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

APPEAL NO. ST/85832/2018
ST/CO/85601/2018

(Arising out of Order-in-Appeal No. MKK/269/RGD/APP/2017 dated 29.11.2017 passed by the Commissioner of Central Tax, CGST, Central Excise & Service Tax (Appeals), Raigarh.)

M/s Shree Electricals Works Appellant

Vs.

CCE & ST, Raigad Respondent

Appearance:

Shri S.G. Thakur, Advocate for Appellant
Shri Atul Sharma, Assistant Commissioner (AR) for Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 04.06.2018
Date of Decision: 19.11.2018

ORDER NO. A/88006/2018

Imposition of penalty under Section 77 & 78 on appellant by the Commissioner of Central Tax (Appeals), Raigarh is being challenged by the appellant in the second round of litigation after its contention regarding wrong assessment of Service Tax liability was reduced from 12.36% to 10.3% and benefit of Rs. 10 lakhs as SSI exemption had been addressed by him on being directed by the CESTAT vide its remand order bearing no. A/86080/17/SMB dated 23.02.2017.

2. Factual back-drop of this case is that the preventive section of the commissionerate of Excise sought information from the Maharashtra State Electricity Distribution Company Limited (MSEDCL), Panvel (R) division concerning names of farms engaged by it in manpower supply and execution of works contract services and obtained information about the appellant's engagement therein. Further enquiry revealed that appellant had evaded payment of Service Tax on such manpower supply to MSEDCL. Investigation was conducted and records of appellant were scrutinised. Service Tax liability to the tune of Rs. 19,01,905/- was worked out. Appellant was put to notice for such payment along with interest and penalties. Upon receipts of its reply, matter was adjudicated by the Additional Commissioner of Central Excise, Raigarh and Order-in-Original dated 16.03.2012 was passed confirming the duty liability and penalty under Section 76, 77 & 78 of the Finance Act, 1994, wherein under Section 78 equivalent amount of penalty was imposed. The same order was unsuccessfully challenged by the appellant before the Commissioner (Appeals) which was ultimately appealed before this Tribunal and the matter was remanded by the Tribunal vide its order dated 23.02.2017 to the Commissioner (Appeals) with the direction to establish the correct amount of demand after ensuring inquiry proceedings, taking into objection of the appellant which were recorded by the Commissioner (Appeals) but not dealt by him.

2.1 Commissioner (Appeals) in his order dated 29.11.2017 has accepted the appellant contention that it was due to discharge tax liability upon completion of ₹10 Lakhs turnover in the financial year 2008-09 and also accepted its objection that duty demand of Service Tax should be fixed at 10.3% as was prevailing between the period 24.03.2009 to 31.03.2009 and rejected the demand of Service Tax made at 12.36%. However, he refused the contention of the appellant that show-cause notice was invalid in lieu of payment of Service Tax along with interest much prior to such issue of show-cause notice. Therefore, he confirmed the penalty under Section 77 and reduced the penalty from ₹19,01,905/- to ₹18,65,432/- which was also equivalent to the tax liability recalculated at 10.3%, while waving off penalty under Section 76 of the Finance Act, 1994 that corresponds to the taxable turnover below the threshold limit of ₹10 Lakhs, for which the appellant was held to be entitled to be covered under exemption Notification No. 06/2005-ST dated 01.03.2005.

3. In its memo of appeal and during the course of hearing of the appeal, the Learned Counsel for the appellant Mr. S.G. Thakur contended that penalty should not have been imposed in violation of the rules when Service Tax along with interest is deposited before issue of such show-cause notice. Learned Counsel for the appellant has relied upon the various judgments in his support as described below:

(i) *CABS India Vs. Commissioner of Service Tax, Bangalore – 2015 (39) STR 461 (Tri.-Bang.)*

(ii) *Lawson Travel & Tours (I) Pvt. Ltd. Vs. CC & CE (A), Cochin – 2008 (12) STR 119 (Tri.-Bang.)*

(iii) *Promt & Smart Security Vs. Commissioner of Service Tax, Bangalore – 2008 (9) SRS 237*

(iv) *Gem Star Enterprise (P) Ltd. Vs. Commissioner of Central Excise & Customs - 2008 (9) STR 237*

(v) *Padmini Products Vs. CCE – 1989 (43) ELT 195 (S.C.)*

(vi) *ABS Inc Vs. CCE – 2009 (16) STR 573*

(vii) *Hariala Deport Service Vs. CCE - 2009 (15) STR 277*

(viii) *Meghna Cement Deport Vs. CCE - 2009 (15) STR 179*

(ix) *CCE Vs. Sanfin - 2009 (13) STR 551*

(x) *Intelligent Protection Force – 2007 (6) STR 248*

3.1 He further submitted that there was no suppression of fact in their case for which extended period was not invokable under Section 73 of the Finance Act, since neither the Order-in-Original nor the show-cause notice had brought forth any *malafide* intention. He further submitted to set aside the order passed by the Commissioner (Appeals) imposing penalty under Section 77 & 78 of the Act.

4. In response to such submissions and in consonance to the cross objection, the Learned AR for the Department Mr. Atul Sharma, Assistant Commissioner submitted that the Order-in-Appeal fully justified the grounds for which extended period was invoked by the Department and the same has attained finality in the Order-in-Appeal which is a speaking order and needs no interference by this Tribunal. Referring to para 7.7 and 7.8 of the Order-in-Appeal, Learned AR has drawn the attention of this Tribunal that the appellant had not filed return for the period 2008-09 till the date of passing of the order and the differential payment was not made till February, 2013. He further submitted that since the entire case was detected by preventive

section based on the information collected from the service receiver and the subsequent delay of return filed by the appellant was not in conformity to the turnover shown in its return with the turnover detected, there was clear suppression of fact with intention to evade duty for which penalty was justifiably imposed by the Commissioner (Appeals).

5. Heard at length from both sides and perused the case records. The appeal memo reveals at para 3 that appellant had negotiated the rate which was inclusive of Service Tax when the client had placed their orders through relevant contracts/work orders. Appellant also had challenged the wisdom and legality of tax assessment before the adjudicating authority and Commissioner (Appeals) in the first round of litigation and the same ground were accepted by the Commissioner (Appeals) after the matter was remanded by this Tribunal, which speaks a lots about the maturity and conversance of the appellant about Service Tax matter that excludes its claim of *bonafide* belief. When the appellant admitted itself that it had negotiated the price which includes Service Tax components, it is not understood as to how he believed that the tax would be paid by the service receiver. More importantly, non-payment of Service Tax collected by the appellant was detected by the Department from the point of service received from the service receiver i.e. appellant and the same would clearly establish the intention of the appellant that it had not paid the tax under *bonafide* mistake, since its intention to evade payment of tax was apparent from its conduct. Further appellant had

suppressed its tax liability even in its return filed belatedly and order of the Commissioner (Appeals) reveals that there was mis-match in the turnover shown in its return and detected by the Department. The investigation made by the Department also reveals that appellant had not declared their Service Tax liability correctly for which he imposed penalty under Section 78 of the Finance Act, 1994. Penalty under Section 77 to the tune of Rs.10,000/- was also imposed as appellant had failed to furnish the periodical ST-3 returns in contravention to Section 70 of the Finance Act, 1994.

6. During the course of hearing of the appeal, nothing has been brought forth by the appellant as to why there was mis-match in the return and actual turnover of the appellant, while return was not filed till the case was detected by the preventive section of the Department after obtaining the information in writing from MSEDCL regarding manpower supply by the appellant and why it had preferred to withheld the Service Tax amount collected by it which, as per its own admission, was inclusive of the billed amount. Moreover, show-cause notice at para 7 indicates that appellant was persuaded by the officer of preventive wing of Central Excise to pay the Service Tax dues which indicates that the said tax had not been paid voluntarily by the appellant upon bringing the matter to its notice by the Department. Such ground in show-cause notice has not been refuted by the appellant anywhere not even in the appeal memo. Admission needs no further proof and no man of ordinary prudence can say that keeping the tax component calculated by it without depositing the

same in the government treasury is not an act of suppression with intent to mis-appropriate the same. Hence the order.

ORDER

7. The appeal is dismissed and the order passed by the Commissioner (Appeals) is here by confirmed. Cross objection is accordingly allowed.

(Pronounced in Court on 19.11.2018)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

Prasad