CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.405

Service Tax Appeal No. 85639 of 2014

(Arising out of Order-in-Appeal No. AV(301)27/2013 dated 14.11.2013 passed by the Commissioner of Central Excise & Customs(Appeals), Aurangabad)

M/s. Rajdeep Buildcon Pvt. Ltd. .....Appellant
"Rajdeep House" Savedi
Ahmednagar 414 003

VERSUS

Commissioner of Central Excise, Aurangabad .....Respondent
Town Centre N-5
CIDCO Aurangabad 431 003

APPERANCE:

Shri Sagar Shah, C.A. with Shri K. Khairnar Advocate for the Appellant
Shri Dilip Shinde, Asst. Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE SHRI CJ MATHEW, MEMBER (TECHNICAL)
HON'BLE SHRI AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/86231 / 2019

Date of Hearing: 18.12.2018
Date of Decision: 18.12.2018

PER: AJAY SHARMA

This Appeal has been filed impugning the order dated 14.11.2013 passed by the Commissioner of Central Excise & Customs (Appeals), Aurangabad in Order-in-Appeal No. AV(301)27/2013.

2. The appellants are engaged in the business of construction, maintenance and repair of roads and commercial construction under

"Works contract service" and "Management, Maintenance or Repair Service". They entered into a contract with the National Highway Authority of India (in short "NHAI") for the work of short term improvement and routine maintenance of westerly division to Pune city on National Highway No.4 and a formal agreement to that effect was executed on 31.08.2005. After the audit of the appellant conducted by the department, a show cause notice dated 21.06.2013 was issued to the Appellant for failure to pay service tax of Rs.36,93,008/- on the value received by them from NHAI during the period 16.6.2005 to 26.7.2009 and also for disallowance of Cenvat credit of Rs.3,93,008/-. The same was adjudicated vide Adjudication Order dated 26.2.2009 confirming the demand of service tax of Rs.36,93,008/- with equal amount of penalty u/s. 78, Finance Act, 1994 and Rs.5,000/- u/s. 77 ibid and also disallowing the Cenvat credit of Rs.3,93,351/-. On Appeal filed by the Appellant, the Commissioner (Appeals) vide order dated 5.8.2009 modified the adjudication order and upheld the demand of Service Tax of Rs.6,19,766/- only with interest and equal amount of penalty. The Appellants accepted the order and deposited the entire service tax amount of Rs.6,19,766/- with interest/ penalty of Rs.6,39,632/- *(totaling Rs.12,59,398/-)* under *'Maintenance & Repair Service'* on 29.10.2009. However, the Revenue challenged the said order of the learned Commissioner by way of Appeal before the Tribunal much belatedly on 22.01.2011.

3. In the month of May, 2012 through Finance Act, 2012 Section 97 was introduced by which the service tax was exempted with

retrospective effect on Maintenance or Repair service for the period from 16.6.2005 to 26.7.2009. If any service tax is collected during the aforesaid period, that was also to be refunded on an application being made within a period of six months from the date on which the Finance Bill, 2012 received the assent of the President. Accordingly on 22.11.2012, the Appellant filed a refund claim for Rs.12,59,398/- being the service tax, interest and penalty paid in accordance with the Order dated 5.8.2009 of the Commissioner (Appeals). The said refund claim was sanctioned by the adjudicating authority vide Order-in-Original dated 6.5.2013. Aggrieved, the Revenue filed Appeal before the learned Commissioner (Appeals) and the learned Commissioner vide impugned order dated 14.11.2013 allowed the Appeal filed by Revenue and set aside the Order-in-Original dated 6.5.2013. On the other hand on 21.06.2013 another show cause notice was issued to the Appellant for recovery of the amount of Rs. 12,59,398/- with interest.

4. Learned counsel for the appellant submitted that the learned Commissioner erred in rejecting the refund claim on the ground that the appellants failed to establish that the refund would not be hit by *unjust enrichment* and that the refund of the amount of penalty paid by the appellants in compliance with the earlier order dated 05.08.2009 of the Commissioner, cannot be granted since the appellant had not appealed against the said order of imposing penalty upon them and the same attained finality. According to learned counsel, the entire issue involved in this appeal is covered by Section 97 of Finance Act, 2012, which states that these services are

not to be covered under the category of Maintenance or Repair service during the relevant period and no Service Tax liability to be charged. He drew our attention to the provisions of Section 97 of Finance Act, 2012. He also submitted that the appellants would not be hit by unjust enrichment and in support of its claim the appellants have filed the affidavit as well as the Chartered Accountant's certificate before the authorities below and the same was relied upon by the Adjudicating Authority while sanctioning the refund claim but these were brushed aside by the learned Commissioner while passing the impugned order. He further submitted that although the appellants tried their best to get the relevant information from NHAI but same was not provided to them. According to him as per the affidavit as well Chartered Accountant's certificate it is clearly established that the Appellants have paid the service tax from their own pocket and have not charged it from NHAI. So far as refund of penalty is concerned, learned counsel submitted that since the service tax itself is not payable, therefore there is no question of payment of penalty and the same is therefore eligible to be refunded. He also submitted that since this is a Service Tax matter therefore the Revenue ought to have filed the Appeal before the learned commissioner in Form ST-4 as provided in Section 85 of the Finance Act, 1994 whereas the same was filed in Form-EA-2 as per Section 35E(4) of Central Excise Act, 1944. The said Appeal therefore should have been rejected by the learned Commissioner on this ground alone. In support of his submissions, the learned counsel produced various decisions. Per contra learned Authorised Representative on

behalf of Revenue reiterated the findings recorded in the impugned order and prayed for dismissal of Appeal.

5. We have heard learned counsel for the appellant and learned Authorised Representative on behalf of Revenue and perused the Appeal Memo alongwith its annexures. In order to appreciate the issues involved in the instant Appeal we have gone through Section 97 of the Finance Act, 1994, as inserted by Finance Act (23 of 2012), dated 28.5.2012. The said provision reads as follows:-

> "97. Special Provision for exemption in certain cases relating to management etc., of roads.
> (1) Notwithstanding anything contained in Section 66, no Service Tax shall be levied or collected in respect of management, maintenance or repair of roads, during the period on and from the 16th day of June, 2005 to the 26th day of July, 2009 (both days inclusive)."

6. In view of the above provision, it is categorically clear that no service tax shall be levied or collected in respect of management, maintenance or repair of roads, during the period from 16.6.2005 to 26.7.2009 (both days inclusive). The period involved in the present appeal is also 16.6.2005 to 26.7.2009. It seems that the learned commissioner rejected the refund of service tax on the ground of unjust enrichment because it has been recorded in the impugned order that the appellants have failed to produce the letter from NHAI that they have not paid the service tax to the Appellant. We have gone through the Chartered Accountant's certificated dated 19.3.2013 as well as the Affidavit dated 6.1.2014 of the General Manager of the Appellant in which it has been categorically

mentioned that the appellants have not received any amount against service tax from NHAI and that they have paid the service tax amount of Rs.6,19,766/- out of their own pocket under the category of 'Management Maintenance and Repair' service for the period 2005-06 to 2009-10. According to us this evidence is sufficient to establish that the service tax has not been passed on to the customer i.e. NHAI by the Appellants. The Hon'ble High Court of Judicature at Allahabad in the matter of *Delta Erectors Pvt. Ltd. vs. UOI; 2016(42) STR 238 (All.)* has held that in view of provision of Section 97(1) of the Finance Act, 2012, the assessee is not liable to pay any Service Tax on the management and maintenance or repair of roads between 16.6.2005 to 26.7.2009, both dates inclusive and if any Service Tax had been collected it would be refunded. Therefore, in view of the above discussions according to us the Appellants are eligible for refund of service tax.

7. So far as the issue of penalty is concerned, it is undisputed that the penalty under section 78 ibid was imposed on the appellants only for violation of provisions of Finance Act, 1994 in not paying the service tax on time. Had the service tax been not there, no penalty would have been imposed on the Appellants. Only because the appellants did not challenge the imposition of penalty and deposited the same without challenging it, cannot be a ground to refund the penalty because without demanding service tax, penalty cannot be imposed. Once service tax is set aside or refunded, penalty cannot survive. Therefore since the Service tax itself has been ordered to be refunded as aforesaid, the penalty deposited by the Appellant for

default in not depositing the service tax on time, is also liable to be refunded. Since on merits we have granted the refund of entire service tax with interest/penalty, therefore there is no need for us to decide the technical issue raised by the appellants that the appeal by the revenue before the learned commissioner was not in proper format.

8. In result, the impugned order passed by the learned Commissioner (Appeals) is set aside and the Appeal filed by the Appellants is allowed, with consequential relief as per law.

(Order pronounced in the open court)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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