

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.04.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

And

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.2081 of 2012

M/s.Raj Kishore Constructions,
rep. by Proprietor
S.Rajasekaran Appellant

Vs.

- 1.The Customs Excise and Service Tax
Appellate Tribunal, South Regional Bench,
Chennai.
- 2.The Commissioner of Service Tax,
MHU Complex, 6th Floor,
No.692, Anna Salai, Nandanam,
Chennai - 600 035. Respondents

Prayer:

Appeal filed under Section 35-G of the Central Excise Act,
against the order passed in Stay Order No.472/12 dated
12.06.2012 in ST/S/409/2011 in ST/639/2011, by the Customs,
Excise and Service Tax Appellate Tribunal South Regional Bench,
Chennai.

For Appellant : Mr.K.Jayachandran
For Respondents: Mr.A.P.Srinivas

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER, J.)

1.This appeal is directed against the order dated 12.06.2012
passed by the Customs, Excise and Service Tax Appellate Tribunal
(in short, the Tribunal).

2.By virtue of the impugned order, the appellant was
directed to pay a sum of Rs.24,00,000/-, towards pre-deposit of
duty, interest and penalty, demanded of him, in order to enable

prosecution of appeal before the Tribunal.

2.1.The appellant was granted four weeks, from the date of the order, to make the deposit and, compliance qua the same was required to be reported on 26.07.2012.

2.2.The appellant, being aggrieved by the order, preferred the instant appeal.

3.The appeal came up for hearing before this Court for the first time on 05.07.2012, when, this Court stayed the direction requiring the appellant to deposit a sum of Rs.24,00,000/- by way of pre-deposit.

3.1.Thereafter, the matter was listed before the Court on 18.07.2012, at which point, the appeal was admitted and the following questions of law were framed for consideration:

"1.Whether in the facts and circumstances of the case, the order passed by the 1st respondent - Tribunal is right and legal, which failed to consider the ingredients of Section 35-F of Central Excise Act as applicable to Service Tax law while disposing the Waiver application, such as prima facie case of the appellant, undue hardship and the interest of the revenue?

2.Whether the Tribunal is right in directing the appellant to pre-deposit a sum of Rs.24 lakhs, when the entire demand is time barred and also discharged by the main contractors?

3.Whether in the facts and circumstances of the case, a sub-contractor can collect Service Tax and liable to pay the same for the services rendered on behalf of their main contractors, who have paid the Service Tax on the same transactions.?"

4.In order to adjudicate upon the questions of law framed in the matter, the following brief facts, are required to be noticed:

4.1.The appellant is a proprietary concern and, is thus, engaged in providing site formation services. The said services are provided by the appellant by levelling the ground and excavating the earth with the help of excavators.

4.2.The appellant, thus, helps in formation of roads within the project area.

4.3.This service is either offered by the appellant, directly to his clients or, to construction companies, which operate in and about Chennai and Hyderabad.

5.The record shows that the Assessee obtained service tax registration from the Service Tax Commissionerate, Chennai, under the category : 'site formation and clearance services'.

6.A perusal of record would also show that upon being audited by the Internal Audit Group of the concerned Commissionerate, certain irregularities were noticed, which led to issuance of a Show Cause Notice (in short, SCN) dated 05.04.2010.

6.1.By virtue of the said SCN, the appellant was called upon to pay service tax amounting to Rs.1,94,18,848/-. The demand was raised for the periods, spanning between 16.06.2005 and 31.12.2008.

6.2.Furthermore, by virtue of the same notice, the appellant was called upon to show cause, as to why : an amount of Rs.2,05,125/- paid by him on 18.02.2009, ought not to be appropriated; service tax amounting of Rs.1,26,400/-, purportedly collected by the Assessee from his customers and not paid, for the services rendered, during quarter ending on 31.12.2008, ought not to be demanded under Section 73(1) of the Finance Act, 1994 (in short, the Act); interest at the applicable rate, ought not to be charged under Section 75 of the Act; interest in the sum of Rs.44,179/-, ought not to be demanded from him under Section 75 of the Act, qua, belated payments of service tax, during the period from October, 2006 to September, 2008; and lastly, penalty ought not to be levied under Sections 76 and 78 of the Act.

7.The appellant preferred a reply dated 12.08.2010, to the said SCN.

7.1.The reply preferred by the appellant, did not, impress the Adjudicating Authority, which led to the Commissioner of Central Excise, passing the order dated 16.09.2011.

7.2.Against the said order, the appellant preferred an appeal to the Tribunal. Along with the appeal, the Assessee, filed an application, for waiver of pre-deposit of duty, interest and penalty, demanded of him.

7.3.It is, in respect of the said application that the impugned order has been passed.

8.A perusal of the impugned order would show that the Tribunal has noted the fact that out of the total demand qua service tax, which is a sum of Rs.1,94,18,848/-, a sum of Rs.1.08 Crores, has been paid by the main contractor.

8.1.To be noted, the Assessee here is a sub-contractor for a Company going by the name : 'Tarapore and Company, Engineers and Contractors'.

8.2.As a matter of fact, the record shows that the exact amount claimed to have been paid by the said main Contractor, is the sum of Rs.1,08,21,372/-.

8.3.This fact, emerges upon a perusal of a communication dated 19.06.2010, addressed by Tarapore and Company, to the appellant, which is appended at page 19 of the paper book.

8.4.Furthermore, it is an accepted position that a sum in excess of Rs.2,00,000/- has already been paid by the appellant/ Assessee; a fact, which also finds mention in the SCN. The exact amount, though, is a sum of Rs.2,05,125/-.

8.5.Despite the aforesaid, the Tribunal came to the conclusion that a further sum of Rs.24,00,000/-, ought to be paid by the appellant, if it were to direct hearing of the appeal.

9.We may, also note that the appellant claimed that he was entitled to abatement with respect to the tax demanded to the extent of Rs.61,00,000/-.

9.1. This of course, is an debatable issue, which would be determined, in our opinion, at the time, when, the appeal is adjudicated upon, based on facts obtaining in the instant case.

10.The learned counsel for the appellant says that the order is erroneous in law, as none of the parameters, which had to be applied, while passing an order on an application seeking waiver of pre-deposit were brought into play by the Tribunal.

10.1.Learned counsel says that the Tribunal was required to examine, as to whether or not, the appellant had a prima facie case and more particularly, whether hardship would be caused, if, it was called upon to pay, in the given circumstances, a sum of Rs.24 lakhs, at this stage of the matter.

10.2.Lastly, the learned counsel submitted that a substantial amount of money towards the demand raised had already been deposited; and therefore, for the Tribunal to call upon the appellant to pay a sum of Rs.24,00,000/- in the given circumstances, would be harsh.

11.Mr.Srinivas, on the other hand, relied largely on the observations made in the impugned order in opposing the appeal.

12.We have heard the learned counsels for the parties and perused the record.

13.As is indicated above, it is not in dispute that against the total demand amounting to nearly Rs.1.95 Crores, the appellant has, admittedly, albeit, via, the main Contractor, deposited, approximately, even according to the Revenue, a sum of Rs.1.08 Crores.

13.1.Furthermore, the appellant has also paid, as alluded to above, sums in the excess of Rs.2,00,000/-.

13.2.In our view, the interest of the Revenue is more or less secured by virtue of deposit of the aforementioned amounts.

13.3.The Tribunal, was in fact required to examine in terms

of Section 35 F of the Central Excise Act, 1944, (in short "the Act") as to whether or not, in its opinion, deposit of the tax demanded or penalty levied, would cause undue hardship to the appellant, and thus, based on the result of enquiry to determine to what extent waiver of demand, if at all, had to be directed.

14. These aspects of the matter have not been adverted to, by the Tribunal. The Tribunal's order is completely bereft of any rationale, as to why, the appellant ought to have been called upon to pay a further sum of Rs.24,00,000/-, when a substantial part of the demand stood deposited with the Revenue. The issue of hardship was not addressed at all by the Tribunal.

14.1. Furthermore, the Tribunal failed to examine whether or not the Assessee had a prima facie case to seek abatement of tax to the extent of Rs.61 lakhs or, whether the Assessee could be called upon to pay service tax, vis-a-vis, services rendered on behalf of the main contractor, who had, as indicated above, deposited the tax.

15. For all these reasons, we are of the view that the order passed by the Tribunal cannot sustain. Accordingly, the impugned order will have to be set aside. It is ordered accordingly.

16. The questions of law, thus, raised are answered as follows:

16.1. In so far as the question nos.1 and 2 are concerned, they are answered in favour of the Assessee and against the Revenue.

16.2. Learned counsels for the parties are agreed that in so far as question no.3 is concerned, it pertains to the merits of the matter and therefore, need not be answered by the Court, at this stage.

16.3. It is held so.

17. The appeal is disposed of in the aforesaid terms.

17.1. The Tribunal, is, thus, directed to list the appeal for hearing and dispose of the same, as expeditiously as possible.

18. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Customs Excise and Service Tax
Appellate Tribunal, South Regional Bench,
Chennai.

2.The Commissioner of Service Tax,
MHU Complex, 6th Floor,
No.692, Anna Salai, Nandanam,
Chennai - 600 035.

+1cc to Mr.K. Kayachandran, Advocate, S.R.No.22281

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C.M.A.No.2081 of 2012



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