IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL

WEST ZONAL BENCH AT MUMBAI

APPEAL NO: ST/170/2008

[Arising out of Order-in-Original No: 12/ST/2008/C dated 29/04/2008 passed by the Commissioner of Customs & Central Excise, Nagpur.]

For approval and signature:

Hon'ble Shri P.R. Chandrasekharan, Member (Technical)

Hon'ble Shri Anil Choudhary, Member (Judicial)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No

2. Whether it should be released under Rule 27 of CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : Yes

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : Yes

Avtar & Company — Appellant

Vs

Commissioner of Central Excise, Nagpur — Respondent

Appearance:

Shri S.S. Gupta, Chartered Accountant for the appellant

Shri V.K. Agarwal, Additional Commissioner (AR) for the respondent

CORAM:

Hon'ble Shri P.R. Chandrasekharan, Member (Technical)

Hon'ble Shri Anil Choudhary, Member (Judicial)

Date of hearing: 15/01/2014

Date of decision: 15/01/2014

ORDER NO: _____

Per: P.R. Chandrasekharan:

The appeal is directed against Order-in-Original No: 12/ST/2008/C dated 29/04/2008 passed by the Commissioner of Customs & Central Excise, Nagpur.

2. Vide the impugned order the learned adjudicating authority has confirmed a service tax demand of ` 1,64,23,993/- along with applicable interest; appropriated an amount of ` 1,36,78,477/- paid by the appellant under protest; imposed penalties on the appellant under the provisions of Sections 76 and 77 of the Finance Act, 1994, and also an equivalent amount of penalty under Section 78 of the Finance Act by classifying the activity undertaken by the appellant under the category of Site formation and clearance, excavation and earthmoving and demolition service as defined in Section 65(97a) read with Section 65(105)(zzza) of the Finance Act, 1994. Aggrieved of the same, the appellant is before us.

3. The learned consultant for the appellant submits that as per the work orders given by M/s. Western Coalfields to the appellant, the activity undertaken by them included removal of all materials in all kinds of strata with its drilling, excavation, loading, transport and dumping, spreading and dozing at specified places as per instructions of the client. However, blasting, lighting and pumping were required to be done by the service recipient. The appellant removed all the materials arising out of these processes and transported and dumped them at specific places. It is his contention that the aforesaid activity would not come within the purview of site formation and clearance, excavation and earth moving and demolition services. As a bundle of activities has been undertaken by the appellant, it is the transportation which is the most predominant activity. Consequently, it is his contention that the impugned demand is not sustainable. However, he fairly concedes that effective from September, 2006 onwards, the service recipient has been reimbursing the service tax on the very same activity and they have been discharging service tax on the same activity under the category of Site formation and clearance, excavation and earthmoving and demolition service and there is no dispute in this regard. The present demand pertains to the period prior to September, 2006 i.e., 16/06/2005 to 24/09/2006. He also submits that the appellant could not discharge service tax liability inasmuch as the recipient of the service, M/s. Western Coalfields Ltd., did not reimburse them the service tax sought to be

reimbursed by the appellant and hence there was a delay on the part of the appellant in discharging the tax liability.

3.1. He also contends that the imposition of equivalent amount of penalty under Section 78 is unsustainable in law inasmuch as the non-payment/delayed payment of service tax was purely on account of non-reimbursement of the service tax amount by the recipient and, therefore, the said penalty should be waived. He also relies on the decision of this Tribunal in the cash of Shri Ganta Ramanaiah Naidu vs. Commissioner of Central Excise 2011-TIOL-76-CESTAT-BANG where in similar circumstances, this Tribunal set aside the penalties imposed by invoking the provisions of Section 80 of the Finance Act, 1994 and therefore, the same be followed in the present case also.

4. The learned Additional Commissioner (AR) appearing for the Revenue, on the other hand, rebutted these contentions. He submits that the appellant did not obtain any registration, nor did he file any returns and, therefore, it is a case of suppression of facts on the part of the appellant that led to invoking the extended period of time for confirmation of service tax demand. Once the extended period of time has been rightly invoked, the question of invoking Section 80 would not arise at all as the appellant did not prove that there was a reasonable case for the failure to pay the service tax. He further contends that even after the matter was clarified by the Board vide a circular dated 12/11/2007, the appellant did not discharge the balance service tax liability nor did they discharge the interest liability. In these circumstances, it is his contention that the conduct of the appellant is that of defiance and hence, the penalty is liable to be imposed on the appellant under the provisions of the Finance Act, 1994. Accordingly, he pleads for upholding the impugned order and dismissal of the appeal.

5. We have carefully considered the submissions made by both the sides. We have perused the work order dated 06/08/2004 wherein a lumpsum amount is given to the appellant for the work carried out, which includes hiring of material handling equipment for removal of all type of material in all kinds of strata with its drilling, excavation, loading, transport and dumping, spreading and dozing at specified places, of the material removed. Section 65(97a) defines Site formation and clearance, excavation and earthmoving and demolition service as:

Site formation and clearance, excavation and earthmoving and demolition includes,-

(i) Drilling, boring and core extraction services for construction, geophysical, geological or similar purposes; or

(ii) Soil stabilization; or

(iii) Horizontal drilling for the passage of cables or drain pipes; or

(iv) Land reclamation work; or

(v) Contaminated top soil stripping work; or

(vi) Demolition and wrecking of building, structure or road, but does not include such services provided in relation to agriculture, irrigation, watershed development and drilling, digging, repairing, renovating or restoring of water sources or water bodies.

5.1. From the above definition, the appellant's activity of drilling, excavation, etc. falls clearly within the scope of taxable service as defined in law. The very fact that the appellant has been discharging service tax liability since September, 2006 under the very same category also shows that the contention of falling outside the purview of service tax liability has been made only as a matter of convenience and not out of any conviction. Therefore, we uphold the classification of service under "Site formation and clearance, excavation and earthmoving and demolition service" as defined in law. Consequently, the appellant is liable to discharge service tax liability on the value received for the services rendered.

5.2. There is no evidence before us to show that transportation activity was the predominant activity, nor any attempt has been made by the appellant as to the amount received in respect of transportation activity or that transportation was predominant activity and the other activities undertaken by the appellant were ancillary to transportation. In the absence of any evidence in this regard, we are unable to accept the contention of the appellant that they are not liable to discharge service tax liability on the aforesaid activity. Accordingly, we uphold the service tax demand of ` 1,64,23,993/- confirmed in the impugned order. Once the liability to service tax is confirmed, liability to pay interest is automatic and consequential and accordingly confirmation of interest on the above demand is also sustainable in view of the provisions of Section 75 of the Finance Act, 1994.

5.3. As regards the penalties imposed on the appellant, they have been imposed under the provisions of Sections 76, 77 and 78 of the Finance Act, 1994. Penalty under Section 76 is attracted for delay or default in payment of service tax. There is no mens rea required to be proved for the imposition of the said penalty. The Hon'ble High Court Kerala in the case of Assistant Commissioner of Central Excise vs. Krishna Poduval (2005) 199 CTR Ker 581 had held that penalty under Section 76 is imposable for the mere default in payment of service tax and no mens rea is required to be proved. Penalty under Section 78 would also be imposable in addition to the penalty under Section 76, if the five elements required for such imposition is present in any transaction. Therefore, the appellant have no case for waiver of penalty under Section 76. As regards, the penalty under Section 77 it is for violation of the provisions of the statute. The appellant had not obtained any registration nor did they discharge the statutory obligation or the service tax liability under Chapter V of the Finance Act, 1994 or the Service Tax Rules. Therefore, penalty of ` 1,000/- under Section 77 is fully justified. Coming to the penalty under Section 78 of the act, which provides for imposition of penalty equal to the amount of service tax confirmed, in the present case, it is a fact that the appellant did not obtain any registration nor did they file any statutory returns. Neither the appellant has followed any of the statutory provisions. In the absence of compliance to any of the provisions of law, contravention of the law and suppression of facts stand fully established. The only contention made by the appellant is that they did not discharge the service tax liability because the service-recipient did not reimburse the same to them and the service-recipient was in correspondence with the Government of India in this regard. Service tax liability is not dependent whether the service recipient makes the payment of service tax or not. The taxable event is the rendering of service and liability has to be discharged on receipt of consideration. In the present case, it is not in dispute that the appellant had rendered the service and received consideration for rendering of such service. Merely because the service recipient did not pay the service tax liability initially, that would not take away/obliterate the liability on the service provider to discharge the tax. If this plea is accepted, it would make the taxable event as receipt of service tax from the recipient of the service which is not the law. The law envisages payment of service tax on rendering of taxable service and it has nothing to do with the receipt of service tax from the service recipient. Therefore, this plea of the appellant that the service-recipient did not reimburse service tax and hence the appellant did not pay service tax is not acceptable or satisfactory explanation. Accordingly, we do not find any merit in the contention of the appellant that the appellant is not liable to penalty under Section 78.

6. In sum, we do not find any merit in the appeal and accordingly we dismiss the same.

(Dictated in Court)

(Anil Choudhary) (P.R. Chandrasekharan)

Member (Judicial) Member (Technical)