Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No. 24 of 2012

(Arising out of OIA-169/2011/COMMR-A/RBT/RAJ dated 10.10.2011 passed by Commissioner of Central Excise-Rajkot)

PSL LIMITED **.....Appellant**
PCD-II GANDHIDHAM,
KUTCH-GUJARAT

VERSUS

C.C.E. & S.T. RAJKOT **.....Respondent**
CENTRAL EXCISE BHAVAN,
RACE COURSE RING ROAD...INCOME TAX OFFICE,
RAJKOT, GUJARAT-360001

APPEARANCE:
Shri Ishan Bhatt (Advocate) for the Appellant
Shri Dinesh M. Prithiani, Assistant Commissioner (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. A/ 10324 /2023

DATE OF HEARING: 04.11.2022
DATE OF DECISION: 27.02.2023

RAJU

This appeal has been filed by M/s Psl Limited against demand of service tax, interest and imposition of penalty under Section 76, 77 and 78.

2. Learned Counsel for the appellant pointed out that they are inter alia engaged in undertaking epoxy coating of pipelines. A demand was made under the head of Business Auxiliary Service for the activity of Epoxy Coating of pipelines undertaken by the appellant. The demand was raised after an audit objection. Learned counsel argued that the demand under the head of Business Auxiliary Service cannot be made for the following reasons:

i. The only activity of 'production' of goods on behalf of client was leviable to service tax prior to 16.06.2005 and only w.e.f. 16.06.2005, the activity of 'production or processing' of goods or

on behalf of client was made liable to service tax. It has been argued that since the period pertains to prior to 16.06.2005 and the activity of Epoxy Coating of pipes does not qualify as "production" of goods and therefore, the said activity is not covered under Business Auxiliary Service.

ii. The second ground raised by the appellant is that the activity of coating of pipes undertaken by them was on a principal to principal basis for M/s IOCL. The activity was not carried out "on behalf of the client" and there was no third party involved in this transaction. In view of above, it was argued that the activity does not fall under the category of Business Auxiliary Service.

iii. The next argument raised related to invocation of extended period of limitation on the ground of bonafide belief. Learned Counsel argued that they had a bonafide belief that activity of coating of pipelines do not qualify as Business Auxiliary Service as neither the said activity amounted to "production" of goods nor it was conducted "on behalf of client". It was argued that there was no suppression and none of the ingredient on Section 73 of the Finance Act, 1994 are present to invoke extended period of limitation.

iv. Learned counsel further sought invocation of provisions of Section 80 of the Finance Act, 1994, to set aside the penalties imposed under Section 76, 77 and 78 of the Finance Act, 1994 as the issue involved relates to interpretation of statute.

3. Learned Authorized Representative relies on the decision of the Commissioner (Appeals). He also relied on the decision of Tribunal in the case of PSL Corrosion Control Services Ltd. to hold that the activity undertaken by them classifies as 'Business Auxiliary Service's. He further pointed out that the said decision of Tribunal has been approved

by Hon'ble High Court as reported in 2011 (23) STR 116. He also relied on the following decisions:

- Hoganas India Ltd. 2015 (39) STR 147 (Tri. Mum.)
- Orient Packaging Ltd. 2011 (23) STR 167 (Tri. Del.)
- PSL Limited 2009 (16) STR 247 (Tri. Ahd.)

4. We have considered rival submissions. We find that the issue in the appellant's own case has been examined by the Tribunal earlier and the matter has been settled by Hon'ble High Court in the following terms:

> ***"6.*** *As can be seen from the impugned order of the Tribunal, on merits the Tribunal has held against the respondent by holding that the respondent was covered even under the un-amended definition of "Business Auxiliary Service". After holding the respondent liable to pay service tax in relation to the activity undertaken by it during the relevant period, the Tribunal was of the view that the quantum of tax was required to be re-quantified by extending benefit of CENVAT credit on duty of coating material used for epoxy coating as well as credit in respect of other input services as available during the relevant period. In the circumstances, the Tribunal deemed it fit to remand the matter to the Adjudicating Authority for re-quantification of the demand by extending the aforesaid benefits to the respondent.*
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> ***7.*** *In this regard it may be pertinent to note that the Commissioner in paragraph 34 of his order has observed thus :*
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> > *"M/s. PSL have further contended that if the activity undertaken by them is held to be taxable, they would be entitled to Cenvat credit of duty paid- -on-coating material, etc. used in epoxy coating and to avail credit on all input services, however, they have not produced any details or any documents in support of this claim. Therefore, the said benefit cannot be granted to them at this stage. However, M/s. PSL shall produce all documentary evidence in support of his claim before the Jurisdictional Deputy/Assistant Commissioner who shall allow such benefit in accordance with the law in force and only after verifying genuineness of the documents produced by them in this regard." However, contrary to the said observations, in the operative part of the order, the Commissioner has confirmed the entire duty demand. Moreover, as noted by the Tribunal the duty demand was also required to be re-quantified in the context of the submission of the respondent that the services prior to 10-9-04, that is, when clause (v) was inserted in the definition of "business auxiliary services" so as to include 'production of goods on behalf of the client'; were required to be excluded."*
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> ***8.*** *Insofar as the liability of the respondent to pay service tax is concerned it is an admitted position that the liability arose only with effect from 10-9-2004 when clause (v) came to be inserted in the*

definition of "business auxiliary services" so as to include 'production of goods on behalf of the client'. Hence, it cannot be gainsaid that the services rendered prior to the said date were required to be excluded while computing the tax liability. As regards entitlement to the benefit of Cenvat credit duty paid on coating material, etc., used in epoxy coating and to avail credit on all input services, both the Commissioner as well as the Tribunal, have concurrently found as a matter-of fact that the respondent was entitled to the me. In the circumstances, no infirmity is found in the order of the Tribunal in remanding the matter to the original adjudicating authority for re-quantification of the demand by extending the above benefits to the respondent. It may also be noted that though a question has been proposed as to whether the Tribunal was justified in remanding the matter to the original jurisdiction authority for re-quantification of the demand, no ground is taken up in the appeal memo in relation to the said question. All the grounds pertain only to the second question. In the prayer clause also the appellant has challenged the order of the Tribunal only to the extent of the penalty on the respondent.

9. *Insofar as imposition of penalties is concerned, the Tribunal was of the view that the revenue was aware of the activity of epoxy coating being carried out by the respondent, inasmuch as litigation as regards whether the said activity amounted to manufacture or not was going on between the Department and the assessee. That upon inclusion of the said service in the service tax net with effect from 10-9-2004, the revenue never advised the respondent to start paying tax on the said activity. The Tribunal, therefore, found that it cannot be said that there was any suppression or intent on the part of the respondent to evade service tax and accordingly, did not find any reason for imposition of penalty upon the respondent, and set aside the same in terms of Section 80 of the Act.*

10. *Section 80 of the Finance Act, 1994 reads thus :*

> *"**80. Penalty not to be imposed in certain cases***
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> *Notwithstanding anything contained in the provisions of section 76, section 77 or section 78, no penalty shall be imposable on the assessee for any failure referred to in the said provisions, if the assessee proves that there was reasonable cause for the said failure"*
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> *Section 76 provides for penalty for failure to pay service tax. Section 77 provides for contravention of Rules and provisions of the Act, for which no penalty is specified elsewhere, whereas section 78 provides for penalty for suppressing value of taxable services.*

11. *From the facts noted above, it is apparent that the revenue was fully aware of the activities carried on by the respondent. In the circumstances, as rightly held by the Tribunal, though according to the revenue the said activities were taxable as "Business auxiliary services", the revenue never advised the respondent to start paying tax on the said activity. That considering the fact that the revenue was aware of the respondent's activities, it cannot be said that there was any suppression, misstatement or intent on the part of the respondent to evade service tax. Besides, the facts of the case indicate that there was a bona fide litigation going on as regards the nature of the activity carried on by the respondent. As to whether the activity carried on the by respondent would amount to production so as to be covered under the category of "Business*

> *Auxiliary Services" was a debatable issue. In the circumstances, it cannot be said that the assessee has not proved that there was reasonable cause for the failure referred to in the provisions of Section 76, Section 77 or Section 78 of the Act. The Tribunal was, therefore, justified in setting aside the penalty imposed under Section 80 of the Finance Act, 1994.*
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> ***12.*** *In the light of the aforesaid discussion, the impugned order of the Tribunal does not suffer from any legal infirmity so as to warrant interference. In the circumstances no question as proposed or otherwise, much less any substantial question of law can be stated to arise out of the impugned order of the Tribunal. The appeal is, accordingly dismissed, with no order as to costs."*

5. The facts in the instant case are similar. Relying on the aforesaid decision of Hon'ble High Court, while demand of service tax and interest is upheld, the penalties imposed under Section 76, 77 and 78 are set aside invoking Section 80 of the Finance Act, 1994. Appeal is partly allowed in above terms.

(Pronounced in the open court on 27.02.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha