

S.P. Constructions Vs. Commissioner of C. Ex.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-13-2007

Judge : S T T.V., P Das

Appellant : S.P. Constructions

Respondent : Commissioner of C. Ex.

Judgement :

1. The applicants have also filed appeals challenging the order of Commissioner of Central Excise made on 22-9-2006. In the impugned order, the Commissioner has demanded service tax as indicated below:Sl.

Party Name Appeal Nos.

Tax (Rs.)No.1 M/s. N.K. Traders ST/377/2007 417864/-2 M/s. S.S. Electrical ST/409/2007 237426/-3 M/s. Krishna Enterprises ST/410/2007 127927/-4 M/s. S.P. Construction ST/360/2007 172167/- Total Rs. 955384/- Apart from this, he has also imposed penalty on these applicants under Sections 76, 77 & 78 of the Finance Act. He also has charged interest from them at appropriate rate under Section 75.

2. All these matters pertain to the period from 2003-05 July 2003 to January 2005. During this period the definition of "Maintenance and repair services" as per the provision of Clause 64 of Section 65 of the Service Tax Act 1984 (sic) (Finance Act, 1994) read as under: Service Tax was leviable on services provided in

respect of Maintenance or repair Service w.e.f. 1-7-2003, as per provisions of Clause 64 of Section 65 of the Service Tax Act, 1994.

(ii) a manufacturer or any person authorized by him, in relation to maintenance or repair or servicing of any goods or equipment, excluding motor vehicle. As per subsection 105 of Section 65 of the Finance Act, 1994, "the taxable service means any service provided or to be provided to a customer, by any person in relation to maintenance or repair services.

3. The contention before us is that the Board Circular dated 27-7-2005 while clarifying the taxability had pointed out that repair or servicing carried out under a contract other than maintenance contract or agreement was not covered within the purview of service tax. It was purely on this basis pleaded that the contract entered into by the applicants are not "pure" maintenance contracts as they included an element of accommodation for routine breakdown of machineries as well.

4. The learned Counsel for the applicants also relies upon the following judgments of the Hon'ble Supreme Court to show that their services are not taxable. *Larsen & Toubro Ltd. v. CCE, Pune-II* 12. During the period in question being 1993-94, no direct decision on the point involved was available. It was noticed that different Benches of the Tribunal in different cases had rendering their decisions differently. In the case of *Billimoria (supra)*, it was categorically held that manufacture of PSC Girders would not attract the provisions of Central Excise Act, 1944. *Padmini Products v. Collector of C. Ex.* - for the proposition that if there was a scope for doubt the appellant should be extended the necessary benefits under the law. *Pushpam Pharmaceuticals Co. v. CCE, Bombay*.

- "Section 11A empowers the department to re-open proceedings if the levy has been short levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. A perusal of the proviso indicates that it has

been used in company of such strong words as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. 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".

5. The learned authorized representative (DR) relying upon the definition of "maintenance services" as it was prior to 16-6-2005 states that the said maintenance service would not only include service relating to maintenance but also repair and services as per the inclusive definition as it existed at the relevant point of time. It was contended that the issue of limitation was never taken before the authorities below and it has only been brought now before the Tribunal.

The Income tax return on which the appellant is relying lying upon to show that the applicants' financial position was weak is over two years old and no attempt has been made by them to indicate the current position of the applicant.

6. Having heard both the sides and perusing the record we come across this Tribunal's order No. 347-352 of 2007 dealing with "maintenance service" providers in a similar matter. In this particular case, the Tribunal had taken note of the chart produced by the appellant showing the amount of service tax which was within the period of normal limitation. However, keeping in view the arguments raised on limitation, the Tribunal in this order had directed the appellant to pay a sum of tax demanded which was well within the time period. In this case, we find prima facie, that the applicant does not appear to be a well organized service provider. The income tax return submitted, although two years old would indicate that the applicants' financial status was not very much rosy. It also appears to us certain cloudiness did prevail at the relevant point of time in the minds of the appellants because of passing of the Assistant Commissioner's order in some fellow service providers case doing similar job. Considering the facts and circumstances, we direct that in ST/410/2007 M/s. Krishna Enterprises, the applicant will deposit a sum of Rs. 53661/- (Rupees fifty three thousand six hundred sixty one only), in

ST/360/2007 - M/s.

S.P. Construction will deposit a sum of Rs. 83996/-(Rupees eighty three thousand nine hundred ninty six only) and in ST/409/2007 M/s. S.S.Electrical will deposit a sum of Rs. 1,19,234/- (Rupees one lac nineteen thousand two hundred thirty four only) within six weeks from today, failing which the defaulting appeal shall stand dismissed. As regard the applicant in ST/377/2007 -M/s. N.K. Traders, pre-deposit is waived till the matter is heard finally. On depositing the required amount, the remaining amount of tax and penalty imposed under the impugned order shall stand waived in respect of appellants who have been directed to do so. Compliance on 2-11-2007.

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