CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL AHMEDABAD
REGIONAL BENCH, COURT NO. 3

SERVICE TAX APPEAL NO. 11050 OF 2015

(Arising out of OIO-AHM-EXCUS-003-COM-036-14-15 dated 25/03/2015 passed by Commissioner of Central Excise, Customs and Service Tax-AHMEDABAD-III)

DHANANJAY G KELA **Appellant**

15/b, Shri Ram Park Society,
2nd Railway Garnala,
Patan, Gujarat

Vs.

CST-AHMEDABAD-III **Respondent**

Custom House... 2nd Floor,
Opp. Old Gujarat High Court, Navrangpura,
Ahmedabad, Gujarat-380009

Appearance:
Present for the Appellant : Shri Jigar Shah, Advocate, Shri Amber Kumrawat and Ms Raksha Bhandhari, Advaocate
Present for the Respondent: Shri Rajesh K Agarwal, Superintendent (AR)

CORAM:
HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C. L. MAHAR, MEMBER (TECHNICAL)

Final Order No. 11103/2024

DATE OF HEARING: **20.03.2024**
DATE OF DECISION: **17.05.2024**

RAMESH NAIR

M/s. Dhananjay G. Kela (hereinafter referred to as "the Appellant") is a proprietorship firm inter alia engaged in providing services of civil construction.

1.1. During the relevant period i.e. April 2007 to March 2011, the Appellant had provided certain construction services to GETCO, a wholly owned subsidiary of the Government of Gujarat which was set up as a part of the ongoing reform towards restructuring of the Power Sector. As per the contracts entered into between the Appellant with GETCO, the scope of work for which the Appellant was engaged involved provision of services such as construction of roads, construction of residential quarters, laying of cables, construction of compound wall, construction of foundation, among other things.

1.2. Since, GETCO is a Government entity, the Appellant was of the belief that the services rendered by it were not for any commercial or industrial purpose, therefore, the Appellant did not discharge any service tax on provision of such services. Further, the services of the Appellant were in fact, in relation to transmission and distribution of electricity and therefore, the same were exempted from levy of service tax in terms of Notification No. 45/2010-ST dated 20.07.2010. Accordingly, for the services provided to GETCO, no service tax was discharged by the Appellant.

1.3. In addition to the above, during the relevant period, the Appellant was also providing construction services to the local Municipality i.e. Patan Municipality/ Mahanagar Palika. The nature of work in this case was rubble stone pitching surrounding the Gudhadi Lake. The Appellant did not discharge any service tax in respect of the said services also on the bona fide belief that the services were not for commercial purpose.

1.4. The Appellant received letters from department seeking information with respect to the work carried out by them whereupon the Appellant vide their letter dated 19.03.2012 submitted the audited financial statements for financial year 2007-2008 to 2010-2011. The Appellant further submitted the copies of work orders issued by GETCO along with the work order wise details of works carried out by them against each order.

1.5. Further on 19.03.2012 statement of Shri Dhananjay G Kela, proprietor of the Appellant firm was recorded wherein he inter alia stated that the contract work undertaken for GETCO was for construction of staff quarters, road, cable trench, control room building, compound wall & foundation. Further it was also

Informed that Appellant has paid total amount of Rs.6,54,193/- against service tax & Rs.6,032 against the interest.

1.6. Pursuant to aforesaid investigation being conducted against the Appellant since 2010, the Show Cause Notice dated 25.10.2012 came to be issued to the Appellant without taking any note of the non-taxability of the services rendered by the Appellant and proposed to recover service tax amounting to Rs. 78,09,657/- along with the applicable interest and penalty.

1.7. In response to the said Show Cause Notice, the Appellant had furnished a detailed reply vide letter dated 21.05.2013 denying all the allegations levelled by the Department. The Appellant also made detailed submissions during the course personal hearing on 11.03.2014.

1.8. However, the Ld. Commissioner confirmed the demand of service tax amounting to Rs. 78,09,657/- along with the applicable interest and penalty vide OIO No. AHM-EXCUS-003-COM-036-14-15 dated 25.03.2015 (hereinafter referred to as "the Impugned Order").

1.9. The Appellant, being aggrieved by the Impugned Order dated 25.03.2015 has preferred the present appeal on the detailed grounds as detailed in the appeal memo.

2. Shri Jigar Shah learned Counsel appearing on behalf of the appellant made the following submissions:-

A.1. The Appellant at the outset submits that the services provided by it are neither classifiable under the category of 'Commercial or Industrial Construction Service nor under the category of 'Works Contract Service' because, the same are not in relation to commerce or industry.

A.3. The Appellant submits that from a bare perusal of the above definition, it is apparent that the services rendered by the Appellant can be made classifiable under the aforesaid categories only if the same are for the purpose of commerce or industry.”

The appellant submits that from bare perusal of definition of commercial or industrial construction service and work contract service, it is apparent that services render by the appellant can be made classifiable under the aforesaid category only if they same are for the purpose of commerce or industry.

A.4. Further, the word 'commercial concern' as per dictionary meaning would mean a person must be established with the purpose of gaining profit and the word 'industry' as per the Black's Law Dictionary means any department or branch of art, occupation or business conducted as a means of livelihood or for profit.

A.5. It is submitted that GETCO is a wholly owned subsidiary of the Government of Gujarat which was set up with the motive of restructuring the power sector by provision of electricity to the public which is a civic amenity. It is submitted that it is evident that GETCO was not established for the purpose of profit motive. Therefore, services provided to GETCO cannot be termed as services rendered for the purpose of commerce or industry. The construction services provided by the Appellant are related to such transmission of electricity carried out by GETCO and therefore, the said services are not classifiable under both the categories i.e. Commercial or Industrial Construction Service' and 'Works Contract Service'.

A.6. Similarly, the Patan Municipality is also is engaged in providing basic civic amenities to the public at large and for the same the Municipality had engaged the Appellant to provide services and therefore, the said services also cannot be said to be in relation to commerce or industry and therefore, again the services provided by the Appellant are not classifiable under both the categories i.e. Commercial or Industrial Construction Service' and 'Works Contract Service'.

A.7. In light of the above submissions, the Impugned Order is liable to be set aside.

B.1. The Appellant submits that the SCN in the present case was issued on 25.10.2012 by invoking the extended period of limitation, proposing to recover the Service Tax for the period from April 2004 to March 2011. The Department in the present SCN has alleged suppression and wilful mis-statement of facts on the part of the Appellant and demand has been accordingly been confirmed by the Ld. Commissioner in the Impugned Order.

B.2. However, in the present case Appellant submits that there was no suppression of any fact of wilful misstatement on its part as there was no wilful act/omission on the part of the Appellant. The Appellant was and still is under the bona fide belief that service tax was not payable by the Appellant and only on account of that belief the Appellant had not paid service tax.

B.3. The Appellant place reliance on the decision of M/s GD Goenka Pvt. Ltd. v. Commissioner of CGST, 2023 (8) TMI 995- CESTAT NEW DELHI wherein it was held that merely because the assessee is required to self- assess his tax liability and that the Department only came to know about the wrongful availment of Cenvat Credit only because it conducted audit does not imply that the Appellant had the intention to evade tax liability. The Hon'ble Tribunal held that the obligation of the assessee is to file his Returns and thereafter it is the duty of the Department to scrutinize such Returns and assess the tax liability. If the Department fails to do so then, the responsibility of the same lies with the Department and not the assessee. The responsibility of the assessee is limited to the filing of his Return and nothing more is required of him. Therefore, in such cases, the Department cannot allege suppression of facts and invoke the extended period of limitation.

B.4. In light of the detailed findings of the Hon'ble Tribunal in the above decision, it is submitted that once the Appellant duly files the Returns, the onus is on the officers of the Department to scrutinize such Returns properly. The onus of any loss to the Revenue in such cases is upon the officers and not the Appellant because the Appellant is not an expert and merely because the tax paid is self-assessed does not mean that in case of any short- payment by the Appellant, the Department can allege suppression of facts. It is the Department's obligation to conduct deep scrutiny of the Returns. Similar finding was given by the Hon'ble Chandigarh Tribunal in case of CCE & ST v. M/s. Himachal Futuristic Communication Ltd., 2023-VIL-1245-CESTAT-CHD-ST."

2.1. He further submits that since as per the nature of the service and the facts involved the appellant's services are correctly classifiable under work contract service, hence demand raised under wrong category i.e. commerce or industrial construction service will not sustain. In support of his submission he placed Reliance on the following Judgments:-

- Sandeep Sobti Vs CCE 2008 (11) STR 115 (T)
- Sima Engg. Constructions Vs CCE 2011 (21) STR 179 (T)
- Kedar Construction Vs CCE 2015 (37) STR 631 (T)
- GD Goenka Pvt. Ltd Vs CGST 2023 (8) TMI 995- CESTAT
- Dinesh Chandra R Agrawal Infracon Pvt. Ltd Vs CGST 2023 (11) TMI 1080-CESTAT
- Jija Builders Vs CCE 2018 (4) TMI 730-CESTAT
- B.R. Kohli Construction Pvt. Ltd Vs CST 2017 (4) TMI 38-CESTAT

3. Shri Rajesh K Agarwal, Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both sides and perused the records. We find that as per the fact of the case the appellant have provided service along with the material and VAT has been paid. Accordingly, the services are correctly classifiable under works contract service. It is settled law that even though the activity of the assesse is taxable but if the assessee is not put to notice for demand of Service Tax specifying the correct classification, show cause notice proposing demand for under

wrong head the demand cannot be sustained, in this regard we relied upon the following judgments :-

- Sandeep Sobti Vs CCE 2008 (11) STR 115 (T)
- Sima Engg. Constructions Vs CCE 2011 (21) STR 179 (T)
- Kedar Construction Vs CCE 2015 (37) STR 631 (T)
- GD Goenka Pvt. Ltd Vs CGST 2023 (8) TMI 995- CESTAT
- Dinesh Chandra R Agrawal Infracon Pvt. Ltd Vs CGST 2023 (11) TMI 1080-CESTAT
- Jija Builders Vs CCE 2018 (4) TMI 730-CESTAT
- B.R. Kohli Construction Pvt. Ltd Vs CST 2017 (4) TMI 38-CESTAT

From the above decision it is the settled law that show cause notice has not proposed the demand under the correct category of the service the demand shall not sustain. Following the rule of the above decision in the present case also since the demand was raised under commercial and industrial construction services whereas the correct classification of the service is work contract service, accordingly the demand in the present case is not sustainable on this ground itself.

Since, the issue involved is interpretation of classification of service and admittedly service work provided to the Government Authority and Public Sector undertaking, the appellant's bona fide belief that the activity is not liable to Service Tax cannot be doubted with. The service were provided to Government Agency the transaction cannot be hidden hence the suppression of fact with mala fide intention to evade payment of Service Tax does not exist in the present case. Accordingly, the demand for the extended period is also hit by limitation.

As per our above discussion and finding the demand of Service Tax and consequential interest and penalties confirmed by the Adjudicating Authority will not sustain.

5. Hence, the impugned order is set side. Appeal is allowed with consequential relief.

(Pronounced in the open court on **17.05.2024***)*

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C. L. MAHAR)
MEMBER (TECHNICAL)

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