IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No. ST/89289-89291/2013

(Arising out Order-in-Appeal No. RPS/230/NSK/2013 dated 26.07.2013, NSK-EXCUS-000-APP-229 & 227-13-14 dated 26.07.2013 passed by the Commissioner of Central Excise (A), Nashik)

For approval and signature:
Hon'ble Shri S.S. Garg, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	No
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	No
3.	Whether Their Lordships wish to see the fair copy of the Order?	Seen
4.	Whether Order is to be circulated to the Departmental authorities?	Yes

Sanjay Services
Kamlesh Labour Contractor
Rutika Services
Appellant

Vs.

CCE Nashik
Respondent

Appearance:

Shri Keval Shah, Advocate for the appellant
Shri M.P. Damle, AC (AR) for the respondent

CORAM:
Hon'ble Shri S.S. Garg, Member (Judicial)
Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing : 29.01.2018
Date of decision : 29.05.2018

O R D E R No: A/86602-86604/2018

Per: C J Mathew

The issue in these three appeals of M/s Sanjay Services, M/s Kamlesh Labour Contractor and M/s Rutika Services being identical, save for the amounts involved, we dispose of these by this common order. M/s Sanjay Services has been confirmed with tax dues of `7,93,048/-, M/s Kamlesh Labour Contractor of `6,62,703/- and M/s Rutika Services of `5,50,193/- under section 73 of Finance Act, 1994 for having provided 'manpower recruitment and supply service' since the imposition of tax on 16th June 2005 under section 65 (105) (k) of Finance Act, 1994. 'The definition is

> 'manpower recruitment or supply agency" means any person engaged in providing any service, directly or indirectly, in any manner for recruitment or supply of manpower, temporarily or otherwise, to any other person;'

in section 65 (68) of Finance Act, 1994

2. The appellants are before the Tribunal for the second time. On the former occasion, they had challenged the liability to tax in the absence of an examination of the contracts that they had entered; to enable that, the matter was remanded back to the original authority. While the

original authority confirmed the recovery proposed in the notice for the period from 16th June 2005 to 31st December 2005 and imposed various penalties, the impugned orders-in-appeal no. RPS/230/NSK/2013 dated 26th July 2013, no. NSK-EXCUS-000-APP-229 and 227-13-14 dated 26th July 2013 of Commissioner of Central Excise & Customs (Appeals), Nashik modified the penal detriment to the extent of setting aside the imposition under section 76 of Finance Act, 1994.

3. We have heard Learned Chartered Accountant appearing for appellants and Learned Authorized Representative. It would appear that shortly after the period covered by the notice issued to them, the appellants, who had not paid tax till then, obtained registrations in February 2006 and had been regularly complying with their statutory obligations for the period after December 2005. Within a further year or so, they had also remitted the arrears as computed by them and discharged the interest liability.

4. According to Learned Chartered Accountant, the lower authorities did examine the various contracts but had failed to consider that the contract with M/s Garware Industries Ltd. was one with lumpsum consideration and not based on number of personnel deployed. We have perused the said contract and we find that while the recompense is specified so, a further provision makes any payment subject to

furnishing of periodical bills indicating deployment. Therefore, these cannot be excluded from the liability to tax. We also take note that the terms of the remand order have been diligently complied with. The previous order of the Tribunal had settled the liability to tax of those contracts in which payment on man hour basis would bring such within the ambit of the taxable services. In view of this, we uphold the taxability of the consideration received by the appellants during the period in dispute.

5. We note that the appellants had discharged their tax liability before the issue of notice though not the interest liability. It would also appear that the amounts confirmed were more than the amounts discharged by them as tax. The appellants contend that they should be accorded the benefit of cum-tax computation as they had not collected the tax from their customers. That does not sustain as an argument; if they were required to discharge their tax liability, their failure to pass on the tax burden is no reason for the exchequer to forgo the dues authorized to be collected by law.

6. Nevertheless, in some cases cum-tax benefit are mandated. Service tax is an indirect tax and macro-economic theory has it that indirect taxes are recovered from the end consumer. We have no quarrel with the theory but tax collection is required to be in accordance with law.

Finance Act, 1994 does not prescribe collection from the customer; nor does it authorize the provider of the service to act as an agent of the State. Though Service Tax Rules, 1994 does prescribe that tax component be separately indicated in the invoice, tax was for the relevant period was to be computed for collection only against receipts. In these circumstances, the option to bear the incidence of tax vests with the provider.

7. However, in the present appeals, we take note that these are all contracts for a calendar year and the dispute pertains to the latter half of 2005 when the tax was imposed for the first time. Obviously, the contract terms did not visualise that service tax shall be leviable and the incidence of tax, while borne by the provider, was not as an option. Consequently, the consideration should be deemed to be inclusive of the tax. With the extension of cum-tax benefit, the tax liability would have been discharged in full.

8. The impost was a new one with the dispute relating to the early days of taxability. The definitions themselves underwent many changes and quite frequently too.

9. Learned Authorized Representative placed reliance on the decision of the Tribunal in *Jivanbhai Makhwana v. Commissioner of Cntral Excise Ahmedabad [2010 (18) STR 206 (Tri-Ahmd)]* to support the contention that the activity

becomes a taxable service when the compensation is in terms of number of labourers. He also placed reliance on the decision of Hon'ble High Court of Gujarat in *Commissioner of Central Excise, Surat-I v. Neminath Fabrics Pvt Ltd [2010 (256) ELT 369 (Guj.)]* for invoking the extended period and consequent penalty which we do not find to be relevant in this context. We also find it odd that a gap of four years lapsed between the registration obtained by the appellants and the issue of notice. There is no evidence of any suppression on the part of the appellants, which are proprietary concerns. The invoking of the extended period is not tenable.

10. For the above reasons, we set aside the penalties under section 78 of Finance Act, 1994 and the demands in excess of the amount appropriated by the original authority.

(Pronounced in Court on 29.05.2018)

(S.S. Garg)
Member (Judicial)

(C J Mathew)
Member (Technical)

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