02/10/2019		10.10.2019

BHV-EXCUS-APP-300-59-2019

	02.08.2019		01.08.2019

Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Delhi

Shri Rakesh Kumar Singh, Joint Commissioner, Service Tax Commissionerate, Ghaziabad, Delhi

Appellant

Shri Rajesh Kumar, Director, Excise & Service Tax Appellate Tribunal, West Block-2, Wing-1, Ground Floor, R.K. Puram, New Delhi-110066

Respondent

[illegible]

(ii) [illegible]

The appeal under sub section (2) and (2A) of the section 86 of the Finance Act 1994, shall be filed in Form ST-7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(2) [illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible]

(3) [illegible]

Revision application to Government of India:

[illegible]

(4) [illegible]

(5) [illegible]

(6) [illegible]

(7) [illegible]

(8) [illegible]

(9) [illegible]

[illegible]

ORDER-IN-APPEAL

Shri Tusharbhai Vasantbhai ... (hereinafter referred to as 'Appellant') has filed the present appeal against Order-in-Original No. SRV-DC/03/030/JC/2017-18 dated 17.8.2017 (hereinafter referred to as the 'impugned order') passed by the Joint Commissioner, Central Excise and Service Tax, Ahmedabad (hereinafter referred to as the 'adjudicating authority').

2. The brief facts of the case are that the appellant is registered with the Service Tax Department under Service Tax Registration No. AAIFS4...SD001 for providing taxable services including 'Supply of Tangible Goods' services. On the basis of information received from the Income Tax Department that the appellant had received income under the head 'Supply of Tangible Goods', 'Cargo Handling Services' and 'Rent a Cab' services, it appeared that the appellant had not paid service tax of Rs.43,47,571/- during the period 2013-14 to 2015-16. Therefore, a show cause notice dated 2.2.2017 was issued to the appellant demanding Service Tax of Rs.43,47,571/- under proviso to Section 73(1) of the Act along with interest under Section 75 of the Act and also proposed imposition of Rs.10,000/- under Section 77(1)(c) of the Act and Rs.43,47,571/- under Section 78 of the Act. The said show cause notice was adjudicated by the adjudicating authority vide the impugned order confirming the demand of Rs.43,47,571/- along with interest under Section 75 of the Act, imposed penalty of Rs.43,47,571/- under Section 78 of the Act and also imposed penalty of Rs.10,000/- under Section 77(2) of the Act.

3. Being aggrieved by the impugned order, the appellant has filed the present appeal interalia on the following grounds:

(i) The turnover of the Appellant for the year 2013-14 and for the year 2014-15 worked out by the lower ... on the basis of ... accounting heads provided by the Income Tax ... which ... service tax in the said heads of income but ... the said heads ... under the entry of all payments that ... which were reversed subsequently by M/s ..., that ... for the year 2013-14 ... for the year 2014-15 ... which is ... than the actual ... that ... by doing ... for the respective years, that ...

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Rs.[illegible] only Rs.59,15,[illegible] is taxable for FY 2014-15 and after considering closing balance of Rs.2,93,736/- in accounting ledger, payable amount comes to only Rs.56,21,[illegible] for FY 2014-15 that similarly for FY 2015-16 they received Rs.58,67,770/- in their bank account, after considering closing balance of Rs.4,52,926/- actual amount payable by Mr. JCL comes to Rs.[illegible] only, [illegible], on the basis of Rs.57,87,635 for FY 2014-15 and turnover of Rs.2,02,12,2[illegible] for FY 2015-16 considered in the SCN and not impugned order is [illegible].

(ii) That the adjudicating authority has wrongly discussed Section 124AD of Income Tax Act as it was not applicable in their case; that Audit of the appellant for the year 2014-15 was not mandatory to be done as per Section 124AD of the Income Tax Act, their annual Turn Over being less than Rs.1 crore.

(iii) That appellant provided Taxable Services of Rent-a-Cab and also had contracts of Transportation of staff by hire from/to their company premises of M/s. JCL; that all payments have been made after deduction of TDS @2% in respect of service of Rent a Cab provided by them and deduction of TDS @1% in respect of services provided in respect of shifting of materials i.e. supply of rectangle Cement Mixing Re-diesel Cargo Loading Services.

(iii) That liability to pay service tax in respect of Rent-a-Cab service is on the service recipient i.e. M/s. JCL under RCM and the service tax on this service is to be paid by M/s. JCL and not by the appellant.

(iv) That they disputed service tax liability only for the year 2014-15 and 2015-16 that total service tax payable by them as per their claim for the years 2014-15 to 2015-16 were [illegible] Rs.[illegible] 3684/- and they have paid full service tax of Rs. 2,[illegible] along with interest in the extent of Rs.2,[illegible].

(v) That the lower adjudicating authority has not gone through the documents submitted before him that they had paid service tax including interest thereon and accordingly the penalty of Rs.50k is liable penalty under Section 78 of the Act was not imposable on them.

4. Personal hearing in the matter was attended by Shri Hemant Patel, Advocate on behalf of the appellant. Shri Jignesh Patel, Advocate, in his submission

(Contd...)

behalf of the Appellant and reiterated the grounds of appeal and submitted that the appellant has not been provided any Personal hearing by the adjudicating authority in time I believe that the impugned order has been passed ignoring their submission. Service tax was collected by them during investigation. Hence issue of SCN, also they were providing services only to M/s. Jubilant Cement Ltd from [illegible] to 2012-13. That even now they do not provide any service to anyone else. That they had not got payment from anyone else as is also evident from ST-3 for [illegible] and in the relevant years, that the records of M/s.UCL in form of Ledger of the respective Parties, UCL books of Account and other documents are duly kept in the Ordinary course of business that service tax [illegible] during F.Y. 2014-15 and F.Y. 2015-16 was to be paid by the service recipient i.e. M/s. Jubilant and not by the appellant that prior to 2014-15 service tax on Rent a Cab service was not paid by them, they gross receipts in respect of the same in 2014-15 and Rs.[illegible] in 2015-16 stated in the SCN are the receipts which are also explained by them in the reconciliation that they have paid all the service tax already, before receiving SCN and hence no penalty [illegible].

FINDINGS

5. I have carefully gone through the facts of the case, the impugned order, Appeal Memorandum and submissions made by the Appellant during personal hearing. The issue to be decided in the present appeal is as to whether the demand of service tax confirmed by the impugned order is [illegible] not?

6. The appellant has also contended that they have received Motor cars on hire with drivers and hence, it is not supply of tangible goods but is in the nature of rent a cab service from 1.7.2012 service tax on service is liable to be paid under Reverse Charge Mechanism and service has been received by the said by the service recipient and not by the appellant. I find that this contention is factually correct and hence, I hold that the demand for the period from 1.7.2012 confirmed on the ground of supply of taxable service is required to be set aside. I do so. However, the confirmation of demand for the period up to 1.7.2012 is upheld.

7. The appellant has admitted service tax liability for the period 2013-14 to 2015-16 but vehemently argued that the demand confirmed in respect of F.Y. 2014-15 and F.Y. 2015-16 is not correct as the same was based on the figures of

[illegible]

the service supplied by M/s [illegible] only and their examinations made before the [illegible] have not been considered in the impugned order. The Hon'ble Tribunal while remanding the matter in the instance of Para 10.5 and Para 10.6 has recorded as under:

> "10.5 ... [illegible] has disputed the liability to pay service tax for F.Y. 2014-15 & 2015-16 submitted that as per Place of Provision of Service Rules, 2012 the service is covered by the service recipient under the category of 'Business Auxiliary Service' [illegible] appellant submitted that the service provider is not liable to pay service tax as the service recipient is liable to pay service tax under reverse charge mechanism. The Adjudicating authority has not given any finding on the issue. The matter is required to be remanded back to the Adjudicating authority to examine the issue afresh in the light of the provisions of Section 66A of the Finance Act, 1994 as amended and the Place of Provision of Service Rules, 2012 as applicable for the relevant period and to decide the issue afresh after giving an opportunity of personal hearing to the appellant.
>
> 10.6 ...
>
> 11. From the aforesaid provisions relating to Finance Act, 1994 and Service Tax Rules, 2012, it is clear that the liability to pay service tax does not arise merely when consideration for the taxable service is received by the service provider, but it is the duty [illegible] to pay service tax on the taxable services [illegible] the service recipient is liable to pay service tax under reverse charge mechanism."

(emphasis supplied)

7. [illegible] has confined the demand without considering the submissions made by the appellant. He has not recorded any findings on the [illegible] whether the service provider, [illegible] has not recorded any findings on the [illegible] whether the service provider, whether it is an 'Intermediary' services or not as per the relevant rules. The appellant has challenged the [illegible] of M/s [illegible] dated [illegible] 2145 issued by the Income Tax

[illegible]

[illegible]

statement is a legal document for the purpose of payment received by the appellant and made by M/s. UCL after deduction of TDS as provided under the Income Tax Act. However, the adjudicating authority has not discussed as to whether the amount over and above the payment reflected in the 26AS Statement of the appellant and in Form 26AS have been received by the appellant and/or suppressed by the appellant. The appellant has contended that only Rs.56,46,574/- was credited in their bank account during F.Y. 2014-15 and Rs.98,87,772/- during 2015-16 and they have not received amounts from M/s. UCL for Rs.87,97,800/- and Rs.2,04,53,278/- as alleged in the SCN and confirmed in the impugned order. Form 26AS statements for the financial years 2014-15 and 2015-16 reveal that M/s. UCL [illegible] made payment of only Rs.5[illegible]/- and Rs.62,21,375.[illegible]/- for the years 2014-15 and 2015-16 respectively to the appellant. I also find that the lower adjudicating authority has not recorded any reason as to why and how the payments reflected in Form 26AS issued under Income Tax Act is incorrect, why the amounts shown in ledger of M/s UCL have not been shown/reflected in Form 26AS, whether these payments have been shown in the expenses side of M/s. UCL in their Balance Sheet for the relevant years i.e. 2014-15 & 2015-16 [illegible] merely on the basis of ledger account maintained by M/s. UCL to confirm the service tax [illegible] by the appellant. The transactions recorded in the ledger [illegible] the appellant need to be held to be incorrect by the adjudicating authority duly substantiated. I find that the impugned order is [illegible] in the [illegible] process and hence has to be held as not correct, legal and proper and the case needs to be remanded to him to decide afresh.

7.1 In view of above, I hold that the service tax [illegible] leviable on supply of tangible goods (other than Renting of Motor Vehicles with driver) for the years 2014-15 and 2015-16 needs to be recalculated by the lower adjudicating authority after considering details in Form 26AS, work orders given by M/s. UCL and actual payments received by the appellant towards value of consideration from M/s. UCL and not only on the basis of ledger account of M/s. UCL. The matter is required to be remanded back to the lower adjudicating authority to determine service tax liability of the appellant on the service of supply of tangible goods for FY 2014-15 and FY 2015-16.

8. The appellant has worked out and admitted their service tax liability as Rs.21,12,558/- for the years from 2011-12 to 2015-16 against confirmed demand of Rs.[illegible] and hence, they contested imposition of penalty of Rs.52,90,703/- on them under Section 78 [illegible] on the ground that they have

paid service charges with interest thereon at Rs 28,05,051/- Copies of the challans submitted by the respondent-establishment showing payments made by them -

Regular Tax Deposited vide Challan No. dated 31.10.2017			Surcharge deposited after 2018			
Sr. No.	Tax Deposited (Rs.)	Challan No.	Dated	Sr. No.	Tax Deposited (Rs.)	Challan No.	Dated
1	9,000/-	Nil	16.11.2017	10	35,284/-	03819	12.2017
2	82,870/-	Nil	16.11.2017	11	83,771/-	03815	9.2017
3	81,785/-	Nil	16.11.2017	12	35,134/-	03817	16.11.2017
4	29,887/-	32851	9.11.2017	13	3,781/-	03819	12.2017
5	16,984/-	32858	9.11.2017	14	1,31,696/-	03819	12.2017
6	3,21,182/-	32860	9.11.2017	15	3,20,301/-	03819	12.2017
7	61,333/-	32859	9.11.2017	16	2,15,112/-	03819	12.2017
8	1,81,499/-	32856	9.11.2017	17	71,274/-	03819	12.2017
9	81,414/-	32853	9.11.2017	18	80,807/-	03815	9.2017
				19	1,70,102/-	03818	12.2017
				20	1,48,760/-	03819	12.2017
				21	1,84,227/-	03815	9.2017
				22	5,847/-	03819	12.2017
				23	48,916/-	03819	12.2017
Total	13,44,353/-			Total	15,60,414/-		
Grand Total				28,05,051/-			

3. The learned appellant has paid Rs 13,44,353/- vide above mentioned challans of Bank dated 31.10.2017 and Rs 15,60,414/- has been paid by way of cheque of Bank vide challan No. 03819 dated 12.12.2017 which is duly signed by the authorized signatory of the respondent-establishment.

4. Statement of the Advocate for the respondent-establishment is reproduced as below:-

"My client is ready to pay the remaining amount of Rs. 28,05,051/- in the form of demand draft, in one week's time from today. In return of this undertaking, the appellant is directed to withdraw the appeal. In case of any default in payment of the amount as mentioned above, the appellant will be liable to pay the amount as directed in the impugned order in addition to the interest and penalty imposed in the impugned order. Statement recorded. Appeal is withdrawn in terms of the statement recorded."

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Provided further that where service tax and cesses are paid within a period of
such days of

(i) the date of service of notice under section [illegible] in respect of service specified in clause (105) of section 65 of the said Act, in cases where no appeal or proceedings in respect of such service tax, interest and penalty are to be deemed to be concluded;

(ii) the date of receipt of the order of the Commissioner (Appeals) or Tribunal or the court, as the case may be, in cases where appeal or proceedings in respect of such service tax, interest and penalty are to be deemed to be concluded.

[illegible]

6.2 It is very clear that penalty is not liable to be imposed under section 78 of the Finance Act, 1994 if the assessee pays the service tax and interest before the issuance of show cause notice. In the present case, the appellant paid service tax of Rs.11,44,557/- before issuance of the show cause notice dated 17.12.2015 but failed to pay service tax of Rs.2,14,527/- and interest thereon. Therefore, the appellant is liable to pay interest on the service tax not paid or short paid by them. Further, penalty is imposed @ 25% of the service tax short paid by the appellant under section 78 of the Act.

7. The appellant has also pleaded that the penalty imposed under section 78 of the Act is unjustified and has relied upon the decision of the Hon'ble Tribunal in the case of Shyam Alloys (P) Ltd. reported as 2012(25) S.T.R. 87 (Tri.-Del.) wherein it was held that power to remand in appropriate cases is vested in Section 35A(3) of the Central Excise Act, 1944 even after amendment. The Hon'ble Tribunal in the case of M/s. Laxmi Iron and Power Products Ltd. reported as 2013 (293) E.L.T. 464 (Tri.-Del.) has also held that Commissioner (Appeals) has inherent power to remand in exercise of the provisions of Section 35A(3) of the Central Excise Act, 1944. The Hon'ble High Court of Gujarat in case of [illegible] of 2014 in Excise Tax Appeal No. 1 of 2014 has held that even after amendment in section 35A(3) of the Central Excise Act, 1944 in 2014, the Commissioner (Appeals) has power to remand.

8. In view of above, I am of the considered view that matter is fit case to remand the matter back to the lower adjudicating authority to decide the service tax payable in respect of supply of [illegible] cases in F.Y. 2014-15 only. The appellant is directed to submit all relevant records and documents in their support within one month from the receipt of this order before the lower adjudicating authority, who shall grant a personal hearing and decide the case within 3 months from the receipt of the order by the appellant. The appellant is also directed to produce all the documents and evidences before the adjudicating authority as they intend to rely upon in their defence.

[illegible]

To

The Deputy Commissioner (Appeals),
Central Goods and Service Tax,
Bhopal Division,
Bhopal.

Sir / Madam,

I am directed to forward herewith an application for determination of appeal for Supply of Tangible Goods services for F.Y. 2014-15 & 2015-16 for consideration and passing necessary order in the matter.

2. यह आवेदन पूरा होने की तारीख से एक माह के भीतर निर्णय आदेश पारित किया जाए।

2. The appeal shall be decided within one month from the date of this application.

Yours faithfully,

(सुनील कुमार जैन)
पंजीकृत डाक द्वारा

रजिस्टर्ड एक्नॉलेजमेंट

To, The Deputy Commissioner (Appeals), Central Goods and Service Tax, Bhopal Division, Bhopal.	प्राप्त किया (Received the above mentioned documents)
	दिनांक (Date)
	हस्ताक्षर (Signature)
	नाम (Name)
	पदनाम (Designation)

नोट:

1. आवेदन मूल अधिकृत कार्यालय प्रमुख को देना है एवं एक अतिरिक्त प्रति रसीद, मुहर तथा हस्ताक्षर की आवश्यकता है।
2. अधिकृत, वैधानिक लेखा एवं कर परामर्श अथवा कंपनी सचिव, आवेदन प्राधिकारी, मामलों की अभ्यावेदन कार्यवाही हेतु।
3. अधिकृत प्रतिनिधि, कार्यालय प्रमुख एवं कर्मचारी के अलावा एक वैधानिक प्रतिनिधि सहित, आवेदन प्रतिनिधित्व, अभ्यावेदन की प्रति आवश्यक है।