IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

CWP No.1502 of 2018

Date of Decision:-03.10.2019

M/s Balaji Manpower Services, Faridabad.

......Petitioner.

Versus

Union of India & Ors.

......Respondents.

CORAM:- HON'BLE MR. JUSTICE JASWANT SINGH
HON'BLE MR. JUSTICE LALIT BATRA

Present: Mr. Jagmohan Bansal, Advocate for the Petitioner.

Mr. Tejender K. Joshi, Sr. Standing Counsel for respondent-Union of India.

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JASWANT SINGH, J.(ORAL)

1. The Petitioner-proprietorship concern through instant petition under Article 226 of the Constitution of India is seeking modification/quashing of order dated 28.12.2017 **(Annexure P-5)** to the extent Customs, Central Excise and Service Tax Settlement Commission (for short 'Settlement Commission') has declined "cum tax" claim of the Petitioner.

2. The Petitioner is rendering services of "Supply of Manpower". The Petitioner during 2011-12 to 2014-15 collected Service Tax from its clients but deposited partial amount with Service Tax authorities. The Respondent initiated an investigation against the Petitioner which culminated into Show Cause Notice dated 24.10.2016 (**Annexure P-1)**. The

Petitioner approached Settlement Commission vide application dated 21.03.2017(**P-2**) who vide impugned order dated 28.12.2017 (**P-5**) finally settled liability of the Petitioner. The Petitioner was granted immunity from prosecution, however penalty of Rs.3.5 Lakh was imposed. The Settlement Commission declined "cum tax" benefit claimed by the Petitioner, which is point of dispute involved in the present petition.

3. Counsel for the Petitioner contended that Settlement Commission has wrongly declined "cum tax" benefit because while calculating tax liability, in the show cause notice itself question of cum tax value was considered and value appearing in Form 26AS was considered as cum tax value. He further contended that sample invoices were produced before Competent Authority alongwith certificate of Chartered Accountant certifying that sale invoices for the period in question were inclusive of service tax, thus there was no reason to deny claim of the Petitioner. He supported his contention with the judgment of this court in the case of **Idea Cellular Ltd. Vs Union of India 2017 (4) GSTL 4(P&H),** CESTAT orders in the case of **Vaishali Developers & Builders Vs Commissioner of C. Ex., Bhopal 2017 (47) STR 300 (Tri. -Del) and Raj Catering Services Vs Commissioner of Central Excise, Pune 2017 (561) STR 426 (Tri.-Mumbai)**. He also cited judgment of Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Delhi Vs Maruti Udyog Ltd. 2002(141) ELT 3 (SC)** which deals with question of cum tax value under Central Excise Act.

4. Counsel for the Respondent contended that Petitioner had failed to submit invoices, thus Settlement Commission has rightly declined claim of the Petitioner. On the question of judgments cited by counsel for the Petitioner, contended that these judgments are not applicable because facts are different and judgment of Hon'ble Supreme Court deals with valuation under Central Excise Act, 1944.

5. It would be useful to look at Para 5 of show cause notice dated 24.10.2016 (**P-1)** and Para 15(i) & (ii) of impugned order **(Annexure P-5)** which has been relied upon both sides. Relevant Paras extracted as below:

> " Para 5 of show cause notice
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> **5.** Whereas, further scrutiny of balance sheets for the financial year 2011-123 to 2014-15**(RUD-VII)**, Form 26AS**(RUD-VIII)** (a statutory document under income Tax Act, showing therein those value on which TDS were deducted of the respective year), it was observed that Assessee have under declared their value of services in their periodical ST-3 returns filed during the financial year 2011-12 to 2014-15. On reconciliation of value of services provided as available in balance sheet & Form 26AS for the financial year 2011-12 to 2014-15 vis-a-vis ST-3 periodical Service Tax to the tune of Rs. 72,65,808/- during the relevant period 2011-12 to 2014-15. The Service Tax liability has been calculated based on higher value of Services as appearing in the Balance Sheet (Col-"Service Income") as well as value as appearing in **Form 26AS by deducting service tax Element, accepting the value on which TDS has been deducted as cum-tax value,** during the respective period 2011-12 to 2014-15 less the value already declared in ST-3 return & service tax paid thereon.
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> Para 15 (i) & (ii) of impugned order:
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> **15 (i**) The Bench finds that the only issue left to be decided was regarding the benefit of cum tax which has been contested by the applicant. We find that Jurisdictional Commissioner in the report

dated 13.10.2017 informed that the Service Tax component separately shown on the invoices may be debited from their total tax liability, however, vide letter dated 2.11.2017, the Jurisdictional Commissioner informed that Service Tax amount shown separately on the invoices cannot be re-determined as the applicant has not submitted copies of all invoices to them. The applicant was given an opportunity to submit copies of all invoices if they wish to avail the cum tax benefit. The Bench finds that the applicant failed to produce all copies of invoices and instead submitted a Chartered Accountant Certificate, certifying that sales invoices for the period 2011-12 to 2014-15 were inclusive of Service Tax. The Bench finds that since the applicant failed to produce the copies of all invoices, even though the applicant was entitled for cum tax benefit on the basis of sample invoices produced by the applicant, the Bench declines to grant cum tax benefit to the applicant.

(ii) We also find that the applicant had not discharged their Service Tax liability even after having collected the same from their customers/service receivers. Thus, the applicant while defrauding the exchequer, garnered double benefit, firstly collected the Service Tax from the service receivers and secondly retained the same with themselves and not deposited with the Government. Therefore, we hold that the applicant does not deserve any leniency and is liable for imposition of penalty. ”

6. The conceded position emerging from record is that the Petitioner declared lesser value of service in the service tax returns than value shown in the balance sheet and 26AS Forms. The Respondent considered value shown in 26AS Forms as “cum tax value” and compared with value shown in balance sheet. The Petitioner submitted sample invoices and certificate of Chartered Accountant certifying that invoices were inclusive of service tax. The Settlement Commission found that

Petitioner is entitled to cum tax benefit, however declined to grant relief.

7. A Division Bench of this Court in the case of **Idea Cellular Ltd. (Supra)** dismissed appeal of the revenue which was filed against order of Tribunal, who had held that party has not collected any service tax from the Sim Card subscribers, thus value of sim cards sold to the subscribers shall be deemed to be cum tax price. Division bench of Tribunal in the case of **Raj Catering Services (Supra)** while confirming demand of service tax extended benefit of cum tax value as department calculated service tax on the gross amount charged by Appellant.

8. The Respondent considered value appearing in 26AS Form cum tax value and Settlement Commission on the basis of sample invoices found that Petitioner is entitled to benefit of cum tax value. The Settlement Commission has further noted that tax was collected but not deposited. The gross value was shown in the balance sheet as well Form 26AS. There seems no reason to deny benefit of cum tax value in view of the fact that price appearing in 26AS Forms was admittedly cum tax price and as per judgments cited by Petitioner gross value is considered as cum tax. The Settlement Commission has found that tax was collected but not deposited but there is nothing on record to show that tax was collected over and above value appearing in balance sheet rather value appearing in 26AS Form has been considered as cum tax price. Thus we find no reason to deny benefit of cum tax value.

9. In view of our above findings, present petition deserves to be allowed and **accordingly allowed**. Order dated 28.12.2017 **(Annexure P-5)** passed by Settlement Commission is modified and Respondent is directed to calculate liability after granting benefit of cum tax value. The needful shall be done within two (2) months from the date of receipt of certified copy of this order.

(JASWANT SINGH)
JUDGE

(LALIT BATRA)
JUDGE

October 03, 2019
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Whether speaking/reasoned	***Yes/No***
Whether Reportable	***Yes/No***