technical)

mm