CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Service Tax Appeal No. 89861 of 2013

(Arising out of Order-in-Original No. 27/ST/COMMR/2013 dated 11.09.2013 passed by Commissioner of Central Excise, Customs & Service Tax, Aurangabad)

M/s N K Construction **.....Appellant**
N K Plaza, Jalna Road, Beed,
Dist Beed - 431122

VERSUS

Commissioner of Central Excise, Aurangabad **.....Respondent**
Town Centre, N-5,
CIDCO, Aurangabad - 431003

Appearance:

Shri Nimesh Mehta, Advocate for the Appellant
Smt M. Suresh, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/88571 / 2018

Date of Hearing: 26.11.2018
Date of Decision: 26.11.2018

Per: S.K. MOHANTY

This appeal is directed against the impugned order dated 11-09-2013 passed by the Commissioner of Central Excise, Customs & Service Tax, Aurangabad, wherein out of the proposed service tax demand of Rs. 78,09,747/- for recovery in the show cause notice, an amount of Rs. 52,30,573/- was confirmed along with interest. Besides, the impugned order also imposed penalties under Section 70, 76, 77 & 78 of the Finance Act, 1994.

2. The Learned Advocate appearing for the appellant, at the outset, submitted that the averments made in the reply to the show cause notice were not properly addressed by the

adjudicating authority. In this context, he submitted that with regard to the issue of security deposit and non-submission of test report, the appellant did not receive the amount from the recipient of service and since the contract pertains prior to POT, the appellant was liable to pay service tax only on receipt basis; that road and public canal construction activities undertaken by the appellant are exempted from payment of service tax; that with regard to receipt of amount from the client M/s. Sunil Hi-Tech Ltd., the appellant had wrongly received the said amount, which was repaid back immediately to such client and as such, in absence of any provision of service, mere exchange of money cannot be subjected to levy of service tax. Learned Advocate further submitted that the cum-tax benefit has not been extended in the impugned order.

3. On the other hand, the Learned AR appearing for the Revenue reiterated the findings recorded in the impugned order.

4. Heard both sides and perused the records.

5. On close examination of the documents annexed to the appeal memorandum vis-a-vis the observations made in the impugned order, we find that the submissions made during the course of adjudication proceedings by the appellant were not properly addressed by the original authority and the adjudged demands were confirmed against it. To illustrate one of the issues regarding payment of service tax by the appellant on the amount received from M/s. Sunil Hi-Tech Engineering Ltd., we find from the certificate issued by M/s. Manoj R. Dugad *& Co.,* Chartered Accountants that the said amount received by the appellant was subsequently returned to the said party. The bank statement furnished by the appellant also confirmed the fact that an amount of Rs.84,19,898/- credited in the appellant’s account on 28.05.2009 was subsequently debited on the next day i.e. on 29.05.2009. Thus, in our view, on such transaction, service tax liability cannot be fastened on the appellant, since there was no element of service involved therein. However, without proper

consideration of the submissions of the appellant and proper verification of the documentary evidences, the impugned order has confirmed the demands in the adjudication order. Further, the appellant had also submitted the summary of confirmation of the adjudged demands in respect of various activities under taken by it. The said submissions of the appellant were also not discussed in the impugned order. Hence, we are of the view that the matter should be remanded to the original authority for a proper fact finding on all the issues involved in the present case.

6. Therefore, after setting aside the impugned order, the appeal is allowed by way of remand to the original authority for passing of *de-novo* adjudication order. This is an open remand and accordingly, the original authority should consider all the issues involved in the case. Needless to say, that opportunity of personal hearing should be granted to the appellant before deciding on the issues afresh.

7. In the result, the appeal is allowed by way of remand.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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