

Devi Constructions Vs. the Commissioner of Central Excise (Appeals)

Devi Constructions Vs. the Commissioner of Central Excise (Appeals)

SooperKanoon Citation : sooperkanoon.com/826617

Court : Chennai

Decided On : Oct-15-2008

Reported in : (2008)221CTR(Mad)72; 2008[12]STR691; [2009]19STT461; (2008)18VST415(Mad)

Judge : P. Jyothimani, J.

Acts : [Central Excise Act, 1944](#) - Sections 11D and 35F; [Finance Act, 1994](#) - Sections 73(2), 76, 77 and 78; Central Excise Rules, 1944 - Rule 57CC; CENVAT Credit Rules, 2001 - Rule 6; CENVAT Credit Rules, 2002; CENVAT Credit Rules, 2004

Appeal No. : W.P. No. 21959 of 2008 and M.P. No. 1 of 2008

Appellant : Devi Constructions

Respondent : The Commissioner of Central Excise (Appeals)

Advocate for Def. : Rajendra Prasad, Adv.

Advocate for Pet/Ap. : K. Vaitheeswaran, Adv.

Judgement :

ORDER

P. Jyothimani, J.

1. By consent of parties, the writ petition is taken up for final disposal even at the admission stage.
2. The writ petition is directed against the order of the respondent, the Commissioner of Central Excise (Appeals), Salem, made in Miscellaneous Order No. 33/2008, dated 30.7.2008 which was passed as interim order pending final decision in the appeal filed by the petitioner against the order of original authority dated 13.11.2007.
3. The impugned order has been passed by the respondent/appellate authority by virtue of powers conferred under Proviso-1 to Section 35F of the [Central Excise Act, 1944](#). Under the impugned order, for the purpose of admitting the appeal, the respondent has directed the petitioner to make pre-deposit of entire service tax of Rs. 5,92,029/- along with 50% of penalty amount of Rs. 7,30,429/- i.e., Rs. 3,65,215/- imposed under Section 76 of Chapter V of [Finance Act, 1994](#); 50% of the penalty amount of Rs. 1,000/-, i.e. Rs. 500/- imposed under Section 77 of Chapter V of [Finance Act, 1994](#); and 50% of penalty of Rs. 7,30,429/- i.e. Rs. 3,65,215/- imposed under Section 78 of Chapter V of [Finance Act, 1994](#).
4. The respondent/appellate authority has directed to make the payment within 30 days for the purpose of enabling the respondent to hear the appeal and the said order is made as requirement of pre-deposit as per the Act. The original authority under the Central Excise Act, viz., the Additional Commissioner of Central Excise, Salem, by order dated 13.11.2007, having found that the service provider viz, M/s. Devi Constructions, the petitioner herein was awarded with the work order No. 17117149 dated 5.7.2004 by M/s. Indian Oil Corporation Limited for construction of Dykes, Internal Roads and other miscellaneous civil works for the upcoming Marketing Terminal at Trichy and Sankari as a part of Chennai-Trichy-Madurai Pipeline Project, has confirmed the demand of service tax of Rs. 7,30,429/- which has been arrived at on the basis of gross amount received by the petitioner during the period from 10.9.2004 to June, 2006 as per the services provided by it under Section 73(2) of the [Finance Act, 1994](#).
5. It is seen that the petitioner itself has agreed that as far as construction of Dykes is concerned, the same falls under construction service and paid an amount

of Rs. 1,38,400/- and the original authority has taken that into consideration and adjusted the same against the tax amount of Rs. 7,30,429/-. In addition to the above said amount, the original authority has also imposed penalty which is equal to the amount of service tax under Section 76 of the Act, a similar amount of penalty under Section 78 of the [Finance Act, 1994](#) apart from imposing penalty of Rs. 1,000/- under Section 77 of the [Finance Act, 1994](#).

6. Assailing the said order of the original authority, the petitioner has approached the respondent being the appellate authority under Section 35F of the [Central Excise Act, 1944](#) and it is, when the matter was argued for admission, the respondent has passed the above said interim order which is impugned in this writ petition.

7. A reference to the impugned order passed by the respondent shows that the petitioner has not raised any point about the financial hardship and even at the time of hearing the appeal, any such hardship had not been contended and therefore, taking note of the conduct of the petitioner in conceding that as regards Dykes, the construction is to be termed as construction service, the respondent held that it should be deemed to be a construction by the petitioner besides other construction activities and in that view of the matter, passed the interim order directing payment of the entire service tax along with 50% of the penalty levied under Sections 76, 77 and 78 of the [Finance Act, 1994](#), less the amount already paid by the petitioner.

8. The learned Counsel for the petitioner would vehemently contend that even though in the grounds of appeal which has been preferred before the respondent, there was no averment about the undue hardship that is being caused to the petitioner by virtue of imposition of service tax with penalty, it is not correct to state that such hardship was not argued at the time when the appeal was posted for hearing. His submission is that to consider about the undue hardship, it was the duty on the part of the respondent to refer to the entire aspects as a whole and since the issue involved in this case is based on the building contract at different stages, unless the respondent has taken the whole case into consideration, the hardship may not possibly be ascertained. His further submission is that while

passing the interim order, the respondent has not taken into consideration the entire aspects to find out the prima facie case and in view of the same, the order has to be set aside.

9. On the other hand, Mr. Rajendra Prasad, learned Counsel for the respondent would submit that in the absence of any pleading of undue hardship by the petitioner, there was no occasion for the respondent, appellate authority, to take into consideration the said aspect at all. The law is well-settled that unless hardship is pleaded, there cannot be any presumption of hardship by the appellate authority and therefore, according to the learned Counsel for the respondent, the impugned order of the respondent, appellate authority need not be interfered with. His further submission is that it is not correct to state that the petitioner being a builder, has not earned any profit, based on the construction agreement.

10. It is true that on a reference to the impugned order passed by the respondent, it is found that there is no contention raised in respect of undue hardship, but the respondent, appellate authority, while deciding the issue, made the petitioner liable for the payment of service tax and penalty, holding that in respect of Dykes, the construction should be deemed to be construction service. The fact that the petitioner has already paid service tax of Rs. 1,38,400/- was also taken into consideration by the respondent, but the unfortunate aspect is that the respondent, appellate authority has only decided about the construction of Dykes that it would attract service tax and without deciding about other construction works, directed payment of entire service tax due for the purpose of admitting the appeal. In my considered view, the appellate authority has not properly appreciated the issue prima facie involved.

11. As rightly submitted by the learned Counsel for the petitioner, for the purpose of arriving at a finding as to undue hardship, certainly the case as a whole should have been considered by the appellate authority. Only on the basis of the finding that the construction of Dykes would come under construction service attracting service tax, it is not proper on the part of the respondent to come to the prima facie conclusion that the petitioner is liable to pay tax for all the works as assessed by the original authority. Section 35F, Proviso-1 makes it very clear that the

Commissioner (Appeals) or the Appellate Tribunal before passing any interim order, shall consider whether the direction for deposit as pre-deposit condition would cause undue hardship to the person against whom such direction is issued. Such a finding is not available in the impugned order of the respondent, nor did the respondent decide the prima facie issue. Section 35F of the [Central Excise Act, 1944](#) is as follows:

Section 35F. Deposit, pending appeal of duty demanded or penalty levied.- Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of central excise authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the [Commissioner (Appeals)] or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the [Commissioner (Appeals)] or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue:

[Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.]

[Explanation.- For the purposes of this section 'duty demanded' shall include,-

- (i) amount determined under Section 11D;
- (ii) amount of erroneous CENVAT credit taken;
- (iii) amount payable under Rule 57CC of Central Excise Rules, 1944;
- (iv) amount payable under Rule 6 of CENVAT Credit Rules, 2001 or CENVAT Credit Rules, 2002 or CENVAT Credit Rules, 2004;

(v) interest payable under the provisions of this Act or the rules made thereunder.]

12. But, that itself is not sufficient to set aside the entire impugned order of the respondent since the order has been passed pending disposal of the appeal in which final adjudication has to be made by the appellate authority as to the correctness of the order of the original authority dated 13.11.2007. Taking into consideration that the construction of Dykes would come under construction service attracting service tax and in respect of which a finding has already been rendered in the order impugned, the appellate authority has to ultimately decide as to whether other contract works are assessable to service tax and that has to be decided at the time of final disposal, in my considered view, to meet the ends of justice, considering the fact that the State Revenue is involved as well as the hardship as put forth by the learned Counsel for the petitioner, a direction should be issued to the respondent to dispose of the appeal at an early date, but with certain reasonable conditions.

13. A reference to the letter dated 26.04.2006 stated to have been submitted by the petitioner as referred to in the impugned order makes it very clear that what was conceded by the petitioner was only in respect of Dykes wall construction work, which is liable for payment of service tax. The relevant portion of the said letter is as follows:

5) Computation of work details, certified by our Civil Engineer.

After having discussed with our tax consultant, we hereby come to the conclusion that the contract works relating to Dykes Wall construction are subject to service tax According to the work assessment given by our civil engineer, 35.91% of the total cost of work comes under Dykes Wall works, Accordingly the service tax liability on Dykes Wall works upto 31.03.2006 works out to Rs. 138400/-. For this we have already remitted with the Government Rs. 1,38,400/- and enclosing herewith the copy of T.R.6 Challan for your reference.

14. In view of the same, the writ petition is disposed of with the following modification to the impugned order of the respondent dated 30.7.2008:

(i) the petitioner shall deposit 50% of the remaining service tax of Rs. 5,92,029/- with the Central Excise Department within a period of 30 days from the date of receipt of copy of the order;

(ii) on the petitioner depositing the said amount within the time stipulated above, the respondent shall take up the main appeal and decide the same on merits and in accordance with law by giving opportunity to the parties;

(iii) in the event of failure of the petitioner in complying with the direction supra, the impugned order of the respondent shall stand revived automatically.

No costs. Connected miscellaneous petition is closed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com