

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

REGIONAL BENCH – COURT NO.2

Service Tax Appeal No. 443 of 2012

(Arising out of Order-in-Appeal No. 149/Bol/2012 dated 30.05.2012 passed by Commissioner of Central Excise (Appeals), Kolkata-IV)

M/s. Kundu Brothers

(Faridpur, Bangal Para Durgapur-713203)

Appellant

VERSUS

Commr. of Service Tax, Kol-IV

(180, Santipally, Rajdanga Main Road, 6th Floor, Kolkata-700107)

Respondent

APPEARANCE :

None for the Appellant

Mr. S. S. Chattopadhyay, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

HON'BLE MR. K. ANPAZHAKAN, MEMBER (TECHNICAL)

FINAL ORDER NO.77468/2023

Date of Hearing : 06 November 2023

Date of Decision: 06 November 2023

PER R. MURALIDHAR:

No one has appeared on behalf of the Appellant. Since the matter pertains to the year 2012, in the interest of justice, the Appeal was taken up for the disposal with the help of the Learned AR.

2. The issue pertains to the alleged short payment of Service Tax by the Appellant. The Show Cause Notice was issued alleging that Service Tax to the tune of Rs.15,90,030/- was short paid during the period 2004-05 to 2008-09. After due process, the Adjudicating Authority confirmed the demand of Rs.15,90,030/-. Being aggrieved, the Appellant has filed their Appeal before Commissioner (Appeals). Their main ground was that in many cases, they have provided the Maintenance and Repair Services, which were not taxable during the period under consideration. They were also aggrieved by the fact that the Adjudicating Authority has not granted the benefit of threshold limit of Rs.4 Lakhs while passing the OIO. The Commissioner

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(Appeals) has considered these facts and has given the following findings:-

6. For the FY 2004-05, it is seen that the appellant have received total amount of Rs.20,39,410/- as shown in their balance sheet against thirteen work orders. Out of these, works executed against eight work orders amounting to Rs.13,13,746/- are not taxable since these were executed in relation to work orders and not under any maintenance contract or agreement. Accordingly, in terms of definition as given in Section 65(64) of the Finance Act, 2005, upto 16.06.2005, no tax can be imposed for repairing services executed against work orders prior to 16.06.2005. Regarding, the remaining five work orders amounting to Rs.7,25,664/- the appellant could not produce copy of three work orders for which they had received an amount of Rs.6,21,039/- and the remaining two orders viz. (1)CD/0932/...../3023, dated 05.11.2004 (2) CD/0852/...../3564 dated 31.12.2004 amounting to Rs.1,04,625/- pertains to erection commissioning and installation services. Thus the net amount of taxable value comes to Rs.3,25,664/- after adjusting the threshold exemption of Rs.4,00,000/- and the appellant is required to pay Service Tax Rs.32,556/- and education cess Rs.651/- along with interest. [Emphasis supplied]

3. He has noted that the Appellant has paid Rs.15,54,165/- and has finalized the amount payable as under:-

"11. From the foregoing discussion, it is held that the appellant is required to pay service tax of Rs.18,12,087/-, E. cess of Rs.36,241/- and S & H.E. cess of Rs.8,066/- which totally comes to Rs.18,56,394/-. The appellant had already paid an amount of Rs.15,54,165/- towards payment of service tax. Thus the appellant is directed to pay the balance amount of Rs.3,02,229/- alongwith interest for delayed payment at the appropriate rate forthwith." [Emphasis supplied]

4. From the Order passed by the Commissioner (Appeals), it is seen that while the Show Cause Notice was only for Rs.15,90,030/- and OIO also was passed for confirming this demanded amount. The

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Commissioner (Appeals) after agreeing with the submissions of the Appellants on several counts, has in fact increased the demand amount by Rs.3,02,229/- The Appellant is before the Tribunal by being agitated by this increased demand of Rs.3,02,229/-.

5. After going through the submissions made by the Learned AR and the document placed before us, we find that this OIA passed by the Commissioner (Appeals) travels beyond the scope of the Show Cause Notice. On the one hand, he admits that threshold limit of Rs. 4 Lakhs was not considered by the Adjudicating Authority and he has given the benefit. He has also given benefit on some other counts. If these benefits are considered, the confirmed demand should have been less than Rs.15,90,030/- whereas he has increased the same to Rs. 18,56,394 which has resulted in enhanced demand of Rs.3,02,229/-. Enhancement in the absence of any allegation in the SCN issued to the appellant, is not permissible. The Appellant has already paid Rs.15,54,165/- which is not disputed by both the sides. The confirmed amount of Rs.3,02,229/- is legally not sustainable. We set aside the same.

6. The Appeal is being disposed only after considering the fact that the Appellant are not disputing the already paid Service Tax amount of Rs.15,54,165/-. It is being made clear that the Appellant will not be eligible for any refund on account of the present Order.

7. The Appeal is disposed of thus.

(Dictated and pronounced in the open court.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(K. Anpazhakan)
Member (Technical)

Pooja