CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Service Tax Appeal No.88268 of 2018

(Arising out of Order-in-Appeal No.PUN-ECUS-001-APP-0007/2018-19 dated 10.04.2018 passed by the Commissioner (Appeals I), Central Tax, Pune

M/s Shri Bharat Construction and Mining Co. **.... Appellant**
Block No.137, Sangli Phata, Shiroli
Kolhapur--416122

Versus

Commissioner of Central Excise & Service Tax., LTU, Mumbai **.... Respondent**
8th Floor Large Tax Payer Unit
Ce3ntre-1, World Trade Centre
Cuffe Parade, Mumbai

And

Service Tax Appeal No.88286 of 2018
Service Tax Cross Objection No. 86846 of 2018

(Arising out of Order-in-Appeal No.PUN-ECUS-001-APP-0006/2018-19 dated 10.04.2018 passed by the Commissioner (Appeals I), Central Tax, Pune

M/s Shri Bharat Cement Pipe Co. **.... Appellant**
Plot No.D-2, MIDC Shiroli
Kolhapur-416122

Versus

Commissioner of Central Excise & Service Tax., LTU, Mumbai **.... Respondent**
8th Floor Large Tax Payer Unit
Ce3ntre-1, World Trade Centre
Cuffe Parade, Mumbai

Appearance:

Shri Mahesh Raichandani, Advocate for the Appellant

Shri Sudhir B. Mane, AC., Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87244-87245 / 2019

Date of Hearing: 06.08.2019
Date of Decision: 06.08.2019

Per: Mr. P. Anjani Kumar

M/s. Shree Bharat Construction and Minining Co. and M/s. Bharat Cement pipe Co. are group companies who are engaged in providing services under taxable head "Supply of Tangible goods services and were paying taxes and filing the said returns. The appellant purchased various capital goods and have availed Cenvat Central Excise Duty paid by them, on the same as the capital goods were used for providing taxable output service. During the course of Audit of the appellant it was observed that M/s. Bharat Construction and mining Co. have sold some capital goods during the year 2014-15 and 2015-16 and did not reverse the Cenvat credit availed under the Rule 3(5A)(a) of Cenvat Credit Rules. On being pointed out by the audit the appellants have paid immediately credit of Rs.41,69,452/- along with interest of Rs.4,13,670/- before issue of Show Cause Notice The appellants were issued a Show Cause Notice which was adjudicated by Order in original dated 20.11.2007 wherein demand of Rs.41,60,827/- was confirmed. The appellant paid a penalty of Rs.10,,40,206/- being 25% of the demand amount within 30 days of the receipt of the order. However, the appellants preferred an appeal before the Commissioner (Appeals) who by impugned order No. 7/2018-19 dated 10.04.2018 has reduced the penalty amount to Rs. 13,12,815/-. Accordingly the appellants have filed the Appeal No.ST/88268/2018. Aggrieved by the imposition of lesser penalty the Department have also filed Appeal ST/88482/2018. Against this appeal the appellants have filed Memorandum of Cross Objections ST/86846/2018.

2. Audit have also found that in respect of Bharat Cement Pipe Co. appellants did not reverse credit of Rs.13,62,049/- on the capital goods removed during 2013-14. The appellants have paid the credit

as well as interest amounting to Rs. 4,75,560/- before issuance of Show Cause Notice . A show Cause Notice dated 30.05.2017 was issued and was adjudicated vide order dated 2/2017-18 dated 14.11.2017 confirming the demand. The appellants have also paid penalty of Rs. 3,40,512/- within 30 days of the receipt of the order. Commissioner(Appeals) vide order No.6/2018-19 dated 10.4.2018 have disposed the appellant's appeal . Against the impugned order appellant have filed ST/898286/2018. As the issue involved in all the appeals is same they are taken up together for discussions and decisions.

3. The learned Counsel for the appellant submits that the appellants are eligible for the benefit provided under section 73(3) of the Finance Act,1994 as they have paid duty along with interest before the issuance of show cause notice. He submits that as there was no suppre3ssion of facts etc. provisions of Section 73930 of the Finance Act, 1994 are applicable to them and no show cause notice ought to have been issued to them and confirmed. Therefore, he submits that the impugned orders are not maintainable in law. He relies upon the following:

(i) CBEC Circular No.137/167/2006-CX4 dated 03.10.2007.

(ii) Adecco Flexione Workforce Solutions Ltd 2011-TIOL-635-HC-KAR-ST .

(iii) The Lalit Ashok 2018-TIOL-3658-CESTAT-Bangalore.

(iv) Tidewater Shipping Pvt.Ltd. 2008 (11) STR 475.

(v) Pepisco India Holding Pvt.Ltd 2019-TIOL-1646-CESTAT-Bangalore.

4. The learned AR objected saying that the applicability of section 73(3) of the Finance Act, 1994 was not raised before the lower authorities. The learned Counsel submits that they have clearly raised this issue in the reply to the show cause notice and in the appeal filed before the Commissioner(Appeals).

5. The learned Counsel further submits that the show cause notice have been issued pursuant to the audit conducted by the department. In view of the following cases, the Show Cause Notice should be held to be barred by limitation.

(i) Aditya College of Competitive Exam 2009(16) STR 154.

(ii) Graphite India Limited 2018-TIOL-1028.

(iii) Continental Foundation 2007(216)ELT 177(SC).

(iv) Chemphar Drugs 1989(40)ELT 276 (SC)

6. The learned AR for the department reiterated the findings of OIO and OIA in respect of ST/88286/2018. However respect of ST 88268/18; the learned AR submits that the appellant during the year 2013-14 cleared some old capital goods on which Cenvat credit was availed from time to time; they did not reverse the credit while clearing the same. Commissioner (Appeals) erred in determining the revised penalty under Rules 15 of Cenvat Credit Rules read with section 78 of Finance Act, 1994; the learned Commissioner though upheld suppression of facts, modified the penalty under Rule 15; in terms of provisions of Section 78 are not applicable where duty has not been paid by reason of fraud or colluding or willful mis-statement or suppression of facts. Reduction of penalty in respect of the period 16.5.2015 onwards; as 25% penalty has not been paid within 30 days of receipt of the order in original the effect will not be

applicable. Therefore the learned Commissioner (Appeals) should have not changed the penalty of Rs.21,98,014/- for the subsequent year.

7. Heard both sides and perused the records of the case. For a better appreciation of the legal provisions in the matter it is beneficial to go through the relevant provisions of law.

(i) Section 73 (3) of the Finance Act, 1994 reads as

> "73(3).- Where any service tax has not been levied or paid or has been short levied or short paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section(1) in re3spect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid."

From the above, it is very clear that the benefit of this provision will not be applicable when there is suppression , willful mis-statement, fraud, collusion etc. The appellant have relied upon various cases that suppression of facts etc. cannot be alleged in the cases amounts have been paid and show cause notice is issued subsequent to audit. I find that in the case of Graphite India Limited (supra), it was held that

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> "…6. 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 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 advise 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 participated 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 CERAQ 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 some credit availed as inadmissible, suppression of fact is made out. It cannot also be established that appellant had any malafide intention to suppress its duty liability from the department. Hence the order."

8. I further find that appellant has relied upon ratio of various cases wherein the Tribunal has consistently held that the provisions of section 73(3) OF THE FINACE Act, 1994 are to be allowed in the cases where tax is paid along with interest before issuance of show cause notice. I find that Karnataka High Court has observed in the case of Adecco Flexione Workforce Solutions Ltd (supra) that

> "3. Unfortunately the assessing authority as well as the appellate authority seem to think , if any assessee does not pay the tax within the stipulated time and regularly pays tax after the due date with interest, it is something which is not pardonable in law. Though the law does not say so, authorities working under the law seem to think otherwise and thus they are wasting that valuable time in proceeding against persons who are paying service tax with interest promptly. They are paid salary to act in accordance with law and to initiate proceedings against defaulters who have not paid service tax and interest in spite of service of notice calling upon them to make payment and certainly not to harass and initiate proceedings against persons who are paying tax with interest for delayed payment. It is high time, the authorities will change their attitude towards these tax payers, understanding the object with which this enactment is passed and also keep in mind the express provision as contained in sub-Se.(3) OF Sec.73. The Parliament has expressly stated that against persons who have paid tax with interest, no notice shall be served. If notices are issued contrary to the said Section, the person to be punished is the person who has issued notice and not the person to whom it is issued. We take that, in ignorance of law, the authorities are indulging in this extravaganza and wasting their precious time and also the time of the Tribunal and this Court. It is high time that the authorities shall issue appropriate directions to see that such tax payers are not harassed. If such instances are noticed by this Court here after, certainly it will be a case for taking proper action against those law breakers."

9. I find that except mentioning in the show cause notice that there has been suppression of facts, no positive act committed by the

appellant has been put forth by the revenue to allege suppression of facts in the impugned cases. I find that the detection is subsequent to the audit and therefore going by the ratio of case laws cited by the app0ellant one cannot allege suppression of facts where show cause notice has been issued on the basis of audit objections. I find that the appellant's case is squarely covered by the ratio of judgements cited above and therefore, provisions of section 73(3) of the Finance Act, 1994 are attracted. I find that there was no reason that show cause notices should have been issued.

8. In view of the above, I allow both the appeals ST/88286/18 and ST/88268/2018 filed by the appellant with consequential relief if any, as per law. Department appeal ST/88482/2018 is rejected. Cross Objection ST/86846/2019 filed by the appellant are accordingly disposed of.

(Operative portion of the order pronounced in the Court)

(P. Anjani Kumar)
Member (Technical

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