(2024) 03 CESTAT CK 0007

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No.3233 Of 2012

??M/S Mehta Construction Company APPELLANT

Vs

Commissioner Of Central Excise, Panchkula RESPONDENT

Date of Decision : 05-03-2024

Acts Referred:
Central Excise Act, 1944 — Section 11A, 11A(1), 28

Citation : (2024) 03 CESTAT CK 0007

Hon'ble Judges : S. S. Garg, Member (J);P. Anjani Kumar, Member (T)

Bench : Division Bench

Advocate : Naveen Bindal, Aneesh Dewan

Final Decision : Allowed

Judgement

P. Anjani Kumar, Member (T)

1. M/s Mehta Construction Company, the appellants, assails the Order-in-Original dated 24.07.2012 passed by Commissioner of Central Excise, Panchkula.

2. The appellants are engaged in providing various taxable services viz. ?Commercial or Industrial Construction Service?, ?Management, Maintenance or Repair Services? and ?Supply of Tangible Goods Service?; on conducting the investigation and verifying the records of the appellants, a show-cause notice dated 11.04.2012 was issued to the appellants demanding of recovery of service tax of Rs.3,38,92,974/- along with interest and penalty; the show-cause notice was adjudicated vide the impugned order vide which learned Commissioner dropped the demand on account of ?Management, Maintenance or Repair Services? and confirmed a demand of Rs.8,54,376/- (Rs.6,37,273 on account of ?Commercial or Industrial Construction Service? and Rs.4,26,335/- on account of ?Supply of Tangible Goods Service?. Hence, this appeal.

3. Shri Naveen Bindal, learned Counsel for the appellant, submits that the demand on ?Commercial or Industrial Construction Service? cannot be sustained as the service was a composite contract falling under the ?Works Contract

Service?; the fact that, it was a composite service, was accepted by the Adjudicating Authority in view of the abatement of 67% granted to the appellants; appellant provided services of construction with the material therefore it cannot be taxed under ?Commercial or Industrial Construction Service?. Regarding the demand in respect of ?Supply of Tangible Goods Service?, learned Counsel submits that they have supplied some machinery wherein not only the possession but effective control was also transferred, in spite of the fact that the appellants provided personnel to operate such machines.

4. Learned Counsel further submits that extended period has been invoked merely on the basis that service tax has not been paid and periodical Returns were not filed; the appellant was under the bona fide belief that service tax is not payable as the services rendered were majorly towards the construction of roads; even the machinery supplied to M/s L&T, were used in the construction of roads which was exempt; the impugned show-cause notice was based on accounts maintained by the appellants and 97.5% of the demand was dropped by the Commissioner himself; therefore, extended period cannot be invoked. He relies on the following cases:

? HP Singh Chadha ? CESTAT Final Order No.60009-60011/2024.

? Real Value Promoters Pvt. Ltd. ? 2018-TIOL-2867- CESTAT-MAD.

? Express Engineers & Spares Pvt. Ltd. -2022 (64) GSTL 112 (Tri. All.)

? Uniworth Textiles Ltd. ? 2013 (288) ELT 161 (SC).

? Hindalco Industries Ltd. ? 2003 (161) ELT 346 (Tri. Del.).

5. Shri Aneesh Dewan, learned Authorized Representative for the Department reiterates the findings of the impugned order and submits that the appellants have themselves submitted in reply to the show-cause notice that in respect of machinery supplied to M/s L&T, the appellants have also supplied personnel.

6. Heard both sides and perused the records of the case. Regarding the demand in respect of ?Commercial or Industrial Construction

Service?, we find that the issue is settled in favour of the appellants vide Final Order No.60009-60011/2024 dated 08.01.2024 by this very Bench relying on the Hon?ble Apex Court judgment in the case of M/s Larsen & Tubro ? 2015 (39) STR 913 (SC). In respect of demand on ?Supply of Tangible Goods Service?, we find that neither the show- cause notice nor the impugned order records any proof of the possession and effective control of the machinery, supplied by the appellants to M/s L&T, was with the appellant themselves. In the absence of such evidence, demand can be sustained only on the basis of averment on the part of the appellant that they have also supplied the operators of the machinery. It is not coming forth in the impugned order as to whether the appellant was paying the wages to the operators and were having effective control of the goods supplied by them. In the absence of the same, demand cannot be sustained.

7. The fact that the show-cause notice has been issued based on the financial records maintained by the appellants; extended period has been invoked on the grounds that the appellants did not obtain registration; paid the tax as applicable and file the Returns; in addition to this, no other express evidence was put forth to show any mala fide intent on the part of the appellants to evade payment of tax. Under these circumstances, we find that Revenue has not made out any case for invocation of extended period. We find that Hon?ble Supreme Court held in the case of M/s Uniworth Textiles Ltd. (supra) that:

22. We are not persuaded to agree that this observation by the Commissioner, unfounded on any material fact or evidence, points to a finding of collusion or suppression or misstatement. The use of the word ?willful? introduces a mental element and hence, requires looking into the mind of the appellant by gauging its actions, which is an indication of one?s state of mind. Black?s Law Dictionary, Sixth Edition (pp 1599) defines ?willful? in the following manner :-

?Willful. Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass?

An act or omission is ?willfully? done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done??

23. In the present case, from the evidence adduced by the appellant, one will draw an inference of bona fide conduct in favour of the appellant. The appellant laboured under the very doubt which forms the basis of the issue before us and hence, decided to address it to the concerned authority, the Development Commissioner, thus, in a sense offering its activities to assessment. The Development Commissioner answered in favour of the appellant and in its reply, even quoted a letter by the Ministry of Commerce in favour of an exemption the appellant was seeking, which anybody would have found satisfactory. Only on receiving this satisfactory reply did the appellant decide to claim exemption. Even if one were to accept the argument that the Development Commissioner was perhaps not the most suitable repository of the answers to the queries that the appellant laboured under, it does not take away from the bona fide conduct of the appellant. It still reflects the fact that the appellant made efforts in pursuit of adherence to the law rather than its breach.

24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that ?the appellants had not brought anything on record? to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of mala fide lies on the shoulders of the one alleging it. This Court observed in Union of India v. Ashok Kumar &Ors. - (2005) 8 SCC

760 that ?it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand

proof of a high order of credibility.?

25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In Aban Loyd Chiles Offshore Limited and Ors. (supra), this Court made the following observations :

?21. This Court while interpreting Section 11-A of the Central Excise Act in Collector of Central Excise v. H.M.M. Ltd. (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed :

?...Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.?

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held :

...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso....?

(Emphasis supplied)

26. Hence, on account of the fact that the burden of proof of proving mala fide

conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant.

8. In view of the above, we are of the considered opinion that the Revenue has not made out any case for invocation of extended period. Therefore, the demand cannot be sustained on merits and on limitation also. Accordingly, the appeal stands allowed.