(2021) 06 CESTAT CK 0009

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Service Tax Appeal No. 52248 Of 2019

M/s Tridot Engineers APPELLANT

Vs

Commissioner Of Central Excise And Central Goods And Service Tax RESPONDENT

Date of Decision : 18-06-2021

Acts Referred:
Central Excise Act, 1944 — Section 11D

Citation : (2021) 06 CESTAT CK 0009

Hon'ble Judges : Rachna Gupta, J

Bench : Single Bench

Advocate : Alok Kumar Kothari, P. Juneja

Final Decision : Dismissed

Judgement

1. The present appeal is assailed out of Order-in-Appeal No. 202/2019 dated 28.05.2019. The relevant factual matrix for the appeal is that the

appellant is engaged in providing service under the category of construction services in respect of â??Commercial or Industrial Buildingâ? and civil

structures, work contract service and is accordingly registered with the Service Tax Department. The appellant filed refund claim for Rs. 38,62,978/-

alongwith the interest in pursuance of the final order passed by CESTAT, New Delhi bearing No. 55945 â?" 99946/2016 dated 16.12.2016 in the

appeal which was filed against the Order-in-Original No. 38/2011 dated 26.08.2011. The said refund claim was observed to be not admissible to the

appellant. Accordingly, vide show cause notice No. 3560/2017 dated 08.02.17, the claim was proposed to be rejected. While adjudicating the said

show cause notice, the Adjudicating Authority vide Order-in-Original No. 84/2017-18 dated 1704.2018 had sanctioned the refund claim for an amount of Rs. 30,05,791/- in terms of the CESTAT order dated 16.12.2016. However, the refund claim of Rs. 8,57,187/- (Rs. 8,01,765/- + interest of Rs.

55,422/-) was rejected, out of which Rs. 5,06,280/- were ordered to be appropriated in the Government exchequer against the demand of normal

period. In an appeal against this order, Commissioner (Appeals) vide the order under challenge had rejected the appeal holding that the refund has

been rejected on the ground of unjust enrichment. Being still aggrieved, the appellant is before this Tribunal.

2. I have heard Shri Alok Kumar Kothari, learned Advocate for the appellant and Shri P. Juneja, Authorised Representative for the respondent.

3. It is submitted on behalf of learned Counsel for the appellant that initially a show cause notice was served upon the appellant in the year 2010

raising a demand of service tax of more than Rs. 1 crore for the period from 01.10.2004 to 31.03.2009 for the â??Construction of Servicesâ?? being

provided by the appellant. It is submitted that after the Larger Bench decision in Larsen & Toubro case reported at 2015-TIOL-187-SC this Tribunal

confirmed the demand only for the period post 01.06.2007. There is no evidence for unjust enrichment on record based whereupon the refund of Rs.

3,50,907/- has been rejected. The order of said rejection is therefore liable to be set aside also for the reason that amount initially was not paid due to

the prevalent confusion at the relevant time about the tax liability towards construction services, services of erection and installation etc. Also Section

11D was never invoked and as such, cannot be invoked at a later stage. Relying upon the submissions, learned Counsel has prayed that the Order-in-

Appeal of Commissioner (Appeals) may be set aside and the present appeal may be allowed.

4. To rebut the said argument, learned Authorised Representative for the respondent has relied upon the findings of Commissioner (Appeals) given in

para 6 of the order under challenge. It is submitted that the Adjudicating Authority below has appreciated that the appellant failed to submit any

documentary evidence in respect of the service tax paid by them that the same was not collected from the customers/ service recipient. In absence

thereof, the rejection of refund of Rs. 3,50,907/- is impressed by the learned Authorised Representative for the respondent to have been rightly

rejected. Appeal is accordingly prayed to be dismissed.

5. After hearing the parties and on perusal of the record, the considered findings are as follows:

The appellant was initially served with the show cause notice bearing No. 388 dated 22.04.2010 proposing the demand of service tax amounting to

Rs.1,45,40,938/- alongwith interest and the proportionate penalties. The said show cause notice was initially adjudicated by Order-inoriginal No.

38/2011 dated 24.08.2011 vide which the refund claim of Rs.30.05.791/- was rejected, Rs. 8,01,765/- were already deposited by the appellant vide

various challans even prior to the issuance of the show cause notice of April, 2010. After the said decision the appellant deposited the remaining

amount of said confirmed demand i.e. Rs. 30,05,791/- vide various challans. However, this Tribunal vide Final Order No. 55945-55946 dated

16.12.2016 while allowing the appeal had restricted the demand for the normal period post 01.06.2007 and penalties imposed were also set aside. It is

consequent to said order that the refund claim in question was filed by the appellant and the impugned show cause notice dated 08.02.2018 was issued

proposing the rejection thereof. The original Adjudicating Authority rejected the said claim of only for an amount of Rs. 8,01,765/-. The Commissioner

(Appeals) has modified the order while rejecting the refund of Rs. 3,50,907/- on the ground of unjust enrichment.

6. The impugned refund claim was filed pursuant to the order of this Tribunal dated 16.12.2016 vide which the appeal of the assessee / present appeal

was allowed to the extent of non leviability of service tax prior to 01.06.2007 and restricting the demand for normal period post 01.06.2007. The

calculation in the initial order of 2011 dated 26.08.2011 in para 46 thereof was relied upon. The said calculation is perused. It stands clear as follows:-

That the amount of Rs. 8,71,365/- is wholly been confirmed to have been recovered from the appellant by this Tribunal by the order of 16.12.2012.

Apparently and admittedly, an amount of Rs. 38,62,978/- stands already deposited by the appellant. Apparently and admittedly, an amount of Rs.

30,05,791/- has already been sanctioned to the appellant. vide the order under challenge which has been passed pursuant to the decision of this

Tribunal dated 16th December, 2012. However, out of remaining Rs. 8,71,365/- a figure of Rs.5,06,280/- as has been arrived at by Commissioner

(Appeals) in para 3.2 of the order under challenge to be appropriated in the Government exchequer and claim of Rs. 3,50,907/- has been rejected for unjust enrichment to the appellant. But I find that there is no reasoning given, in the order, to arrive at the value of Rs.5.06.280/-. Though the

calculation arrived at in the order dated 26.08.2011 in para 46 thereof was relied upon by this Tribunal in its order dated 16.12.2012. There is no

explanation of the specific documentary evidence which reveal that Rs.3,50,907/- is an unjust enrichment to the appellant.

7. From the above facts, it stands abundantly clear that an amount of Rs.8,01,765/- is the confirmed liability of the appellant in terms of order dated

16.12.2012. The refund to that extent plus interest of Rs. 55,422/- thereupon is therefore liable to be rejected. Accordingly, it is held that the appellant

is not entitled for any refund claim post the sanction of refund of Rs.30,55,791/-.

8. In consequence of the above said finding, the order of Commissioner (Appeals) stands modified to the effect that instead of Rs. 5,06,280/- to

Government exchequer and attributing Rs.3,50,907/- to unjust enrichment, the total refund claim of Rs.8,57,187/- stands rejected. Appeal accordingly

is dismissed. The order under challenge stands modified in terms of the above observations.

(Pronounced on 18.06.2021).