IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

West Block No. 2, R.K. Puram, New Delhi - 110 066.

Principal Bench, New Delhi

COURT NO. I

DATE OF HEARING : 16/06/2015.

Service Tax Stay Application No. 57519 of 2013 in Appeal No. 56958 of 2013

[Arising out of the Order-in-Original No. 28/ST/COMMR/DM/RTK/ 2012-13 dated 18/01/2013 passed by The Commissioner of Central Excise (Adj.), Rohtak.]

For Approval and signature :

Hon’ble Shri Justice G. Raghuram, President

Hon’ble Shri Rakesh Kumar, Member (Technical)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?

2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?

3. Whether their Lordships wish to see the fair copy of the order?

4. Whether order is to be circulated to the Department Authorities?

M/s M/s Shubham Electricals Appellant

Versus

CST & ST, Rohtak Respondent

Appearance

S/Shri A.K. Batra, C.A. and Varun Gaha, Advocate for the appellant.

Shri Amresh Jain, Authorized Representative (DR) for the Respondent.

CORAM :

Hon'ble Shri Justice G. Raghuram, President

Hon'ble Shri Rakesh Kumar, Member (Technical)

Final Order No. 51964/2015 Dated : 16/06/2015

Per. Justice G. Raghuram :-

Appeal is preferred against the adjudication order dated 18/01/2013 passed by the Commissioner, Central Excise, Rohtak. The impugned order confirms service tax liability of Rs. 1,53,14,782/- for the period 2006-2007 to 2010-2011 apart from interest under Section 75 and penalties under Section 77 and 78, while dropping penalty under Section 76 of the Finance Act, 1944. Heard the respective parties.

2. Proceedings were initiated by a show cause notice dated 21/10/11. The show cause notice and the impugned adjudication order are vitiated by incoherence and vagueness, to which aspect we shall advert to in some detail, later herein.

3. The show cause notice asserts that : (a) the appellant was registered for providing Works Contract Service, taxable under Section 65 (105) (zzzza) of the Act ; (b) that information was gathered by the Anti-Evasion Branch, Delhi which revealed that the appellant was engaged in providing taxable services to other clients but was not remitting the service tax due ; (c) that investigation was therefore initiated and several letters were addressed to the appellant seeking copies of transactional documents and other relevant correspondence such as letters and agreements entered into in relation to Common Wealth Games Projects, copies of interim and final bills raised for providing services in relation to CWG projects and other documents such as audited financial statements and the like; that the appellant failed to respond; thereupon reminder letters were issued; that the appellant vide his letter dated 17/6/11 furnished certain documents including copies of its registration certificate, balance sheets from 2005-2006 to 2009-2010, service tax returns with challans, copies of award letters received from DDA/CPWD etc. and information of having received Rs. 375.16 lakhs for CWG works and had intimated that pending amount would approximately Rs. 53 lakhs ; that the appellant submitted copies of 28 letters in respect of works executed (details of which were set out in a table in para 5 of the show cause notice); that further investigation and summons ensued; that from scrutiny of the documents submitted by the appellant and the investigation, the appellant is seen to have filed nil ST-3 returns except for 2007-2008 and to have remitted service tax of a mere Rs. 998/-; and from the award letters submitted, appellant appears to have rendered taxable services but failed to remit the tax due.

4. In para 8 of the show cause notice, which we consider critical to the validity of the show cause notice, it is stated :-

"8. Whereas from the documents submitted by the party it appears that they have rendered the taxable services which may either be classified under Management, Maintenance or Repair service or Erection, Installation and Commissioning services and other construction linked services as defined under the Finance Act, 1994 (emphasis added)."

5. After extracting the definition of Management, Maintenance and Repair services and setting out contents of the Board Circular dated 27/7/05 and definition of Erection, Commissioning or Installation service in para 9, para 10 observes that the appellant failed to provide detailed contractual documents for ascertaining the exact nature of the works executed and that on the basis of the facts and documents on record, a best judgment assessment method, provided under Section 72 of the Act is being pursued for valuation of the tax liability for the year 2010-2011, on account of absence of audited balance sheets for this period. In para 11, the quantum of liability to service tax is set out while noting that since the required documents/information was not provided by the appellant, income having a probability of classification under the Act is being taken as the value of the taxable services. In para 12 of the show cause notice, at more than one place it is alleged that the appellant had provided taxable services and is liable to service tax for services provided. Para 13 refers to provisions of the Act pertaining to the charge of service tax, valuation and other provisions specifying the requirement of registration and filing of returns as well as provisions authorising a best judgment assessment. This paragraph also alleges that since the appellant had suppressed the fact of having rendered taxable services despite being registered for providing works contract service it is clear that it was aware of the provisions of the Act and thus it is justifiable to invoke the extended period of limitation on account of fraud, collusion etc.

6. Suffice it to notice that in the entirety of the show cause notice there is not a single assertion proposing to levy and collect service tax on the basis of any specified taxable services allegedly rendered by the appellant except the several alternative taxable services speculated to have been proved and set out in para 8 (supra).

7. In response to the show cause notice, appellant submitted a reply on 30/12/11 inter-alia pleading that all contracts executed by it were registered as works contracts which are also assessable to VAT; that since the contracts were works contracts involving deemed sale of goods, exclusion of the value of the goods, either under Notification No. 12/03 dated 20th June, 2003 or abatement of 67% of the value, under Notification No. 01/06 dated 1/3/06 or under the composition scheme provided in Works Contract Composition Scheme Rules, 2007 should be granted; that a substantial number of the works executed were non-commercial and non-industrial in nature and therefore fall outside the ambit of commercial or industrial construction service, prior to 01/6/07 as also sub-clause (b) of explanation (ii) of Section 65 (105) (zzzza), post 01/6/07; that the show cause notice was ambiguous

and vague since it failed to specify the exact taxable service under which the activity of the appellant falls to be considered as a taxable service; and that in several contracts, works involved segments which were outside the purview of commercial or industrial construction or even works contract service, vide the exclusionary clauses in the definition of these taxable services. Appellant also pleaded before us that Section 98 of the Act with retrospective effect exempted levy and collection of service tax in relation to Management, Maintenance and Repair services provided for non-commercial Government buildings during the period 16/6/05, till the Negative Tax Regime (whole of the period of the services provided by the appellant). This interim response was followed by another reply to the show cause notice, dated 10th January 2013, reiterating the same claims/defenses.

8. Learned Consultant for the appellant adverts to page 11 of the memorandum of appeal which sets out in a tabular form the total consideration received by the appellant during the relevant period in issue; the reasons for non-liability to tax and setting out at Sl. No. (v) that certain services which do not fall under the category of construction of complex but could be liable to tax would be in respect of receipt of Rs. 84,28,830/-, which were in respect of works contract services. Shri Batra, the learned Consultant would submit that on this consideration, after availing abatement benefits of 67% of the value, service tax of Rs. 3,00,442/- was remitted on 26th April, 2013, after the impugned order was passed and the present appeal preferred. We are recording this fact only to complete the narrative.

9. The impugned adjudication order is drafted in 32 paras spread over 22 printed pages. Paragraphs 1 to 17 reiterate almost verbatim, the contents of the show cause notice dated 21/10/11. Para 18 elaborates the response of the appellant and its several defences to the vague and incoherent allegations in the show cause notice. Para 19 sets out particulars of the personal hearing provided. Paras 20 to 31 purport to be part of discussion and findings of the Commissioner. Para 20 is formal in nature and states to have considered the facts of the case, the records and as to providing personal hearing. Para 21 identifies the issues involved in the case. The third sentence in para 21 onwards is a reproduction of para 7 of the show cause notice. Paras 22 to 28 are reproduction of paras 8, 9, 11, 12, 14, 15, 16 and 17 of the show cause notice. Paras 29 to 31 could alone be considered, if at all, the analysis by the learned Commissioner. Para 29 asserts that none of the contentions of the appellant are tenable since it failed to provide the required information to the Department during investigation. It is also observed that the appellant obtained service tax registration for Works Contract on 10/12/07 and was therefore aware of the applicable law. From this observation, the Commissioner infers that the appellant willfully suppressed the fact of earning/receiving taxable income and withheld information which led to evasion of service tax. In para 31, the impugned order records that though the appellant intentional and willfully suppressed the taxable value and failed to remit service tax, the facts came to light only during the process of audit. Para 31 abruptly jumps to the conclusion, without any preceding analysis nor a finding as to the specific taxable services provided by the appellant, that service tax of Rs. 1,53,14,782/- is recoverable under the proviso to Section 73 (1) of the Act alongwith interest, excluding penalty under Section 76. Para 32 records the operative portion of the order declaring the specified liability to service tax, interest and penalties.

10. It is a axiomatic that a best judgment assessment under Section 72 could only be for ascertaining the quantum of the tax liability, in a context where the actual extent of liability cannot be determined with methematical precision on account of non-availability of relevant documents or financial records. There cannot be a best judgment assessment regarding the specific taxable service provided. There can be no best judgment, for instance as to whether the tax liability is for income tax, sales tax, excise duty, customs duty, service tax or professional tax. A conclusion as to the taxable event and the liability to tax under the appropriate fiscal legislation authorizing the levy and collection of such tax is a matter for determination with precision and clarity and not by a process of guess-work or speculation.

11. Neither the show cause notice dated 21/10/11 nor the impugned adjudication order dated 18/1/13 record any assertion/ conclusion whatsoever as to which particular or specific taxable service the appellant had provided. In the absence of an allegation of having provided a specific taxable service in the show cause notice and in view of the failure in the adjudication order as well, neither the show cause notice nor the consequent adjudication order could be sustained.

12. Shri Amresh Jain, learned DR would strenuously contend that Revenue was handicapped and crippled by the total non-cooperative of the attitude of the appellant which failed to respond in time to the several notices issued, failed to furnish the relevant transactional documents and to assist the adjudication process in its efforts to identify the specific taxable service provided by the appellant.

13. We have noticed earlier that the show cause notice itself adverts to the fact that the appellant had provided copies of 20 work orders executed in relation to CWG Projects, particulars of which are set out in a tabular form in para 5 of the show cause notice. From the description of the works in this table, officers could have classified the several works into the appropriate taxable service which may appropriately govern rendition of these services. In any event officers are not handicapped and the Act provides ample powers including of search under Section 82 of the Act to obtain information necessary to pass a proper, disciplined and legally sustainable adjudication order. The disinclination to employ the ample investigatorial powers conferred by the Act is illustrative of gross Departmental failure and cannot afford justification for passing an incoherent and vague adjudication order. The failure to gather relevant facts for issuing a proper show cause notice cannot provide justification for a vague and incoherent show cause notice which has resulted in a serious transgression of the due process of law.

14. For the aforesaid reasons, we declare the show cause notice dated 21/10/11 and the consequent impugned adjudication order dated 18/1/13 to be unsustainable and quash the same. The appeal is allowed, in the circumstances without costs and with consequential benefits.

(Dictated and pronounced in open court)

(Justice G. Raghuram)

President

(Rakesh Kumar)

Member (Technical)