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

Service Tax Appeal No. 239 of 2011

(Arising out of the Order-in-Appeal No. 34/ST/BBSR-II/2011 dated 16.03.2011 passed by Commissioner (Appeals) of Central Excise, Customs & Service Tax, Bhubaneswar.)

M/s Reliable Industries,
(Brahamani Taranga Vedvyas, Rourkela, Sundergarh,

...Appellant (s)

VERSUS

Commissioner of CGST & Central Excise, Bhubaneswar,
C. R. Building, Rajaswa vihar, Bhubaneswar-751007, Odisha,

. ...**Respondent(s)**

APPERANCE :
Shri Rajeev Agarwal, Advocate & Shri D. S. Agarwal, Shri Vikash Kumar Banka, both Chartered Accountants for the Appellant
Shri S. Mukhopadhyay, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)
HON'BLE MR. K. ANPAZHAKAN MEMBER (TECHNICAL)

FINAL ORDER No.77672/2023

DATE OF HEARING : 08.12.2023
DATE OF DECISION : 08.12.2023

PER K. ANPAZHAKAN :

The present appeal has been filed against the impugned Order-in-Appeal 34/ST/BBSR-II/2011 dated 16.03.2011. The demand in this case pertains to Rs.4,05,205 and Rs.34,865, totally amounting to Rs. 4,40,070/- Out of this amount, the Appellant has already paid Rs. 4,05,205 along with Interest of Rs.1,30,876/- before issue of the SCN. The Appellant is disputing the penalty equal to duty imposed on this amount already paid. They are also disputing the balance tax of Rs. 34,865/-.

2. Regarding the penalty imposed under Section 78 of the Finance Act, 1994, the Appellant submits that proceedings were initiated for non-payment of Service Tax on commission income for the period 2006-07. On being pointed out by the authorities, they have immediately

deposited Service Tax of Rs.4,05,205/- along with interest of Rs.1,30,876/- on 25.02.2009 without raising any dispute. In terms of Section 73(3) of the Finance Act, 1994, where the Service Tax along with the interest is paid by the assessee on the basis of tax ascertained by the Central Excise Officer, no SCN is required to be served. In this regard, the Appellant placed their reliance on the decision of the Tribunal in the case of **M/s. National Power Engineering Company vs. Comm of CGST & C. Excise, Siliguri** wherein this Tribunal vide Final Order no. 76011/2023 has held that penalty is not imposable on such cases. Accordingly, the Appellant prayed the issuance of SCN and imposition of penalty under Section 78 is liable to be set aside.

3. Regarding the demand of service tax of Rs. 34,865/-, the Appellant submits that they have earned the income by letting out the land to ICICI Bank for the purpose of parking of vehicles repossessed by the Bank. The said income has been booked by them as "godown rent" in their books of accounts. The Authorities have classified the said income under the category of Renting of Immovable Property Service(RIPS), which was made subject to levy of service tax w.e.f. 01.06.2007 under Section 65 (105) (zzzz) of the Finance Act.

4. The Appellant submits that levy under the category RIPS was held to be unconstitutional by the Hon'ble Delhi High Court on 18.04.2009 **(Home Solution Retail India Limited vs Union of India, 2009 (14) STR 433 (Del.).** The issue with regard to the levy was in dispute. The impugned Show Cause Notice dated 18.03.2010 was issued during the period when the levy already was declared unconstitutional. It was only in the Finance Act, 2010 enacted on 08.05.2010, the levy was revalidated with retrospective effect. The Appellant submits that the demand was raised by invoking extended period of limitation which is legally not sustainable for the reason that the levy was in dispute during that period and there cannot be any case of any fraud or suppression with an intent to evade payment of service tax. Hence, the demand of service tax by invoking the extended period of limitation is liable to be set aside.

5. Regarding merits of the demand, the Appellant submits that the land has been used for parking of repossessed vehicles by ICICI bank,

which is not in dispute. The definition of immovable property provided in Explanation 1 to Section 65(105) (zzzz) of the Finance Act clearly excludes in Clause (c) thereof the land used for parking purposes. The said exclusion from the definition has been completely ignored by the Ld. Asst. Commissioner in the impugned OIO. Since the land has been used for parking purpose, which has been specifically excluded from the definition of Immovable Property, the question of levy of service tax does not arises at all. Accordingly, they prayed for setting aside the demands confirmed in the impugned order on this count.

6. The Ld. D.R. reiterated the findings in the impugned order. He submits that the Appellant themselves recorded the income as 'godown rent'. Accordingly, the service rendered are warehousing services and the Appellant is liable to pay service tax on the said income.

7. Heard both sides and perused the appeal documents.

8.We observe that there are two issues involved in this appeal. Theyare:

(i) Whether penalty is imposable under Section 78 of the Finance Act, 1994 when service tax along with interest thereon has been paid before issue of the SCN and whether further penalty of Rs.5,000/- imposable under Section 77 of the Finance Act, 1994?

(ii) Whether Service Tax of Rs.34,865/- is payable under the category of Renting Immovable Property Services (RIPS) during the period 2007-08 & 2008-09 for the amount shown as 'godown rent' in the balance sheet?

9. Regarding the penalty imposed under Section 78 of the Finance Act, 1994, we observe that the Appellant has deposited the Service Tax of Rs.4,05,205/- along with interest of Rs.1,30,876/- on 25.02.2009 without raising any dispute. In terms of Section 73(3) of the Finance Act, 1994, where the Service Tax along with the interest is paid by the assessee on the basis of tax ascertained by the Central Excise Officer, no SCN is required to be served. We observe that this view has been held by this Tribunal in the case of **M/s. National Power Engineering Company vs. Comm of CGST & C. Excise, Siliguri** vide Final Order no. 76011/2023. By following the decision cited above we hold that imposition of penalty under Section 78 of the Finance Act, 1994 is not

warranted in this case, accordingly, we set aside the penalty imposed under Section 78 in the impugned order.

10. Regarding the demand of service tax of Rs. 34,865/-, we observe that the Appellant has earned the income by letting out the land to ICICI Bank for the purpose of parking of vehicles repossessed by the Bank. This fact is not disputed as the same has been recorded by the adjudicating authority in Para 8.1 of the OIO. We observe that the said income has been booked by the Appellant as “godown rent” in their books of accounts. The Authorities have classified the said income under the category of RIPS, which was made subject to levy of service tax w.e.f. 01.06.2007 under Section 65 (105) (zzzz) of the Finance Act. From the definition of immovable property, as provided in Explanation 1 to Section 65(105) (zzzz) of the Finance Act, we observe that in Clause (c) of the Explanation, the land used for parking purposes has been specifically excluded from the levy of service tax under the category of RIPS during the relevant period. We observe that the impugned order has not considered this exclusion at all.

11. The Ld. D.R submitted that the Appellant themselves recorded the income as 'godown rent'. Accordingly, he contended that the services rendered are warehousing services and the Appellant is liable to pay service tax on the said income. In this regard, the Appellant submitted the copy of the agreement entered by them with ICICI bank to substantiate their claim that the land was used for parking of repossessed vehicles and they are entitled for the benefit of the exemption as provided under Clause (c) of Explanation 1 to Section 65(105) (zzzz) of the Finance Act. On perusal of the agreement, we observe that the Annexure to the agreement gives the rates payable by ICICI bank, which is reproduced below:

<u>RATE ANNEXURE</u>

COMMERCIAL VEHICLE :

Rs.50/- per DayperVehicle

Auto : Rs.35/ per day per Vehicle

TWO WHEELER : Rs.10/- per
Day per Vehicle

12. From the rate payable by ICICI bank as per the agreement mentioned above, it is evident that the land has been used for parking of the vehicles by ICICI bank. Accordingly, we hold that the Appellant are entitled for the exemption provided under Clause (c) of Explanation 1 to Section 65(105) (zzzz) of the Finance Act, which specifically excludes the land used for parking purposes from levy of service tax under the category of RIPS. Accordingly, we hold that the demand of Rs.34,865/- confirmed along with interest and penalty in the impugned order is not sustainable and we set aside the same.

13 Regarding, the penalty of Rs.5000/- imposed under section 77 of the Finance Act, we observe that the penalty was imposed for non registration and not filing the returns and non-payment of the tax in time. We observe that the Appellant has been filing returns regularly. The demand confirmed in the impugned order has been held as not sustainable. In view of the above, we hold that penalty under Section 77 is not imposable and accordingly we set aside the same.

14. In view of the above discussion, we set aside the impugned order and allow the appeal filed by the Appellant.

(Dictated and pronounced in the open Court)

(R. Muralidhar)
Member (Judicial)

(K. Anpazhakan)
Member (Technical)

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