

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

Appeal No. ST/85936, 85940, 85961/2018

(Arising out of Order-in-Appeal No. PK/159-161/Appeal Thane/TR/17-18 dated 01.01.2018 passed by the Commissioner of Central Excise(A), Thane)

PRS Permacel Pvt. Ltd.

Appellant

Vs.

CCGST Thane Rural

Respondent

Appearance:

Shri Subash Chaudhary, Manager for the appellant
Shri Vivek Diwedi, AC (AR) for the respondent

CORAM:

Hon'ble Dr. Suwendu Kumar Pati, Member (Judicial)

Date of hearing : 05.06.2018

Date of decision : 30.11.2018

O R D E R No: A/88035-88037/2018

Confirmation of penal liability under the Finance Act against non-payment of service tax under partial reverse charge mechanism has given rise to this appeal.

2. Fact of the case, in a nutshell, is that appellant is a manufacturer which had undergone EA Audit in March 2015 by the respondent department. It was noticed that for renting motor vehicle, availing of security service and

availing of manpower service, appellant had failed to discharge service tax liability under the reverse charge mechanism introduced vide Notification 30/2012 and on being pointed out by the Audit team it had discharged the entire tax liability along with interest payable on those three components of service. But as it had not voluntarily paid the penalty of 15% along with the duty liability, it was put to show-cause notices and before receipt of reply to show-cause and without the appellant being heard in person, adjudicating authority i.e. Assistant Commissioner, Service tax, VII Mumbai vide three adjudication proceedings confirmed the duty liability, interest and penalty by holding the extended period clause applicable to the appellant. After unsuccessful attempt before the Commissioner (Appeals Thane), GST & CE, Mumbai appellant has preferred this appeal against the common order passed in all three appeals.

3. In his memo of appeal and during course of hearing of appeal, Id. Representative for the appellant Shri S. Chaudhary submitted that much before show-cause was issued, upon being pointed out by the auditors who are equivalent to Central Excise officers, duty liability along with interest were discharged for which show-cause should not have been issued to the appellant. He further submitted that vide their letter dated 09.02.2016 (Exhibit D)

appellant had intimated the respondent department in response to show-cause notice that they had not received audit report and they required a month's time after receipt of the said audit report to prepare and submit their reply to the show-cause and vide Exhibit-F i.e. letter dated 16.05.2016 appellant also had intimated the adjudicating authority that they had not received the audit report and the officer dealing with the matter was on leave for which they wanted adjournment of the date for personal hearing to any future date after 20.07.2016 but without providing the appellant the opportunity of personal hearing, the adjudicating authority passed the order-in-original confirming the charges in the show-cause. He affirms that appellant was not liable to pay 15% of service tax along with tax and interest due on it as under reverse charge mechanism, the receiver of service has not collected any service tax and withheld the same for deposit for which he prays for dismissal of the order of Commissioner (Appeals). He relied upon the case laws reported in *2017 (346) ELT 378 (Kar.) Jindal Vijayanagar Steel Ltd.*, *2014 (36) STR J188 Comm vs. Manipal Country*, *2012 (28) STR J151 Commissioner vs. U.B. Engineering Ltd.*, *2018 (5) TMI 484-CESTAT Mercedes Benz India Pvt. Ltd. etc.*

4. In response to such submissions, Id. AR for the department supported the reasoning and rationality of the

order passed by the Commissioner (Appeals) and in placing reliance on the judgment reported in *2017 (346) ELT 378 (Kar.)*. Ld. AR further submitted that in any case of default on payment of duty, penalty has to be paid as it is statutorily mandatory. In drawing attention of this Court to the Order-in-Appeal at para 6 that appellant had not disputed the service tax liability and accepted in principle that there was delayed payment of service tax for the relevant period for which being a long time registered manufacturer it is to be treated as well-versed with the Rules and Regulations pertaining to Central Excise and Service Tax laws and it has failed to disclose the correct value of tax in ST-3 returns for which wilful suppression can easily be attributed to it. He also pointed out that principle of natural justice was not violated since there was nearly six months gap between issue of show-cause and the date fixed for personal hearing during which period appellant could have sought for documents like audit report from the department, as has been observed by the Commissioner (Appeals) in para 5 of his Order-in-Appeal and therefore interference by this Tribunal is uncalled for.

5. Heard from both sides at length and gone through the case records. It is noticed that in the Order-in-Appeal the Id. Commissioner (Appeals) has placed on record objections of the appellant which are also reiterated here by the Id.

Manager for the appellant company as discussed above but rejected its plea of denial of principles of natural justice on the ground that there was a gap of six months between date of receipt of show-cause on 03.12.2015 and date of personal hearing given in May 2016 and appellant had not availed the gap period to obtain copy of audit report(wrongly noted as OIO). However, it is found from the show-cause and during the description of the fact by the Id. Commissioner (Appeals) that appellant had **failed** to discharge the service tax liability. It is not understood as to why a person who failed to discharge the same cannot be equated with his ignorance to follow the new rule of partial reverse charge mechanism introduced by Notification no. 30/2012 w.e.f. 01.07.2012 and why the same shall be equated with suppression of fact and mis-declaration through ST-3. More importantly, neither the show-cause notice nor any documents relied in Order-in-Appeal and order-in-original, any reference is available as to whether the entire 100% tax component was realised by the service provider and deposited in the government to establish that there was occasion of revenue loss to the government.

6. Partial reverse charge mechanism has been introduced by way of Notification 30/2012 dated 20.06.2012. In the said Notification, w.e.f. 01.07.2012 in case of supply of manpower for any purpose or service in

execution of work contract by an individual, HUF or partnership firm whether registered or not including association of persons are required to pay 25% of service tax and the service receiver is required to pay 75% of the said tax. Going by the backdrop of bringing such provision into the statute book, if various literatures are referred, it can be found that this Notification 30/12 has brought a new legislation of taxation to existing system of "reverse charge mechanism" by including "partial reverse charge mechanism" as a new system in respect of specified services provided for certain category of services fixing liability of payment of service tax partially on the service provider and partially on the service recipient.

6.1. The governing body of Central Excise, CBEC had issued clarification in the education guide that in the partially reverse charge method, the service provider shall issue an invoice indicating the name, address and registration of the service provider and that of the service receiver, to mention the description of service as well as value of taxable service provided or agreed to be provided and the service tax payable thereon inclusive of service tax payable by service provider. Notification 33/12-ST dated 30.06.2012 indicates that if the turnover of the service provider is less than 10 lakhs, the service recipient shall be obliged to pay his

share of service tax (of the service provider also) under the partial reverse charge mechanism. There is no denial of the fact that the idea behind introduction of this procedure was to bring unorganised sector on record so that the proper books of account are maintained by them, even though they are not aware about the various statutory liability cast on them and the same will remove the difficulty of the government in tracing out the service provider who are liable to pay service tax. But as commented by Ms. S. Sharma in her article on Reverse Charge Mechanism published in the Chamber Journal of December 2012 at page 95, this system would bring lot of confusion and uncertainty and among them the first would relate to identification of such vendors. In other words, whether the service provider is from an organised sector or unorganised sector, it would be difficult for the service recipient to trace out the same. Circular no. 30/12 is applicable to individual i.e. proprietorship firm, HUF, partnership firm and association of persons for whom this bifurcation of 75:25 or 50:50 is required to be made for the purpose of payment of service tax.

7. Now coming to the statutory audit procedure, the purpose of audit, as available in the Manual published by the Institute of Chartered Accountants of India in respect of

EA audit and CERA audit under Chapter 17 is that the idea behind such conduct of verification is to reasonably ensure that no amount, which under the central excise law is chargeable as duty, escapes taxation and the process of verification is always carried out in the presence of assessee and in the process, the auditor is required to discuss the matter with the assessee and advice him to follow correct procedure in future. It is also referred in the said manual that after such submission of audit report, in cases where the disputed amount have not already been paid by the assessee at the spot, demand notices are issued by the department for their recoveries. EA 2000 audit was therefore held to be participative audit. Likewise CERA audit is conducted by the Comptroller and Auditor General of India in respect of receipt and expenditure of the Government of India. It also discharges revenue audit which covers central excise, service tax and customs laws during which time the assesses were examined by CERA audit party to point out the deficiencies, leakage of revenue and non recoveries of dues by the Central Excise Department. Therefore, it cannot be said that only because audit party had found non-observance of partial reverse charge mechanism procedure in respect of certain services, without any reference to the categorising of service provider, appellant is to be tested for suppression etc.

8. In the conclusion, I have got no hesitation to say that respondent has not brought forth any cogent evidence on record to establish the charge of wilful suppression by the appellant company to invoke extended period of service so as to justify penalty. Hence the order.

9. The appeal is allowed and the order passed by the Commissioner (Appeals) in Order-in-Appeal No. PK/159-161/Appeal Thane/TR/17-18 dated 01.01.2018 is hereby set aside.

(Pronounced in Court on 30.11.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)