CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Service Tax Appeal No. 2503 of 2010

(Arising out of Order-in-Original No. 28/2010/ST dated 17.09.2010 passed by the Commissioner of Central Excise, Customs and Service Tax, Cochin)

G.K. Contractors
IInd Floor, 2B, Ananthanam Studios,
Old Railway station Cross Road,
Ernakulam, Kerala - 682018 ....**Appellant**

VERSUS

Commissioner of Central Excise, Cochin
C.R. Building, I. S. Press Road,
Kochi, Kerala –682018 ....**Respondent**

Appearance:

Mr. Hariharan, Chartered Accountant (CA) for the Appellant

Mr. P. Saravana Perumal, Addl. Commr. (AR) for the Respondent

CORAM:

Hon'ble Mr. P.A. Augustian, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

FINAL ORDER NO. 21767 /2024

Date of Hearing: 12.11.2024
Date of Decision: 12.11.2024

Per: Pullela Nageswara Rao

The issue in the present appeal is regarding service tax demand on 'construction of complex' services and 'works contract' service. The demand on 'construction of complex' services is for the period from January 2006 to March 2009 and on 'works contract' service for the period from November 2007 to March 2009.

2. The brief facts are the Appellant has carried out 'construction of Residential complex', service as sub-contractor for various builders

including M/s. Olive Builders and M/s. National Builders. Alleging that the appellant has not registered with the service tax department and did not pay the service tax under the category of 'construction of complex' service for the period January 2006 to March 2009 and under the category of 'works contract' service for the period November 2007 to March 2009 show cause notice (SCN) was issued dated 26.08.2009. On adjudication the adjudicating authority confirmed the demand of Rs. 1,01,61,153/- under construction of 'complex services' for the period January 2006 to March 2009 and Rs. 15,83,690/- under 'works contract' for the period November 2007 to 2009 along with interest and imposed penalties under section 76 and 78 of the Finance Act, 1994. Aggrieved by the impugned order this appeal is filed before the Tribunal.

3. The learned Chartered Accountant for the appellant during the hearing submits that; the steel and cement were provided free of cost by the builders and all other materials required for the construction like sand, hollow bricks, etc., are purchased on payment of VAT and used by the appellant. Thus, the entire sub-contract turnover is in the nature of composite contracts for construction involving supply of goods and services and classifiable as 'works contract' service. As regards 'construction of complex' service, Learned Chartered Accountant submits that appellant had availed abatement of 67% as per the Notification No. 01/2006 dated 01.03.2006. However, alleging that the gross amount for assessing the service tax did not include the value of free supply of cement and steel by customers, the benefit of abatement as per Notification No. 01/2006 dated 01.03.2006 as sought by the appellant was denied and proceedings were initiated for recovery of the differential service tax. In this regard Learned Chartered Accountant submits that the issue is no more *res integra* and the issue is already settled by the Hon'ble Supreme Court in the matter of Commr. of C.Ex., & Customs, Kerala Vs. M/s. Larsen & Toubro Ltd – 2015 (39) STR 913 (SC), the service tax demand on composite contracts comprising of materials and labour is not sustainable for the period before and after 01.06.2007 under "Construction of Complex" Service.

4. Learned Chartered Accountant further submits that the issue regarding exclusion of the free supply of material was considered by the Tribunal in the matter of **Bhayana Builders (P) Ltd. Vs. Commr. of Service Tax, Delhi – 2013 (32) STR 49 (Tri. – LB)** and affirmed by the Supreme Court in **Commr. of S.T. Vs. Bhayana Builders (P) Ltd. – 2018 (10) GSTL 118 (SC).** Accordingly, denial of 67% abatement as per Notification No. 01/2006 dated 01.03.2006 on the ground that appellant has not included the cost of free supply of steel and cement in the taxable value of service is unsustainable.

5. As regards demand on works contracts under 'works contract' service, learned Chartered Accountant submits that the alleged short payment of tax was erroneously included in the 'works contract' service and appellant had paid the said amount with interest and Rs. 15 Lakhs out of the said consideration represent advances received during the initial stages of new contract to be adjusted in future.

6. Learned Chartered Accountant further submits that appellant being the sub-contractor, the issue regarding taxability was subject to dispute over a period of time and there are a large number of decisions of the Tribunal that a sub-contractor is not liable to pay Service tax and liability for payment of service tax is on the main contractor. Considering the above, the Tribunal has taken a view that invoking the extended period of limitation and penalty cannot be imposed on the appellant for omission on the part of the appellant as a sub-contractor to pay service tax. This view is followed by the Tribunal in the matter of **M/s. Vishal Engineering Company Vs. CCE and S.T., Panchkula – 2024-TIOL-918-CESTAT-CHD.** Learned Chartered Accountant further submits that entire allegation being made as per the amount reflected in the balance sheet, books of accounts and VAT returns there cannot be an allegation of suppression of fact or fraud or misstatement of facts with an intent to evade payment of tax. Thus, it is settled law that invoking the extended the period of limitation and imposition of penalty in a such a situation is prima facie unsustainable.

7. The Learned Chartered Accountant in support relied on the following decisions;

(i) Cosmic Dye Chemical Vs. Collector of Central Excise 1995 (75) E.L.T. 721 (S.C.)

(ii) Uniworth Textiles Vs. Commissioner of Central Excise 2013 (288) E.L.T. 161 (S.C)

(iii) Continental Foundation Jt. Venture Vs. Commissioner - 2007 (216) E.L.T. 177 (S.C.)

(iv) Ajay Kumar Gupta Vs. CESTAT - 2015 (39) S.T.R. 736 (P & H)

(v) Shriram Chits Pvt. Ltd. Vs. C.CE & S.T., Hyderabad 2023 (69) G.S.T.L. 397 (Tri. - Hyd.)

(vi) Hindalco Industries Ltd. Vs. C.CE Allahabad -2003 (161) E.L.T. 346 (Tri. - Del.).

8. Further, the learned Chartered Accountant submits that considering that the appellant had paid the service tax under the 'works contract' service as demanded in the show cause notice as it is held by the Hon'ble High Court of Punjab and Haryana in the matter of **Ajay kumar Gupta (supra),** penalty cannot be imposed.

9. Learned Chartered Accountant also draws our attention to the copies of the balance sheet 31.03.2011, profit and loss account for the year ended on 31.03.2011, schedule of balance sheet statement from the State Bank of India and the details of the Service tax paid by main contractor M/s. Olive Builders with copies of challans and the letter dated 22.06.2010 issued by M/s. Olive Builders confirming that they have paid an amount of Rs. 5,12,51,210/- on the contracts received from 01.04.2006 to 31.12.2008 and M/s. G. K. Contractors carried some of their construction works as sub-contractor and details of the amount paid to them are also mentioned and clarified that service tax paid by the M/s. Olive Builders included the amount paid to sub-contractor also.

10. Learned Authorised Representative (AR) reiterated the findings in the impugned order.

11. Heard both sides and perused the records.

12. In view of the above discussion as regards the issue of levy of service tax for the period January 2006 to March 2009 on 'construction of complex' service, we find that it is squarely covered by the decision of the Hon'ble Apex Court in M/s. Larsen & Toubro Ltd, (supra) for the period up to 01.06.2007 and by CBEC Circulars Circular No. 108/2/2009-ST dated 29.01.2009 and Circular No. 151/2/2012-ST dated 10.02.2012 up to 01.07.2010. Further, we find that the demand on 'works contract' service for the period November 2007 to 2009 is unsustainable. Therefore, the impugned order confirming the demands along with interest and imposition of penalties are unsustainable and is liable to be set aside.

13. Accordingly, impugned order is set aside and appelal 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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