CUSTOMS,EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD

REGIONAL BENCH : COURT NO – 3

Service Tax Appeal No. 12843 of 2018-SM
(Arising out of OIA No.- AHM-EXCUS-002-APP-28-17-18 dated 26.07.2018 passed by Commissioner (Appeals) Commissioner of Central Excise, Customs and Service Tax-Ahmedabad)

Aahir Construction Appellant

G-301, Ratna Apartment, Sun N Step Club Road
Opp. Alok Bungalow, Thaltej
Ahmedabad

-VERSUS-

C.C.E. Ahmedabad Respondent

Custom House, First Floor,
Old High Court Road, Navrangpura,
Ahmedabad, Gujarat, 380009

Present For the Appellant : Shri Jigar Shah, Advocate

Present For the Respondent : Shri T.K. Sikdar, Asst. Commissioner(AR)

CORAM:

HON'BLE MEMBER (JUDICIAL) , MR. RAMESH NAIR

FINAL ORDER NO. A/ 11557 / 2019

Date of Hearing: 30/07/2019
Date of Decision: 22/08/2019

RAMESH NAIR

The brief facts of the case are that the appellants are engaged in the activities of civil construction during the period of dispute i.e. 01/04/2015 to 29/02/2016, the appellant constructed the buildings of Institute of Kidney Disease and Research Centre as the sub-constructor of M/s Malani Constructor. The activities carried out by the appellant under the work order given by M/s Malani construction was exempted under Sno. 12 of notification 25/2012-ST dated 20.06.12. However, during the period of dispute i.e., 01/04/2015 to 29/02/2016, the said exemption from payment of Service tax was withdrawn. Thereafter, the appellant continued to pay the service tax on construction services. The Central Government inserted section 102 in the Finance Act, 1994 to enable the assessee to claim refund of Service Tax paid during the period 01/04/2015- 29/02/2016. In view of insertion of section 102 in the Finance Act, 1994, the appellant filed refund claim of Rs. 14 lakhs paid for construction of building of Institute Of Kidney Disease as sub constructor of M/s Malani Construction. The appellants were issued a Show Cause Notice bearing F NO. SD/02/REF-85/2016-17 dated 23/09/2016 proposing to reject the refund claim filed by the appellant on the ground of unjust enrichment.

The Adjudicating Authority, ie., Ld. Assistant Commissioner of Service, Ahmedabad vide his Order-in-Original no. SD-02/REF-186/VIP/2016-17 dated 16/11/2016 rejected the refund claim of Rs. 14 lakhs filed by the appellant on the ground that the appellants have not crossed the bar of unjust enrichment and also on the ground that the activities carried out by the Appellant do not qualify as works contract services. The appellants, being aggrieved by the OIO, filed a detailed appeal before the Ld. Commissioner of Central Excise (Appeals) at Ahmedabad raising all the legal and factual grounds. The appellants also submitted the all the required documents before the Commissioner (Appeals). Ld. Commissioner (Appeals) vide Order in appeal no. AAHIR/EXCISE-002-APP-309-17-18 dated 05/09/2017, remanded the proceeding with a direction that the Original Adjudicating Authority should verify the work order issued to the appellants and also the invoices, ledgers, accounting statements raised by the appellant. The Ld. Assistant Commissioner of Central Excise, Ahmedabad vide OIO no. Div-VII/North/58/Refund/Aahir/2017-18 dated 10/01/2018 rejected the refund claim of Rs. 14 lakhs filed by the appellants. Being aggrieved by the said OIO dated 10.01.2018, the appellant again preferred a detailed appeal before the Ld. Commissioner of Central Excise (Appeals) at Ahmedabad. Ld. Commissioner (Appeal), Ahmedabad vide OIA no. AHM-EXCUS-002-APP-28-2017-18 dated 26.07.2018 rejected the refund claimed by the appellant. Therefore, the present appeal was filed by the appellant.

2. Shri Jigar Shah, Ld. Counsel appearing on behalf of the appellant submits that as against the filing of refund claim, the show cause notice issued to the appellant only raised the issue of unjust enrichment. Therefore, the other issues that whether the service is of works contract or otherwise was not the issue raised in the show cause notice. However, the order is dealt with the aspect of nature of services which is beyond the scope of show cause notice. In this regard, he placed reliance on the following judgments:

1. Prince Khadi Woolen handloom Prod. Coop. Indl. Society v/s CCE 1996 (88) ELT 637 (SC)
2. Reckitt & Colman of India Ltd. v/s CCE 1996(88) ELT 641 (SC)
3. Commissioner v/s Reliance Ports & Terminal Ltd. 2016 (334) ELT 630 (Guj.)
4. CCE v/s. Ballarpur Industries 2007 (215) ELT 489 (SC)
5. CCE v/s GAIL 2008 (232) ELT 7 (SC)

He further submits that as regard the issue of bar of unjust enrichment, the same is not applicable in the present case. He submits that the Original Adjudicating Authority and Appellate Authority has accepted this fact itself. He further submits that the appellant have proved beyond doubt that if the refund is granted to them, then it will not result in unjust enrichment. In this regard, they have submitted certificate from principal M/s Malani Constructions who have never paid Service Tax amount to the appellant. He submits that the Adjudicating Authority as well as Appellate Authority has accepted the fact that if the refund is granted to the appellant, then it will not result into unjust enrichment which he recorded in para 10 of his order dated 30/07/2018. He also submits that the main contractor has certified that they have never paid Service Tax to the appellant. The issue is squarely covered by the judgment of Hon'ble Gujarat High Court and Tribunal which are as follows:

(1) Modest Infrastructure 2011 (31) STR 650 (Guj.)
(2) Modest Infrastructure 2011 (24) STR 369 (Tribunal)
(3) Nutan Shah 2015 (8) TMI 68-CESTAT Ahmedabad

He submits that though the nature of services was not issue in the SCN even though on that aspect also in their favour. He submits that activities carried out is in fact working contract. Revenue authority has also ignored the documentary evidences produced by the appellant, merely to reject the refund claim. He submits that the appellant have provided the work contract services along with the material such as M.S. wire, while performing the construction of activity. Therefore it is works contract. The appellant have submitted by the relevant documents which prove beyond doubt that they had performed works contract services only. He submits that since appellant provided works contract service which was valued less than Rs. 5lakh, there was not requirement of obtaining registration under the VAT law. He also placed reliance on the decision of the Hon'ble Supreme Court in the case of CCE, Pro Lab 2015 (321) ELT 366 (SC). As directed by this Bench, the appellant filed additional documents such as ledger accounts maintained in the appellant's books of accounts in respect of principal M/s Malani Constructions and also the ledger accounts maintained in the books books of principal M/s Malani construction. Both the accounts were certified by the Chartered Accountant. The CA certificates were also submitted.

3. Shri T.K. Sikdar, Ld. Asst. Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. I have heard both sides and perused the records. I find that the Show cause notice that refers to refund application filed by the appellant has raised objection only with regard to aspect of unjust enrichment. Whereas, the Adjudicating Authority as well as the Ld. Commissioner (Appeals) had gone into the aspect of nature of services, whether the services fall under works contract service or

otherwise. Such an important issue cannot be dealt without making any allegations in the show cause notice. Both the authorities have travelled beyond the scope of show cause notice which is legally not permissible for the authority to deal with at such stage of adjudication as well by Commissioner (Appeals) as this is a settled law in the judgments cited below:

1. Prince Khadi Woolen handloom 1996 (88) ELT 637 (SC)
2. Reckitt & Coleman of India 1996(88) ELT 641 (SC)
3. Reliance Ports & Terminal 2016 (334) ELT 630 (Guj.)
4. Ballarpur Industries 2007 (215) ELT 489 (SC)
5. GAIL 2008 (232) ELT 7 (SC)

In view of above settled laws, both the authorities who have decided the issue that the services provided by the appellant is not of works contract and consequently rejected the refund claim, is absolutely illegal and incorrect. Therefore, the findings as regard the issue of works contract is quashed and set aside. Now the issue remains to be decided is that whether there is unjust enrichment or otherwise. As regard unjust enrichment, even the Ld. Commissioner (Appeal) in Para 10 of his order dated 30.07.2018, observed as under:

> *10. As regards appellant's contention that the burden of service tax has not been passed on is not a matter of dispute as the adjudicating authority has concluded in the impugned order dt. 10.01.2018, that the appellant has borne the burden of service tax of Rs.14,00,000/- and have not passed on the same to the Original Contractor and hence the doctrine of unjust enrichment is not attracted in this case. The department has also not filed any appeal in this regard, and therefore, the matter of unjust enrichment in this case has attained finality.*

In view of above clear finding, the appellant has not passed the incidence of refund amount of Rs. 14 lakhs to any other person. Against this finding no challenge was made by the department. Therefore, this issue on unjust enrichment attained finality in favour of the appellant. Moreover, on going through the records, I find that the appellant have not paid the Service Tax over and above the service charged by the principle M/s Malani Construction, which is clearly appearing in ledgers of both the parties, the appellant as well as the principle, that amount of Service Tax was not paid by M/s Malani Construction to the appellant. Even in the main contract, awarded to the principle M/s Malani Construction clearly states that no payment towards service tax for the work under reference has been paid by this department and will not be paid in future as per our contract conditions. M/s Malani construction also issued a certificate stating that *"M/s Aahir Construction" has paid the Service Tax from their own funds and have not recovered the same from us. Since the services provided to the Govt., a local authority or governmental authority by way of construction of civil structure meant predominantly for use other than commerce, industry or any other business or profession is exempted under notification no. 09/2016-ST dated 11/03/2016 read with section 102 in the Finance Act, 1994. We have not paid the service tax to the said Aahir Construction and have advised them to take refund of service tax from the service tax department in view of the retrospective exemption*." It is also observed that appellant have issued credit note to M/s Malani Construction for an amount of Rs. 14 lakhs towards Service Tax which was initially charged in the bill. With the ample of evidences as discussed above, there is absolutely no doubt that the appellant have not passed on the incidence of Service Tax paid by them to any other person. Therefore, not only on the basis of evidence but as per clear concluding finding given by the Commissioner (Appeal) in his order in para 10, the issue of unjust enrichment does not exist. Accordingly, I find that appellant is clearly entitled for refund of Service Tax paid by them. As a result, the impugned order is set aside. Appeal is allowed with consequential relief, if any.

(Pronounced in the open court on 22/08/2019)

(Ramesh Nair)
Member (Judicial)

Diksha