

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
REGIONAL BENCH : ALLAHABAD
COURT No. I**

APPEAL No.ST/56050/2014-CU[DB]

(Arising out of Order-in-Original No. 05/COMMR/CX/2014-15 dated 17/09/2014 passed by Commissioner of Central Excise & Service Tax, Lucknow)

M/s Apco Infratech Ltd.

Appellant

Vs.

Commissioner of Central Excise & S.T., Lucknow

Respondent

Appearance:

Shri Dharmendra Srivastava, C.A.,

for Appellant

Shri Sandeep Kumar Singh, Deputy Commissioner (AR),

for Respondent

CORAM:

Hon'ble Smt. Archana Wadhwa, Member (Judicial)

Hon'ble Mr. Anil G. Shakkarwar, Member (Technical)

Date of Hearing : 10/12/2018

Date of Decision : 10/12/2018

FINAL ORDER NO-72899 / 2018

Per: Archana Wadhwa

After hearing both the sides, we find that the appellant was engaged in providing various services under the category of 'Works Contract'. They were also providing certain services like Road, Construction etc., which are exempted from payment of Service Tax. They were availing the Cenvat credit in respect of such services.

2. The dispute in the present appeal relates to the payment of service tax, in respect of 'Works Contract Service', from the period October, 2007 to March, 2012 on the basis of Composition Scheme. The said composition scheme, which

attracted rate of duty of 2% or 4% during the relevant period required an assessee to opt for payment of tax under the said scheme. The revenue objection is that inasmuch as the appellant did not opt for the said scheme, therefore, the same was not available to them. As such proceedings stand initiated against them, raising demand of duty resulting in passing of present impugned order.

3. On the other hand the appellant's contention is that by paying the duty under the said scheme and by reflecting the said fact in their ST-3 returns, they have opted for the said scheme. As per the appellant, there was no requirement to separately file such option and the very fact that the Revenue was made aware of payment of due tax in terms of composition scheme, itself is a fact reflecting upon the appellant's option.

4. On the said issue, we agree with the learned Advocate. The effect of exercising the option to pay tax in terms of composition scheme is to let the revenue know about such utilization of the scheme. Having reflected the same in their ST-3 returns, Revenue becomes aware of the said fact, thus, justifying the fact of letting the revenue know about their option.

Tribunal in the case of M/s Vaishno Associates Vs Commissioner of Central Excise & Service Tax, Jaipur-I reported as 2018-TIOL-1486-CESTAT-DEL has dealt with an identical issue and have observed that as the assessee started

making payment of service tax under the composition scheme by reflecting the same in the return, such fact would amount to exercise of option and the benefit cannot be denied for reason for failure to file intimation prior to payment of service tax under 'Works Contract Service'. As such the said decision of the Tribunal settles the issue in favour of the assessee.

5. A further dispute arises as regards availment of input tax credit. Revenue has contended that inasmuch as, the appellant has availed composition scheme, it was not permissible to avail the Cenvat credit.

Learned Advocate appearing for the appellant submits that the said credit was reversed by them, thus leading to a situation as if no credit was availed. Though the adjudicating authority has accepted the fact of reversal of the credit but he has not extended the credit by observing that the said credit was not reversed within the time limit prescribed for filing a revised ST-3 return.

However, we do not find favour with the above stand of the Revenue. As per the settled law such reversal can be even at the appellate stage and as such would amount to non availment of credit. The expiry of the period of filing the revised ST-3 return has got no relation to the timing of reversal of credit.

6. Further, the service tax stands confirmed on the mobilization charges, which the appellant had received as advance payment from their customers, for buying of the

materials etc. As per the appellant, they are paying interest to their buyers and this amount was nowhere connected with any service. The said issue, according to learned Advocate also stands decided by the Tribunal in the case of SMS Infrastructure Ltd. Vs Commissioner of Central Excise, Nagpur reported as 2017 (47) STR 17 (Tri.-Mumbai).

7. At this stage, we note that almost all the issues stand decided by one or other order of the Tribunal or of other judicial forum. The same are required to be examined, as regards their applicability to the facts of the present case. For said purpose, we set aside the impugned order and remand the matter to Commissioner for fresh decision in the light of law declared in various decisions, to which his attention would be drawn by the appellant. However, the appellant would be given an opportunity to put forth his case. We make it clear that all the issues are left open and the appellant is at liberty to contest the same before the adjudicating authority.

8. Appeals are remanded as indicated hereinabove.

(Dictated in Court)

(Anil G. Shakkwar)
Member (Technical)

(Archana Wadhwa)
Member (Judicial)

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