CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 2572 of 2010

(Arising out of Order-in-Original No. 25/2010-ST dated 31.08.2010 passed by the Commissioner of Central Excise & Customs, Thiruvananthapuram-1)

M/S Nikunjam Construction Pvt., Ltd.,
Indrapratham, TC 4/2554(3),
Pattom, Kowdiar Road,
Thiruvananthapuram, Kerala - 695004 **...Appellant**

VERSUS

Commissioner of Central Excise &
Service Tax, Thiruvananthapuram
T C No. 26/334 (1&2), ICE Bhavan Press,
Club Road, Statue, Thiruvananthapuram,
Kerala – 695001. **.....Respondent**

Appearance:

Mr. Prasanna Krishnan. V, Chartered Accountant for the Appellant
Mr. Rajesh Shastry, Authorised Representative (AR) for the Revenue

Coram:

Hon'ble Mr. P.A. Augustian, Member (Judicial)
Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order No. 21736 /2024

Date of Hearing: 29.11.2024
Date of Decision: 29.11.2024

Per: P. A. Augustian

The issue in the present appeal is regarding demand of service tax on the activity of 'construction of residential complex' (CRC) service under section 65(30a) r/w section 65(105)(zzzh) of the Finance Act, 1994.

2. The Appellant was engaged in the activity of 'commercial or industrial construction' and 'construction of complex' having more than 12 units. The Appellant was filing ST-3 returns under the category of

'construction of residential complex' service regularly and the taxable value adopted for the payment of service tax was 33% of the total value received as construction cost after availing the abetment of 67% as provided under Notification No.18/2005 dated 07.06.2005 which was in force till 28.02.2006 and Notification No.1/2006-ST dated 01.03.2006 as amended thereafter. The ST-3 returns under the category of 'works contract' service have also been filed by the Appellant, regularly. During audit, it is observed that as per the ST-3 returns and challans filed by the Appellant for the period from October 2007 to March 2008, Appellant had short paid service tax and thereafter Adjudication authority as per the impugned order, confirmed the demand and aggrieved by said order, present appeal is filed before the Tribunal.

3. When the appeal came up for hearing, the Learned Chartered Accountant (CA) for the Appellant produced the details of demand as appended below:

Sl. No	Brief Note on the dispute	Period	Tax + Cess (Rs)	Appellant's submission
1	Deemed value of Residential Flats constructed for landowners in Nikunjam Retreat	2006-07	2,41,302	Works contract service cannot be taxed under CRC. The AO rejects to accept this right position of law
2	Advance received from customers in respect of Residential Flat.	2005-06 (till 15.06.2005)	3,65,054	Works contract service cannot be taxed under CRC. The AO rejects to accept this right position of law.
3	Short payment of interest under Construction Residential Complex Services	June 2005 to Sep 2008	14,992	Works contract service cannot be taxed under. The AO rejects to accept this right position of law.
4	Short payment of tax related to advances	Apr 2007 to Mar 2008	33,174	Works contract service cannot be taxed under CRC. The AO rejects to accept this right position of law.

5	CENVAT Credits from input services, used by us against our ST liability under Works Contract Service	Apr 2008 to Sep 2008	2,57,398 2,08,252 1,35,615	CENVAT credits related to Input Services are available for paying ST under Works Contract. OIO grossly errs by treating the output service as Construction of (Residential) Complex and denying the CENVAT. Resultant demand that short payment under Construction of Complex is illegal and non-est in law.
6	Short payment related to advances in Project 'Harmony'	Sep 2007 to Sep 2008	9,44,151	Works contract service cannot be taxed under CRC. Advances under under Construction of Residential Complexes exempted till 30.06.2010 as per Notification No 36/2010-ST
7	Advance received from customers in respect of "Fortune" and "Rhapsody"	Apr 2008 to Sep 2008	8,97,336	Works contract service cannot be taxed under CRC. Advances under under Construction of Residential Complexes exempted till 30.06.2010 as per Notification No 36/2010-ST.
8	Construction of Hospital building to Non-Profit organization	2007-08	-	Entire demand (Service Tax of Rs. 22,43,340) dropped by the O1O; no dispute in this regard
9	Reverse Charge under 'Goods Transport Agency' (GTA) Service	2007-08	42,791	Exemption (Abatement) at 75% denied; CBEC Circular dated 12.03.2007 clarified that exemption is available to anyone who pays the freight. In any case CENVAT credit available on such payment in time proves Revenue Neutrality
	Demand under dispute (Tax = Rs 31,25,073)		31,40,065	

4. The Learned Chartered Accountant (CA) submits that as regards the demand against 1 to 8 of above table, issue is covered by the judgment of the Hon'ble Supreme Court in the matter of **Commissioner of Central Excise and Customs Kerala Vs. Larsen and Toubro 2015 (39) STR 913 (SC)**. The Learned Chartered Accountant (CA) further submits that as per the decision of this Tribunal in the matter of **M/s. KVJ Builders & Developers Pvt Ltd Vs.**

Commissioner of Central Excise, Customs-(2024 (17) Centax-197 (Tri.Bang), the demand was set aside which was wrongly confirmed under the construction of 'commercial or industrial construction' service, since it was classifiable under the category of 'works contract' service and the appellant was paying service tax under 'works contract' service as in the Appellant's case.

5. The Learned Chartered Accountant (CA) for the Appellant further submits that the Appellant was registered under 'works contract' service with effect from June 2007 and were filing returns under 'works contract' service, regularly. Even as per the impugned order, request for opting the activity was taken up with the respondent vide letter dated 15.12.2007. Further the Appellant were paying Kerala VAT for the sale/ transfer of material during the entire works contract execution and there was no project without supply of material. Fact being so, the entire issue is squarely covered by the decision of this Tribunal in **M/s. KVJ Builders & Developers Pvt Ltd**. As regards the demand under 'Goods Transport Agent (GTA)' service against Sl. no. 9 of the above table, the Adjudication authority has confirmed the demand on the ground that Service Tax Rules, 1994, mandates payment of service tax by the recipient if the recipient is one of the seven specified categories as per Rule 2(d)(v). The Appellant being a private limited company falls under the category and is liable to discharge service tax. However, the Learned Chartered Accountant (CA) submits that there is no discussion in the impugned order and further submits that exemption of 75% was denied without specifying any reason. As per the CBEC Circular dated 12.03.2007, exemption is available to anyone who pays the freight. In Appellant's case, CENVAT credit available on such payment in time proves revenue neutrality. Facts being so, there is no reason or justification to confirm demand pertaining to the period 2007 and 2008. Accordingly, the said demand is also unsustainable since the Appellant paying the service tax regularly on the other activities is also eligible to take CENVAT credit for the balance 25%. Facts being so, considering the revenue neutrality situation, the impugned order confirming the demand is prima facie unsustainable.

6. The Learned Authorised Representative (AR) reiterated the finding in the impugned order.

7. Heard both sides and perused the records.

8. We find it is an admitted fact that Appellant was paying service tax by availing the benefit of Notification as applicable under 'works contract' service and was paying VAT under the relevant State laws during the relevant period. Thus, considering the ratio of the judgment of this Tribunal in the matter of **M/s. KVJ Builders & Developers Pvt., Ltd., (supra)** relied by the Appellant, the impugned order confirming the demand under 'Construction of Residential Complex' service is unsustainable. As regarding the demand of Rs 42,791/- under 'Goods Transport Agent (GTA)' service, exemption of 75% was denied without specifying any reason. Further we find that if CENVAT credit was available on such payment in time and since the Appellant was paying the service tax, balance 25% also could have been utilized for the other activities. Thus, considering the revenue neutrality, the said demand is also unsustainable. In view of the above discussion the impugned order is liable to be set aside.

9. Accordingly, the impugned order is set aside, and the appeal is allowed with consequential relief, if any, in accordance with law.

(Operative portion of the order was pronounced in open court on conclusion of hearing.)

(P.A Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

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