(2015) 06 CESTAT CK 0005

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeals No. 388 Of 2009

M/s. M L Agrawal Construction — APPELLANT

Vs

Commissioner Of Customs And Central Excise, Indore (MP) — RESPONDENT

Date of Decision : 12-06-2015

Acts Referred:

Finance Act, 1994 — Section 76, 78, 84

Citation : (2015) 06 CESTAT CK 0005

Hon'ble Judges : Ashok Jindal, J;R. K. Singh, Technical Member

Bench : Division Bench

Advocate : Abhishek Jaju, B B Sharma

Final Decision : Allowed

Judgement

1. The appellant is in appeal against the impugned order demanding service tax from the appellant under the category of repair and maintenance

service.

2. The facts of the case are that initially the show cause notice dated 30.4.2007 was issued to the appellant to demand service tax under the category

of construction services for the period 2004 to March, 2006.Â The said show cause notice was adjudicated by the adjudicated authority and demand

of service tax under the category of construction services was confirmed by allowing abatement of 67% to the appellant.Â Â Â Thereafter, the

Commissioner of Service Tax issued revised notice under section 84 of Finance Act, 1994 on the ground that adjudicating authority has made an error

by allowing 67% abatement to the appellant as appellant is engaged in the activity of repair and maintenance service.Â The said show cause notice

was adjudicated and demand of service tax under the category of repair and maintenance service has been confirmed against the appellant.

Aggrieved from the said order appellant is before us.

3. Learned Advocate appearing on behalf of the appellant submits that in this case initially service tax is demanded from the appellant under the

category of construction services. Same was adjudicated and appellant has admitted their liability under construction service and paid service tax by

claiming the abatement of 67% from the gross value of service provided. Later on, the notice was issued to them under section 84 of Finance Act,

1994 to change the classification of the service which was not permissible at this stage. Therefore, impugned order is in violation of law. Therefore,

same is to be set aside. To support this contention, he relied on the decision of Brij Mohan Surinder Kumar vs. CCE, Ludhiana [2012 (25) STR 58

(Tri-Del)]; and CC Mumbai vs. Toyo Engineering India Ltd. [2006 (201 ELT 513 (SC)] to say that department cannot travel beyond the issue involved

in the show cause notice.

4. On the other hand, learned AR submits that there was an error in the adjudication order wherein the adjudicating authority allowed 67% abatement

to the appellant as appellant was engaged in the activity of repair and maintenance. Therefore, they are not entitled to claim the abatement.

Consequently, the learned Commissioner found the adjudication order is not correct and as he was having the powers under section 84 of the Act,

rightly classified the activity of appellant under the category of repair and maintenance service. Therefore, impugned order is to be upheld.

5. Heard the parties. Considered the submissions and examined the records.

6. We find that the initially the show cause notice was issued to the appellant to demand service tax under the category of construction services which

was demanded and demand of service tax was confirmed under the said category against the appellant which appellant has not disputed. Under

section 84 of the Act, learned Commissioner revised the show cause notice to change the category of the service provided by the appellant which is

not permissible at this stage. Same view has been held by this Tribunal in the case of Brij Mohan Surinder Kumar (supra) wherein this Tribunal has

observed as under:

â??7. We have found that the impugned order was passed raising the service tax demand of Rs. 82,251/- and penalty under Sections 76 &

78 of the Act was also imposed. We have perused the show cause notice referred

to above issued for adjudication. Show cause notice listed

different services provided by the appellant in second para thereof. We have also examined contents of annexure appearing at page 29 of

appeal folder. That page only indicates about only one service provided and most specifically at great length explains to have been carried

out for repair and maintenance service, that too of immovable property.

8. The Revisionary authority proceeded on a different premises for issuing show cause notice asking the appellant to show the reason why

its services should not fall under the category of commercial or industrial construction service. This is clear from para 9 of show cause

notice for revision under Section 84 of the Act.

9. The object of Section 84 being only to review an order causing prejudice to the interest of Revenue, that Section does not confer original

jurisdiction at all. When the original jurisdiction was exercised issuing show cause notice on a different premises the revisionary authority

had no power to review the show cause notice itself usurping the power of the original authority. Revisionary power is only exercisable

when an order causing prejudice to interest of Revenue comes up. Matter arising on the basis of SCN only can be reviewed in revisionary

jurisdiction.â??

7. Therefore, we hold that learned Commissioner has travelled beyond the scope of show cause notice by revising show cause notice which is not

permissible in law. Same view has been taken b Apex Court in the case of CC, Mumbai vs. Toyo Engineering India Ltd. (supra) wherein Honâ??ble

Apex Court has observed as under:

16. Learned counsel for the Revenue tried to raise some of the submissions which were not allowed to be raised by the Tribunal before us,

as well. We agree with the Tribunal that the revenue could not be allowed to raise these submissions for the first time in the second appeal

before the Tribunal. Neither adjudicating authority nor the appellate authority had denied the facility of the project import to the

respondent on any of these grounds. These grounds did not find mention in the show cause notice as well. The Department cannot be travel

beyond the show cause notice. Even in the grounds of appeals these points have not been taken.

8. As the learned Commissioner has travelled beyond the scope of issue of show cause notice, therefore, we do not find any merit in the impugned

order, same is set aside. Appeal is allowed with consequential relief, if any.

(Dictated and pronounced in the open court)