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

Service Tax Appeal No. ST/75424/2018

(Arising out of Order-in-Appeal No.206/RAN/2017 dated-12/12/2017 passed by the Commissioner (Appeals) CGST & Central Excise , Ranchi)

M/s. Ved Security

Applicant (s)/Appellant (s)

Versus

Commr. of Central Excise &
Service Tax-Ranchi

Respondent (s)

Appearance:

Sri P.P. Singhl, C.A. for the Appellant (s)

Shri K. Choudhuri, Supdt. (A.R.) for the Respondent (s)

Date of Hearing/Decision :-27.12.2018 ***Date of Pronouncement***:06/06/2019

F. O. No. 75544/2019

PER SHRI P.K. CHOUDHARY

Briefly stated the facts of the case are that the appellant is a proprietorship firm engaged in providing security services and is a Directorate General of Resettlement (DGR) approved security agency firm for providing security services to public sector and private sector enterprises. The appellant has obtained registration with the jurisdictional Service Tax authorities in Ranchi. The appellant closed down its business operations in Ranchi and obtained registration with authorities in Delhi. Investigation proceedings were initiated for the non payment of service tax for the period October 2010 to March 2015 for the business operations in Ranchi. The appellant participated in the summon proceedings in Ranchi wherein they inter-alia submitted that there were certain non payment of service tax due to arrears from the clients. Show Cause Notice dated 16.03.2016 was issued for demand of service tax of Rs. 44,23,088/- together with interest and penalty under Section 77 and 78 of the Finance Act, 1994, based upon the difference in figures appearing in TDS statement in Form 26AS and the amount disclosed in the ST-3 returns. In the course of adjudication, the appellant disputed the figures appearing in Form 26AS and stated that the same could not be considered as the correct value of taxable service for determining the service tax liability. The Adjudicating Authority after following the due process of law vide adjudication order dated 28.07.2016 confirmed the demand of service tax of Rs. 20,45,427/- with equivalent penalty under Section 78 and further penalty of Rs. 10,000 under Section 77 for failure to file correct Return. The remaining tax demand was dropped. The Adjudicating Authority also ordered appropriation of Rs. 7,68,373/- with interest of Rs. 12,000/- paid by the appellant during the investigation.

2. In the appeal proceedings before the Ld. Commissioner (Appeals), Ranchi, the demand of service tax was reduced to Rs. 16,93,934/- vide the Order-in-Appeal dated 12.12.2017. The appellant’s request for adjustment of excess payment of service tax of Rs.42,776/- for the period 2013-14 against the total arrear was rejected by the Ld. Commissioner (Appeals) in the said appeal order on the ground that appellant should have resorted to such adjustment under Rule 6(4A) of the Service Tax Rules, 1994 or should have claimed refund. Further, the submission of appellant in respect of demand on the basis of inflated figures appearing in Form 26AS filed by its clients, viz, Mahanadi Coalfields Ltd (MCL) and Madhucon Projects Ltd (MPL) were not also rejected by the Ld. Commissioner (Appeals) on the ground that the said Form 26AS is not a fictitious document but one that is to be filed by an entity making payment and deducting Income Tax at source. It has also been observed that even there may be errors in 26AS statements but the same would create a TDS obligation on the party declaring the payments in question.

3. Heard Sri P. P. Singh, CA, appearing for the appellant and Sri K. Choudhuri, Supdt. (AR) appearing on behalf of the Revenue. The Ld. CA filed a detailed written submission wherein he has submitted that :-

(i) Both the authorities below made an error in not appropriating the total amount of service tax of Rs.15,57,973/- paid by them in the course of investigation and at the adjudication stage, as per the statement submitted by them in the Appeal Memo.

(ii) The Ld. Commissioner (Appeals) also committed an error in not considering the excess tax of Rs 42,766/- paid during 2013-14 which have to be considered as payment for the amount short paid for the remaining period.

(iii) With regard to inflated figures appearing in Form 26AS statements, he submitted that the figures therein could not be considered as correct value of taxable services inasmuch as there could be various reasons for mismatch which can only be explained by the parties who have actually filed the said statement. The appellant had also written letters to the concerned parties which remained unanswered.

(iv) With regard to service tax liability of Rs.26,438/- for services provided to National University of Study and Research in Law, Ranchi, which is a Government body, the Ld. CA submitted that the said demand pertained to period prior to 1st July, 2012 (prior to Negative List based Service Taxation), during which period they were verbally informed that no tax is payable since the recipient is a Government body and not covered in the expression 'any person' as per the definition of taxable service. He stated that specific exemption was subsequently introduced w.e.f. 1st July, 2012.

(v) With regard to penalty, the Ld. C.A submitted that they could not make timely payment due to paucity of fund and excessive delay in recovering the amount from the clients. It is his submission that one of the clients, MCL, released payment of Rs.8,28,708/- which was over-due, only after the intervention of service tax department. He also submitted that one of the parties, M/s Atlanta Limited has not made the payment of service tax which has been deposited by the appellant from his own pocket, out of the amount received from "One Rank One Pension" (OROP). He relied upon several decisions to plead that delay in payment of service tax could not be attributed to the reasons of wilful suppression or fraud when the service consideration with tax liability have been duly accounted in the Books of

Accounts. He emphasized that the appellant is entitled to waiver of penalty under Section 80 of the Act, inasmuch as there was a reasonable cause for the delay in payment of service tax, even in case where extended period of limitation is invokable, as has been held by the Hon'ble Allahabad High Court in the case of Daurala Organics vs. Commissioner of Central Excise [2014] 46 taxmann.com 271 (Allahabad). He also relied on the Apex Court's decision in Delhi Transport Corporation vs. Comm. of Service Tax [2016] 69 taxmann.com 175 (SC) wherein it has been held that when tax could not be deposited in view of the poor financial position, it would be considered as reasonable cause and no penalty should be imposed in such a situation.

4. The Ld. Departmental Representative appearing on behalf of the Revenue supported the findings made by the Ld. Commissioner (Appeals) and submitted that the appellant paid service tax only when the investigation was initiated and therefore, he is not entitled to relief by way of waiver of penalty.

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

6. I observe that the appellant had not discharged payment of service tax because of non receipt of payments from the clients as also contended before the lower authorities right from the investigation stage. However, off late he deposited the service tax in the course of adjudication. I find that the demand herein is primarily based on the figures appearing in Form 26AS statement filed by the clients on whom the appellant has no control. Although the appellant has submitted the bank statements before the Adjudicating Authority, no credence has been given to the appellant's submissions by the authorities below in view of the figures appearing in the aforesaid Form 26AS. In my view, the value of taxable services cannot be arrived at merely on the basis of the TDS statements filed by the clients inasmuch as even if the payments are not made by the clients, the expenditures are booked based on which the Form 26AS is filed, which cannot be considered as value of taxable services for the purpose of demand of service tax. At this stage, I am of the opinion that the ends of natural

justice would be met if the matter is sent back to the Original adjudicating authority for the purpose of correct computation of service tax demand and interest thereon as per law. The appellant shall co-operate with the adjudicating authority and submit the details of invoices raised during the period in dispute duly tallied with the turnover/ receipts as per the financial statements. Where in cases, the service tax amount has not been received by the appellant, the tax liability shall be calculated on cum-tax basis as per Section 67 of the Act. The contention of the appellant that they have already paid the service tax of Rs.15,57,973/-, the same shall be duly verified by the authorities. The appellant shall submit a certificate from the Chartered Accountant in support of his contentions.

7. In so far as the service tax liability of Rs.26,438/- is concerned, for services provided to National University of Study and Research in Law, Ranchi, I am not convinced with the arguments made by the appellant inasmuch as the phrase “any person” used in the definition of taxable services for being the service recipient, shall also include the government bodies. No specific exemption notification has been pointed out by the appellant pertaining to the period prior to 1st July, 2012, under which the appellant claimed their services to be exempt. It is my considered view that the appellant is not entitled to any relief on this count and held accordingly.

8. With regard to the claim of the appellant regarding adjustment of excess service tax of Rs.42,776/- for the period 2013-14 from the total service tax liability for the impugned period October 2010 to March 2015, there is no dispute with regard to the fact that there has been excess payment of tax. When both the excess and short payment of tax has arisen during the period in dispute, there is no reason for not allowing the adjustment of excess amount of tax paid. I find that the Tribunal in the following cases have held that the assessee is entitled for adjustment of excess amount of tax paid so that demand is raised only for the net amount of tax paid in short:-

CCE vs. Telecom District Manager, BSNL -2017 (47) STR 282 (Tri-Del)

CCE, Mysore vs. Powercell Battery India Ltd.- 2010 (19) STR 400 (Tri-Bang)

9. In so far as penalty is concerned, the appellant admittedly did not pay service tax since payments were not received from the clients. Although the receipts from the services rendered and the tax amount payable have been duly accounted for in the financial statements, the payment of tax was delayed because of financial reasons. It is also found that apart from the reconciliation issues for demand raised on the basis of Form 26AS, the appellant instead of disputing the tax liability has all along been submitting right from the investigation stage that tax could not be paid for paucity of funds consequent to non receipt of payments from the clients. It is not a case where the service tax collected from the client has not been deposited. Therefore, there was a reasonable cause for delay in payment of service tax for which the appellant would be liable to pay interest as per law. By respectfully following the decision of the Hon'ble Allahabad High Court in the case of Daurala Organics (Supra), I am of the view that the appellant is entitled for waiver of penalty under Section 80 of the Act even in the instant case where extended period of limitation has been invoked. Therefore, the penalties imposed are set aside.

10. Appeal is thus disposed of in the above terms and remanded for the limited purpose of recomputation of demand as per the directions given in this order.

(Pronounced in the court on 06/06/2019)

Sd/-

P.K. CHOUDHARY
(JUDICIAL MEMBER)

k.b/-