(2025) 01 CESTAT CK 1545

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Service Tax Appeal No. 50804 of 2020

Madhya Pradesh Poorva Kshetra Vidyut Vitaran Co. Ltd. @APPELLANT
@Hash Commissioner, Central Excise & CGST, Jabalpur @RESPONDENT

Date of Decision : 01-01-2025

Acts Referred:
Finance Act, 1994 — Section 65(B)(44), 66EE, 67, 73, 74
Central Excise Act, 1944 — Section 11AC
Indian Contract Act, 1872 — Section 2(b)

Citation : (2025) 01 CESTAT CK 1545

Hon'ble Judges : Dr. Rachna Gupta, Member (J);Hemambika R. Priya, Member (T)

Bench : Division Bench

Advocate : Rajeev Agarwal, Rajeev Kapoor, Aejaz Ahmed

Final Decision : Allowed

Judgement

Rachna Gupta, J

1. The present appeal has been filed to assail the order-in-original No. 06/2019 dated 28.2.2020. The facts relevant for the present adjudication, in brief, are as follows:

1.1 M/s Madhya Pradesh Poorva Kshetra Vidyut Vitaran Co. Ltd., the appellant is a State Government company registered with the Service Tax department. During the course of the scrutiny of appellant’s record i.e. ST-3 return for the period from October March 2015-16 as well as the challans showing payment of service tax, it was observed that:

(i) Challan for November 2015 pertaining to a different registration number was utilized for payment of service tax by the appellant. The challan was generated in favour of Regional Accounts Officer, Rao Sagar but appellant utilized the same resulting into short payment of service tax amounting to Rs. 5,68,451/-:-

(ii) The service tax was paid @ 12.36% on Works Contract Service under Reverse Charge Mechanism despite that it was revised to 14% with effect from 1.6.2015.

Hence an amount of Rs. 42,188/- was short paid by the appellant;

(iii) Swachha Bharat Cess (SBC) was not been paid/short paid @ 0.5% of the taxable value under Works Contract Service under Reverse Charge Mechanism resulting in short payment of SBC amounting to Rs. 22,344/-;

(iv) The appellant had collected amount of penalties from the contractors/ suppliers. The amount is alleged to have been collected for tolerating the act of the contractors which is a 'declared service' in terms of Section 66E(e) of the Finance Act, 1994. Accordingly, the service tax amounting to Rs. 2,10,11,500/- is proposed to be recovered on the amount of penalties collected by the appellant from 2014-2015 to June 2017-2018.

2. Based on these observations and respective allegations four of the above mentioned amounts were proposed to be recovered along with the interest and the penalties vide Show Cause Notice No. 03/2019-20 dated 9.10.2019. The proposal has been confirmed vide the impugned order. Being aggrieved, the appellant is before this Tribunal.

3. We have heard learned counsel for the appellant and learned Departmental Representatives for the Revenue.

4. Learned counsel for the appellant mentioned that the demand has been confirmed on four different issues. It is mentioned that with respect to three issues of alleged short payment of amount of Rs. 5,68,451/-, Rs. 42,188/- and short payment of SBC amounting to Rs. 22,244/-, the amount of service tax has already been paid. However, it has wrongly been deposited in the name of appellant's another unit at Rao Sagar instead of it being deposited in appellant's head office at Jabalpur's account. Learned counsel has impressed upon that there is sufficient evidence that Rao Sagar unit of appellant has not utilized the payment through the challan in their service tax returns or the elsewhere. Hence the tax stands duly deposited for the amount in question and the appellant cannot be asked to deposit the same amount of tax twice.

4.1 The demand on three of these issues is also objected as being barred by time. It is submitted the demand has been raised based upon the appellant's own documents verified during the audit. No additional evidence is produced by the department. When all facts have taken from the appellant's document, the allegations of suppression and fraud are absolutely not sustainable are rather absolutely wrong. The decision of this Tribunal in the case of M/s Vandana Global Ltd. Vs. CCE, Raipur decided vide Final Order No. 51135 of 2022 dated 02.12.2022 in Excise Appeal No. 53026 of 2018 has been relied upon where it has been held that the authorities cannot contend that "had the audit not being the non-payment of service tax would have remained undetected." The authorities are required to undertake audit and scrutiny within the prescribed normal period of limitation. Show cause notice is, therefore, alleged to be barred by time. The order under challenge based on the said show cause notice is, therefore, prayed to be set aside. With these submissions the appeal is prayed to be allowed.

5. While rebutting the submissions made on behalf of appellant, at the outset, the findings of order in original are reiterated. It is submitted by learned Departmental Representative that service tax paid against the service tax registration under a different registration but utilized for the payment of service tax against the liability of another registration, irrespective the two are sister concerns, but the practice is not legally permissible as there is no provision for the adjustment of the amount paid for a different assessee. The CBEC Circular No. 58/7/2003-ST dated 20 May 2003 has rightly been differentiated by the adjudicating authority below. As per the said circular the payment made in the wrong accounting code can be adjusted. However, in the present case the payment is made in the name of the different assessee. Hence there is no infirmity in the findings while confirming the demand of service tax of Rs. 5,68,451/-. The short payment of Rs. 42,188/- and of SBC amounting to Rs. 22,344/- is purely on the basis of payment not being made as per the prescribed rate of duty. Hence there is no infirmity in those findings. With respect to the demand of service tax of Rs. 2,10,11,500/-, the findings in the order under challenge have purely been relied upon. Learned Departmental Representative further submitted since the appellant has short paid the payment resulting into tax evasion this observation is sufficient proof of alleged suppression. Hence the extended period has rightly been invoked. With these submissions, the appeal is prayed to be dismissed.

6. In the light of the entire above submissions and perusing the appeal as well as the annexed records, we observe that the issues which need to be adjudicated with respective submission of appellant are as follows:

S.No.

Issue Involved

Submissions on behalf of appellant

1.

Payment of service tax of Rs. 5,68,451/- for November, 2015 through challan mentioning Service Tax Registration of Regional Unit belonging to Appellant

Demand completely time barred

2.

Short payment of service tax of Rs. 42,188/- for the period from June 2015 to September 2015.

Tax already paid. Demand completely time barred

3.

Short payment of Swacch Bharat Cess (SBC) of Rs. 22,344/- from November

2015 to March 2016.

Tax already paid. Demand Completely time-barred.

4.

Service Tax of Rs. 2,10,11,500/- on Liquidated Damages/Penalty for the period April 2014 to June 2017.

Issue already decided in favour in Appellant?s other Units cases

7. As submitted that the payment vis-à-vis issue No. (1), (2) and (3) stands already paid. Hence present is not the case of evasion of payment of tax. It is also clearly apparent that those demands pertains to the year 2015-2016 and were proposed to be recovered vide show cause notice dated 9.10.2019. The entire period under three of these issues is therefore, beyond the normal period prescribed under Section 73 of Finance Act, 1994 / 11AC of Central Excise Act, 1944. Both these observations and that there is no other evidence except appellant's own document to prove the alleged act of suppression on part of appellant, we hold that the aforesaid provisions have wrongly been invoked while issuing the show cause notice. Therefore, the show cause notice is held to be barred by them. We draw our support from the decision of Hon'ble Apex Court in the case titled as CCE Vs. Chemphar Drugs & Liniments - 1989 (40) ELT 276 (SC) – Extended period is applicable only when something positive other than mere inaction or failure on the part of the manufacture is proved. Conscious and deliberate withholding of the information manufacturer is necessary for invoking the extended period. If the department had full knowledge or the manufacturer had reasonable belief that he is not required to give a particular information, only normal period of limitation i.e. one year is applicable. Resultantly, the demand of these issues is held purely barred by period of limitation. The demand on three of the issues (i), (ii) and (iii) as mentioned above is liable to be set aside.

8. Coming to the demand of service tax amounting to Rs. 2,10,11,500/- alleging it to be an amount received for rendering declared services defined under Section 66E, we foremost peruse the provision, it reads as follows:

"Declared services.

66E. The following shall constitute declared services, namely:

(a) renting of Immovable property:

(b) construction of a complex, building, civil structure.

(c) temporary transfer or permitting the use or enjoyment.

(d) development, design, programming, customization

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act:

(f) transfer of goods by way of hiring, leasing

(g) activities in relation to delivery of goods on hire purchase or any

(h) service portion in the execution.

(i) service portion in an execution

(j) assignment by the government of the right."

9. It is clear from the perusal of clause (e) of the said section that the said clause intent to levy of service tax only when there is an agreement entered into between the parties in terms of which the promisee agrees to refrain himself from an act or to tolerate a situation or to do an act in return of a consideration from the promiseer. However, in the present case, subject matter of agreement is to supply various goods or services or both these stipulated period. There is no agreement by the other party to not to supply the goods or to not to render the services nor there can be the intention of the other parties to get penalized.

10. Declared service, otherwise, has first to be a service which in terms of Section 65(B)(44) of Finance Act, 1944 is any activity carried by a person for another for consideration. The term consideration is defined in explanation (a) to Section 67 of the Act to mean any amount that is payable for the taxable service. "Section 2(b) of Indian Contract Act, 1872 also defines 'consideration' as when at the desire of the promisor the promise or any other person has done or abstained from doing, or does or abstains from doing or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise." In the present case there is no agreement nor any intention to breach the terms of the agreement. The appellant herein has simply agreed to be compensated by deducting charges from the bills for any loss or admitted cause to them from the breach of contract on part of the contractor. Resultantly, the recovery of liquidated damages/penalty from the other parties cannot be called as service and the amount so received cannot be called as the amount of consideration. The activity of receiving such an amount of penalty is wrongly alleged to be an amount towards rendering the declared services. The act of receiving such an amount/liquidated damages is otherwise covered under Section 73 and 74 of the Contract Act. The issue is otherwise no more res integra. We rely upon the decision in the case of South Eastern Coalfields Ltd. Vs. Commissioner of C.Ex. & ST, Raipur reported in 2021 (55) GSTL 549 (Tri.-Del.)

11. Further, it has been observed that in appellant's own case the amount of liquidated damages recovered being a penalty imposed on contractor/suppliers for failing to supply goods or executing the work within the stipulated time schedule and for the loss suffered on account of breach of contract of purchase or sale. The demand was set aside by the department itself by Commissioner (Appeals) vide an order August 2, 2019. The appeal against the said order has been dismissed by this Tribunal vide Final Order No. 50610 of 2022 in Service

Tax Appeal No. 50824 of 2020. We have no reason to differ from the said findings. Hence we hold that on demand even on issue No. (4) has been wrongly confirmed and the same is also liable to be set aside. However, learned counsel has also stated at bar that the appellant shall not be applying for the refund of the amount deposited vis-à-vis issue No. (i), (ii) and (iii), no order for any consequential benefit to appellant is announced.

11. In view of entire above discussion, the order under challenge confirming four of the demand and holding that the extended period is invocable is hereby set aside. Consequent thereto, the appeal is hereby allowed.

(Pronounced in open Court on 01.01.2025)

