

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Service Tax Appeal No.12257 of 2013

(Arising out of OIO-60/COMMR/2013 dated 23/04/2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

Deep Construction Company

.....Appellant

Plot No. -M, Sector -8,
Mani Complex, Office No. 224,
GANDHIDHAM, GUJARAT

VERSUS

C.C.E. & S.T.-Rajkot

.....Respondent

Central Excise Bhavan,
Race Course Ring Road...Income Tax Office,
Rajkot, Gujarat-360001

WITH

Service Tax Appeal No.13095 of 2013

(Arising out of OIO-60/COMMR/2013 dated 23/04/2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT)

C.C.E. & S.T.-Rajkot

.....Appellant

Central Excise Bhavan,
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Rajkot, Gujarat-360001

VERSUS

Deep Construction Company

.....Respondent

Plot No. -M, Sector -8,
Mani Complex, Office No. 224,
GANDHIDHAM, GUJARAT

APPEARANCE:

Shri Abhishek Doshi, Chartered Accountant for the Assessee
Shri G. Kirupanandan, Assistant Commissioner (AR) for the Revenue

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

Final Order No. A/ 10258-10259 /2023

DATE OF HEARING: 17.10.2022
DATE OF DECISION: 08.02.2023

RAJU

This appeal has been filed by Deep Construction Company against demand of service tax and interest and imposition of penalty under Section 76 & 77 of the Finance Act, 1994. The appeal has also been filed by revenue against non-imposition of penalty under Section 78 of the Finance Act, 1994 and dropping of demand to the extent of Rs. 48,26,850/-.

02. Learned Chartered Accountant appearing on behalf of the appellant argued that the demand has been confirmed by denying the benefit of notification no.1/2006-ST dated 01.03.2006 on the ground that the appellant has not included the value of free supply given by the service recipient. Learned Chartered Accountant pointed out that the issue regarding includability of the value of free supplies has been examined by Hon'ble Apex Court in the case of BHAYANA BUILDERS (P) LTD.- 2018 91 taxmann.com 109 (SC).

2.1 He further pointed out that in the appellant's own case, relief has been granted by tribunal for the demand of earlier period vide order no. A/10081/2014 dated 06.01.2014. Learned counsel further asserted that no free supply material was supplied during the period 2008-09 and 2009-10 and department has not produced any evidence of any supplies on free material.

2.2 Learned counsel pointed out that the second issue which has been raised by revenue in revenue's appeal relates to the benefit of Notification No. 32/2007-ST dated 22.05.2007. He pointed out that the Commissioner has rightly dropped the demand to Rs. 48,26,850/- demanded in the show cause notice. Learned Counsel claimed that they had not claimed any cenvat credit of inputs but only of input service which is permissible under Notification No.32/2007-ST dated 22.05.2007.

2.3 The third issue raised in the impugned order is if the appellant has adjusted the amount of Rs.1,43,72,143/- in the ST-3 returns on account of excess payment. He pointed out that the Commissioner has rightly observed that during the period April-2008 to March-2008, the total duty paid by the appellant was Rs. 60 lacs and therefore, the figure of Rs.1,43,72,143/- mentioned in the show cause is not correct.

2.4 He argued that the Commissioner has wrongly denied the adjustment of Rs. 10,46,184/- done during the period October- 2008 to March- 2010 on account of monthly limit prescribed under Rule 6 of Service Tax Rules, 1994.

2.5 He further argued that penalty under Section 76 & 77 has been wrongly imposed on the appellant as they had acted within the framework of law while availing credit of input service and availing the benefit of notification No. 32/2007-ST dated 22.05.2007.

2.6 He further argued that the penalty under Section 78 was rightly dropped by Commissioner observing that the periodical returns for the year 2008-09 and 2009-10 were filed and the demand was made within the normal period of one year even though the period covered is two years.

03. Learned AR reiterated the grounds mentioned in the appeal filed by the revenue. He pointed out that the Commissioner has come to the conclusion that no credit of input has been taken by the appellant by examining only a few invoices. He argued that the Commissioner ought to have examined the entire cenvat credit availed by the appellant and only thereafter decided the issue about availment or otherwise of cenvat credit on inputs. He further argued that the show cause notice points out about adjustment of Rs.1,43,72,143/- but the Commissioner has without any evidence stated that the said figure is incorrect. He pointed out that the Commissioner has failed to establish from where he ascertained how the figure mentioned in the show cause notice is incorrect.

3.1 He further argued that even if the demand is within the limitation period, if the element of suppression, mis-declaration, etc. with intention to evade duty are available in the conduct of M/S. DEEP CONSTRUCTION CO. then penalty under Section 78 should have been imposed. He argued that merely because the demand is within the limitation, the Commissioner should not have dropped the penalty under Section 78 of the Finance Act, 1994.

04. We have considered the rival submissions. We find that the following issues arise in the instant case :-

- (i) If the Commissioner has rightly denied the benefit of notification no. no.1/2006-ST dated 01.03.2006 on the ground that the appellant has obtained some free supplies from the service recipient while executing the Commercial, Industrial Construction Service for the service recipient.

- (ii) If the Commissioner has verified non availment of cenvat credit on input before allowing the benefit of Notification No. 32/2007-ST dated 22.05.2007.
- (iii) Whether the Commissioner has rightly rejected the amount of excess adjustment i.e. Rs.1,43,72,143/- mentioned in the show cause notice.
- (iv) Whether the Commissioner has rightly dropped the penalty imposed under Section 78 of the Finance Act, 1994.

4.1 We find that as far as first issue is concerned, the Hon'ble Apex Court in the case of BHAYANA BUILDERS (P) LTD.- 2018 91 taxmann.com 109 (SC) has held that the value of free supplies cannot be included in the gross amount charged for the purpose of levy of service tax. In the said decision, following has been observed:-

17. *Faced with the aforesaid situation, the argument of the learned counsel for the Revenue was that in case the assessee did not want to include the value of goods/materials supplied free of cost by the service recipient, they were not entitled to the benefit of notification dated September 10, 2004 read with notification dated March 01, 2005. It was argued that since building construction contract is a composite contract of providing services as well as supply of goods, the said notifications were issued for the convenience of the assessee. According to the Revenue, the purpose was to bifurcate the component of goods and services into 67%:33% and to provide a ready formula for payment of service tax on 33% of the gross amount. It was submitted that this percentage of 33% attributing to service element was prescribed keeping in view that in the entire construction project, roughly 67% comprises the cost of material and 33% is the value of services. However, this figure of 67% was arrived at keeping in mind the totality of goods and materials that are used in a construction project. Therefore, it was incumbent upon the assessee to include the value of goods/material supplied free of cost by the service recipient as well otherwise it would create imbalance and disturb the analogy that is kept in mind while issuing the said notifications and in such a situation, the AO can deny the benefit of aforesaid notifications. This argument may look to be attractive in the first blush but on the reading of the notifications as a whole, to our mind, it is not a valid argument.*

18. *In the first instance, no material is produced before us to justify that aforesaid basis of the formula was adopted while issuing the notification. In the absence of any such material, it would be anybody's guess as to what went in the mind of the Central Government in issuing these notifications and prescribing the service tax to be calculated on a value which is equivalent to 33% of the gross amount. Secondly, the language itself demolishes the argument of the learned counsel for the Revenue as it says '33% of the gross amount **'charged'** from any person by such commercial concern for providing the said taxable service'.*

According to these notifications, service tax is to be calculated on a value which is 33% of the gross amount that is charged from the service recipient.

Obviously, no amount is charged (and it could not be) by the service provider in respect of goods or materials which are supplied by the service recipient. It also makes it clear that valuation of gross amount has a causal connection with the amount that is charged by the service provider as that becomes the element of 'taxable service'.

Thirdly, even when the explanation was added vide notification dated March 01, 2005, it only explained that the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of construction service. Thus, though it took care of the value of goods and materials supplied by the service provider/assessee by including value of such goods and materials for the purpose of arriving at gross amount charged, it did not deal with any eventuality whereby value of goods and material supplied or provided by the service recipient were also to be included in arriving at gross amount 'gross amount charged'.

19. Matter can be looked into from another angle as well. In the case of **Commissioner, Central Excise and Customs, Kerala v. M/s. Larsen & Toubro Ltd. (2016) 1 SCC 170**. This Court was concerned with exemption notifications which were issued in respect of 'taxable services' covered by sub-clause (zzq) of clause (105) read with clause (25b) and sub-clause (zzzh) of clause (105) read with clause (30a) and (91a) of Section 65 of Chapter V of the Act.

This Court in the aforesaid judgment in respect of five 'taxable services' [viz. Section 65(105)(g), (zzd), (zzh), (zzq) and (zzzh)] has held as under:

"23. A close look at the Finance Act, 1994 would show that the fixed taxable services referred to in the charging Section 65(105) would refer only to service contracts simpliciter and not to composite works contracts. This is clear from the very language of Section 65(105) which defines 'taxable service' as 'any service provided'.

Further, while referring to exemption notifications, it observed:

"42. ...Since the levy itself of service tax has been found to be non-existent, no question of any exemption would arise."

It is clear from the above that the service tax is to be levied in respect of 'taxable services' and for the purpose of arriving at 33% of the gross amount charged, unless value of some goods/materials is specifically included by the Legislature, that cannot be added.

20. It is to be borne in mind that the notifications in questions are exemption notifications which have been issued under Section 93 of the Act. As per Section 93, the Central Government is empowered to grant exemption from the levy of service tax either wholly or partially, which is leviable on any 'taxable service' defined in any of sub-clauses of clause (105) of Section 65.

Thus, exemption under Section 93 can only be granted in respect of those activities which the Parliament is competent to levy service tax and covered by sub-clause (zzq) of clause (105) and sub-clause (zzzh) of clause (105) of Section 65 of Chapter V of the Act under which such notifications were issued.

In view of the clear observations of the Hon'ble Apex Court, the order of the Commissioner to the extent it demands duty on the value of free supplies is set aside and appeal of M/S. DEEP CONSTRUCTION COMPANY to that extent is allowed.

4.2 The second issue relates to availment of exemption notification No. 32/2007-ST dated 22.05.2007. The ground on which the benefit of the said notification is sought to be denied is that the appellant has availed the benefit of cenvat credit. The Commissioner in his order has held that the notification No. 32/2007-ST dated 22.05.2007 permits availment of cenvat credit to the extent of input service while providing the output services. Learned counsel has asserted that M/s. DEEP CONSTRUCTION COMPANY has availed cenvat credit only of the input services and not of the inputs. The Commissioner has examined a few invoices and the ST-3 returns of the year 2009-10 and some worksheets with ST-3 returns to conclude that no input credit has been taken. The revenue has argued that conclusion reached on the basis of a few invoice cannot be sustained. The notifications are to be interpreted strictly and if M/S. DEEP CONSTRUCTION COMPANY has availed any cenvat credit of any inputs used while availing notification 32/2007-ST dated 22.05.2007 then the benefit of said notification cannot be granted. We find merit in the argument of the revenue. In view of the above, the impugned order is set aside and the matter is remanded to the original adjudicating authority for fresh adjudication after verifying the facts fully.

4.3 The third issue relates to the appeal filed by the revenue against the rejection of amount of adjustment mentioned in the show cause notice amounting to Rs.1,43,72,143/-. The Commissioner in his order has held that the said amount is incorrect. It is seen that while coming to the said conclusion Annexure D to the show cause notice has not been fully examined. Annexure-D to the show cause notice gives month wise list of adjustments made by the appellant. In this background, we find merit in the appeal filed by the revenue to the extent that no reasoning has been given by the Commissioner for rejecting the amount mentioned in the show cause notice which is duly supported by Annexure-D to the show cause notice. The order in this regard is set aside and matter is remanded.

4.4 The issue regarding imposition of penalty under Section 78 has been decided by Commissioner on the ground that for an earlier show cause notice for the period 2004-08 adjudicated by the Commissioner penalty under Section 78 has been imposed. It has been argued by the

Commissioner that the periodical returns for the period 2008-09 and 2009-10 and therefore, the entire demand for the two years is within limitation. Since the demand is for a period within limitation, no penalty under Section 78 has been imposed by the Commissioner. We find that this ground raised by the Commissioner for non-imposition of penalty under Section 78 is misplaced. It is apparent that the return for the period 2008-09 and for the first half of the year 2009-10 has been filed belatedly which itself can possibly be a cause for invoking suppression. Merely because penalty under Section 78 has been imposed for the earlier period, no penalty can be imposed for any subsequent period is a misplaced notion. There is nothing in the section 78 to support this view. So long as the element necessary for imposing penalty under Section 78 are present even for the show cause notices issued for the normal period of limitation, the penalty under Section 78 can be imposed relating to Para 4.2, 4.3 and 4.4 above.

05. In view of above, we partly allow the appeal and remand the matter to the adjudicating authority to pass a fresh adjudication order in the above terms.

(Pronounced in the open court on 08.02.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul