

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

SERVICE TAX APPEAL NO. 10220 OF 2022

(Arising out of OIO-VAD-EXCUS-001-COM-12-21-22 dated 13.01.2022 passed by Commissioner of Central Excise, Customs & Service Tax- VADODARA-I)

NEXCEL INFRA

12/260 SARVESHWAR FLATS NEW IPCL ROAD SUBHANPURA
VADODARA-GUJARAT

....Appellant

VERSUS

C.C.E. & S.T. Vadodara-I

1ST FLOOR...CENTRAL EXCISE BUILDING,
RACE COURSE CIRCLE,
VADODARA, GUJARAT-390007

....Respondent

APPEARANCE:

Shri Saurabh Dixit, Advocate appeared for the Appellant

Shri. Dinesh M. Prithiani (Authorized Representative) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
 HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/ 12237 /2022

DATE OF HEARING: 17.10.2022

DATE OF DECISION: 22.12.2022

RAMESH NAIR

The brief facts of the case are that the Appellant is engaged in undertaking construction activities, mainly for various Government / Local authority related projects. The issue involved is whether the Appellant is liable to pay Service Tax on differential value in comparing Form 26AS/ITR statement and taxable value declared in the ST-3 returns for the year 2016-17.

2. Shri. Saurabh Dixit, Learned Counsel appearing on behalf of the Appellant submits that out of the total Service Tax demand proposed, substantial amount of demand is already dropped vide the impugned order, which is not challenged by revenue department. The balance demand in dispute consists of three separate types of issues, which are dealt with separately. He also submitted that in all the cases, the Appellant acted merely as a sub-contractor to the main contractor, one M/s. Shantilal B. Patel & Co., on whom no demand of Service Tax has been raised till date, leading to their bonafide belief that they were exempt from payment of Service Tax in the capacity of Sub-Contractor.

3. He submits that the first nature of demand is raised on undertaking construction of Affordable Housing under Mukhyamantri Gruh Yojna (MGY), the Appellant had provided services to the main

contractor in the nature of planning designing, construction of flat type high rise buildings cum commercial units including site development with all infrastructure services for lower income group (LIG) scheme (45 sq.mt. Carpet Area) at various locations in Vadodara under the Mukhyamantri Gruh Yojna(MGY). The impugned order denies exemption under Notification No.25/12-ST Sr. No. 29(h) read with Sr. No.14(ca)(ii) thereof, on the grounds that since apart from affordable housing, the MGY scheme also had certain "commercial units" and hence, the exemption is not available thereon under Sr. No.14(ca)(ii) of Notification No.25/12-ST. He further submitted that evenif certain "commercial units" were a part of Affordable housing scheme of the state Govt., and since the Appellant constructed residential units as also minuscule commercial units as part of a single affordable housing scheme of state Govt under MGY, it does not mean that such exemption is ipso facto unavailable to such construction activity or that the said project ceased to be under MGY as affordable housing project. Nowhere does Notification No..25/12-ST, more particularly Sr. No.14(ca)(ii) thereof state that if one single commercial unit is constructed, the housing scheme will cease to be housing scheme. Also, no demand was ever raised on the main contractor, and hence, the Appellant considered themselves to be eligible for exemption as a sub-contractor under Notification No.25/12-ST Sr. No.29(h) thereof, which exempts a sub-contractor where main contractor is exempt from payment of Service Tax.

4. He further submits that as regards the Narmada Guest House construction and refurbishment work undertaken for the main contractor M/s. Shantilal Patel, the impugned order holds that inasmuch as the work order executed between the Appellant and the main contractor was dated 1.12.15, whereas only "contract entered into prior to 1.3.15 towards such construction services provided to Govt/local authority" is exempt from payment of Service Tax, the said exemption is not available to the Appellant. He further submitted that admittedly, no demand of Service Tax on main contractor was ever raised, which led to the bonafide belief regarding the Appellant being exempt under Notification No.25/12-ST Sr. No.29(h) as a sub-contractor.

5. He submits that as regards Service Tax demand for Irrigation work for Bodki Irrigation Scheme under Work Order dt.1.10.16, admittedly, the Appellant, in the capacity of Sub-Contractor to M/s.

Shantilal B. Patel & Co., had undertaken works contract in the nature of irrigation work for the Bodki Irrigation Scheme across river Zinzooda near village Bodki, Rajkot.

6. He however submits that the impugned order denies exemption to the Appellant and seeks recovery of Service Tax on the ground that since the Appellant provided the back to back work order received by the main contractor i.e. Shantilal B. Patel & Co. and not directly from irrigation department/Govt body itself and the proof that such work was entrusted to main contractor by State Govt/Govt authority was not produced in form of work order/contract. While it is their case that the work order No.AB-4/BODKI T.R. /206 dt.19.1.2010 placed by the irrigation department upon main contractor viz. M/s. Shantilal B. Patel & Co. and the Agreement No.SSP/B2/T-190/2016-17 DT.1.5.2016 made between such main contractor and the Appellant was produced before the lower authority, it is anyway a part of the appeal paperbook at running page No. 54 to 57.

7. For all the different demands raised, he submits that in none of the cases the main contractor has either paid Service Tax nor any demand was admittedly raised on them, and the Appellant always entertained a bonafide belief in this regard regarding eligibility of exemption being Governmental work. He finally argued that CESTAT in the case of P.R. Rolling Mills Pvt. Ltd 2010(249) ELT 232(Tri-Bang) as upheld by Hon'ble Supreme Court of India as reported at 2010(260) ELT A84(SC), held that if any duty was paid by job worker, would be availed as Cenvat Credit by principal anyway, this being revenue neutral situation, the demand has to be treated as time-barred.

8. Shri Dinesh M. Prithiani, learned Assistant Commissioner (Authorised Representative) reiterates the findings recorded by the lower authority. He submits that since apart from affordable housing, even marginal commercial construction was involved, for which no breakup is provided by the Appellant, the exemption is not available to them.

9. We have considered the rival submissions. The admitted facts involved in the present case are that the Appellant had undertaken Government construction work, in the capacity of a sub-contractor, for the main contractor M/s. Shantilal B. Patel & Co. for all the three separate disputes involved in the present appeal. All remaining demand

originally proposed, are already dropped by the Adjudicating authority himself. It is also an admitted fact, as also certified by the main contractor, that they neither paid any Service Tax in respect of all three service activities in dispute, nor any demand was raised against them in this regard as well.

10. We find that the Appellant has mainly contended that they were under bonafide belief that no Service Tax was payable on the work in question, being exclusively Governmental construction and when the main contractor too had not paid any Service Tax thereon without any adverse view being taken by Service Tax department. The demand is mainly contested as being time-barred as such. We find force in the submissions made by the Ld. Advocate on this count. In the given set of facts and circumstances, the bonafide belief entertained by the Appellant cannot be questioned. Also if the Appellant was liable to pay Service Tax, back to back, even the main contractor would have also been liable to pay the same. Whatever Service Tax, if paid by the Appellant, would have been back to back availed as Cenvat Credit by the main contractor anyway.

11. We also find merit in the reliance on the decision of the CESTAT in the case of P.R. Rolling Mills Pvt. Ltd 2010(249) ELT 232(Tri-Bang) as upheld by Hon'ble Supreme Court of India as reported at 2010(260) ELT A84(SC), to the effect that if any duty was paid by job worker, would be availed as Cenvat Credit by principal anyway, this being revenue neutral situation, the demand has to be treated as time-barred. The same analogy can be applied even for sub-contractor and main contractor as well.

12. Therefore without going into any other issues, including whether exemption for construction of affordable housing under MGY scheme is available irrespective of small portion of commercial construction involved as part of MGY scheme under the tender floated, we find that the issue on hand can otherwise be decided in the facts and circumstances of the present case, on account of demands being time-barred. Also, the work order No.AB-4/BODKI T.R. /206 dt.19.1.2010 placed by the irrigation department upon main contractor viz. M/s. Shantilal B. Patel & Co. and the Agreement No.SSP/B2/T-190/2016-17 DT.1.5.2016 made between such main contractor and the Appellant is already produced by the Appellant qua Bodki River irrigation work

related issue and no purposeful meaning will be served by remanding the matter back for re-examination of this, especially in light of the fact that the appeals are required to be allowed on account of demands being time-barred anyway.

13. Therefore, in light of the above, the impugned order is set aside, and appeal is allowed with consequential relief, if any, in accordance with law.

(Pronounced in the open court on 22.12.2022)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha