CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Service Tax Appeal No. 87052 of 2019

(Arising out of Corrigendum to Order on Remand No. 05/ST/COMMR/2018 dated 27.07.2018 issued by the Commissioner of CGST & Central Excise, Aurangabad)

M/s. Bharuka Construction **Appellant**
Plot No. 236/258, Akshay Deep Plaza,
Town Centre, Aurangabad.

Vs.

Commissioner of Cus, CE & ST, Aurangabad **Respondent**
N-5, Town Centre, CIDCO,
Aurangabad 431 003

Appearance:

Shri Pankaj Rathore, Consultant (Proxy), for the Appellant
Shri Dilip Shinde, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 18.05.2022
Date of Decision: 18.05.2022

FINAL ORDER NO. A/85517/2022

This appeal is directed against Corrigendum to Order on Remand No. 05/ST/COMMR/2018 dated 27.07.2018 issued by the Commissioner of CGST & Central Excise, Aurangabad. By the said corrigendum, the Commissioner has held as follows:-

F. No. V(ST)15-31/Commr/Adj/2017-18/
Aurangabad dtd 10.10.2018

CORRIGENDUM TO ORDER ON REMAND NO. 05/ST/COMMR/2018 dtd.27.07.2018

Please refer subject order in remand. Particular attention is drawn towards para 10 of aforesaid order. Para 10 is based upon worksheet submitted by the assessee in compliance of the para 5 of CESTAT order No A/87894/17/STB dated 05.06.2017. While analyzing and scrutinizing the worksheet and data submitted by assessee there is an inadvertent error crept in para 10 of the said order in remand to the extent mentioned below, which is corrected as under.

Therefore revised para 10 may be read as under, in place of original para 10.

10. From the worksheet submitted by the assessee and the Service Tax liability as per SCN, I find that

	2006-07	2007-08	2008-09
a) As per SCN value	101850753	108027138	10822799
b) Value as per NOticee's submission	120462468	164145616	93916850
c) Value ineligible for exemption	8848777	2636302	0
d) Value on which service tax is payable.	129311245	166781918	93916850
e) Taxable Value (i.e. 33%)	42672711	55038033	30992561
f) Service tax payable	5223140	6802701	3830680
g) Service tax already paid	4552325	6718938	3542343
h) Difference if any payable by the noticee	670815	83763	288337
Total Service Tax payable by the Noticee			**1042915**

Consequently differential amount of service tax payable by the assessee is Rs. 10,42,915/-. As a result order portion of the aforesaid remand order be read as under in place of original Order.

ORDER

(i) I confirm the demand of Service tax of Rs10,42,915/- against the assessee under proviso to Section 73(1) of the Finance Act,, 1994 on Commercial or Industrial Construction.

(ii) I impose the penalty of Rs. 10,42,915/- on the assessee under Section 78 of the Finance Act, 1994 for willfully suppressing the facts from the knowledge of the department with intent to evade the service tax. If desired, assessee can avail the facility provided under proviso to Section 78 of the Finance Act, 1994 and pay penalty of 25% of Rs. 10,42,915/- provided he pays remaining amount of service tax, discharge all interest liability and also pays 25% penalty within 30 days from the date of communication of this order.

(iii) I impose a penalty on assessee @2% of the amount of service tax of Rs. 10,42,915/- per month or Rs. 200/- per day whichever is higher, for the period of default under Section 76 of the Finance Act, 1994, but such penalty shall not exceed the amount of Service tax of Rs.10,42,915/-. The Assistant Commissioner(Service tax), Central excise, Customs & Service tax, Aurangabad should communicate to assessee about the total amount of penalty for the period of default and assessee should pay the same immediately.

(iv) I confirm the recovery of interest from the assessee on the amount confirmed at Para (i) above under Section 75 of the Finance Act, 1994.

(Shrikant S. Patil)
Commissioner

2.1 I have heard Shri Pankaj Rathore, Consultant for the appellant and Shri Dilip Shinde, Assistant Commissioner, Authorised Representative for Revenue.

2.2 Proceedings were undertaken by the Commissioner as per CESTAT order No. A/87894/17/STB dated 14.06.2017 holding as follows:-

"4. We have carefully considered the submissions made by both the sides

5. We find that there is no dispute raised by the appellants regarding the taxability on commercial or industrial construction However, the appellants have raised serious issues on the quantification of demand. As per the submission made by the appellant, we find that if the documentary evidences are produced before the adjudicating authority and if it is found satisfactory, the services provided to SEZ, TISS and services related to the individual residential houses are prima facie exempted. There is an error apparent in taking the service tax paid during 2008-09. However, this important issue, which may bring the service tax liability down to substantial amount needs to be reconsidered. We, therefore, remand the matter to the original authority to verify the claim of the appellant regarding the exempted portion of the services and to re-quantify the correct demand. All other issues are kept open."

2.3 After considering the submissions made by the appellant, Commissioner has dropped the demands against the appellant as per the following order:-

"a) I hereby drop the proceedings initiated vide Show Cause Notice Sr. No. 86//ST/Commr/2010 issued under F No. Prev/VII/gr-I/31/08-09 dated 22.09.2010 to M/s. Bharuka Constructions, 236/258, Akshaydeep Plaza, Town Centre, CIDCO, Aurangabad demanding Service Tax of Rs. 83,60,614/- (Rupees Eighty Three Lakhs Sixty Thousand Six Hundred Fourteen Only), as legally non-sustainable.

b) This order is passed without prejudice to any other action that may be taken against them under the Central Excise Act, 1944 and the Rules made there under or under any other Law for the time being in force. So ordered."

2.4 While dropping the demand, Commissioner has in para 10 observed as follows:-

10. From the worksheet submitted by the assessee and the Service Tax liability as per the SCN, I find that

		Year	Turnover Gross (Inclusive VAT etc.)	Total Receipts (Excluding VAT etc.)	S. Tax payable	S. Tax paid	Net S. Tax payable
As per SCN		2006-07	161890125	101850753	5769941	4535973	1233968
As per assessee's submission	Taxable		142994236	120462468	4865707	4552325	313382
	Non-Taxable		18895889	17213169			
							1217616
	Ineligible amt. of Non-Taxable		8848777				
Difference	Eligible amt. of Non-Taxable		10047112				
As per SCN		2007-08	198441973	108027138	9217610	6717310	2500300
As per assessee's submission	Taxable		171901144	164145616	6695171	6718938	-23767
	Non-Taxable		26540829	16796314			
							2498672
	Ineligible amt. of Non-Taxable		2636302				
Difference	Eligible amt. of Non-Taxable		23904527				
As per SCN		2008-09	142566526	10822799	5067788	441441	4626347
As per assessee's submission	Taxable		107112416	93916850	3830680	3542343	288337
	Non-Taxable		35454110	39114222			
							1525445
Total Difference	Eligible amt. of Non-Taxable		69405749				
S. Tax payable for the year 2006-07, 2007-08 & 2008-09							5241733
Eligible Non-taxable amount Rs.69405749							8495263
Total. Net S. Tax payable for the year 2006-07, 2007-08 & 2008-09							-3253530

2.5 By way of corrigendum, the Commissioner has sought to modify the order dropping the demand entirely and confirming the demand to the extent indicated in the corrigendum. A corrigendum issued could not have gone to impact the final order as Commissioner would become functus officio after passing the said order. Ideally any change in the order passed could have been done only by way of an appeal before the concerned appellate authority. The corrigendum has been passed even without allowing an opportunity of hearing to the appellant. As this corrigendum substantially impacts the rights of the appellant, they should have been allowed an opportunity of hearing by the adjudicating authority. Accordingly the appeal filed needs to be allowed and the matter needs to be reconsidered by the Commissioner on the corrigendum issued.

3.1 In the result, the appeal is allowed and the matter remanded back to the original authority to allow an opportunity to the appellant to represent themselves on the issues raised in the corrigendum. Since the matter is quite old, the Commissioner is directed to decide the matter within three months of receipt of this order.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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