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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-01-2006

Judge : M Ravindran

Appellant : Thales-e-transaction Cga

Respondent : Cce

Judgement :

1. This appeal is directed against the order in appeal dated 24/2/2005 which upheld the dismissal of refund claim of the appellants by order in original.
2. The relevant facts that arise for consideration are that appellants under the impression that they are covered under the provisions of Service Tax got themselves Registered under the category of "Consulting Engineer" and paid the Service Tax for the period from 1st April 2002 to 31st March 2003. The appellants were awarded a lump sum contract for supply and installation of Automatic fare collection system for Delhi Metro Rail Corporation under an agreement. Under the said agreement the appellants were to submit Designs and drawings for approval of Delhi Metro Rail Corporation. The appellants filed a refund claim for the Service Tax paid by them under mistaken provisions of law, on the ground that they came to know that Service Tax is not payable when there is a lump sum contract, for which they relied upon the decision of the Tribunal in the case of Daelim Industrial Co. Ltd v. CCE Vadodara 2003 (115) ELT 457(Tri-Del). The adjudicating authority allowed the refund and ordered the amount to be credited to Consumer Welfare Fund. On an appeal the appellate authority has

concurred with the views of the adjudicating authority.

3. Considered the submissions made by both sides and permitted the records. The appellants appeal against the order in original has been rejected by the Commissioner (Appeals) based on the following finding: I have gone through the case records and party's written and oral submissions. The main pleas of the appellant are that the Assistant Commissioner has ordered the refund amount to be credited to the Consumer Welfare Fund on the presumption that the appellants have passed on the burden of duty to DMRC; that this presumption is based on Section 12B of the Central Excise Act, which has been made applicable to Service Tax provision by virtue of Section 83 of the Finance Act, 1994; that the judgment cited make it clear that turnkey contract cannot be vivisected for levying Service Tax. On going through the certified copy of the contract submitted by the Appellant, I find that one of the terms of the contract is that tenderers shall quota a fixed lump sum price for the contract as a whole in Annexure II inclusive all taxes, duties etc., including taxes to be deducted at source, except where it is expressly indicated otherwise elsewhere in Annexure II. From the contract made available, it cannot be established that the Service Tax amount has not been passed on to the client and therefore, I refrain from interfering with the impugned order. The appeal is, therefore, rejected.

It can be seen, that the appellant are not required to pay the Service Tax during the relevant period is not disputed by lower authorities.

The refund claim has been rejected by the lower authorities only on the ground that the appellant's contract shows lump sum price as a whole and hence the presumption that the appellant might have collected the Service Tax from their Customers. To my mind this presumption would be erroneous, if the appellant is able show by way of chartered accountant's certificate and certificate from DMRC that the incidence of Service tax, has not been, in fact passed on. CMMCO Ltd. v. CCE, Jaipur reported at in an identical issue in respect of Excise duty For the foregoing reasons we hold that the Assistant Collector erred in coming to the conclusion with reference to the condition in the schedule of rates that the rates are inclusive of all duties and taxes, that the rates mentioned therein conclusively

included the element of excise duty and therefore, the appellant should be held to have passed on the duty burden to their customer. Such conclusion of the duty burden of having been passed on to the customer would have been justified if the cost structure which had entered into the calculation for arriving at the prices mentioned in the schedule of rates had been examined to see whether that provided for the inclusion of any amount on account of Central Excise duty.

In the present case also the lower authorities have rejected the refund claim of the appellants on the ground that the rates quoted in contract are inclusive of all taxes. The ratio of the Tribunals decision in the case of Cimmco Ltd. (Supra) is squarely applicable to the present case before me.

5. To my mind rejection of refund claim by the lower authorities on presumption would be erroneous. If the appellants are able to produce evidence that they have not passed on the incidence of Service Tax to their clients, then they are eligible for Refund.

6. In view of the above findings, the order in appeal is liable to be set aside. I set aside the impugned order and remand the matter back to adjudicating authority, to decide the refund claim afresh after granting the appellants an opportunity of personal hearing and producing evidence in their support.

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