IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Service Tax Appeal No.77346 of 2019 & Cross Objection No.75040 of 2020

(Arising out of Order-in-Appeal No.132/Kol-South/2019 dated 25.07.2019 passed by Commissioner (Appeals) of CGST & Excise, Kolkata)

Commissioner of CGST & Excise, Howrah
15/1, Strand Road, Kolkata-700001

Appellant

VERSUS

M/s Bengal Beverages Pvt. Ltd.
Durgapur Expressway, P.O.-Dankuni, Coal Complex, Hooghly-712310

Respondent

APPERANCE :

Shri A. K. Biswas, Authorized Representative for the Appellant
Shri Ankit Kanodia, Advocate for the Respondent

CORAM:
HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
HON'BLE SHRI RAJU, TECHNICAL MEMBER

FINAL ORDER NO.75634/2021

DATE OF E-HEARING : 25.08.2021
DATE OF DECISION : 25.08.2021

Per P.K.Choudhary :

The present appeal has been filed by the Revenue being aggrieved with the Order-in-Appeal No.132/Kol-South/2019 dated 25/07/2019 passed by the Ld. Commissioner (Appeals-I), CGST & CX, Kolkata whereby he has dropped the demand of service tax and Cenvat credit to the extent of Rs.1,19,35,067/-for the period 2003-04 to 2005-06, along with interest and penalty as proposed in the show cause notice dated 19/06/2007. The Respondent have also filed Cross Objection for an amount of Rs.1,82,748/- representing service tax demand under storage and warehousing services as confirmed by the first appellate authority.

2. Briefly stated, the facts of the case are that the Respondents are engaged in the manufacture of soft drinks and beverages and are an authorized bottler of Coca Cola Company, classifiable under Chapter No. 2202 of the Central Excise Tariff Act, 1985 and are also registered with the Service Tax department for payment of service tax under reverse charge mechanism under Goods Transport agency services.

2.1 The Respondents were issued SCN dated 19/06/2007 for the period from 2003-04 to 2005-06 demanding service tax on Visicooler Hire charges recovered by the Respondent under the head "Business Auxiliary Services". Also demand was raised under reverse charge mechanism on services stated to be received from goods transport agencies. The demand was also raised on rent collected by the Respondent for its godown given on rent under the category of storage and warehousing services. The total demand under the above categories amounted to service tax of Rs.1,19,79,683/- and education cess of Rs.1,20,096/-. During the adjudication proceedings, the Respondent had sought time from the department on account of death of the mother of the person handling the service tax matters of the Respondent. However the Ld. Adjudicating authority was of the view that since ample opportunities had already been provided to the Respondent, it proceeded to decide the case on the basis of records available and thus the Order-in-Original dated 25/09/2018 was passed wherein all the issues as raised in the SCN were confirmed alongwith interest and imposition of penalty. The Respondent filed an appeal against the captioned Order-in-Original dated 25/09/2018 before the First Appellate Authority and produced all the documents and evidences in its support with the appeal paper book. The First Appellate Authority after taking a note that an ex parte order was passed by the adjudicating authority, decided the case based on the records and documents submitted by the Respondent and vide Order in Appeal dated 25/07/2019, the demand of service tax under business auxiliary service, goods transport agency services and demand for recovery of Cenvat credit was set aside and the demand under the storage and warehousing services was confirmed. It is against the said

Order-in-Appeal dated 25/07/2019 that the Revenue has preferred an appeal to the extent of dropping the service tax demand to the tune of Rs 1,19,35,067/- (including cess) on the ground that the first appellate authority has violated the provisions of Rule 5 of the Central Excise (Appeals) Rules, 2001 as he has allowed production of additional evidence which was not provided by the Respondent before the Ld. Adjudicating authority. The Respondent has also filed a cross objection for the demand of Rs.1,82,748/- confirmed by the first appellate authority on storge and warehousing services.

3. The Ld. Departmental Representative (DR), while supporting the impugned review order, states that the Learned Commissioner (Appeals) has violated the provisions of the appeal rules as he has considered new evidences which was not produced by the Respondent earlier and hence he prays for allowing the appeal of the department.

4. Shri Ankit Kanodia, Ld. Advocate, appearing on behalf of the Respondent, submits that the adjudicating authority had passed an *ex parte* order and the Respondent was prevented from submission of relevant documents. It is also his submission that the Ld. Commissioner (Appeals) has discussed all the allegations in detail and has accordingly dropped the demand in the instant case on the business auxiliary services, GTA service and demand of Cenvat credit. He thus states that the order of the Ld. Commissioner (Appeals) deserves to be allowed to the extent of dropping of the demand of service tax and Cenvat credit as the same is based on merits and principles of natural justice. He also relies on the judgment of the Hon'ble Gujarat High Court in the case of Utkarsh Corporate Services Vs. Commissioner of Central Excise & Service Tax, as reported in 2014 (34) S.T.R. 35 (Guj.). In his support, the first appellate authority is provided with sufficient discretion to allow additional evidence once the ground is made out by the appellant. He thus prays for dismissing the departmental appeal to this extent.

As regards the demand confirmation on storage and warehousing services, the Ld. Advocate has submitted that it had earned income by way of giving the premises on rent to the following two customers during the period 2004-05 and 2005-06 :- (a). M/s. Dankuni Soft Drinks Limited- as office premises and (b) M/s. Global Aqua Private Limited- a factory shed for manufacturing activities. Thus, hire charges received in relation to both of the above-mentioned premises cannot be considered as Storage and Warehousing Charges. In this regard, he has relied on the following judgments in his defense:

(a) COMMISSIONER VS. FINOLEX INDUSTRIES LTD. - 2016 (41) S.T.R. J114 (BOM) ;

(b) ANTONY GARAGES PVT. LTD. VS. COMMISSIONER OF CENTRAL EXCISE, RAIGAD 2015 (38) S.T.R. 49 (TRI. - MUMBAI) ;

(c) SAHA ROADLINES PVT. LTD. VS. COMMISSIONER OF SERVICE TAX, KOLKATA 2010 (19) S.T.R. 882 (TRI. – KOLKATA).

5. Heard both sides through video conferencing and perused the appeal records.

6. The short issue that arises for consideration in the instant appeal is whether the lower appellate authority was justified in his wisdom to consider additional evidence which was not produced by the Respondents herein before the Ld. Adjudicating authority.

7. We find from the appeal paper book submitted by the Respondent before the lower appellate authority that the Respondent produced copies of Rent agreements, invoices, contracts with transporters etc. with the appeal paper book which was not available before the ld adjudicating authority. Also the Respondent has submitted that there was sufficient cause due to death of the mother of the person handling service tax matters of the Respondent to represent the matter before the adjudicating authority.

8. We find that in the instant case since the adjudicating authority has passed the order on *ex parte* basis and without hearing the respondent on merits while the first appellate authority has passed the

same on merits. We find it appropriate to remand the case back to the adjudicating authority with the specific direction to verify the documents presented by the respondent before the first appellate authority and keeping in mind the merits of the case as decided by the lower appellate authority and pass an order after providing an opportunity of hearing to the respondent in the interest of justice.

9. Thus, the appeal filed by the Revenue is allowed by way of remand to the adjudicating authority with the above directions. Cross objection filed by the respondent also gets disposed off.

(Operative part of the order was pronounced in the open Court)

Sd/

(P. K. Choudhary)
Member (Judicial)

Sd/
(Raju)
Member (Technical)

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