
(2015) 04 MAD CK 0263

In the Madras High Court

Case No : C.M.A. Nos. 764 to 788 of 2015 and M.P. No. 1 of 2015

Thirumurugan Enterprises

APPELLANT

Vs

The Customs, Excise and Service Tax Appellate Tribunal and
Others

RESPONDENT

Date of Decision : 30-04-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14
Finance Act, 1994 — Section 65 (105), 72, 73, 83, 86

Citation : (2016) 36 GSTR 202 : (2015) 40 STR 681 : (2016) 88 VST 215

Hon'ble Judges : R. Sudhakar, J;K.B.K. Vasuki, J

Bench : Division Bench

Advocate : K. Jayachandran, for the Appellant; V. Sundareswaran, Advocates for the Respondent

Judgement

R. Sudhakar, J.—Aggrieved by the common order of the Tribunal in remanding the matters back to the adjudicating authority in the appeal filed by the Revenue, the respective appellants/assesseees are before this Court by filing the present appeals raising the following questions of law:-

"i) Whether the finding of the 1st respondent Tribunal that the appellant rendered taxable service and was liable to pay service tax, merely on the ground of receipt of payments from NLC?

ii) Whether the 1st respondent Tribunal is justified in ignoring the decisions of the co-ordinate Bench reported in 2009 (13) STR 542, 2011 (22) STR 571 for the legal issue that "non-specification" of classification/category of services in the show cause notice and in the adjudication order would be fatal to the proceedings?

iii) Whether the 1st respondent Tribunal is justified in ignoring the decision of the Hon'ble Madras High Court reported in 2011 (23) STR 7 (Mad), wherein it was held that Tax liability-Dept., exercising power under fiscal statute while passing

order bringing someone under tax net, is required to render specific finding as to liability and demand cannot be on surmises and conjectures, especially when it was admitted that the demand was made without specifically proposing the classification of service?"

2. In view of the order, which this Court proposes to pass, it is not necessary to deal with the questions of law, as raised above.

3. The facts, in a nutshell, are as hereunder:-

The appellants/assesseees herein are contractors, who carried out various activities for the Neyveli Lignite Corporation (for short "NLC"), a Government of India Undertaking. The respondent/Department found that the activities, undertaken by the assesseees/appellants, come within the purview of service tax and, therefore, they are liable to pay service tax.

4. Accordingly, the appellants/assesseees were visited with show cause notices. It further appears that subsequent to the show cause notices, in the adjudication proceedings, many of the parties did not appear and the matters were adjudicated and assessment orders were passed demanding service tax. It is also not in dispute that some amount has been paid pending the dispute and subsequently substantial amounts have also been paid.

5. Be that as it may. These appellants, consequent to the assessment order, pursued the matter by filing appeals before the Commissioner (Appeals) and the Commissioner (Appeals) considered the prima facie case pleaded by the appellants on the following grounds:-

"(1) that the show cause notices did neither propose the classification of taxable service (s) for which the service tax was demanded from the appellants nor specify the classification of services allegedly rendered by the appellants;

(2) that the corresponding Orders-in-Original have also not specified the classification of the taxable services, against which the demands of service tax have been confirmed;

(3) that without prejudice to the above, the nature, scope and coverage of individual contracts entered into by the appellants with NLC have not been considered in the notice for demand of service tax;

(4) that in the absence of specific proposal for classification and allegation that the service rendered against a given contract would be classifiable under a particular provision of Finance Act, 1994 (Section 65 (105)), the demands made on the generic basis, merely on the basis of payments received from NLC by such appellants, should not have been confirmed in the orders-in-original;

(5) that the Ld. Commissioner of Central Excise, Puducherry, vide his Orders-in-Original Nos. 82 and 89 dated 29.12.2009 (relied upon in all the appeals) dropped the proceedings in both the cases only on the ground of "non-specification" of classification of services, in the notices. The legal position in this

regard is also settled in favour of the appellants as per the following order of the Hon"ble CESTAT : (a) 2009 (13) STR 542 (Tri. Chennai) in the case of Coramandel Fertilizers Ltd. Vs. CCE, Chennai and 2011 (22) STR 571 (Tri. Chennai) in the case of United Telecoms Ltd. -Vs - CST, Hyderabad ;

(6) that all demands have been barred by limitation under Section 73 of Finance Act, 1994. In this context, the findings of the adjudicating authorities admitting to the department"s knowledge as early as 2002 about the appellants" activities as per contracts with NLC are highlighted, as evident from identical findings of adjudicating authority in a number of impugned orders;

(7) that the demands have been made without any verification, or inquiry or investigation as to the nature of works carried out by the appellants with reference to the various contracts signed with NLC. It is submitted that no statements were recorded from either the appellants or the authorities of NLC in this regard;

(8) that the fact of payment of VAT by the appellants have also been ignored. Moreover, the individual turnover of each of the appellants have not been considered at all for allowing the value based service tax exemption available under Notification No. 6/2005 ST. The specific exclusion of road laying, widening of roads from the scope of taxable service under "Commercial or Industrial Construction Service" were also not examined or considered;

(9) that in view of the above, the confirmation of demand merely on the ground of receipt of payments from NLC by the appellants cannot be a valid ground for sustaining the demands. A number of decisions of Hon"ble CESTAT, confirm this settled legal position, e.g., (21) STR 119 (Tr. Del.) in the case of Jetlite (India) Ltd., Vs. CCE, New Delhi ;

(10) that the impugned orders, in certain cases, waived penalties, in other cases imposed penalties. The adjudicating authorities did not appreciate the facts in the first place. Despite admission of the circumstances as being similar in all cases and when NLC itself was not in a position to provide the nature of services, the imposition of penalties was totally inconsistent in law."

6. The above grounds raised by the appellants/assesseees were considered threadbare by the Commissioner (Appeals) in the light of the various decisions of the Tribunal and the Supreme Court to come to the conclusion that the show cause notices lack clarity and the show cause notices do not state which part of the works executed by the appellants/assesseees fall under taxable service and which services provided fall under non-taxable service. The Commissioner (Appeals) accepted the plea of the appellants/assesseees both on vagueness of show cause notice and also on the plea of limitation and set aside the order of adjudication. For better clarity, the relevant portion of the order of the Commissioner (Appeals) is extracted hereinbelow:-

"6.1. I find that in the impugned SCNs issued by the department there were no

allegation as regards to the category under which the appellants are liable to service tax and the SCNs simply state that the appellants are providing taxable service and have received payments for such services and therefore entire amount received is liable to service tax as could be seen from the impugned SCNs.

6.2. In this connection it is to be pointed out that Hon''ble CESTAT in the case of CCE, Chandigarh Vs. Arpit Advertising reported in 2011 (23) STR 460 (Tri. Del.) has held as follows:-

"Appeal to Appellate Tribunal - Lack of clarity in appeal - SCN proposed demand based on figures in balance sheet under Head "Commission/Discount/Inventive" without investigating true nature of service and its taxability - SCN deals with barter agreement but same not enclosed in appeal paper - Nature of service rendered not clear - Appeal not filed with clarity as to what should be taxable value - Assessable value doubted - No willingness on part of department to quantify extent of undervaluation or under-declaration - No verification report as desired by Tribunal produced - Revenue's appeal dismissed as unsubstantiated and not pursued diligently - Section 86 of Finance Act, 1994." (paras 8, 9, 10, 11, 12, 14).

6.3. The Hon''ble CESTAT, in the case of CCE, Raipur Vs. Shyam Enterprises reported in 2011 (23) STR 29 (Tri. Del.) has held as follows:-

"Demand - Show cause notice not providing foundation for levy - Manpower Recruitment and Supply services-Submission that erection and commissioning of tower parts done through engagement of employees/workers of company not amounts to providing manpower recruitment and supply service - SCN not making any head or tail of Revenue's case - Audit objections not bring out supply of manpower - SCN not providing foundation for levy in respect of activity carried out - Charge with a basis not noticed in SCN - Revenue's appeal dismissed-Section 73 of Finance Act, 1994." (para 3).

6.4. Further the Hon''ble Supreme Court in the case of CCE, Commissioner of Central Excise, Bangalore Vs. Brindavan Beverages (P) Ltd. and Others, (2007) 119 ECC 87 : (2007) 145 ECR 87 : (2007) 213 ELT 487 : (2007) 8 SCALE 549 : (2007) 5 SCC 388 : (2007) 7 SCR 1033 has held as follows:-

"Show cause notice - Opportunity to meet allegations - SCN is foundation on which the Department has to build up its case - If allegations in show cause notice not specific and on the contrary vague, lack details and/or unintelligible, sufficient to hold that noticee not given proper opportunity to meet allegations indicated in show cause notice." (para 10).

6.5. I find that in the instant case the impugned SCNs do not contain the details like the category of services under which the service tax liability would fall; that the nature of activities carried out by the appellants and whether such activities could be classified under specific categories of services and applicability of

relevant provisions to the said category. As rightly held by the Apex Court, SCN is foundation on which the Department has to build up its case. In the absence of specific allegations, the appellants would not be in a position to defend their case effectively. Hence I hold that the above case laws are applicable to the instant cases and accordingly the impugned orders emanated from such insufficient SCNs are not sustainable.

7.0. Further, each category of service carries its own valuation and different effective dates. It is observed that there are some amounts which are not supposed to be included under taxable category. The impugned orders too failed to specify the category of service (s). In this connection it is pertinent to point out that Hon"ble CESTAT in the case of Hi-Cons Building Products Vs. Commr. of C.Ex. and Cus. and S.T., Cochin, reported in 2011 (23) STR 366 (Tri. Bang) has held as follows:-

"Order - Non-speaking order - Show cause notice classifying activity under Commercial or Industrial Construction Service - Adjudication order containing different conclusion that Erection, Commissioning and Installation service besides construction service provided - Entire demand confirmed without break-up of amount attributable to services rendered and order silent on exact services rendered - Impugned order set aside - Matter remanded to adjudication authority to consider afresh - Sec. 73 of Finance Act, 1994." (Para 5).

Further Hon"ble High Court of Madras in the case of M. Suganthi Vs. The Assistant Commissioner of Central Excise, Pollachi Division, (2011) 23 STR 7 : (2011) 31 STT 537 : (2011) 40 VST 433 has held as follows:-

"Demand - Tax liability - Department exercising power under fiscal statute while passing order bringing someone under tax net, required to render specific finding as to liability - Demand cannot be on surmises and conjectures - Section 73 of finance Act, 1994." (Para 12).

8.0. I also find that all the SCNs are time barred inasmuch as the department had been aware that the appellants had been rendering services to M/s. NLC from the year 2002 onwards. This being so the appellants cannot be fastened with duty liability invoking proviso to Sec. 73 as there was no intention on the part of the appellant to evade payment of service tax. There were also series of correspondences with NLC on the rendering of various services by the appellants.

8.1. In this connection it is pertinent to point out that the Apex Court in the case of Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay, (2002) 80 ECC 6 : (1995) 78 ELT 401 : (1995) 3 SCC 462 Supp has held that "where facts are known to both the parties the omission by one to do what he might have done and not that he must have done does not render it suppression of fact". In view of the Apex Court's decision, since the facts was known to the Department, the extended time limit is not available to the department and the issue is totally time barred. Further it is a settled law that when interpretations of the provisions involved, extended period is not invocable.

9. To conclude that the department's cases fall flat both on merit as well as on time bar aspect.

10. In view of the facts, case laws and discussions above, I set aside the impugned Orders-in-Original passed by the Lower Adjudicating Authorities and allow all the appeals."

7. Aggrieved by the order of the Commissioner (Appeals), the Department pursued the matter in appeal before the Tribunal on the findings of the Commissioner (Appeals) with regard to the vagueness of the show cause notices as well as with regard to the plea of limitation. The present appellants, who were respondents before the Tribunal, reiterated their plea on all the issues that were considered by the Commissioner (Appeals), which includes the plea of limitation as well, which has been recorded by the Tribunal in para-5 of its order. The relevant portion of the order of the Tribunal is extracted hereinbelow for better appreciation:-

"(f) The Department was aware of the activities of the assesseees right from 2002 and there were meetings of senior level officers of the Department, including the Commissioner of Central Excise, Puducherry, with the NLC officials and the assesseees in NLC. Any allegation of suppression of facts with intent to evade payment of tax was erroneous, since the basis for the show cause notices to the assesseees were the information reportedly provided by NLC or assesseees themselves in some cases through their balance sheets.

(g) The contention/grounds of appeal of the Department that the assesseees did not provide details/records etc., cannot be a valid ground to shift the onus of classification of the activity of assesseees under one or more of the taxable services.

(h) The Department did not follow any of the legal procedures prescribed under Section 14 of Central Excise Act, 1944 (summon procedure to collect information) read with Section 83 of the Finance Act, 1994 or under Section 72 of the Finance Act, 1994 (Best Judgment assessment procedure), in any of the cases covered by the present batch of appeals. No specific investigation was carried out or enquiries made with NLC authorities, by the Department in any of the cases in terms of the above provisions."

8. The Tribunal, however, while extracting the portion of the order of the Commissioner (Appeals) was of the view that the Revenue discharged the burden by producing statements of NLC and that the assesseees did not dispute it at any point of time and the entire demand was raised on the basis of the statement of NLC, which was not disputed by the assesseees. However, the Tribunal felt that since the statements received from NLC by the Department were not provided to the assesseees/appellants, they could not explain the amounts received with reference to the work discharged by them. Therefore, the matters were remitted back to the assessing officer to provide the statement, provided by NLC, to the assesseees/appellants to enable them to defend the demand of tax and,

thereafter, the adjudicating authority was directed to pass orders after giving opportunity of hearing to the assessee. Further, all the issues were also directed to be kept open for decision by the adjudicating authority. Aggrieved by the said order of the Tribunal, the appellants/assessee are before this Court by filing the present appeals.

9. Mr. Jayachandran, learned counsel appearing for the appellants/assessee contended that there was no proper classification of works rendered by the assessee in the show cause notices and, therefore, the show cause notices suffered from illegality, which cannot be cured and, accordingly, the remand by the Tribunal is virtually an attempt to confirm the adjudication order. It is the further submission of the learned counsel for the appellants that the demands are barred by limitation, which the Tribunal failed to address and that the remand order is bereft of details as to reasons for remand. Further, it is the submission of the learned counsel for the appellants that the burden has been shifted on the appellants for segregating the works that would attract service tax, when there is no proper classification made with regard to the works, by NLC, on which aspect of the matter the show cause notices are also silent. Further, learned counsel submitted that each appellant has provided a different service, which has not been appreciated in proper perspective by the Tribunal and a common order has been passed, which is per se illegal and unsustainable. Therefore, it was prayed that the order of the Tribunal is liable to be set aside.

10. Per contra, learned standing counsel appearing for the respondent/Department, on notice and instructions, submitted that the appellants were rendering the works mentioned in the show cause notices to NLC and therefore, they are liable to pay tax. The appellants are registered for the services, as mentioned in the show cause notices, and have been rendering the services to NLC and receiving payment thereof and, therefore, they are liable to pay service tax and the tax has been rightly demanded by the Department. It is further submitted that the remand by the Tribunal is an open remand with no fetters on both the sides and the appellants cannot have any grievance with the said order as they are only directed to show the taxable services rendered by them for the purpose of payment of tax. In such circumstances, it is submitted that no interference is called for with the order of the Tribunal.

11. Heard the learned counsel appearing for the appellants/assessee and the learned standing counsel appearing for the respondent/Department and perused the materials available in the typed set of documents.

12. Before proceeding further to decide the issue, it is relevant to note that it is the stand of the appellants/assessee that many of the services undertaken by them do not fall under taxable category, which has been pointed out by the Tribunal in para-5 (b) of its order, which, for better clarity, is extracted hereinbelow:-

"a) Water supply-drainage for Government Hospital, Guest House in NLC.

- b) Drain cutting, dumping yard mines, earth excavation, forming bunds, laying of inner roads and maintenance of such roads; fixing safety grills to courtyard, school works, community halls.
- c) Earthwork, school building and painting of Government Hospital.
- d) Renovation and construction of toilets in MB and GH.
- e) Electrical works.
- f) Drip Irrigation systems.
- g) Making of gate arches, earth work excavation, control room, development of quarter - Guard.
- h) Improvement of electrical installations, cable cleaning of Kisok Motors, etc.
- i) Horticulture, lawn gardens, up-keeping watch and ward section office and Stores, ancillary mining activities, lawns and gardens.
- j) Pontoon shifting, pump laying, cleaning of drills.
- k) Loading, transporting scrap civil works in ash bund, lathe pump house, street lights, electrical work in canteen, removal of fly ash.
- l) Wiring in mine 1, 1 A entrance painting transformers, switch gears, lighting ventilation.
- m) Water supply works.
- n) Back feeding arrangements, AMC water treatment plant rewinding of motors.
- o) New approach ramp, CWC hardening of bunds.
- p) Vulcanizing of wide steel cords, removal laying of wide belts, cutting rolling and transporting of wide belts."

13. However, a careful perusal of the orders of the adjudicating authority, the Commissioner (Appeals) as also the Tribunal would reveal that the Commissioner (Appeals) has decided the issues on two aspects, viz., one on the vagueness of the show cause notices stating that it is bereft of details and being without clarity and the other on the plea of limitation. The Tribunal, however, in its order, while extracting the portion of the order of the Commissioner (Appeals) was of the view that the Revenue had discharged its burden by producing the statements given by NLC and that the assessee did not dispute it at any point of time and that the entire demand was raised on the basis of the statements provided by NLC. However, this finding of the Tribunal runs counter to the plea raised by the appellants/assessee before the Commissioner (Appeals) as the show cause notices were challenged on the very foundation that they are vague and without particulars as to classification of works that attracts service tax.

14. Further, the Tribunal, while glossing over the various decisions of the Tribunal

and the Supreme Court, has come to an erroneous conclusion that the only grievance of the assesseees is that the Revenue did not give break-up of the amounts with reference to each service rendered by them. This finding of the Tribunal appears to be a fallacy on fact. As extracted by us in the earlier portion of the order, the various contentions raised by the present appellants before the Commissioner (Appeals) shows that that issue as raised is not pure and simple break-up of amounts, which should have been shown in the show cause notice, but the show cause notices itself being vague and bereft of details as to the nature of taxable services rendered by the appellants/assesseees to NLC.

15. Furthermore, we also find that the issue of limitation has been answered by the Commissioner (Appeals) in favour of the present appellants, but which finding has not been considered by the Tribunal while discussing the issue. No finding has been rendered by the Tribunal on the aspect of limitation.

16. This Court, therefore, is of the considered view that without going into these issues, mere remanding the matter back and asking the adjudicating authority to re-adjudicate the matter after giving break-up of the details to the assesseees/appellants will not suffice. The issues raised by the appellants/assesseees and answered by the Commissioner (Appeals) in their favour has to be considered by the Tribunal on its own merits and there being no finding on the issues in the manner in which the plea has been taken by the present appellants, who were successful before the Commissioner (Appeals), we find that the order of the Tribunal cannot be sustained on an issue of open remand.

17. The arguments of the learned standing counsel for the Department that all the issues can be trashed out before the adjudicating authority does not find favour with this Court as the Department cannot be allowed to fill up the lacunae in the show cause notices on the basis of an open remand as alleged by appellants.

18. Therefore, this Court is of the considered view that the matter has to be remitted back to the Tribunal to consider the facts, as narrated above, as has been presented by the Department and contested by the appellants/assesseees in the proceedings before the lower authorities as well.

19. Accordingly, this Court sets aside the order of the Tribunal and remands the matter back to the Tribunal to answer the issues in relation to the findings of the Commissioner (Appeals) which was under challenge before the Tribunal in the appeals. All the appeals are allowed by way of remand. Consequently, connected miscellaneous petitions are closed. However, in the circumstances of the case, there shall be no order as to costs.