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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD.

REGIONAL BENCH – COURT NO. 1

Service Tax Appeal No. 70616 of 2019

(Arising out of order in original No. 04/ST/ALLD/2019 dated 21.01.2019 passed by the Commissioner (Appeals), Custom, Central Goods & Service Tax and Central Excise, Allahabad).

M/s Quest Engineers & Consultant Pvt. Ltd., **Appellant**
51-C, Dayanand Marg, Allahabad (U.P.)

VERSUS

Commissioner, Central Goods & Service Tax and Central Excise **Respondent**
38, M. G. Marg, Allahabad (U.P.).

APPEARANCE:

Shri Abhinav Kalra, Advocate for the appellant
Shri Santosh Kumar Agarwal, Authorised Representative for the respondent

CORAM:

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

FINAL ORDER NO.70226/2021

DATE OF HEARING: 03.08.2021
DATE OF DECISION: 28.09.2021

ANIL CHOUDHARY:

The present appeal is directed against the Order-in-Appeal No. 04/ST/APPL/ALLD/2018 dated 02.01.2019 passed by the Commissioner (Appeals), CGST & Central Excise Appeal Commissionerate, Allahabad.

2. Brief facts of the case are that the appellants were providing 'Consulting Engineer Service' taxable under the Finance Act, 1994 (hereinafter referred to as 'the Act') on which service tax was payable by the appellant. The appellant had also received 'rent-a-cab

service' and 'legal service' on which service tax was payable by the appellant under reverse charge.

3. It was alleged in the show cause notice that the appellant had suppressed the 'taxable value' of consulting engineer services provided to their clients during the period 2011-12 to 2015-16 and also that service tax has not been paid on the services of 'rent-a-cab service' and 'legal services' under 'reverse charge' during this period.

4. Initially the service tax liability had been worked out and proposed for Rs. 75,26,309/- for the period 2011-12 to 2015-16 through the show cause notice dated 05.01.2017, on the basis of working of tax due minus (-) tax paid during this period. However, the adjudicating authority allowed the 'cum-duty benefit' in terms of section 67 of the Act, on the ground that the amount of turnover taken from 'Form 26AS' (under Income Tax) for calculation of tax liability should be cum-duty, in view of the CESTAT, Eastern Bench, Kolkata in the case of **CCE & Cus, Patna Vs Advantage Media Consultant [2008(10) STR 449 (Tri.-Kolkata).** After allowing the cum-duty benefit wherever applicable, the tax liability had been confirmed to the extent of Rs. 58,34,034/-, along with interest thereon and equal penalty was also imposed.

5. In first appeal, the Ld. Commissioner (Appeals) have reduced the penalty to Rs. 46,19,772/- in terms of the first proviso to section 78(1) of the Act, however, the amount of tax payable by the appellant and interest thereon were confirmed.

6. Being aggrieved, this appeal is preferred.

7. It is submitted that the appellant had rendered consultancy services to M/s NHAI, M/s LEA, M/s EE - Road Construction Road Division - Government of Jharkhand, M/s SA Infrastructure Consultants P. Ltd., and UPHAM International Corporation with respect to the road construction projects undertaken by them. The remuneration received by the appellant for the services so rendered included two parts, namely 'professional fee', and 'reimbursement' of certain expenses like office supplies, utilities, printing expenses, rent of office set up near the site, office supplies, utilities and communication expenses etc. Tax on the professional fee charged from the customers for consultancy services was paid by the appellant, however, tax on the reimbursements, the appellant has neither charged nor paid service tax. It has been contended that in terms of section 67(1)(i) of the Act it was the intention of the law makers to bring into the tax bracket only the gross amount charged by the service provider for such services provided or to be provided by him, i.e. only the amount charged by the service provider for the service rendered by him, and nothing over and above that. Therefore, any amount received by the appellant towards the reimbursement of any expenses, cannot be brought into tax net, especially when professional charges for the services rendered by the appellant have already been taxed. Appellant also submitted the details of admitted liability of service tax with the payment details thereof, along with reconciliation with balance sheet data. The reconciliation chart shows

that entire tax liability which has been admitted, has been duly deposited by the appellant.

8. It is further contended that the Ld. adjudicating authority has confirmed the demand on gross receipt of Rs. 1,41,25,207/- (gross amount before appropriation), on the basis of figures recorded in Form 26AS of the appellant, without proper investigation or appreciation and while computing the tax liability on the basis of Form 26AS, no explanation had been asked from the appellant in respect of the nature of payments recorded in the same. Further, urges that service tax against a particular receipt recorded in Form 26AS, would have been deposited in the previous year, since service tax was payable on accrual basis, while the same is reflected on receipt basis (in form 26AS), which may end up in twice charging of tax. There may be some other cases where TDS was deducted but the same was not liable to service tax as per the provisions of the Finance Act. As such, the contention of the Ld. Adjudicating authority that every payment which is recorded in Form 26AS is service income and liable to tax, is baseless, erroneous and lacks merit. He also relied upon various case laws as under:

a) Indus Motor Company Vs CCE, Cochin 2007-TIOL-1855-CESTAT-Bang: 2008(9) STR(Tri. Ban.) held that payment of service tax in this case is based on assumption and presumption; therefore, demand cannot be confirmed.

b) Synergy Audio Visual Workshop Pvt. Ltd. Vs CST Bangalore, 2008-TIOL-809-CESTAT-BANG; The Tribunal in this case following its earlier decision held that service tax payment cannot be confirmed on the basis of the amount shown in the income tax return and balance sheet or profit and loss account.

c) TIL Vs CST Kolkata 2008-TIOL-181-CESTAT-KOL: In this case, demand was raised on the basis of figures contained in the Annual Report including balance sheet and Profit and Loss account. The Tribunal held that since the basis of the calculation of the demand has not been given to the appellants, the proceedings flowing from such a defective show cause notice, are neither legal nor proper.

d) Similar view has been confirmed by the Hon'ble High Court in the matter of Firm Foundation Vs Pricipal Commissioner wherein the Hon'ble High Court set aside the demand of service tax computed on the basis of Profit & Loss account of the assessee.

The Learned Adjudicating authority has, while confirming the demand in the instant matter by holding that the entire turnover recorded in Form 26AS, as taxable is turnover, and hence, liable to service tax, failed to acknowledge the fact that the allegation made by the department should be supported by cogent evidence.

e) The Hon'ble Supreme Court in H.P.L. Chemicals Ltd. Vs CCE Chandigarh 2006 (197) ELT 324 (S.C.) held that '*the department has to adduce proper evidence and discharge burden of proof".*

f) LSE Securities Ltd. Vs CCE, Ludhiana vide Final Order No. ST/A/363-366/12 (2012-TIOL-593-CESTAT-DEL) held that *"Burden of proof failed to be discharged by the revenue, to bring the receipt to charge'.*

g) Interim Order in Chandela Travels Vs CCE, Noida 2013 (32)STR (32) STR 453 (Tri.-Del) wherein it was held that *"4. …. Learned DR's contention that it has been asked by the revenue from the appellant and they have not been able to give any figures for the same, does not prima facie carry much weight inasmuch as the onus lies upon the revenue to substantiate the allegations made by them."*

9. It has also been contended that penalty under section 78 of the Act is not sustainable as the conditions precedent prescribed therein did not exist, in the instant case.

10. Learned Authorised Representative Shri Santosh Kumar Agarwal relies on the impugned order. He further relies on the findings of the Commissioner (Appeals), which are as follows:-

i) There is no dispute that the appellant have provided consulting engineer service to NHAI and others and have not carried out any road construction activity.

ii) Entry No. 13(a) of Notification No. 25/2012-ST dated 20.06.2012 exempts services provided by way of construction, irrigation, commissioning, installation, completion, fitting out, repair, maintenance, renovation or alteration of road, bridge or terminal for road transmission for use by general public, whereas the appellant have provided consulting engineer services only and have not carried out any of the activities specified in this entry. Thus, their claim for the benefit of exemption is totally baseless. (emphasis supplied).

iii) Appellant have been *suo moto* paying service tax on their consulting activity and the case of Revenue is of short payment of service tax.

iv) The contention of appellant that there was no suppression of facts is also devoid of any substance as the short payment was detected only during the enquiry conducted by the Department, whereas under self assessment procedure the appellant was required to pay their service tax liability correctly. Thus, extended period of limitation have been correctly invoked for issue of the show cause notice.

11. Having considered the rival contentions, we find that the following are the admitted facts:-

i) The appellant have provided consulting engineer services to various recipients and from the copy of agreements produced before the Department, that all the services provided are related to road construction activity.

ii) The appellant is registered with the Department for providing the consulting engineer services and have regularly filed the returns and deposited the admitted tax.

iii) The period involved is 2011-12 to 2015-16 and the show cause notice was issued on 05.01.2017, invoking the extended period of limitation.

iv) The appellant have admittedly paid service tax of Rs.82,91,173/- during the period of dispute.

v) The Revenue have computed the tax liability on the basis of gross turnover as reflected in Form No. 26AS (under the Income Tax provision), which is a document available on the website of Income Tax Department, wherein the data recorded is on cash basis or receipt basis of accounting. Whereas under the provisions of service tax, the tax liability is computed on the basis of accrual on mercantile system of accounting, which is in contrast to the cash basis of accounting.

vi) The only allegation in the show cause notice for invocation of extended period of limitation is – appellant was not paying service tax within time and have not deposited the statutory return in time and thus have fully suppressed the material facts with intent to evade payment of service tax.

vii) It is further alleged that it was only on enquiry by the Department, it was found that appellant have provided consulting engineer services to various recipient(s) for construction department as pure agent of NHAI and EE - Road Construction Department, and have received payments during the period 2011-12 to 2015-16.

12. Appreciating the facts and circumstances, we find that the allegations of Revenue are frivolous, that it was only on enquiry it came to know about the affairs of the appellant, i.e. providing of taxable service in view of the admitted facts that appellant is a registered assessee under the Service Tax provision, and have been filing their returns and paying tax. It is not alleged by the Revenue that the appellant was not maintaining proper financial records, register and vouchers for their transaction. We further find that Form No. 26AS is not a statutory document for determining the taxable turnover under the Service Tax provisions. We find that form 26AS is

maintained on cash/ receipt basis by the Income Tax Department for the purpose of tax deducted at source, etc. being the relevant data for Income Tax. Whereas under the Service Tax provisions, the service tax is chargeable on mercantile basis (accrual basis) on the service provided whether the value of such service is received or not. Thus, we find that the whole basis of show cause notice is incorrect and/or misconceived.

13. We further hold that the extended period of limitation is not available to Revenue under the facts and circumstances. We further hold that the appellant is entitled to exemption under the Notification No. 25/2012-ST under Sl. No. 13(a) of the said notification for providing consulting engineer services in the matter of road construction. When road construction is exempt, every activity is exempt relating to the road construction including consulting engineer services. The appellant also relied on the ruling in **Lord Krishna Real Infra Pvt. Limited vs. Commissioner of Customs, CE & ST, Noida**, Final Order No. 70126/2019 dated 27.12.2018. This Tribunal has held in other disputed cases, that even the barricade provided on the side of highway, maintaining greenery on the side or middle of highway, construction of any facility, refreshment centre for road users, is also part of the road construction and such activity is also exempt. Even the administrative building constructed by the concessionaire, for construction of the road or highway for administration and collection of toll etc. is part of road.

14. As regards 'Rent a cab service, for demand under RCM, as receiver of service, we find that there is no specific allegation as required under Section 66A read with Notification no. 30/2012-ST.

15. Accordingly, in view of our findings, we allow the appeal and set aside the impugned order. We also hold that extended period of limitation is not available to Revenue. We also hold that appellant is also entitled to consequential benefits, in accordance with law.

(Pronounced on-28/09/2021).

Sd/-
(Anil Choudhary)
Member (Judicial)

Sd/-
(P. Anjani Kumar)
Member (Technical)

Pant