

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

REGIONAL BENCH – COURT NO. 2

Service Tax Appeal No. 77752/2018

(Arising out of Order-in-Appeal No.188/S.Tax-I/Kol/2018 dated-
26/02/2018 passed by Commissioner of CGST & CX, Howrah
Commissionerate, Kolkata)

M/s. Nexgen Trade Services
2, Khetra Das Lane,
Kolkata-700 012

Applicant(s)/Appellant(s)

Versus

Commr. of CGST & CX, - Kolkata North
Commissionerate,
180, Shantipally,
Rajdanga Main Road,
Kolkata-700 107

Respondent (s)

Appearance:

Sri S.K. Goyal, C.A. for the Appellant (s)
Shri S. Mukhopadhyay, Supdt. (A.R.) for the Respondent (s)

CORAM:

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

Date of Hearing/Decision:14.05.2019 ***Date of Pronouncement***:21.06.2019

FINAL ORDER NO: FO/75640/2019

PER SHRI P.K. CHOUDHARY

The facts of the case in brief are that the appellant is a partnership firm. An investigation was conducted by the officers of Survey, Intelligence & Verification (SIV) of Service Tax Department. Pursuant to such investigation, Show-Cause Notice (SCN) dated-17.10.2014 was issued alleging that the appellant had not declared actual amount realized under the category of 'Business Auxiliary Service' (here-in-after referred to as the said service), in their ST-3 returns in comparison with Balance Sheet for the period 2009-10 to 2011-12 and thus short paid Service Tax of Rs.5,05,336/- and also wrongly availed and utilized Cenvat Credit amounting to Rs.4,88,190/- during 2009-10. The SCN demanded Service Tax and CENVAT Credit along with applicable interest. It also proposed penalty under Section 77 & 78 of the Finance Act, 1994 (here-in-after referred to as the said Act) and penalty under Rule 15(3) of the CENVAT Credit Rules, 2004 read with Section 78 of the said Act.

2. Relying upon the provisions of sub-rule (1) of Rule 6 of the Service Tax Rules, 1994 (here-in-after referred to as the said Rules) as incorporated vide Notification No.03/2012-ST dated 17.03.2012 the Additional Commissioner of erstwhile Service Tax, Service Tax-I Commissionerate, Kolkata (here-in-after referred to as the Adjudicating Authority) has observed that for the period 2009-10 to 2010-11 Service Tax was payable on receipt basis and in respect of 2011-12, he contended that if the amount received in the previous year was less than Rs.50 lakhs then only benefit could be given in the current year upto a total of Rs.50 lakhs. The adjudicating authority recalculated the demand in respect of year 2011-12 by taking into account the figure of 'Closing Debtors' for the said year which had not been considered in SCN.

Accordingly, he in due process of disposal by adjudication of the Show Cause Notice vide his Order-in-Original No.124/ADC/ST-I/KOL/2015-16 dated 31.03.2016 has confirmed the Service Tax of Rs.21,578/- in respect of year 2009-10 to 2011-12 (Rs.1,792/-, Rs.12,331/- and Rs.7,455/- for the year 2009-10, 2010-11 and 2011-12 respectively) allowing a relief of Rs.4,83,757/- for the year 2011-12.

3. The Principal Commissioner of Service Tax-I Kolkata being aggrieved by the decision of the Adjudicating Authority reviewed the said Order-in-Original under Section 84(1) of the said Act and vide Order-in-Review No. 65/Nexgen/ADC/ST-I/Kol/2016-17 dated 27/07/2016 directed the Assistant Commissioner, BBD Bag-II Division, Service Tax-I Commissionerate, Kolkata to file appeal on the following grounds as stated below:

- i) The adjudicating authority has recalculated the demand in respect of the year 2011-12 by considering that the Service Tax for the said period was payable on Receipt basis and not on Billing basis as per the provisions of sub-rule (1) of Rule 6 of the Service Tax Rules (STR), 1994 as amended vide the Service Tax (Amendment) rules, 2012 and has reduced the same to Rs.7,455/- in place of Rs.4,91,212/- as determined in the SCN. The adjudicating authority has failed to take into account the fact that the said amendment in Rule 6(1) of the STR was effective from 01/04/2012 while in the instant case the demand under consideration was for the period 2011-12.
- ii) In the instant case the tax liability of the respondent has been determined in respect of provision of 'Business Auxiliary Service' by them falling under sub-clause (zzb) of Clause (105) of Section 65 of the said Act, which not being one of the specified services as stated under Rule 7 of the point of Taxation Rules, 2011. Hence, the point of taxation in the instant case to be determined as per the provisions of Rule 3 of the point of Taxation Rules, 2011, i.e., the time when the invoices for the service provided or to be provided is issued or in other words on billing basis for the period 2011-12. The adjudicating authority erroneously recalculated the demand for the said year as Rs.7,455/-, an additional demand of Rs.4,83,757/- (i.e. Rs.4,91,212.00 as reduced by Rs.7,455.00) is therefore liable to be confirmed alongwith interest and imposition of penalty under Section 78 of the said Act, the same was dropped in Order-in-Original.

4. The Ld. Commissioner (Appeal) while allowing the appeal filed by Revenue modified the Order-in-Original No. 124/ADC/ST-1/KOL/2015-16 dated-28.04.2016 passed by the Ld. Additional Commissioner of erstwhile Service Tax, Service Tax-I Commissionerate, Kolkata to the extent of confirming demand of Service Tax of Rs.4,83,757/- and consequent interest and penalty under Section 78 of the said Act. Being aggrieved, the appellant is in appeal before the Tribunal.

5. The Ld. Consultant appearing on behalf of the appellants submitted that for the period 2011-12, demand has been raised considering opening debtors and bill raised during the period 2011-12 which is evident from Annexure 'A' of the Show Cause Notice. He submits that point of Taxation Rules, 2011 was introduced with effect from 01.04.2011.

6. The Ld. Consultant further submitted that Rule 9 of the point of Taxation Rules, 2011 – “Transitional provision”, provides an option to taxpayer to pay tax on receipt basis where provision of services is completed on or before 30th day of June, 2011 or where the invoices are issued upto the 30th day of June, 2011. Accordingly, the appellant exercising this option had paid tax on receipt basis for the invoices issued upto 30.06.2012 as per the transitional provision as contained in Rule 9 of point of Taxation Rules, 2011 and on billing basis for the bill raised on or after 01.07.2011 as per Rule 3 of point of Taxation Rules, 2011. Detail calculation relating to tax payable and paid for the period 2011-12 alongwith supporting documents were also filed. On the other hand, the Ld. D.R. on behalf of the Revenue, reiterates the findings of the O-I-A and made the Bench go through at page 24 of Appeal Paper Book, which is a part of Grounds of Appeal filed by appellant and argues that transitional rule will not be applicable as the said rule read as “*Nothing contained in this sub-rule shall be applicable*”, *Relevant text of the rule is reproduced below:*

“9. Transitional Provisions- Nothing contained in this sub rule shall be applicable,-

- (i) Where the provision of service is completed; or
- (ii) Where invoices are issued prior to the date on which these rules come into force. Provided that services for which

- (iii) provision is completed on or before 30th day of June, 2011 or where the invoices are issued upto the 30th day of June, 2011, the point of taxation shall, at the option of the taxpayer, be the date on which the payment is received or made as the case may be.

7. The learned Consultant further submitted that corrigendum to the Notification 25/2011-ST had been issued on 04.04.2011 stating that in Rule 9 – for “this sub-rule”, read “these rules”, there by, transitional provision would be applicable in the instant case. He also submitted copy of TRU letter bearing No.F. No.341/34/2010-TRU and requested the Bench to go through point 13 of the said TRU letter. Relevant text of the point is reproduced below :

“13. It is further clarified that the transitional provisions will apply to all invoices issued before 31.03.2011 in so far as taxpayers who switch over to the new rules on 01.04.2011. Those assesses who like to shift to the new rules on 01.07.2011 would have similar protection in respect of invoices issued before the date they switch over to the new rules. The benefit has also been extended to services when provision has been completed before 01.04.2011 or 01.07.2011, as the case may be. It is also clarified that the payments received before the new rules come into force do not require any transitional provisions as they are already required to pay tax on payment basis.”

Further, the Ld. Consultant submitted the following documents to establish the amount received during the period 01.04.2011 to 30.06.2011 and the amount of bills raised by the appellant w.e.f. 01.07.2011.

1. Copy of Chartered Accountant certificate
2. Copy of Party Ledger
3. Copy of Bank Statement
4. Copy of Bills raised during the period 2011-12
5. Copy of ST-3 return for the period 2011-12.
6. Total liability calculation taking Rule 9 of point of Taxation Rules, 2011 into consideration:-

Particulars	Taxable Value (Rs.)	Service Tax (Rs.)
Amount received during the period 01.04.2011 to 30.06.2011	1,21,112/-	12,475/-
Amount received on or after 01.07.2011 out of the bills raised upto 30.06.2011	13,15,722/-	1,35,519/-
Bills raised during the period 01.07.2011 to 31.03.2012	11,51,520/-	1,18,607/-
		2,66,601/-

8. Heard both sides and perused the appeal records.

9. I have gone through the amended Rule 9 of Point of Taxation Rules, 2011 as amended on 01.04.2011. On going through the said Rule, I find that the said Rule overrules the other Rules and specifically applies to the case in hand and as per the said Rule, taxpayer has given an option to pay tax on receipt basis where provision of services is completed on or before 30th day of June, 2011 or where the invoices issued upto 30.06.2011.

10. Admittedly, in this case, the appellant has paid service tax on receipt basis for invoice issued upto 30.06.2011, which is in compliance with Rule 9 of Point of Taxation Rules, 2011 and on billing basis for the bill raised on or after 01.07.2011 as per Rule 3 of Point of Taxation Rules, 2011. Thus, I hold that the appellant has correctly discharged its service tax liability of Rs.2,66,601/- in the following manner:-

Service Tax paid	Amount (Rs.)
i) As per ST-3 Return	2,10,536/-
ii) Through Challan No. 50116 dated- 15.02.2016	7,454/-
iii) Through Challan No. 00153 dated- 14.03.2019	48,611/-
	2,66,601/-

11. Regarding penalty under Section 78 of the said Act, since there had been regular amendments and changes in Rules during the period and since

the appellant have paid the tax alongwith applicable interest, which is also almost equal to the amount of demand, it is my considered view that no penalties should be imposed and accordingly, the penalty is set aside.

12. In view of the above discussions, the impugned order is set aside and the appeal filed by the appellant is allowed with consequential relief, if any.

(Pronounced in the Court on 21-06-2019)

Sd/-

P.K. CHOUDHARY
(JUDICIAL MEMBER)

k.b/-