IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. ST/86177/2015

(Arising out of Order-in-Original No. GOA-EXCUS-000-COM-024-2014-15 dated 5.3.2015 passed by Commissioner of Central Excise, Goa)

L & G Enterprises **Appellant**

Vs.

Commissioner of Central Excise, Goa **Respondent**

<u>Appearance:</u>

Shri R.K. Tomar, Advocate, for appellant
Shri M. Suresh, Deputy Commissioner (AR), for respondent

<u>CORAM:</u>

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 10.7.2018
Date of Decision: 10.7.2018

ORDER No. **A/86991/2018**

Per: Sanjiv Srivastava

Appeal is directed against the order in original No GOA-EXCUS-000-COM-024-2014-15 dated 05.03.2015 of the Commissioner Central Excise, Goa holding as follows:

1. *I confirm the demand of Rs 88,49,572 (Rupees Eighty Eight Lakhs Forty Nine Thousand Five Hundred and Seventy Two Only) for the taxable*

service of "Supply of Tangible Goods Service" / "Declared Service" rendered by the Noticee during the period 16.05.2008 to 31.3.2013 as per proviso to Section 73(1) of the Finance Act, 1994.

2. *I confirm the demand of Rs 1,77,723 (Rupees One Lakhs Seventy Seven Thousand Seven Hundred and Twenty Three only) towards the additional consideration received on account of receipt of HSD at concessional rate during the period 16.05.2008 to 31.03.2013 as per proviso to Section 73(1) of the Finance Act, 1994.*
3. *I appropriate the amount of Rs 90,27,295/- towards the above said liability from the amount of Rs 92,48,593/- voluntarily deposited by the noticee.*
4. *I demand interest at the appropriate rate under Section 75 of the Finance Act, 1994. I appropriate the amount of Rs 55,584/- deposited towards interest and adjust the amount from the excess payments of Rs 2,21,298/- paid by the Noticee.*
5. *I am not imposing any penalty under section 76 of the Finance Act, 1994.*
6. *I am imposing a penalty of Rs 10,000/- (Rupees Ten Thousand only) under Section 77 of the Finance Act, 1994.*

7. *I impose a penalty of Rs 90,27,295/- (rupees Ninety Lakhs Twenty Seven Thousand two Hundred and Ninety Five only) under Section 78 of the Finance Act, 1994. However, if the Noticee pays the Service Tax along with interest within 30 days of receipt of this order, the penalty imposed will be reduced to 25% of the service Tax confirmed above otherwise the penalty imposed will remain.*

2.0 Acting on the Intelligence necessary records and documents were requested and resumed for investigation from the Appellant. Investigations made revealed that the appellants were supplying earth moving machineries viz., excavators, dozers, screen plant and also tipper trucks on hire basis to their clients namely, M/s Kala Mines and Minerals (KMM), M/s Maheshwari Minerals, M/s Mineral enterprises, M/s Deep Mining Equipments, S Soban Babu etc., (Clients). It was also found that Appellants were issuing periodical invoices to all their Clients except KMM in respect of the services rendered. They have collected the service Tax in respect of the services rendered to their clients but did not deposited the same and also had not filed any service tax returns. It was also found that though Appellant have received huge payments from KMM, they have not issued any invoices in respect of the services provided by them to KMM. Thus Appellants have evaded the service tax by not remitting the entire service tax collected from clients into government account and also by not charging and collecting the service tax and also by suppressing the taxable value received. During the course of investigations statement of Shri Louis Rodrigues was recorded and various documents such as *"Statement of Machinery Working Hours"* prepared by the Appellants scrutinized and it was found that during the period Appellant had received a gross amount of Rs 8,05,22,947/- by deploying their earth moving machineries on hire basis and the Service Tax payable on the said amount being Rs 88,49,572/- under the category of *"Supply of Tangible Good Services".* It was also observed that the Appellant had received High Speed Diesel Oil at concessional rate from KMM for operating the said machinery. The value of said HSD is in form of additional consideration (Rs 16,92,617/-) and Service Tax at rate applicable to the Taxable Service being provided is also leviable. A show cause notice dated 14.10.2013 was accordingly issued to Appellant demanding Service Tax from them in respect of the services provided by them under category of "Supply of Tangible Goods" and by invoking extended period of limitation as per Section 73 of Chapter V of Finance Act, 1994. The show cause notice was adjudicated as indicated in para 1 above and aggrieved by the order Appellants are before us.

3.0 Appellant have in their appeal assailed the order in original on three counts-

i. The necessary ingredients for invoking the extended period are not present in this case and hence demanding service tax by invoking the extended period of limitation is bad in law;
ii. The value of taxable service as determined by the adjudicating authority as Rs Rs 8,05,22,947/- is totally arbitrary and hence the demand of Service Tax to the tune of Rs 88,49,572/- is highly exaggerated and cannot be sustained.
iii. In respect HSD supplied at concessional rate already there are decision of this tribunal that Service tax cannot be demanded on the actual value of such HSD so supplied.

4.0 Have heard Shri R K Tomar, Advocate for the Appellant and Shri M Suresh Deputy Commissioner (Authorized Representative) for the revenue.

5.0 Shri R K Tomar submitted on the behalf of Appellant that-

- As far as issue of levying service tax on the supply of HSD at concessional rate by the recipient is concerned the matter is no longer res integra. Issue has been decided against inclusion of such charges for computation of tax liability in case of Bhayana Builders (P) Ltd. Vs Commissioner of Service Tax Delhi [2013 (32) STR 49 (T-LB)];

- In case of Supplies made to KMM, they had not paid any service tax for the reason that they had not been issuing any invoice to them as directed by the service recipient. Since no invoice was issued to KMM, there was no occasion to determine the Tax liability in respect of the taxable services provided by them to KMM.
- In respect of the supply of tangible good services provided by them to other service recipients they had paid the service tax albeit not by the due date but late, However, an amount of Rs 26,99,779/- along with interest of Rs 55,584/- was paid by them prior to start of investigations;
- Since they have not received any service tax from the service recipient namely KMM, the amounts received by them from KMM should treated as cum tax value for determination of tax liability as has been held by this tribunal in case of V P Panneerdas & Co Vs Commissioner of Service tax, Chennai [2018 (5) TMI 1238 - CESTAT].

- The amounts paid by them even before the start of investigation should not be taken into account for determining the penalty under section 78 of Chapter V of the Finance Act, 1994.

6.0 Learned Authorized Representative for revenue supported the order and submitted that-

- Benefit of Cum tax value cannot be allowed to the Appellant in view of Apex Court decision in case Amrit Agro Industries Ltd Vs Commissioner Central Excise Ghaziabad [2007 (210) ELT 183 (SC)];
- In the present case Appellant were regularly collecting the tax from their service recipients but were not depositing the same with the Government Account, in manner provided. Since they were actually collecting these amounts and not paying to the government account, definitely they have breached the trust imposed on them and hence will deserve no leniency;
- In case of KMM it is fact that they had been receiving huge sums of money in respect of the services provided by them to KMM, non preparation of invoice in respect of the amounts being so received cannot be a justification for nonpayment of Service Tax. By non payment of tax and not filing the returns as provided for by the

Service Tax Rules, 1994 Appellants have suppressed the information in respect of taxable services from the department and hence extended period of limitation as provided in Section 73 has rightly been invoked for making the demand of service tax;

- The penalty under section 78 is also justified in view of malicious conduct of Appellant in not paying the tax on due date and non filing of return.

7.0 We have considered the submissions made by both the sides. Para 23 & 25 of the order in original records as follows-

> *"23. ......A perusal of the statement furnished by Noticee confirmed the receipt of payment by the Noticee from M/s Kala Mines and Minerals on regular basis. Accordingly, Service Tax was demanded from the services rendered to M/s Kala Mines and Minerals on the gross amount received by the Noticee. The records revealed that the Noticee has received payments from various other clients also, As per the records, the noticee has received gross amount of Rs 3,11,01,168/- from M/s Kala Mines and Minerals during the period 16.05.2018 to 31.03.2018. During the period May 2008 to March 2013, the Noticee has received gross amount of Rs 8,05,22,947/- from all their clients which includes the receipts of Rs 3,11,01,168/- from M/s Kala Mines and Minerals.*

Accordingly , Service Tax payable on the gross taxable value received by them was worked out as Rs 88,49,572/-.

25. ..... The Noticee has also accepted the Service Tax liability for the above said services rendered by them. They have also charged and collected Service Tax from all their clients other than Kala Mines and Minerals. In respect of M/s Kala Mines and Minerals they have charged taxable value on the basis of the "statement of machinery working hours" after deducting the TDS and HSD supplied at concessional rate. Thus, the liability of payment of service tax is not in dispute and accordingly I hold that the Noticee is liable to pay Service Tax of Rs 88,49,572/- on the gross payment of Rs 8,05,22,947/- received by them during the period May 2008 to March 2013."

8.0 Objections raised by the appellant in respect of quantification, i.e. for allowing them the benefit of cum tax value as gross value cannot be sustained in view of the Apex Court decision in case of Amrit Agro Industries Ltd (Relied upon by the Authorized Representative) wherein it has been held –

"In our view, the above judgments in the case of Maruti Udyog Ltd. and Srichakra Tyres Ltd. have no application in the facts of the present case. In the case of Asstt. Collector of Central Excise v. Bata India Ltd. reported in 1996 (84) E.L.T. 164 this Court held that under section 4(4)(d)(ii) of Central Excises and Salt Act, 1994 the normal wholesale price is the cum-duty price which the

wholeseller has to pay to the manufacturer-assessee. The cost of production, estimated profit and taxes on manufacture and sale of goods are usually included in the wholesale price. Because the wholesale price is usually the cum-duty price, the above section 4(4)(d)(ii) lays down that the "value" will not include duty of excise, sales tax and other taxes, if any, payable on the goods. It was further held that if, however, a manufacturer includes in the wholesale price any amount by way of tax, even when no such tax is payable, then he is really including something in the price which is not payable as duty. He is really increasing the profit element in another guise and in such a case there cannot be any question of deduction of duty from the wholesale price because as a matter of fact, no duty has actually been included in the wholesale price. It was further held that the manufacturer has to calculate the value on which the duty would be payable and it is on that value and not the cum-duty price that the duty of excise is paid. Therefore, unless it is shown by the manufacturer that the price of the goods includes excise duty payable by him, no question of exclusion of duty element from the price for determination of value under section 4(4)(d)(ii) will arise."

9.0 Second issue raised in respect of invocation of extended period too cannot be allowed, for the reason that in case of clients other than KMM they were raising invoices for receiving the payment in respect of the services provided. Also they were in all such cases collecting the Service Tax from their client but were not depositing the same with government account. In case of KMM just because service recipient had instructed them not to raise the invoices cannot be justifiable reason for not raising the invoices in respect of the supply of services as provided in law more so when they were receiving huge payments against such supply from KMM. The fact about receipt of payment from KMM is not in dispute. They have also during the relevant period failed to file the ST-3 returns in the manner as prescribed thereby contravening the provisions of Section 70 of Chapter V of Finance Act read with Rule 7 of the Service Tax Rules, 994. They have also suppressed the fact about provision of taxable service and value of taxable service so provided by them with the intention to evade payment of Service Tax. Accordingly extended period of limitation as provided by proviso to Section 73(1) of Finance Act 1994 has been correctly invoked in the present case. Also since all the ingredients for imposing penalty under section 78 are present in the matter the imposition of penalty equivalent to the quantum of tax evaded cannot be faulted with.

9.0 Now coming to the issue in respect of demand of Service Tax on concessional supply of HSD to the

Appellant. We find that the issue in this aspect is squarely covered by the decision of larger bench in case of Bhayana Builders [2013 (32) STR 49 (T-LB)]. The said decision of Larger Bench has been upheld by the Apex Court as reported in 2018 (2) TMI 1325. Respectfully following the said decision the demand of tax in respect of such concessional supply of HSD is dropped and also the penalty amount received to that extent.

10.0 In result we dismiss the appeal of the party on all counts except for the demand in respect of the concessional supply of HSD by their client, and consequential penalty on this demand.

(Pronounced in court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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