(2021) 08 CESTAT CK 0077

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 40328 Of 2017, 41096 Of 2019

K. Balakrishnan And Anr. APPELLANT

Vs

Commissioner Of GST And Central Excise RESPONDENT

Date of Decision : 26-08-2021

Acts Referred:

Citation : (2021) 08 CESTAT CK 0077

Hon'ble Judges : Sulekha Beevi C.S., J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Partly Allowed

Judgement

1. The issue involved in these appeals being the same, they are heard together and are disposed by this common order.

2. The appellants were issued Show Cause Notice demanding service tax under the category of 'Manpower Supply Service' provided to M/s. Tractors and Farm Equipments Ltd. (TAFE) as per the agreement entered into by them with TAFE. After due process of law, the original authority confirmed the demand along with interest and imposed penalty. Aggrieved by such order, the appellants filed appeal before Commissioner (Appeals) who upheld the same Hence these appeals before the Tribunal.

3. At the time of hearing, the ld. Counsel Shri N. Viswanathan submitted that Show Cause Notice is issued invoking extended period. In Appeal No. ST/40328/2017, the Show Cause Notice dated 20.10.2014 is issued for the period April 2009 to March 2013. In Appeal No. ST/41096/2019, the Show Cause Notice dated 7.12.2016 is issued covering the period from 2011 - 12 to 2014 - 15. For the period prior to 2012, the issue stands covered by the decision of the Tribunal vide Final Order No. 40359 to 40367/2019 dated 19.2.2019 wherein the Tribunal has held the issue in favour of the appellant. After the period 1.7.2012, the appellant is not contesting the liability to pay service tax. The appellant had paid the tax. However, this contention has not been considered properly by the

authorities below. He prayed that for the period after 2012 the matter may be remanded to the original authority to examine whether the appellant has discharged the service tax on the impugned services and also to grant the cum-tax benefit.

4. The ld. AR Shri Arul C. Durairaj appeared for the department and supported the findings in the impugned order.

5. Heard both sides.

6. From the submissions, it is seen that for the period prior to 2012, the issue stands covered in favour of the appellant wherein the Tribunal has held that as per definition of Manpower Supply Services, the demand cannot sustain for the job works / contract works done by the appellant for TAFE. The relevant portion of the final order passed by the Tribunal is reproduced as under:-

6. Heard both sides. The issue is whether the activity of the appellant would fall within the category of Man Power Recruitment or Supply Agency Service. We have perused the agreement placed before us in the case of Shri R.Athinarayanan. The relevant paragraphs are reproduced as under :

"1. The Contractor agrees to execute, fulfil and discharge the work and obligations hereinafter provided in the manner herein after agreed to the entire satisfaction of the management of the Company.

2. The Contractor will execute and efficiently handle the work entrusted to him in accordance with the specification as having been correctly executed and efficiently handed until it is approved by the Company.

3. In case the jobs entrusted / assigned to the Contractor are not satisfactory or not in accordance with the specifications or samples given by the Company, the Contractor shall be liable to change the same and in default whereof the Contractor shall compensate to the Company or the customer, as the case may be.

... ...

7. If in case of any default by the CONTRACTOR to carry out the requirement of the condition referred to in clause 6, supra, the CONTRACTOR will indemnify the COMPANY from liability to pay any compensation to the accidentee employees on this account.

... .

11. The Company will have privity of contract with the Contractor only and will give instructions to him and will have nothing to do or be concerned with the conditions of employment of the workers working for the Contractor.

12. The Company will not retain any control, supervision or the manner of the discharge, dismissal or retrenchment or re- 6 Appeal Nos.ST/40570-40575, 40577,40996,40997/2013 employment of the workers engaged / employed by

the Contractor.

...

14. The Contractor will obtain license under the Contract Labour (Regulation and Abolition) Act according to the number of workers engaged by him by depositing the fees and complying with the formalities. He will also seek the renewal of the contract at or before the expiry of the license."

On perusal of the preamble of the agreement itself it is seen that appellant is an independent contractor appointed for executing work that are entrusted to him by TAFE. So also, at clause 3 as well as clause 7, it is stipulated that appellant shall be responsible for the defect in executing the works. Appellant executes the works along with other workers and merely because he has engaged other workers in executing the work, it cannot be said that he is the supplier of man power. In clause 11 of the agreement, it is stated that the company will have privity of contract with the contractor only and will give instructions only to the appellant/contractor and has nothing to do with the conditions of employment of the workers who work with appellant. Reliance placed by the department in clause 14, in our view, is misconceived. It can be seen that while the workers are engaged to work within the manufacturing activity premises they have to abide by certain labour legislations. Merely taking such licence or abiding by such labour law, it cannot be said that the contract for executing works within the manufacturing activity would be supply of man power. The argument of Ld. AR is that original authority has observed that the agreement is tailor-made for specific purpose, however we find that no evidence has been brought forth by the department to prove that the agreement per se was not followed in its letter and spirit or for that matter, there is no evidence that has been unearthed by the 7 Appeal Nos.ST/40570-40575, 40577,40996,40997/2013 department contrary to the piece rate payment being made to the appellants and that payments were not for man hour or per persons supplied. There being so, the conclusions that have been arrived by lower authorities can at best be termed as presumptive without any evidential or legal basis. The decision relied by Ld. AR is not on facts. The decision relied upon by the Ld. Counsel for appellants especially that of the decision in the case of Bhagyashree Enterprises (supra) covers the issue under consideration. Following the same, we are of the considered view that demand cannot sustain. Impugned orders are set aside. Appeals are allowed with consequential benefits, if any, as per law."

7. Following the same, we are of the view that the demand prior to 2012 cannot sustain and requires to be set aside which we hereby do.

8. The ld. Counsel has submitted that they are not contesting the liability after 2012. It is also argued by him that they have discharged the service tax liability and the matter may be remanded to verify the same and also to look into the issue of cum-tax benefit. On perusal of the impugned order, it is seen that though the appellant has raised this contention, the same has not been

considered by the authorities below. The matter with regard to the period after 2012 is remanded to the adjudicating authority who shall determine afresh the duty demand for the period after 1.7.2012 and examine whether service tax on these services has been discharged. The cum-tax benefit contention shall also be looked into. With regard to the penalty imposed after the period 2012, we are of the opinion that being an interpretational issue the appellant cannot be saddled with the guilt of intention to evade tax. Further, there is no allegation or finding of any positive act on the part of the appellant of willful suppression to evade service tax. On such score, imposition of penalty is unwarranted and requires to be set aside which we hereby do.

9. The demand, interest and penalties for the period prior to 1.7.2012 is set aside. For the period after 1.7.2012 the matter is remanded to the adjudicating authority who shall redetermine the duty as directed above. The penalties for the period after 1.7.2012 is also set aside. The impugned orders are modified in above terms. The appeals are partly allowed and partly remanded.

(Pronounced in open court on 26.8.2021)