IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT NO.

Appeal No. ST/90159/2014

(Arising out of Order-in-Appeal No. PUN-EXCUS-002-APP-50-14-15 dt.22.9.2014 passed by the Commissioner (Appeals-II) Central Excise, Pune)

M/s. Guru Construction : **Appellant**

VS

Commissioner of C. Ex. Customs, Kolhapur : **Respondent**

Appearance

Shri M.A. Nayalkalkar and
Shri S.S. Punalkar, Advocates for Appellant

Shri Vivek Dwivedi, Asstt. Commr. (A.R) for respondent

CORAM:

Hon'ble Shri Ramesh Nair, Member (Judicial)
Hon'ble Shri Raju, Member (Technical)

Date of hearing : 09/01/2018
Date of pronouncement : 22/03/2018

ORDER NO...A/85716 / 2018

Per : Ramesh Nair

The issue involved in the present appeal is related to non payment of service tax on construction activities undertaken by the Appellant for M/s Bharat Sanchar Nigam ltd., M/s Mahrashtra State Electricity Transmission Company Ltd. and one M/s Marvelous Metals Pvt. Ltd during the period 10.09.2004 to 2007 – 08. By issuance of show cause notice it was alleged that the Appellant has rendered 'Constructions Services' & Commercial or Industrial Construction Services". It was proposed to demand service tax on the value of services and to impose penalties. The adjudicating authority vide adjudication order dt. 12.01.2010 confirmed the demand of service tax and imposed penalty u/s 77 and 78 of the Finance Act, 1994. The Appellate Commissioner partially modified the adjudication order by setting aside the demand in respect of services rendered to M/s BSNL limited. A partial demand in case of M/s Marvellous was also dropped on the ground that the same pertains to the period when the services were not taxable. The remaining demands and penalties were upheld in Order-in-Appeal. Hence the present appeal by the Appellant.

2. Shri M.A. Nayalkalkar and Shri S.S. Punalkar, Ld. Advocates appearing for the Appellant submits that they had contended before the Appellate authority that their services are of Works Contract. That though this plea was raised first time before the Appellate Authority but being a question of law the same could have been raised at any stage. The same was not considered by the Appellate Authority. That the services rendered to Maharashtra State electricity Board was in relation to power transmission and hence not liable for service tax in terms of Notification No. 45/2010 – ST dt. 20.07.2010 under which retrospective exemption was given for the period upto 26.02.2010 for services in relation to transmission of electricity and upto 21.06.2010 in respect of distribution of electricity.

3. Shri Vivek Dwivedi, ld. AC (AR) appearing for the revenue reiterates the findings of the impugned order. He further submits that the Appellant did not challenge the classification of services proposed by the revenue before the adjudicating authority or the Appellate

Authority and hence they cannot dispute the same at Tribunal stage. He submits that the Appellate authority also confirmed the demand since the same were falling under the category of Construction Service. He submits that the services are liable to be taxed and the penalties are liable to be upheld.

4. We have considered the rival submissions and gone through the records of the case. The Appellate authority has refused to consider the plea of the Appellants that the services are covered under the category of "Works Contract" on the ground that the Appellant did not raise issue before adjudicating authority. We are of the view that the classification of services during the period has remained under confusion. Further the question being of law can be raised at any stage and therefore the reasoning adopted by the Appellate Authority to deny the claim of the Appellant is erroneous. We also find that it is not appearing either from the adjudication order and the Appellate order as to why the Appellants are not eligible for exemption in case of services rendered to M/s MSETCL. The Board vide notification No. 45/2010 – ST dt. 20.07.2010 has granted exemption to services in relation to power transmission and distribution. The Tribunal in case of Shri Ganesh Construction 2014 (35) S.T.R. 348 (Tri. - Bang.) has held that services rendered to State Electricity Board is not taxable. We are therefore of the view that the Appellant is not liable for service tax in respect of services given to MSETCL and we set aside the demand and penalties to that extent. As regard demand of service tax in respect of Marvellous Metals and other services we find if the services are in the nature of Works Contract, the same shall not be

liable for service tax before 01.06.2007. We deem it fit to remand the matter back to the adjudicating authority to reconsider the claim of the Appellant regarding “Works Contract Servcies” or other wise and decide the case accordingly only in case of services given to M/s Marvellous Metals. The penalty shall also be levied accordingly after considering the submissions of the Appellant. The impugned order stands modified to the above extent. The appeal is disposed by way of remand in above terms.

(Pronounced in court on 22/03/2018)

(Raju)
Member (Technical)

(Ramesh Nair)
Member (Judicial)

SM.