

(2019) 09 CHH CK 0148
In the Chhattisgarh High Court
Case No : Tax Case No. 2 Of 2019

Pawan Engineering Works a proprietor concern	APPELLANT
Vs	
Commissioner Of Custom And Central Excise & Service Tax	RESPONDENT

Date of Decision : 25-09-2019

Acts Referred:

Central Excise Act, 1944 — Section 35G
Finance Act, 1994 — Section 73, 73(1), 76, 78, 80

Citation : (2019) 09 CHH CK 0148

Hon'ble Judges : P.R. Ramachandra Menon, CJ; Parth Prateem Sahu, J

Bench : Division Bench

Advocate : Prafull N. Bharat, Anand Shukla, Maneesh Sharma

Final Decision : Dismissed

Judgement

P. R. Ramachandra Menon, CJ

1. This is an appeal filed under Section 35 G of the Central Excise Act, 1944 (for short, 'the Act'), whereby the challenge raised against the order

passed by the Commissioner (Appeals) Central Excise & Service Tax, Raipur - I (for short, 'the Adjudicating Authority'), came to be dismissed as per

a common order dated 31.01.2013. The points suggested by the Appellant as involving in 'substantial questions of law' are as given below :

i. Whether, in facts and circumstances of the present case the learned Tribunal vide impugned order is correct in not considering submissions /

documents for wrong invocation of jurisdiction ?

ii. Whether, in facts and circumstances of the present case the learned Tribunal is correct in holding that the Commissioner, Central Excise, Raipur

had jurisdiction to initiate proceedings when the work in question was executed in the State of Orissa, Bihar and West Bengal i.e., outside the

geographical limits of Raipur jurisdiction ? iii. Whether, in facts and circumstances of the present case the Appellate Tribunal vide impugned order is

correct in confirming demand of service tax invoking extended period of limitation under proviso to section 73 of the Act ? iv. Whether, in facts and

circumstances of the present case the Appellate Tribunal vide impugned order is correct in confirming recovery of interest U/S 75 of the Act ? v.

Whether, in facts and circumstances of the present case the Appellate Tribunal vide impugned order is correct in confirming imposition of penalties

U/S 76, 77 & 78 of the Act ?

2. The sequence of events is as follows :

(a) The Appellant, admittedly, is engaged in providing services of erection, commissioning and installation to the service recipient M/s. Larsen and

Toubro Limited (M/s. L&T). It is stated that the Appellant had entered into a contract with the Awarder of the work i.e., M/s. L&T for mechanical

fabrication and erection and also for supply of labour for various activities at the site. It is stated that the raw materials for fabrication of the structures

are provided by M/s. L&T and the Appellant's fabrication and erection work as mentioned above consisted of providing common beams, crane girder,

roof, truss purlins etc. which involves making and cutting, fit up, welding as per drawing, specification and structure specified by the Awarder i.e. M/s.

L&T.

(b) The Intelligence Wing of the Central Excise gathered information that the Appellant was providing services as aforesaid without even getting

registered with the Service Tax Department and paying any service tax on the taxable services provided by it, particularly, for the period from

01.10.2006 to 15.12.2011. It was accordingly, that a summons was issued to the Appellant in terms of Section 14 of the Act on 27.01.2012, asking the

proprietor of the concern to appear on 17.02.2012. On the said date, statement of the Appellant was recorded, a copy of which has been produced as

Annexure-A/2. Subsequently, statement of the service recipient (M/s. L&T) was recorded by the authorities of the Excise Department, a copy of

which has been produced as Annexure-A/3. With reference to the materials collected, Annexure- A/4 show-cause notice was issued to the Appellant

on 17.04.2012, referring to the incriminating circumstances and to explain the position. This was responded by the Appellant by submitting Annexure-

A/5 reply, stating that the Appellant was under the bona fide impression that no registration was necessary, primarily, for the reason that the activity

being done by the Appellant was only a 'manufacturing activity' coming within the definition of term 'Manufacture' under Section 2(f) of the relevant

Act. It was also pointed out that, insofar as it was a 'manufacturing activity', no service tax was liable to be paid. That apart, according to the

Appellant, service tax in respect of the entire installation has already been satisfied by the M/s.L&T / service recipient and since service tax is a

'destination oriented' one, collection of the same from the M/s.L&T, to be routed through the Appellant will only be an empty formality. It was also

added that the Appellant had not taken registration, as advised by the M/s.L&T that no such registration was necessary as they were satisfying the

tax. The Appellant also contended that, if for any reason the M/s. L&T had failed to satisfy the tax, the Appellant was ready to satisfy the same.

(c) After considering the reply, the adjudication proceedings were finalized by the Commissioner as per Annexure-A/6 order dated 31.01.2013,

mulcting the liability upon the Appellant to the extent as ordered. Met with the situation, the Appellant preferred Annexure-A/7 appeal to the Customs,

Excise and Service Tax Appellate Tribunal, New Delhi (for short, 'the Tribunal') along with an I.A. for interim stay. The said I.A. came to be finalized

directing the Appellant to deposit full amount covered by the order under challenge; which made the Appellant to feel aggrieved, who approached this

Court by filing Tax Case No. 21 of 2014. The above case was dismissed by this Court as per Annexure-A/8 order dated 19.06.2014, however,

granting a further period of 'six months' to the Appellant to effect the deposit as ordered by the Tribunal. The fact remains that the Appellant could not

satisfy the deposit within time, which made the Tribunal to reject the appeal as per Annexure-A/9 order dated 02.01.2015.

(d) The Appellant sought to challenge Annexure-A/9 by filing Tax Case No. 34 of 2015 before this Court. It was noted by this Court that the appeal

was belated and that the delay was not liable to be condoned. It was accordingly, that interference was declined, the delay petition was dismissed and

as a natural consequence, the appeal as well. This was taken up before the Apex Court by filing Special Leave Petition (Civil) No.32961/2015,

wherein Annexure-A/11 order was passed by the Apex Court on 04.01.2016. It was brought to the notice of the Apex Court that the Appellant, in the

meanwhile, had effected the deposit of Rs. 4.68 crores. The Apex Court directed to satisfy a further sum of Rs.50 lacs in addition to the sum of

Rs.4.68 crores by the end of February, 2016, making it clear that, on satisfaction of the amount as above, the appeal rejected by the Tribunal would

stand restored so as to cause the merit to be considered. Subsequently, an application was moved before the Apex Court for modification of the above

order, which was considered and finalized as per order dated 17.03.2016, whereby time to effect the deposit was extended till 28.03.2016. Pursuant to

the said order, the Appellant deposited the remaining sum of Rs. 50 lacs as ordered by the Apex Court, thus, effecting a total deposit as Rs. 5.18

crores (4.68 crores + 50 lacs). On satisfying the requirement as ordered by the Apex Court, the appeal was restored by the Tribunal. However, after

considering the merits involved, the Tribunal held that there was no scope for interference with the order passed by the adjudicating authority and

accordingly, the appeal was dismissed as per Annexure-A/1 order dated 28.06.2018, which is under challenge in the present appeal.

(e) Incidentally, it is also brought to the notice of this Court that the Appellant had filed an I.A. before the Tribunal seeking to implead the M/s. L&T

/service recipient as a party to the appeal. The said I.A. was dismissed by the Tribunal holding that the M/s. L&T had moved the Tribunal by filing a

separate appeal (against the penalty of Rs.20,000/- charged against them for the lapses on their side) and in the said circumstance, it was not

necessary to have impleaded them in the appeal preferred by the Appellant. The said order was put to challenge by the Appellant by filing W.P.(T)

No. 65 of 2017, which was disposed off by this Court as per Annexure-A/12 judgment dated 07.12.2017 as it was not pressed and that it would be

without prejudice to the rights and liberties of the parties concerned. All contentions were left open, as discernible from paragraphs 4 and 5 of

Annexure-A/12. It was thereafter, that the appeal was finalized by the Tribunal as per Annexure-A/1 order, which is a common order, dismissing the

appeal preferred by the Appellant as well as the appeal preferred by the M/s. L&T.

3. We heard Mr. Prafull N. Bharat, the learned counsel for the Appellant as well as Mr. Maneesh Sharma, the Standing Counsel representing the

Department.

4. The contentions have been moulded mainly with reference to 'four grounds' as

asserted by the learned counsel during the course of hearing. Firstly, it is contended that the Adjudicating Authority is not having the territorial jurisdiction; secondly, that the work done amounts to 'manufacture' under Section 2(f) of the Act which takes it outside the purview of service tax liability; thirdly, that the M/s. L&T had already satisfied the service tax and as such no loss has been caused to the State, which hence cannot be recovered from the Appellant again as it will amount to double taxation; and lastly, that the proceedings initiated and finalized by the Adjudicating Authority are hit by the law of limitation.

5. The learned Standing Counsel appearing for the Respondent submits that none of the above contentions is liable to be sustained as devoid of any merit and these aspects have been discussed in detail by the Tribunal, giving proper reasoning for the finding arrived at. Reference is made to the relevant provisions under the Statute so as to sustain the order passed by the Adjudicating Authority and the Tribunal.

6. With regard to the first point, the learned counsel for the Appellant submits that the relevant Notification regarding the jurisdiction of the

Commissioner clearly denotes at Sl. No. 73 that, it provides power to the Commissioner of Excise, Raipur (Adjudicating Authority herein), to have the territorial jurisdiction in the State of Chhattisgarh alone. A specific ground has been raised as ground 'C' in the appeal in this regard. It is pointed out

that the work done was in the State of West Bengal, Orissa and Bihar, by virtue of which it was not open for the Commissioner of Excise, Raipur to

have initiated or finalized any proceedings against the Appellant. The said issue has been considered by the Tribunal as revealed from paragraphs 8 to

12 of Annexure-A/1. With reference to the materials on record, the Tribunal held that admittedly, the Head Office of the Appellant was situated at

Raipur; that the Appellant/Proprietor of the establishment was residing at Raipur; that the Appellant had neither registered centrally nor regionally so

as to confine to the jurisdiction to a particular place as sought to be effected by the Appellant and further that, all the work orders were executed by

the Appellant at his Raipur address, as admitted by him in this regard. It was also observed that there was a malafide attempt on the part of the

Appellant, as apparent from the materials on record, insofar as the Appellant was providing similar service to M/s. L&T (as a sole recipient) through a

sister concern, under the name and style as M/s. M.R. Engineering and that the said establishment is also in the proprietorship of the Appellant,

registered at Raipur. It was further noted that the Appellant also got registered subsequently, at Raipur, after issuance of the show-cause notice. It

was accordingly held that no material was produced to conclude that the Commissioner Excise, Raipur / Adjudicating Authority had no jurisdiction.

We find no reason to deviate from the said finding. This is more so, since the Appellant did not have any dispute with regard to 'territorial jurisdiction'

when the proceedings were initiated by the Adjudicating Authority. Though such a ground has been raised in the appeal filed before the Tribunal, the

Appellant did not raise or dispute the territorial jurisdiction or authority of the Commissioner in Annexure-A/5 reply filed in response to Annexure- A/4

show-cause notice. After having submitted to the jurisdiction of the Commissioner / Adjudicating Authority without any protest, it is not correct or

proper for the Appellant to take a 'U-turn', when the decision has gone against him. It is settled law that the power conferred upon the competent

authority with reference to 'territorial jurisdiction' is not an instance of total lack of jurisdiction, so as to make the order null and void. In the said

circumstance, the contention now putforth by the Appellant, as raised in ground 'C' of the appeal is without any pith or substance. It is repelled

accordingly.

7. With regard to the second point, as to the alleged manufacturing activity being done by the Appellant, it is true that Section 2(f) of the Act defines

the term 'Manufacture' in the following lines :

Section 2(f) : ""manufacture"" includes any process -

- (i) incidental or ancillary to the completion of a manufactured product;
- (ii) which is specified in relation to any goods in the section or Chapter notes of The Fourth Schedule as amounting to manufacture; or
- (iii) which in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer;

and the work ""manufacture"" shall be construed accordingly and shall include not only a person who employs hired labour in the production or

manufacture of excisable goods, but also any person who engaged in their production or manufacture on his own account.

Obviously, it is an inclusive definition and not exclusive one. Admittedly, the activity being pursued by the Appellant in the premises of M/s. L&T

involving fabrication, commissioning and erection is by making use of the raw materials supplied by the service recipient / M/s. L&T. There is no case

for the Appellant that the Appellant was owner of the raw materials, which were put into the alleged manufacturing activity, to give rise the products.

There is no instance of any sale and the products cannot be called as goods, having no independent marketability, as tailor-made, subject to the

specifications given by the M/s. L&T / service recipient.

These aspects have been discussed in detail by the Tribunal in paragraph 12 onwards, also with reference to the verdicts passed by the Apex Court in

Hawkins Cookers Ltd. vs Collector of Central Excise, 1997 (96) ELT 507 SC and M/s Cipla Ltd vs Commissioner of Central Excise, 2008 (225) ELT

403 SC. It was accordingly, that the contention was repelled, holding that the activity of the Appellant was a 'service' coming within the purview of

relevant provisions of the Statute as mentioned in paragraphs 12 and 13. No tenable ground is raised or substantiated to take a different view. It is

nothing but a 'service', the Appellant admittedly having no ownership over the materials supplied by the M/s. L&T or on the products.

8. With regard to the third point, that M/s. L&T has already discharged the tax liability, the relevant aspects have been discussed by the Tribunal in

paragraphs 13 to 16. The authorities to the Department had put specific questions to the Appellant / service provider and to the M/s. L&T / service

recipient when their statements were taken; copies of which have been produced as Annexures-A/2 and A/3. The relevant questions and answers

given in their statements by the respective persons are reproduced herein below :

Shri Ambika Prasad Shukla (Contractor) [service provider] :

Q.No.7 : When you are paying service tax in respect of M/s. M.R. Engineering Works, Raipur, why service tax was not paid by you in respect of

M/s Pawan Engineering Works, Raipur even though you are providing identical services that too to a single service receiver.

Ans : M/s. Pawan Engineering Works, Raipur was engaged by M/s L&T for some Erection and Fabrication works being conducted in the sites of

Wheel Casting Plant, Chhapra under Railway Ministry and at Dhamara Port, Odisha, We were advised by our service receiver that we need not to

pay any service tax since the said services provided by us were exempted from service tax. In this regard the document in respect of the services

provided at Railways and Port will be submitted at the earliest.

Shri Ashim Dey (Manager - Indirect Taxes, Kolkata Region, M/s. Larsen & Toubro Ltd., Kolkata) [service recipient] :

Q.No. 11 : In reply to Q. No.4, Shri S. Soman, Partner M/s. S.R. Brothers stated that ""We are entirely guided by M/s. L&T. It is M/s. L&T who

prepares the bill except in few cases where L&T demanded separate bill from us we have raised the same. Where M/s. L&T prepare Running bill

with service tax mentioned therein, we receive the service tax and pay the same whereas in case where they do not show service tax and not paid to

us, we do not pay. There is no practice to claim service tax separately and accordingly we have not claimed."" What would you like to say about this ?

Ans : The responsibility of Service Tax payment lies on the service provider i.e. subcontractor. If subcontractor raises bill, we pay service tax to them.

Regarding preparation of Invoice we have stated in answer to Q.No.3 & 4 of statement dated 17.01.2012.

Q.No. 18 : M/s M.R. Engineering Works and M/s Pawan Engineering Works, both are of the same Proprietor and providing the same service. They

why M/s L&T is paying Service Tax to M/s M.R. Engineering Works but not to Ms Pawan Engineering Works ?

Ans : If subcontractor claims Service tax, we pay the same.

Q.No. 19 : If the subcontractor does not claim Service tax, why M/s L&T does not object ?

Ans : We advise all the subcontractor to take service tax registration and discharge their liability.

Q.No. 20 : In your statement dated 30.01.2012, as regards to the reimbursement of Service tax to M/s S.R. Brothers, you had replied to check up and

comment. Please clarify.

Ans : M/s S.R. Brothers have not submitted any claim till date.

The Appellant is virtually pleading ignorance of law, as to the necessity to have taken registration, in spite of the fact that the service provided by the

Appellant is a taxable service. The Appellant himself is aware of this fact, as the Appellant who is also a proprietor of another establishment by name

M/s. M.R. Engineering Works, has registered the said establishment with the authority, which course was not pursued in respect of the present

establishment i.e. M/s. Pawan Engineering Works.

In response to the pointed question raised by the Department, the answer is that the registration was not taken, 'as advised' by the service recipient /

M/s. L&T. But the answer given by the M/s. L&T in their statement, when specific question was put in this regard, was that they used to repay the

tax, if at all it was claimed by the service provider and further that they had given clear instructions to all service providers to have had registration.

The explanation offered by the Appellant that they had not taken registration and were not satisfying the service tax, despite the liability to satisfy the

same, merely on the basis of instructions / advice stated as given by the service recipient / M/s. L&T can never be accepted as any explanation, much

less, anything reasonable or satisfactory. Ignorance of law is no excuse. This being the position, the said ground also does not hold any water at all.

9. Coming to the next point that the proceedings were barred by limitation, the learned counsel makes a reference to Section 73 of the Finance Act,

1994, as it existed prior to the amendment brought about with effect from 28.05.2012 (as the relevant period insofar as the Appellant is concerned, is

from 01.10.2006 to 15.12.2011). The recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded is dealt with under

Section 73 of the Finance Act, 1994 and the time stipulated is 'one year'. However, under the 'proviso' to Section 73, extended time is provided in

respect of the specific instances under a, b, c, d & e. The provision reads as follows :

73. (1) xxx xxx xxx ""Provided that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by

reason of -

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax, by the person

chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words [eighteen months] the words ""five years"" had been substituted.

10. The contention of the Appellant is that the extended period of 'five years' is not applicable to the instant case, as it does not come within the

purview of specific Clauses at 'a, b, c, d and e'. This aspect has been considered by the Tribunal and it has been clearly held in paragraph 17 that non-

registration of the Appellant, in the given circumstances, definitely will amount to suppression of the relevant facts, which came to the notice of the

Department, only later, on the basis of some intelligence gathered by the Preventive Officers of the Central Excise. This being the position, it squarely

comes within the purview of 'sub-Clause (d)' under the proviso to Section 73 (1) of the Finance Act, 1994 and hence it was open for the Department

to have invoked the extended period of 'five years' for issuing the show-cause notice. We are of the view that the finding rendered by the Tribunal is

well supported by the reasoning and hence it warrants no interference.

11. The learned counsel for the Appellant makes the last submission, that the Appellant has already satisfied a sum of Rs.5.18 crores, which covers

the actual amount of the assessment and that remaining question is only in respect of the 'penalty'. It is pointed out that the Appellant was actually

acting bona fide, based on the instructions / advice given by the M/s. L&T (service recipient) and it was in the said circumstances, that M/s. L&T

was sought to be impleaded by filing an I.A. before the Tribunal, which however was not permitted. This being the position, the course pursued by the

Appellant might be considered as a reasonable cause for the failure as envisaged under Section 80 of the Finance Act, 1994, so as to exclude the

Appellant from satisfying penalty (which otherwise is payable under Sections 76 or 78 of the Finance Act, 1994). The learned counsel submits that the

above penalty provisions are not attracted and the Appellant might be considered for the benefit of Section 80 of the Finance Act, 1994. Though the

said provision came to be deleted with effect from 14.05.2015, insofar as the Appellant is concerned, the said provision was governing the field for the

period from 01.10.2006 to 15.12.2011 involved herein.

12. After hearing both the sides, we are of the view that the course and conduct pursued by the Appellant is not liable to be branded as innocent or

bona fide, insofar as the necessity to have taken registration was well known to the Appellant, who, in fact, had taken registration in respect of the

sister concern belonging to the very same Appellant as Proprietor, which was being run under the name and style as M/s. M.R. Engineering Works,

providing necessary services to the very same service recipient / M/s. L&T.

13. In the above circumstances, we do not find any tenable ground to interdict Annexure-A/1 verdict passed by the Tribunal. There is no substantial

question of law. The appeal fails. It stands dismissed as devoid of any merit.